This opinion is subject to revision before publication.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

DeShaun L. WELLS, Airman
United States Air Force, Appellant

No. 23-0219
Crim. App. No. 40222

Argued March 6, 2024—Decided September 24, 2024

Military Judges: Charles E. Wiedie (arraignment), Willie J. Babor (warrant application), and Matthew N. McCall.

For Appellant: *Captain Samantha M. Castanien* (argued); *Megan P. Marinos*, Esq. (on brief); *Major Kasey W. Hawkins*.

For Appellee: *Captain Tyler L. Washburn* (argued); *Colonel Matthew D. Talcott*, *Lieutenant Colonel James P. Ferrell*, and *Mary Ellen Payne*, Esq. (on brief).

Judge SPARKS delivered the opinion of the Court, in which Judge MAGGS and Judge JOHNSON joined. Judge HARDY filed a

dissenting opinion, in which Chief Judge OHLSON joined.

Judge SPARKS delivered the opinion of the Court.

Contrary to his pleas, Appellant was convicted at a general court-martial by a panel of officer and enlisted members of assault consummated by a battery, obstructing justice, and extramarital sexual conduct, in violation of Articles 128, 131b, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 928, 931b, 934 (2018). The members sentenced Appellant to a bad-conduct discharge, 255 days of confinement, two months of restriction to the limits of Royal Air Force Lakenheath, United Kingdom, two months of hard labor without confinement, forfeiture of all pay and allowances, and reduction to grade E-1. The convening authority disapproved the adjudged restriction and hard labor without confinement, but otherwise took no other action on the sentence. The United States Air Force Court of Criminal Appeals affirmed the findings and sentence. *United States v. Wells*, No. ACM 40222, 2023 CCA LEXIS 222, at *30, 2023 WL 3597239, at *11 (A.F. Ct. Crim. App. May 23, 2023) (unpublished).

We granted review of the following issue:

> Is Appellant's conviction for a Clause 2, Article 134, UCMJ, offense legally insufficient as to the terminal element?

United States v. Wells, 84 M.J. 113 (C.A.A.F. 2023) (order granting review).

As will be discussed below, we hold that Appellant's conviction is legally sufficient.

I. Background

The lower court summarized the relevant background as follows:

> In November 2019—while he was married—Appellant met a British national, BF, through the electronic dating application Tinder. BF testified that Appellant first told her that he was divorced, but a week later said he was actually in the process of getting divorced. Appellant and BF entered a dating relationship, to include sexual intercourse, which lasted several months. BF spent weekends at Appellant's home and they discussed marriage and having children together. BF testified that during the relationship Appellant also met BF's parents. In January 2020, BF discovered Appellant was not actually in the process of divorcing his spouse. BF contacted the Appellant's command's public affairs office via email and reported, *inter alia*, that Appellant lied to her about being divorced. During cross-examination, BF stated her sexual relationship with Appellant did not make her think less of the Service.
>
> At trial, and in response to circuit trial counsel's questions, BF testified about an intimate video of her and Appellant:
>
> Q. [D]id you ever come to learn about videos that he may have still had in his possession after your relationship was over?
>
> A. Yes.

Q. Can you talk to us a little bit about that?

A. It was towards the end of last year. I was having loads of Brandon[, UK,] people request me on Instagram, local girls from the area, and I'm not originally from the area, so it was a bit concerning to me. So I ended up messaging one of them and I was like, do I know you because I was concerned that something was going around about me. She had explained that she had also dated [Appellant]. She had told me that he had been sharing intimate videos of me and pictures of me with people. That's how I came to light on the videos that were being shared.

BF identified the person she messaged regarding the video as LW. LW, who also had engaged in a romantic relationship with Appellant, met with BF in person. LW described to BF a video that included BF and "mentioned a bathtub." BF testified she "knew exactly what time that was because there was only one time we had had sex in the bath." LW also testified and explained Appellant showed her the video and that afterwards she contacted BF. Later, BF and LW went to Appellant's home to confront him. Appellant was not home; however, Appellant's wife was present and they addressed the video with her instead. The video of Appellant and BF engaging in sexual conduct was also uploaded to a publicly accessible pornographic website and viewed at least 817 times.

Wells, 2023 CCA LEXIS 222, at *8-10, 2023 WL 3597239, at *3-5 (alterations in original) (footnotes omitted).

II. Analysis

Article 134, UCMJ, creates three different types of crimes, commonly referred to as Clauses 1, 2, and 3 offenses. *Manual for Courts-Martial, United States* pt. IV, para. 91.c.(1) (2019 ed.) (*MCM*). Clause 1 offenses involve disorders and neglects to the prejudice of good order and discipline in the armed forces. *Id*. Clause 2 offenses involve conduct of a nature to bring discredit upon the armed forces. *Id.* Clause 3 offenses involve noncapital crimes or offenses which violate federal law, including law made applicable through the Federal Assimilative Crimes Act. *Id*.

For Appellant to be found guilty of the offense of extramarital sexual conduct, charged under Clause 2, the Government was required to prove beyond a reasonable doubt that Appellant: (1) wrongfully engaged in extramarital conduct with BF; (2) Appellant knew at the time that he was married to someone else; and (3) under the circumstances, the conduct was of a nature to bring discredit upon the armed forces. *MCM* pt. IV, para. 99.b. We granted review to consider whether the evidence was legally sufficient to establish the third element.

Appellant argues that his conviction is legally insufficient because the only direct evidence at trial on Clause 2 demonstrated that the service was not discredited by his extramarital sexual conduct. We perform a de novo review of legal sufficiency issues. *United States v. Richard*, 82 M.J. 473, 476 (C.A.A.F. 2022). Legal sufficiency is evaluated by determining

whether, after viewing the evidence in the light most favorable to the prosecution, any rational factfinder could have found the essential elements of the crime beyond a reasonable doubt. *Id*.

It is well established that conviction of a criminal offense under the Constitution requires proof of every element of the offense beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *In re Winship*, 397 U.S. 358, 361-64 (1970); *United States v. Neal*, 68 M.J. 289, 298 (C.A.A.F. 2010). The use of conclusive presumptions to establish the elements of an offense is unconstitutional because such presumptions conflict with the presumption of innocence and invade the province of the trier of fact. *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979).

According to Appellant, *United States v. Phillips*, 70 M.J. 161 (C.A.A.F. 2011), cannot be relied upon to determine the legal sufficiency of the Clause 2 offense in his case because nothing in the record, other than the fact of the activity itself in that case, was required to find the conduct service discrediting. Thus, echoing the *Phillips* dissent, he argues that the terminal element in *Phillips* was conclusively presumed from the charged conduct itself. In *Phillips*, the accused was caught in possession of child pornography during a search of his room by law enforcement looking for evidence pertaining to an unrelated larceny offense. *Id.* at 163-64 There was no testimony that the accused's conduct was service discrediting or that anyone other than the agents searching his room were even aware of his conduct. *Id.* at 164. This Court explained that the government is required to prove every element of an offense beyond a reasonable doubt and that it is improper to find the commission of an

offense to be conclusively service discrediting. *Id.* at 165. We, however, rejected the notion that a conviction under a service discrediting theory requires proof of the public's knowledge of an accused's conduct. *Id*. Instead, this Court concluded: "The focus of clause 2 is on the 'nature' of the conduct, *whether the accused's conduct would tend to bring discredit on the armed forces if known by the public." Id.* at 165-66. We further explained that the government need not prove anyone was aware of an accused's conduct or "to specifically articulate how the conduct is service discrediting." *Id*. at 166. Instead, the government must "introduce sufficient evidence of the accused's allegedly service discrediting conduct to support a conviction." *Id*. We also emphasized that "[w]hether conduct is of a 'nature' to bring discredit upon the armed forces is a question that depends on the facts and circumstances of the conduct." *Id.* Ultimately, we concluded a rational trier of fact could have found the accused's possession of child pornography to be service discrediting "had the public known of it." *Id.*

Even though Appellant asserts BF's testimony at trial revealed that her personal opinion of the armed forces was untarnished, we are not persuaded that the Government failed to prove the terminal element. Here, there was sufficient evidence for the trier of fact to determine beyond a reasonable doubt that Appellant's conduct under the facts and circumstances would tend to bring the service into disrepute if it were known. The evidence supports a finding that Appellant's sexual relationship with BF was neither private nor discreet and therefore tended to bring the service into disrepute. In fact, the evidence established Appellant showed a video of his extramarital sexual conduct to others and made it

available to the general public to view on a website. As the video depicts Appellant engaging in intimate sexual acts with BF, it is strong evidence of the "open or notorious nature" of the extramarital conduct. BF's opinion does not operate to contradict or minimize the service discrediting nature of Appellant's conduct—her opinion merely reflects the opinion of one person. Considering our deferential review under the legal sufficiency standard, we conclude a rational trier of fact could have found Appellant's conduct service discrediting.

To buttress his insufficiency claim, Appellant contends that we should overturn *Phillips* because it was wrongly decided. According to Appellant, Clause 2, on its face, is unconstitutional because it permits conviction for per se service discrediting conduct and therefore cannot be used as the basis to uphold the vitality of *Phillips* as a precedent. Although we believe that *Parker v. Levy*, 417 U.S. 733 (1974), established conclusively the constitutionality of Article 134, UCMJ, we will address this aspect of Appellant's argument.

When asked to overrule one of our precedents, we analyze the matter under the doctrine of stare decisis. *United States v. Blanks*, 77 M.J. 239, 241-42 (C.A.A.F. 2018). Stare decisis is the doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again. *United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018). "[A]dherence to precedent is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."

Id. (alteration in original) (internal quotation marks omitted) (quoting *Blanks*, 77 M.J. at 242).

Applying stare decisis is not an inexorable command, and we are not bound by precedent when there is a significant change in circumstances after the adoption of a legal rule, or an error in legal analysis. *Id*. In evaluating the application of stare decisis, we consider: "whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law." *Id*. (citation omitted) (internal quotation marks omitted).

For offenses under Article 134, UCMJ, the President has explained: " 'Discredit' means to injure the reputation of. This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem." MCM pt. IV, para. 91.c.(3). The President further iterated service discrediting conduct in the context of extramarital conduct:

> Extramarital conduct may be Service discrediting, even though the conduct is only indirectly or remotely prejudicial to good order and discipline. "Discredit" means to injure the reputation of the armed forces and includes extramarital conduct that has a tendency, because of its open or notorious nature, to bring the Service into disrepute, make it subject to public ridicule, or lower it in public esteem. While extramarital conduct that is private and discreet in nature may not be service discrediting by this standard, under the

> circumstances, it may be determined to be conduct prejudicial to good order and discipline.

MCM pt. IV, para. 99.c.(1). This Court has stated that "[p]residential narrowing of the 'general' article through examples of how it may be violated is part of why Article 134, UCMJ," is not considered unconstitutionally void for vagueness. *United States v. Jones*, 68 M.J. 465, 472 (C.A.A.F. 2010) (citing *Levy*, 417 U.S. at 753-56). Further, it is this narrowing of the breadth of Article 134 through these presidential enumerations that provides servicemembers with fair notice of what conduct is subject to criminal sanction under the statute. Until the United States Supreme Court decides otherwise, Article 134, UCMJ, in its entirety, remains constitutional on its face.

Appellant's main contention as to why *Phillips* should be discarded as controlling precedent is that it sanctions per se service discrediting conduct, and as a result, the Government is unconstitutionally relieved of its burden to prove all elements of the charged offense beyond a reasonable doubt. Yet, *Phillips* expressly stated that so-called "conclusive presumptions" are impermissible. 70 M.J. at 165. Simply put, *Phillips* did not expressly or impliedly sanction such a presumption.

The instant case directly refutes Appellant's contention that the terminal element alone is sufficient to convict for Clause 2. Here, the members were told they had to determine beyond a reasonable doubt that Appellant's conduct was service discrediting. They were told that in making the determination, they must "consider all the facts and circumstances offered on the issue." They were properly instructed on criteria to use in making their

determination. No reasonable panel that followed these instructions could have made a "per se" determination that the mere fact of Appellant's extramarital sexual conduct was automatically service discrediting.

Given that *Phillips* expressly condemns conclusive presumptions and reaffirms that the Government must prove not only the offense itself, but also the nature of that offense beyond a reasonable doubt, the decision in *Phillips* is not unworkable or poorly reasoned. We have also considered the other factors affecting our application of stare decisis and conclude that they do not aid Appellant's argument. Consistent with our precedent, we reiterate that whether any given conduct violates Clause 2 is a question for the trier of fact to determine, based upon all the facts and circumstances; it cannot be conclusively presumed from any particular course of conduct.

III. Judgment

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Judge HARDY, with whom Chief Judge OHLSON joins, dissenting.

Earlier this term, but after we granted review in this case, the Judge Advocate General of the Air Force certified *United States v. Rocha* to this Court for review. 83 M.J. 275 (C.A.A.F. 2023) (certificate for review). In that case, the appellant was convicted of violating Clause 2 of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2018), for engaging in indecent acts with a childlike sex doll—conduct that a panel of members sitting as a general court-martial found to be of a nature to bring discredit upon the armed forces. *United States v. Rocha*, 84 M.J. 346, 347-48 (C.A.A.F. 2024). Although in this case Appellant urges this Court to overturn its prior decision in *United States v. Phillips*, 70 M.J. 161 (C.A.A.F. 2011), *Rocha*—an Article 134, Clause 2, case in which the government presented no evidence or argument in direct support of the terminal element—already provided the Court with the opportunity to reconsider its decision in *Phillips*. The Court declined to do so, and *Phillips* remains good law. It therefore remains the case that for convictions under Clause 2, Article 134, UCMJ, proof of the charged conduct itself "*may* be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that, under all the circumstances, it was of a nature to bring discredit upon the armed forces." *Id.* at 163. Nevertheless, I disagree with the majority's conclusion that *in this case* a rational trier of fact could have found Appellant's actions service discrediting beyond a reasonable doubt based on his conduct alone.

Common sense dictates that the military does not consider every act of extramarital sexual conduct by

servicemembers to violate Clause 2 of Article 134, UCMJ; and that conclusion is confirmed by the President's guidance in the *Manual for Courts-Martial, United States* (*Manual* or *MCM*). The President expressly acknowledges that not all extramarital conduct is service discrediting and lists nine factors for commanders to consider when determining whether such conduct is criminal under Article 134, UCMJ. *MCM* pt. IV, para. 99.c.(1)(a)-(i) (2019 ed.). Yet the Government in this case made no attempt to persuade the panel that Appellant's extramarital conduct satisfied any of these factors or was otherwise service discrediting. To the contrary, the *only* evidence presented to the panel directly with respect to the terminal element was the testimony of the coactor who stated that she did *not* hold Appellant's misconduct against the armed forces. Confronted with this record, I cannot say that the Government met its burden of proving each element of Article 134, UCMJ, beyond a reasonable doubt. I therefore respectfully dissent.

I. *United States v. Phillips*

In *Phillips*, the Court held that in Article 134, Clause 2, cases, proof of the charged conduct "*may*" be sufficient to prove the terminal element. 70 M.J. at 163. The Court emphasized the word "*may*," underscoring the fact that in some cases, additional evidence would be necessary to prove beyond a reasonable doubt that the charged conduct was of a nature to bring discredit upon the armed forces. Additionally, the Court stated that "whether any given conduct violates [Clause 2] is a question for the trier of fact to determine, based upon all the facts and circumstances; it cannot be conclusively presumed

from any particular course of action." *Id.* at 165. Thus, in applying *Phillips* the Court must look at the underlying circumstances of the charged conduct—in this case, extramarital sexual conduct—to determine whether the service discrediting element has been proven beyond a reasonable doubt.

Outside of the military, extramarital sexual conduct between adults is generally not a criminal act. And even within the military, the President has instructed that such conduct only violates Article 134, UCMJ, when the accused "wrongfully" engages in it. *MCM* pt. IV, para. 99.b.(1). Of course, the accused's conduct must also satisfy the terminal element by being either prejudicial to good order and discipline, service discrediting, or both. *MCM* pt. IV, para. 99.b.(3). In the *Manual*, the President provides a lengthy description of extramarital conduct that satisfies these requirements. *MCM* pt. IV, para. 99.c.(1).

The President explains that service discrediting adultery "includes extramarital conduct that has a tendency, because of its open or notorious nature, to bring the Service into disrepute, make it subject to public ridicule, or lower it in public esteem." *Id.* The President also notes, however, that "extramarital conduct that is private and discreet in nature may not be service discrediting by this standard." *Id.* To assist commanders in determining whether specific extramarital conduct violates Article 134, UCMJ, the President has provided an extensive, but nonexhaustive, list of factors that commanders should

consider when determining whether extramarital conduct violates Article 134, UCMJ.[1]

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[1] The factors include:

> (a) The accused's marital status, military rank, grade, or position;
>
> (b) The co-actor's marital status, military rank, grade, and position, or relationship to the armed forces;
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> (c) The military status of the accused's spouse or the spouse of the co-actor, or their relationship to the armed forces;
>
> (d) The impact, if any, of the extramarital conduct on the ability of the accused, the co-actor, or the spouse of either to perform their duties in support of the armed forces
>
> (e) The misuse, if any, of Government time and resources to facilitate the commission of the conduct;
>
> (f) Whether the conduct persisted despite counseling or orders to desist; the flagrancy of the conduct, such as whether any notoriety ensued; and whether the extramarital conduct was accompanied by other violations of the UCMJ;
>
> (g) The negative impact on the units or organizations of the accused, the co-actor or the spouse of either of them, such as a detrimental effect on unit or organization morale, teamwork, and efficiency;
>
> (h) Whether the accused's or co-actor's marriage was pending legal dissolution, which is defined as an action with a view towards divorce proceedings, such as the filing of a petition for divorce; and
>
> (i) Whether the extramarital conduct involves an ongoing or recent relationship or is remote in time.

MCM pt. IV, para. 99.c.(1)(a)-(i).

Accordingly, whether a servicemember's extramarital conduct constitutes a crime under Article 134, UCMJ, depends on the specific nature and circumstances of the charged conduct. Some extramarital conduct violates Article 134, UCMJ; other extramarital conduct does not. Because this is a fact-specific, multifactored, case-by-case determination, the Government must carry some burden of proving, beyond a reasonable doubt, that Appellant's extramarital conduct was of a nature to bring discredit upon the armed forces.[2] *See Phillips*, 70 M.J. at 164 ("It is established that conviction of a criminal offense under the Constitution requires proof of every element of the offense beyond a reasonable doubt."); *In re Winship*, 397 U.S. 358, 361-64 (1970). I turn, therefore, to the evidence the Government presented to the panel to determine whether the Government met its burden in this case.

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[2] It is worth noting that the President's guidance in the *Manual* also makes clear that the Government's burden to prove the terminal element will be different for other offenses under Article 134, UCMJ. For example, the *Manual* recognizes only two circumstances that will prevent the possession of child pornography from being criminal: (1) when the accused is "not aware that the images were of minors, or what appeared to be minors, engaged in sexually explicit conduct," and (2) when the facts demonstrate that the accused "unintentionally and inadvertently acquired" the child pornography. *MCM* pt. IV, para. 95.c.(5), (12). This difference likely reflects the fact that child pornography "harms and debases the most defenseless of our citizens," *United States v. Williams*, 553 U.S. 285, 307 (2008), and that its possession violates both federal law and the law of all fifty states and the District of Columbia.

II. The Legal Sufficiency of Appellant's Conviction Under Article 134, UCMJ

Before this Court, the Government argued that various factors—including that Appellant shared the video of the victim online and lied to the victim about being married— made Appellant's behavior in conducting the affair "duplicitous, crass, flagrant, and exploitive." I take no issue with this characterization of Appellant's conduct. But the fact that the Government is making this point for the first time now—years after Appellant's court-martial—only highlights and emphasizes the deficiency of the Government's argument at trial.

A. Evidence Presented at Trial

During Appellant's court-martial, the Government largely ignored the terminal element of the Article 134 offense. Outside of evidence that Appellant had an extramarital affair, the Government presented no evidence on how Appellant's conduct was of a nature to discredit the armed forces. The Government never argued that the extramarital conduct was "open or notorious" or that it was otherwise service discrediting under the nine factors enumerated by the President in the *Manual*.

Unlike the Government, trial defense counsel did not neglect the terminal element of the Article 134 offense. During the defense's cross-examination of BF, the following exchange occurred:

> [Trial Defense Counsel:] Given that relationship, you do not think any less of the United States Air Force?
>
> [BF:] What, for having a relationship with him?

[Trial Defense Counsel:] Right.

[BF:] What do you mean?

[Trial Defense Counsel:] Does it make you—you do not think any less of the United States Air Force, at large, based on your relationship with Airman Wells.

[BF:] Just the relationship, minus if—

[Trial Defense Counsel:] Yes

[BF:] —he's accused of everything.

[Trial Defense Counsel:] Your consensual sexual relationship with Airman Wells, you don't hold that against—

[BF:] If he was a single man then I wouldn't— it's not their responsibility to stop someone cheating, but it is to stop them from running around getting girls pregnant and beating them.

[Trial Defense Counsel:] *To be clear, as it relates to your consensual sexual relationship—*

[BF:] Yeah.

[Trial Defense Counsel:] *—you do not hold it against—*

[BF:] *No.*

[Trial Defense Counsel:] [T]he *U.S. Air Force.*

[BF:] *No.*

(Emphasis added.) Thus, the only evidence in the record that directly addressed whether Appellant's extramarital conduct was service discrediting was

contrary evidence—BF, the victim of Appellant's actions, did *not* hold Appellant's conduct against the Air Force.

In its closing argument, the Government acknowledged this testimony, stating "[t]hankfully, [BF] is not willing to impute [Appellant's] conduct onto the Air Force at large. . . . She is mature enough to at least say . . . . I'm not going to hold [Appellant's conduct] against the Air Force." But even though the only evidence of the terminal element on the record was contrary evidence, the Government still did not argue why Appellant's conduct—when considered in light of the President's guidance in the *Manual*—was nonetheless service discrediting. The Government did not claim that Appellant's adultery was "open or notorious" or explain why the President's nine factors supported a finding of guilt. Instead, the Government merely expressed gratitude that Appellant's conduct did not actually injure the military's reputation, but reminded the panel that the military's reputation *could have been* injured. In the Government's view, this is all the law requires under *Phillips*. I am not willing to extend this Court's holding in *Phillips* that far.

B. "Open or Notorious" Conduct

In concluding that Appellant's conviction was legally sufficient, the majority relies on the evidence that "Appellant showed a video of his extramarital sexual conduct to others and made it available to the general public to view on a website." *United States v. Wells*, __ M.J. __, __ (6) (C.A.A.F. 2024). The majority concludes that because the "video depicts Appellant engaging in intimate sexual acts with BF, it is strong

evidence of the 'open or notorious nature' of the extramarital conduct." *Id.*

My problem with this approach is twofold. First, I do not believe that the uploaded video establishes the "open or notorious" nature of Appellant's conduct as the majority suggests. The record indicates that when Appellant posted the video online, both his and BF's identities were anonymous. Neither Appellant nor BF was identifiable in the video, and the video provides no indication that Appellant had any connection to the United States military. Thus, while Appellant's extramarital sexual conduct was not purely private, its level of openness and notoriety was more trivial than the majority implies.

Second, and more importantly, the Government never argued at trial that the uploaded video established that Appellant's extramarital conduct was open or notorious, and it made no attempt to otherwise connect the video to the terminal element of the Article 134 offense. Instead, trial counsel focused on whether BF was actually the person in the video and whether she consented to Appellant recording her. But those arguments addressed the charge for unlawful recording or broadcasting under Article 120c, UCMJ, 10 U.S.C. § 920c (2018), for which Appellant was found not guilty. The Government never argued to the panel that the video made Appellant's extramarital conduct known to others, bringing disrepute and public ridicule upon the military. *See MCM* pt. IV, para. 99.c.(1) (explaining why open and notorious extramarital conduct is service discrediting).

C. Appellant's Due Process Rights

To now accept the Government's "open or notorious" argument—or any of the other arguments the Government presents now on appeal—raises fundamental questions of fairness and due process. Because the Government never argued at trial that Appellant's extramarital conduct was service discrediting because it was committed in an open or notorious manner, Appellant was never given any notice of the theory under which the Government now claims he was found guilty. Appellant therefore never had the opportunity at trial to introduce contrary evidence or to rebut the theory that his extramarital conduct was open or notorious. When pressed on this point at oral argument, Government counsel stated that "[the defense] could have attacked whether it was open and notorious . . . and if they failed to do so unconvincingly for a factfinder, that's how the justice system works." Oral Argument at 38:40-39:20, *United States v. Wells* (C.A.A.F. Mar. 6, 2024) (No. 23-0219). Under the Government's view, it has no obligation to present any evidence or argument with respect to the terminal element in any Clause 2, Article 134, case, but the accused has the burden to affirmatively refute *every possible theory* for why his extramarital conduct was service discrediting. I disagree with the Government that this is "how the justice system works."

As the Court reaffirmed in *Phillips*, "conviction of a criminal offense under the Constitution requires proof of every element of the offense beyond a reasonable doubt." 70 M.J. at 164 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *In re Winship*, 397 U.S. at 361-64)). And the terminal element in a

Clause 2, Article 134, case is an element of the offense which "must be proved beyond a reasonable doubt like any other element." *Id.* at 165. The Supreme Court has made clear that the Constitution prohibits the government from shifting this burden to the accused. *Sandstrom v. Montana*, 442 U.S. 510, 523-24 (1979).

In this case, Appellant was convicted of violating Article 134, UCMJ, by engaging in extramarital conduct that was of a nature to discredit the armed forces. The President's guidance in the *Manual* instructs that such conduct may violate Article 134, UCMJ, in some circumstances but does not do so in other circumstances. The Government largely ignored the terminal element, neither arguing that Appellant's extramarital acts were conducted in an open or notorious manner or that they satisfied any of the other nine factors enumerated by the President for identifying violations of Article 134, UCMJ. As a result, the only evidence in the record directly related to the terminal element was the coactor's testimony that Appellant's misconduct did not harm her views about the armed forces.

As I mentioned above, in its briefs and at oral argument before this Court the Government offered reasonable theories why Appellant's extramarital conduct was service discrediting. But this is neither the time nor the place for those arguments to be presented and litigated in the first instance. Due process requires a criminal defendant to be presented with a "meaningful opportunity" to defend himself. *Jackson v. Virginia*, 443 U.S. 307, 314 (1979). Appellant was denied that opportunity in this case. For that reason, I do not believe that Appellant's

conviction for violating Article 134, UCMJ, was legally sufficient, and I respectfully dissent.

III. Conclusion

For the foregoing reasons, I would reverse the decision of the United States Air Force Court of Criminal Appeals as to Appellant's conviction under Clause 2, Article 134, UCMJ.

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40222

UNITED STATES
Appellee

v.

DeShaun L. WELLS
Airman (E-2), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 23 May 2023

Military Judge: Charles E. Wiedie (arraignment); Willie J. Babor (warrant application); Matthew N. McCall.

Sentence: Sentence adjudged 28 July 2021 by GCM convened at Royal Air Force, Lakenheath, United Kingdom. Sentence entered by military judge on 23 August 2021: Bad-conduct discharge, confinement for 255 days, forfeiture of all pay and allowances, and reduction to E-1.

For Appellant: Major Kasey W. Hawkins, USAF.

For Appellee: Lieutenant Colonel Thomas J. Alford, USAF; Major John P. Patera, USAF; Captain Olivia B. Hoff, USAF; Mary Ellen Payne, Esquire.

Before RICHARDSON, CADOTTE, and ANNEXSTAD, *Appellate Military Judges.*

Judge CADOTTE delivered the opinion of the court, in which Senior Judge RICHARDSON and Judge ANNEXSTAD joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

CADOTTE, Judge:

A general court-martial comprised of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification each of assault consummated by a battery, obstruction of justice, and extramarital sexual conduct, in violation of Articles 128, 131, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 928, 931, 934.[1,2] The members sentenced Appellant to a bad-conduct discharge, 255 days of confinement,[3] two months restriction to the

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[1] Unless otherwise noted, all references in this opinion to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*).

[2] The court members found Appellant not guilty of 12 specifications.

[3] Appellant served 255 days of pretrial confinement.

limits of Royal Air Force (RAF) Lakenheath, United Kingdom (UK), two months hard labor without confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority disapproved the adjudged restriction and hard labor without confinement, but otherwise did not disturb the adjudged sentence.

Appellant raises seven assignments of error, which we have reworded, combined, and reordered, claiming: (1) Appellant was deprived of his right to a unanimous verdict; (2) the evidence supporting the convictions for extramarital sexual conduct, assault consummated by a battery, and obstruction of justice is legally and factually insufficient;[4] (3) the military judge erred by allowing the victim's counsel to deliver the victim's unsworn statement without good cause shown; (4) the military judge abused his discretion by permitting the members to consider an "inappropriately inflammatory victim impact statement which impeached the verdict;" and (5) Appellant's sentence is inappropriately severe.

We have carefully considered issue (1) and determine no discussion or relief is warranted. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987). We find no material prejudice to a substantial right of Appellant and Appellant is not entitled to relief.

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[4] We have combined three assignments of error raised by Appellant. Appellant raised legal and factual insufficiency for his assault consummated by a battery and obstruction of justice convictions pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

I. BACKGROUND

Appellant was assigned to RAF Lakenheath, United Kingdom. Within a year of getting married at the age of 20 to another Air Force member, Appellant engaged in sexual relationships with women outside his marriage, including BF and SH. Ultimately, members found Appellant guilty of three specifications—extramarital sexual conduct involving BF, assault consummated by a battery against SH, and obstruction of justice—which were outgrowths of these relationships.

II. DISCUSSION

A. Legal and Factual Sufficiency

Appellant challenges the sufficiency of the extramarital sexual conduct, assault consummated by a battery, and obstruction of justice convictions. We resolve each of these challenges adverse to Appellant and conclude the convictions are legally and factually sufficient.

1. Law

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). "Our assessment of legal and factual sufficiency is limited to the evidence produced at trial." *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citing *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993)), *rev. denied*, 82 M.J. 312 (C.A.A.F. 2022).

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found

the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). The evidence supporting a conviction can be direct or circumstantial. *See United States v. Long*, 81 M.J. 362, 368 (C.A.A.F. 2021) (citing R.C.M. 918(c)) (additional citation omitted). "[A] rational factfinder[ ] [may] use [its] 'experience with people and events in weighing the probabilities' to infer beyond a reasonable doubt" that an element was proven. *Id.* at 369 (quoting *Holland v. United States*, 348 U.S. 121, 140 (1954)). The "standard for legal sufficiency involves a very low threshold to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal quotation marks and citation omitted).

"The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt." *Rodela*, 82 M.J. at 525 (alterations, internal quotation marks, and citation omitted). "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017), *aff'd* 77 M.J. 289 (C.A.A.F. 2018) (alteration in original)

(quoting *Washington*, 57 M.J. at 399). "The term reasonable doubt . . . does not mean that the evidence must be free from conflict." *Id.* (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)).

a. Extramarital Sexual Conduct

For Appellant to be found guilty of the offense of extramarital sexual conduct, the Government was required to prove beyond a reasonable doubt that Appellant: (1) wrongfully engaged in extramarital conduct with BF; (2) Appellant knew at the time that he was married to someone else; and (3) under the circumstances, the conduct was of a nature to bring discredit upon the armed forces. *See Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 99.b.

Covered "extramarital conduct" consists of genital, oral, and anal to genital sexual intercourse; and oral to anal sexual intercourse. *MCM*, pt. IV, ¶ 99.c.(2). The President explained generally for offenses under Article 134, UCMJ: "'Discredit' means to injure the reputation of. This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem." *MCM*, pt. IV, ¶ 91.c.(3). The President further explained service-discrediting conduct in the context of extramarital conduct:

> Extramarital conduct may be Service discrediting, even though the conduct is only indirectly or remotely prejudicial to good order and discipline. "Discredit" means to injure the reputation of the armed forces and includes extramarital conduct that has a tendency, because of its open or notorious nature, to bring

> the Service into disrepute, make it subject to public ridicule, or lower it in public esteem. While extramarital conduct that is private and discreet in nature may not be service discrediting by this standard, under the circumstances, it may be determined to be conduct prejudicial to good order and discipline.

MCM, pt. IV, ¶ 99.c.(1).

Our court recently addressed service-discrediting conduct as the terminal element:

> "Whether any given conduct [is service-discrediting] is a question for the trier of fact to determine, based upon all the facts and circumstances; it cannot be conclusively presumed from any particular course of action." [*United States v. Phillips*, 70 M.J. 161, 165 (C.A.A.F. 2011)]. "[T]he degree to which others became aware of the accused's conduct may bear upon whether the conduct is service discrediting," but actual public knowledge is not a prerequisite. *Id.* at 166. "The trier of fact must determine beyond a reasonable doubt that the conduct alleged actually occurred and must also evaluate the nature of the conduct and determine beyond a reasonable doubt that [the appellant]'s conduct would tend to bring the service into disrepute if it were known." *Id.* (citing *United States v. Saunders*, 59 M.J. 1, 11 (C.A.A.F. 2003)).

United States v. Heppermann, 82 M.J. 794, 801–802 (A.F. Ct. Crim. App. 2022), *rev. denied*, 83 M.J. 103 (C.A.A.F. 2022).

b. Assault Consummated by a Battery

For Appellant to be found guilty of assault consummated by a battery, the Government was required to prove beyond a reasonable doubt: (1) Appellant did bodily harm to a certain person, SH; (2) the bodily harm was done unlawfully; and (3) the bodily harm was done with force or violence. *See MCM*, pt. IV, ¶ 77.b.(2)(a)–(c). "Bodily harm" means an offensive touching of another, however slight. *MCM*, pt. IV, ¶ 77.c.(1)(a). "A battery is an assault in which the attempt or offer to do bodily harm is consummated by the infliction of that harm." *MCM*, pt. IV, ¶ 77.c.(3)(a). "[E]ven if an alleged victim did not consent to being touched, an accused cannot be convicted of assault consummated by a battery if the accused mistakenly believed the alleged victim consented and that belief was 'reasonable under all the circumstances.'" *United States v. Mader*, 81 M.J. 105, 108 (C.A.A.F. 2021) (quoting R.C.M. 916(j)(1)).

c. Obstruction of Justice

For Appellant to be found guilty of obstruction of justice, the Government was required to prove beyond a reasonable doubt: (1) Appellant wrongfully did a certain act; (2) did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal or disciplinary proceedings pending; and (3) the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice. *See MCM*, pt. IV, ¶ 83.b.(1)–(3).

2. Extramarital Sexual Conduct

a. Additional Background

In November 2019—while he was married—Appellant met a British national, BF, through the electronic dating application Tinder. BF testified that Appellant first told her that he was divorced, but a week later said he was actually in the process of getting divorced.[5] Appellant and BF entered a dating relationship, to include sexual intercourse, which lasted several months. BF spent weekends at Appellant's home and they discussed marriage and having children together. BF testified that during the relationship Appellant also met BF's parents. In January 2020, BF discovered Appellant was not actually in the process of divorcing his spouse. BF contacted the Appellant's command's public affairs office via email and reported, *inter alia*, that Appellant lied to her about being divorced. During cross-examination, BF stated her sexual relationship with Appellant did not make her think less of the Service.

At trial, and in response to circuit trial counsel's questions, BF testified about an intimate video of her and Appellant:

> Q. [D]id you ever come to learn about videos that he may have still had in his possession after your relationship was over?
>
> A. Yes.
>
> Q. Can you talk to us a little bit about that?

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[5] Appellant was found not guilty of the other offenses for which BF was the alleged victim.

> A. It was towards the end of last year. I was having loads of Brandon[, UK,] people request me on Instagram, local girls from the area, and I'm not originally from the area, so it was a bit concerning to me. So I ended up messaging one of them and I was like, do I know you because I was concerned that something was going around about me. She had explained that she had also dated [Appellant]. She had told me that he had been sharing intimate videos of me and pictures of me with people. That's how I came to light on the videos that were being shared.

BF identified the person she messaged regarding the video as LW. LW, who also had engaged in a romantic relationship with Appellant, met with BF in person. LW described to BF a video that included BF and "mentioned a bathtub." BF testified she "knew exactly what time that was because there was only one time we had had sex in the bath." LW also testified and explained Appellant showed her the video and that afterwards she contacted BF. Later, BF and LW went to Appellant's home to confront him. Appellant was not home; however, Appellant's wife was present and they addressed the video with her instead. The video of Appellant and BF engaging in sexual conduct was also uploaded to a publicly accessible pornographic website and viewed at least 817 times.[6]

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[6] Members found Appellant not guilty of a specification of indecent broadcasting in violation of Article 120c, Uniform Code of Military Justice, 10 U.S.C. § 920c.

b. Analysis

Appellant claims his conviction for extramarital sexual conduct is not legally or factually sufficient because the Government did not prove the terminal element of the offense—i.e., the conduct was of a nature to bring discredit upon the armed forces. Appellant alleges "not only was there no evidence" of his conduct being service-discrediting, there was "actually contrary evidence." We disagree.

Appellant asks this court to distinguish his case from *Phillips* where the Court of Appeals for the Armed Forces held "evidence that the public was actually aware of the conduct is not necessarily required" and "proof of the conduct itself *may* be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that, under the circumstances, it was of a nature to bring discredit upon the armed forces." 70 M.J. at 163. We find no reason to distinguish *Phillips*; consequently, we follow our superior court's decision.

Appellant also focuses on BF's testimony that Appellant's conduct did not adversely impact her view of the military. However, the Government does not need to prove anyone's "opinion of the military was lowered." *United States v. Moore*, No. ACM S32477, 2018 CCA LEXIS 560, at *21 (A.F. Ct. Crim. App. 11 Dec. 2018) (unpub. op.). Moreover, a factfinder is "not required to accept" the views of a witness, and "could consider other evidence in determining whether Appellant's conduct tended to discredit the service." *Heppermann*, 82 M.J. at 802.

From our review of the record, we are convinced the evidence is both legally and factually sufficient.

We find there was ample evidence for the trier of fact to determine "beyond a reasonable doubt that [Appellant]'s conduct would tend to bring the service into disrepute if it were known." *Saunders*, 59 M.J at 1. The evidence supports a finding that Appellant's sexual relationship with BF was neither private nor discreet. In fact, the evidence established Appellant showed a video of his extramarital sexual conduct to others and it was available to the general public to view on a website. As the video depicts Appellant engaging in intimate sexual acts with BF, it is strong evidence of the "open or notorious nature" of the extramarital conduct.

When viewing the evidence offered at trial in the light most favorable to the Government, a rational factfinder could readily find the essential elements of extramarital sexual conduct beyond a reasonable doubt. We therefore conclude the evidence is legally sufficient to support Appellant's conviction. Giving the appropriate deference to the trial court's ability to see and hear the witnesses, and after our own independent review of the record, we ourselves are convinced of Appellant's guilt beyond a reasonable doubt. Accordingly, we also find the evidence factually sufficient.

3. Assault Consummated by a Battery

a. Additional Background

Appellant met another British civilian, SH, on Tinder in November 2019. After communicating with SH for several weeks, Appellant met her in person. Appellant picked up SH and her friend from SH's friend's home, and they went to Appellant's home. SH went inside to use Appellant's bathroom. Afterwards,

Appellant "pulled" her to the living room sofa, where she consensually performed oral sex on Appellant. SH's friend remained in Appellant's car, then knocked on Appellant's door requesting to go home. The three left Appellant's home, and a few hours later Appellant and SH returned. Upon arriving at Appellant's home, SH and Appellant "shot gunned" a beer together. During trial, and in response to circuit trial counsel's questions, SH testified about what happened next with Appellant:

> A. He pulled me into the living room just like normal, like he did before, and he turned around and slapped me in the face.
>
> Q. Was there any kind of a prelude to that? Had there been any incident or disagreement with you?
>
> A. No. Nothing.
>
> Q. How hard did he slap you in the face?
>
> A. Not very hard. I kind of laughed like in shock, like well kind of and then he done it again, so I hit him back and then he hit me again the third time like really, really hard.
>
> Q. When you said that he hit you, are we open hand --
>
> A. Slap.
>
> Q. -- closed hand. It was a slap. Where did he actually hit you on your body?
>
> A. On my face.
>
> Q. You said that you hit him back after the second strike.
>
> A. Mmm-Hmm.

Q. Where did you hit him?

A. On the face.

Q. How did you hit him?

A. Not as hard as he hit me.

Q. I mean, closed fist, open hand?

A. Slap.

Q. You slapped him back?

A. Yes.

Q. Prior to him slapping you the first time, had you been play fighting or –

A. No.

Q. -- any type of -- were you even -- was there any physical contact?

A. No. It was just walking into the room and he just turned around and slapped me in the face.

Q. All right. After you slapped him, was the slap that you received significantly different than the first two even?

A. Yes, a lot harder.

Q. How did it impact you physically?

A. I felt dizzy. It just took a few seconds to actually come back in the room. It went dark and, yes, I was very dizzy.

Q. I want to go all of the way back from the first time that you met [Appellant] to this point, had you ever told him that you like to be slapped or that that was okay?

A. No. Definitely not.

> Q. Had you ever had a history of play fighting with him or anything like that?
>
> A. No.
>
> Q. What happened after that more significant slap?
>
> A. He drug me to the sofa the same way he did before, but more aggressively. He sat down and pulled me down and forced my head down and, yeah, forced himself inside my mouth.[7]

Appellant was convicted of striking SH "in the face with his hand."

b. Analysis

Appellant asserts SH "was not initially offended by the slapping, and only became offended when necessary to make an allegation against [Appellant]." Appellant further argues SH's demeanor during the slapping indicates she consented to the slapping, or that Appellant had an honest and reasonable mistake of fact as to SH's consent to being slapped. Finally, Appellant argues SH initiated oral sex on Appellant immediately following the slap, which illustrates that she was not offended by the slap. Based on the foregoing, Appellant argues his conviction is not legally and factually sufficient. We disagree.

We find SH's testimony describing the facts and circumstances surrounding Appellant's slapping her to be compelling. SH testified Appellant "pulled [her] into the living room . . . just like he did before, and he

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[7] Members found Appellant not guilty of a specification of a violation of Article 120, UCMJ, 10 U.S.C. § 920, for which SH was the alleged victim.

turned around and slapped [her] in the face." SH stated there was no prelude to the slap and that she "kind of laughed like in shock." After Appellant slapped her again, SH hit him back and Appellant responded by hitting her "really, really hard." SH testified that she never communicated to Appellant that she liked to be slapped, or that she found slapping acceptable. SH explained they were not play fighting. Based on SH's testimony, SH was offended and did not consent to being slapped. Likewise, the evidence also supports the conclusion that Appellant did not have an honest and reasonable mistake regarding SH's consent to him slapping her. We see no evidence that would show Appellant honestly, much less reasonably, believed SH wanted him to slap her in the face. We also find no merit to Appellant's argument that his conduct could not have been offensive because SH performed oral sex on him after he struck her.

When viewing the evidence offered at trial in the light most favorable to the Government, a rational factfinder could readily find the essential elements of assault consummated by a battery—and the absence of affirmative defenses—beyond a reasonable doubt. We therefore conclude the evidence is legally sufficient to support Appellant's conviction. Giving the appropriate deference to the trial court's ability to see and hear the witnesses, and after our own independent review of the record, we ourselves are convinced of Appellant's guilt beyond a reasonable doubt and find the evidence factually sufficient.

4. Obstruction of Justice

a. Additional Background

On 3 December 2020, while Appellant was in pretrial confinement, pursuant to a search warrant, Air Force Office of Special Investigations (AFOSI) agents coordinated with Appellant's spouse to search Appellant's home and vehicle for electronic devices. After AFOSI agents conducted the search, Appellant's wife spoke with Appellant by phone. She explained to Appellant that AFOSI agents were looking for electronic devices. Unfortunately for Appellant, the phone call was being monitored by confinement facility staff, SSgt JG and SrA TV. SSgt JG testified that Appellant asked his wife to log into his SnapChat and Instagram social media accounts. The couple discussed the usernames and passwords for the accounts. During the call, Appellant's wife logged into an account while Appellant instructed her to delete it. SrA TV also overheard Appellant instruct his wife to delete conversations with some people on his social media.

On the same day, Snapchat sent an email to Appellant that his account was deactivated, and a follow-up email that Appellant's account would be deleted in 30 days.

b. Analysis

Appellant claims his conviction is not legally and factually sufficient because the Government failed to prove he had the intent to influence, impede, or otherwise obstruct justice when he asked his wife to delete his social media accounts and messages. We are not persuaded.

Appellant suggests it is reasonable to interpret the evidence as showing Appellant and his wife discussed deleting their conversations only because they did not want them read by other people. However, another reasonable interpretation is that Appellant was asking his wife to delete evidence of his misconduct. The sequence of Appellant's conversation with his wife is strong circumstantial evidence that Appellant was not merely attempting to keep communications with his wife private. Appellant's request to his wife to delete digital evidence from his social media accounts took place just after she informed him AFOSI had searched his home and vehicle for electronic devices. We find there was ample evidence to support the conclusion Appellant's intent was to influence, impede, or obstruct AFOSI's criminal investigation into Appellant.

When viewing the evidence offered at trial in the light most favorable to the Government, a rational factfinder could readily find the essential elements of obstruction of justice beyond a reasonable doubt. We, therefore, conclude the evidence is legally sufficient to support Appellant's conviction. Giving the appropriate deference to the trial court's ability to see and hear the witnesses, and after our own independent review of the record, we ourselves are convinced of Appellant's guilt beyond a reasonable doubt.

B. Victim Impact Statement

Appellant claims the military judge erred when he allowed the victim's counsel for SH to deliver her unsworn victim statement without good cause shown. Appellant further alleges the military judge abused his discretion when he permitted the members to

consider what Appellant characterizes as "an inappropriately inflammatory victim impact statement which impeached the verdict." Appellant asks us to set aside his sentence as a remedy. We find relief is not warranted.

1. Additional Background

Appellant was convicted of striking SH in the face with his hand. SH's counsel presented a written three-page statement to the court and read it to the members verbatim on SH's behalf. Appellant's trial defense counsel objected to the contents of the statement, arguing, "[I]t doesn't relate specifically to the offense for which the accused was convicted. Instead, it's our position that it makes, throughout the unsworn statement, unveiled reference[s] to those things in which the accused was acquitted of and it's our position that that's improper." Trial defense counsel further stated, "[T]his is then just a way to shoehorn those offenses for which the accused was acquitted into the unsworn statement, thereby, not explicitly, but it's impeaching the verdict."

The military judge then asked the victim's counsel if the impact described in the unsworn statement stemmed from the slap. In response, the victim's counsel stated that the statement was created after the findings and SH's words "directly track R.C.M. 1001(c) to discuss impact directly arising from or directly relating to the offense."

The military judge explained that "if the victim says this is how they have been impacted from the slap, this is how they've been impacted by the slap." The military judge stated that he declined to be "a lie detector for the victim." The military judge further

explained, "The victim is allowed to say what that impact is if that's what they feel is deriving directly relating to or arising from that slap." However, at the request of the military judge, some changes were made to the original statement to replace some plural words to singular, such as changing "choices" to "choice."

SH's statement, as presented to members, began, "My name is [SH] and I thank you for the opportunity to provide this Victim Impact Statement before the Honorable Court in accordance with my Article 6b rights. I have asked my Special Victims' Counsel to read this statement on my behalf."

SH's counsel read the following statements from SH's victim impact statement:

> Beyond the physical pain that [Appellant] caused me, the deep emotional wounds that [Appellant's] selfish choice inflicted has left real psychological scars.
>
> . . . .
>
> For the longest time, I felt like I was to blame for [Appellant's] choice that night. The idea I had created an atmosphere where I could be assaulted haunted me in invisible and permanent ways. I felt completely hopeless and ashamed for letting this freakish crime happen to me. . . . It is not my fault that [Appellant] took this deliberate and disdainful action.
>
> . . . .
>
> The trauma of [Appellant's] violent offense has impacted my day-to-day life in ways I never imagined.

. . . .

> When [Appellant] committed this vile act, he didn't just steal my peace of mind, he also stole the social and family life I cherished.
>
> . . . .
>
> No one in or outside the Air Force should ever have to go through the abuse I suffered at the hands of this arrogant and selfish individual. No woman in Britain or America should ever be threatened by his sick and despicable behavior ever again.

Appellant's trial defense counsel did not object to SH's counsel reading of SH's statement to the members. The military judge did not make an express finding of "good cause" regarding SH's counsel presenting SH's statement on her behalf.

2. Law

We review a military judge's interpretation of R.C.M. 1001 de novo, but review a decision regarding the presentation of a victim-impact statement in presentencing for an abuse of discretion. *See United States v. Hamilton*, 78 M.J. 335, 340 (C.A.A.F. 2019) (considering a previous version of R.C.M. 1001); *United States v. Barker*, 77 M.J. 377, 382–83 (C.A.A.F. 2018) (same).[8] A military judge abuses his discretion when he makes a ruling based on an

[8] Rules addressing a victim's right to be reasonably heard were contained in R.C.M. 1001A, *Manual for Courts-Martial*, *United States* (2016 ed.) (2016 *MCM).* However, those rules are now contained in R.C.M. 1001(c). *See MCM*, App. 15, at A15-18 ("R.C.M. 1001(c) is new and incorporates R.C.M. 1001A of the [2016 *MCM*]."). Our analysis cites to these versions as applicable.

erroneous view of the law. *Barker*, 77 M.J. at 383. Similarly, "[a] military judge abuses his discretion when his legal findings are erroneous . . . or when he makes a clearly erroneous finding of fact." *United States v. Edwards*, 82 M.J. 239, 243 (C.A.A.F. 2022) (internal citations omitted).

When an appellant does not object to the presentation of victim matters, we review for plain error. *See United States v. Gomez*, 76 M.J. 76, 79 (C.A.A.F. 2017). An appellant bears the burden of establishing: "(1) there was error; (2) the error was clear or obvious; and (3) the error materially prejudiced a substantial right." *Id.* (citation omitted). When testing for prejudice in the context of sentencing, we determine whether the error substantially influenced the adjudged sentence by considering the following four factors: "(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." *Hamilton*, 78 M.J. at 343 (quoting *United States v. Bowen*, 76 M.J. 83, 89 (C.A.A.F. 2017)). "An error is more likely to be prejudicial if the fact was not already obvious from the other evidence presented at trial and would have provided new ammunition against an appellant." *Barker*, 77 M.J. at 384 (citation omitted). An error is more likely to be harmless when the evidence was not "critical on a pivotal issue in the case." *United States v. Cano*, 61 M.J. 74, 77–78 (C.A.A.F. 2005) (internal quotation marks and citation omitted).

Article 6b, UCMJ, 10 U.S.C. § 806b, details several rights belonging to crime victims. Among these are the "right to be reasonably heard at . . . [a] sentencing

hearing relating to the offense." Article 6b(a)(4)(B), UCMJ, 10 U.S.C. § 806b(a)(4)(B); *see also* R.C.M. 1001(c)(1) ("[A] crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at the presentencing proceeding relating to that offense.").

"The right to make an unsworn victim statement solely belongs to the victim or the victim's designee and cannot be transferred to trial counsel." *Edwards*, 82 M.J. at 241 (first citing *Hamilton*, 78 M.J. at 342; and then citing *Barker*, 77 M.J. at 378). This right "is separate and distinct from the [*G*]*overnment's* right to offer victim impact statements in *aggravation*, under R.C.M. 1001(b)(4)." *Id.* (quoting *Barker*, 77 M.J. at 378). "Upon good cause shown, the military judge may permit the crime victim's counsel . . . to deliver all or part of the crime victim's unsworn statement." R.C.M. 1001(c)(5)(B).

Notwithstanding a victim's right to be reasonably heard, a military judge has the responsibility to "[e]nsure that the dignity and decorum of the proceedings are maintained," and "exercise reasonable control over the proceedings[.]" R.C.M. 801(a)(2)–(3); *see also LRM v. Kastenberg*, 72 M.J. 364, 372 (C.A.A.F. 2013) (noting a victim's "right to a reasonable opportunity to be heard on factual and legal grounds" is "subject to reasonable limitations and the military judge retains appropriate discretion under R.C.M. 801").

"The crime victim may make an unsworn statement and may not be cross-examined on it by trial counsel, defense counsel, or the court-martial. The prosecution or defense may, however, rebut any statements of fact therein. The unsworn statement

may be oral, written, or both." R.C.M. 1001(c)(5)(A). "The content of [sworn and unsworn victim statements] may only include victim impact and matters in mitigation." R.C.M. 1001(c)(3).

3. Analysis

a. Victim's Counsel Reading Victim's Unsworn Statement

Appellant first raises whether the military judge erred by allowing special victims' counsel to deliver SH's unsworn statement aloud to the court members. Since Appellant did not object, we review for plain error. We begin our analysis with the presumption the military judge knew and followed the law, including when and how to apply the standard of whether good cause was shown. *See United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007) ("Military judges are presumed to know the law and to follow it absent clear evidence to the contrary."). Here, the record is clear this military judge was familiar with R.C.M. 1001(c), and we see no indication that the military judge failed to consider and find "good cause" before allowing the special victims' counsel to read the victim's statement to the members after SH specifically requested her counsel deliver it on her behalf. Furthermore, even if we assume the military judge committed error, we find no prejudice.

In this case, we find counsel's reading of the victim's statement provided no "new ammunition" against Appellant. *See Barker*, 77 M.J. at 384. Appellant argues that because SH did not personally deliver her statement, members were unable to evaluate her credibility and whether her delivery was with genuine emotion. We note, however, that SH

already had testified during findings, so the members were familiar with her recitation of the facts of the case and her demeanor in describing them. We find Appellant's argument in that delivery of SH's statement by her counsel provided "new ammunition" against Appellant because SH did not personally deliver her statement—resulting in members being unable to observe and evaluate SH's credibility—without merit. SH was within her right to have presented the written statement alone without members having an opportunity to view SH's delivery of it. We find SH's counsel simply reading the written document to the court members did not amount to any significant addition to, or expansion of, the statement. *Cf. Edwards*, 82 M.J. at 246 (finding that in producing a victim-impact video containing images and music, "trial counsel made creative and organizational decisions that . . . incorporated her own personal artistic expression," and thereby "misappropriate[d] the victim's right to be heard"). Any error here was not prejudicial because it "did not involve the subject matter, but rather the form in which it was presented." *See United States v. Kerr*, 51 M.J. 401, 406 (C.A.A.F. 1999).

We further find special victims' counsel reading aloud the victim unsworn statement had no substantial influence on the sentence. This reading did not change the strength of the parties' cases.[9] The readings were not an improper government attempt to

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[9] The victims were not parties, and their unsworn statements were not part of the Government's case. *See Edwards*, 82 M.J. at 245; *L.R.M.*, 72 M.J. at 368 (finding the victim was a "nonparty to the court[ ]-martial"). We acknowledge, however, that the content of these statements favored the Government.

"slip in evidence in aggravation that [ ] would otherwise be prohibited by the Military Rules of Evidence." *Hamilton*, 78 M.J. at 342. Had the victim personally read her statement to the members, she *may* have imparted more emotion than counsel, whose reading did not add substance to the words on the page. We are not convinced Appellant suffered any prejudice when special victims' counsel read SH's victim statement aloud to the court members in this case. Finding no prejudicial error, we decline to grant relief on this issue.

b. Content of Victim Impact Statement

Appellant argues the military judge abused his discretion when he permitted the members to consider what he calls an inappropriately inflammatory victim impact statement which impeached the verdict. We are not persuaded.

The military judge did not abuse his discretion when he allowed SH's victim impact statement to be presented to members in accordance with R.C.M. 1001. The military judge clearly applied the correct law, specifically considering "the parameters of R.C.M. 1001 and what is proper for a victim impact statement." The military judge's ruling is supported by the record; SH's statement is written such that her claimed impact can be attributed to the single offense against her for which Appellant was found guilty. The military judge reasonably concluded that, on its face, SH's statement did not refer to matters for which Appellant was found not guilty, and consequently, the statement did not impeach the verdict. The military judge's legal findings were not erroneous and he did not make a clearly erroneous finding of fact. *Edwards*,

82 M.J. at 243. We find the military judge did not abuse his discretion.

C. Sentence Severity

Appellant claims his sentence is inappropriately severe considering the nature and seriousness of the offenses of which he was convicted. Appellant characterizes these offenses as "low-level" and, according to him, "routinely disposed of via summary courts-martial or nonjudicial punishment."[10] Appellant argues, consequently, "the punitive discharge and lengthy confinement adjudged in this case are inapposite." We disagree and find no relief is warranted.[11]

We review sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2016). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we] find correct in law and fact and determine[ ], on the basis of the entire record, should be approved." Article 66(c), UCMJ. "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States*

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[10] Appellant also argued we should engage in sentence comparison under *United States v. Lacy*, 50 M.J. 286 (C.A.A.F. 1999), as a result of LW receiving a letter of counseling for her participation in obstruction of justice with Appellant. We have carefully considered this issue and determine no discussion or relief is warranted. *See Matias*, 25 M.J. at 361. We find that Appellant is not entitled to relief.

[11] We have carefully considered all claims Appellant raised in assignment of error (5); some warrant discussion, but none warrant relief. *See Matias*, 25 M.J. at 361.

v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (per curiam) (citations omitted). While we have great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010).

Appellant contends the adjudged bad-conduct discharge and 255 days of confinement are excessive. We disagree and do not find Appellant's sentence inappropriately severe considering the maximum punishment available and the record before us. The maximum sentence available for the offenses for which Appellant was convicted was a dishonorable discharge, six years and six months of confinement, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand. Appellant not only committed an offense involving physical violence and participated in an open and notorious extramarital affair, but to cover up these crimes, he requested his wife destroy digital evidence. We have given full individualized consideration to Appellant and to the appropriateness of his sentence. After careful consideration of the matters contained in the record of trial which were before the members, the nature and seriousness of Appellant's offenses, and his record of service, we find the sentence is not inappropriately severe.

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d).

Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee
USCA Dkt. No. 23-0224/AF
Crim.App. No. 40250

v.

ORDER

Charles S. Nestor,
Appellant

On further consideration of the granted issue, 84 M.J. 138 (C.A.A.F. 2023), and in view of *United States v. Wells*, __ M.J. __ (C.A.A.F. 2024), it is, by the Court, this 24th day of October, 2024,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Bosner)
Appellate Government Counsel (Payne)

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40250

UNITED STATES
Appellee

v.

Charles S. NESTOR
Technical Sergeant (E-6), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 30 June 2023

Military Judge: Matthew P. Stoffel.

Sentence: Sentence adjudged on 8 October 2021 by GCM convened at Kadena Air Base, Japan. Sentence entered by military judge on 2 November 2021: Dishonorable discharge, confinement for 16 months, and reduction to E-1.

For Appellant: Major David L. Bosner, USAF.

For Appellee: Lieutenant Colonel Thomas J. Alford, USAF; Major Morgan R. Christie, USAF; Captain Olivia B. Hoff, USAF; Mary Ellen Payne, Esquire.

Before RICHARDSON, CADOTTE, and ANNEXSTAD, *Appellate Military Judges*.

Judge ANNEXSTAD delivered the opinion of the court, in which Senior Judge RICHARDSON and Judge CADOTTE joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

ANNEXSTAD, Judge:

At a general court-martial, a panel of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification each of wrongfully possessing and distributing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934.[1] A military judge sentenced Appellant to a dishonorable discharge, confinement for 16 months, and reduction to the grade of E-1. The convening authority took no action on the sentence.

Appellant raises seven issues which we have reordered and reworded: (1) whether the military judge abused his discretion when he permitted the Government to introduce certain character evidence under Mil. R. Evid. 404(b); (2) whether the military judge committed reversible error in his instructions to the members; (3) whether Appellant's conviction for possession of child pornography (Specification 1) is

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[1] All references to the UCMJ, the Military Rules of Evidence, and the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

legally and factually sufficient; (4) whether Appellant's conviction for distribution of child pornography (Specification 2) is legally and factually sufficient; (5) whether the findings of guilty constituted an unreasonable multiplication of charges; (6) whether Appellant's convictions of Specifications 1 and 2 are legally and factually sufficient as to the terminal element; and (7) whether Appellant is entitled to a unanimous verdict under the Fifth and Sixth Amendments.[2,3]

With respect to issues (5), and (7), we have carefully considered Appellant's contentions and find they do not require discussion or warrant relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

We consolidate issues (3), (4), and (6) since they concern the legal and factual sufficiency of both specifications. We find error and provide relief for issue (4). We affirm the remaining findings of guilty and the sentence, as reassessed.

I. BACKGROUND

As part of a Joint Crimes Against Children Task Force in June of 2020, Naval Criminal Investigative Service (NCIS) investigators discovered Appellant's use of an Internet protocol (IP) address associated with suspected child pornography. NCIS Special Agent (SA) GH described at trial how he used investigative peer-to-peer software to search for child pornography on a particular peer-to-peer file sharing

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[2] U.S. CONST. amend. V and VI.

[3] On 29 March 2023, Appellant withdrew one additional issue for our consideration alleging that the record of trial was incomplete.

network.[4] He explained that peer-to-peer file sharing networks rely on individual users to download and share files, and that when a user downloads a file using peer-to-peer software, the software by "default" automatically begins sharing the file—or pieces thereof—with other network users.

SA GH testified he used peer-to-peer software designed specifically for law enforcement agents (modified software) to conduct an undercover child pornography investigation on 23 June 2020. He explained that the modified software differed from the publicly available software (standard software) in several respects, including two features significant to this case. First, unlike the standard software, the modified software did not share any downloaded files. Second, the modified software connected to only one IP address at a time—meaning the entire file is downloaded from one individual instead of pieces of a file from many. Using these features, SA GH downloaded a suspected child pornography video from an IP address in Okinawa, Japan—belonging to Appellant—which was serviced by a local Japanese Internet service provider (ISP). The downloaded video, hereinafter referred to as the spanking video, was admitted as a prosecution exhibit[5] at trial and SA GH described it as follows:

> It depicts a – it's a living room-type setting, what looked like appeared to be an ottoman. There was a – what appeared to be a low-teen,

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[4] Without objection, the military judge recognized Special Agent GH as an expert in the fields of "digital forensics" and "peer-to-peer software."

[5] The video was admitted as Prosecution Exhibit 5.

> preteen child bent over, couldn't tell if it was male or female, with what appeared to be an adult, white male, spanking the unclothed bare bottom of the other individual.

SA GH sent a request to the Japanese ISP to determine the registered owner of the IP address in question. The Japanese ISP responded with "Tech Sergeant Charles Nestor" and provided the registered owner's work location. After identifying Appellant as an Air Force member, SA GH turned over the investigation to the Air Force Office of Special Investigations (AFOSI).

On 9 July 2020, AFOSI, led by SA JR, along with Okinawan police, obtained a search authorization for Appellant's off-base residence where they subsequently seized 27 electronic devices, including, *inter alia,* a Lenovo laptop and a ThinkPad laptop. The devices were sent to the Department of Defense Cyber Crime Center Cyber Forensics Laboratory (DC3/CFL) for analysis, where it was determined that Appellant was the registered owner and a regular user for both laptops. It also revealed Appellant had password-protected both laptops, and they both contained evidence relevant to the question of whether the Appellant knowingly possessed child pornography and knowingly distributed a child pornography video between December 2019 and July 2020.[6]

Mr. TB, a cyber forensics examiner from DC3/CFL, conducted the forensic analysis on Appellant's two

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[6] The rest of the devices seized from Appellant's residence contained no relevant information concerning the charged offenses.

laptops and testified at trial as an expert in the field of digital forensics. Mr. TB testified that he discovered—in a subfolder located on the Lenovo laptop—a commercially produced foreign film entitled "Maladolescenza," which featured three different minors engaging in sexually explicit conduct. He also found two additional videos depicting a preteen girl masturbating with a water faucet in a bathtub. Mr. TB stated these files were downloaded using Appellant's user profile beginning in December 2019 and all the files had to be specifically placed in the subfolder by Appellant.

Mr. TB further testified the Lenovo laptop contained: (1) 28 additional files with filenames indicative of child pornography; and (2) 72 other movies or video files "that contained scenes with children, at some stage [of] undress[ ]," including videos depicting what appeared to be children changing clothes at a beach house, showering, and engaging in sexual activity. In addition to items (1) and (2), *supra*, Mr. TB stated that he discovered three additional video clips of scenes spliced together in VLC media player that exhibited a child in some stage of undress, including an adult female bathing a nude prepubescent female and a teenage male and female who are both topless. He stated two of the three video clips were recorded scenes from a commercially produced German movie and the video clips captured the limited scenes in the film where a child was undressed to some degree.

In addition to the Lenovo laptop, Mr. TB also testified that he found 97 deleted files with filenames indicative of possible child pornography on the ThinkPad laptop data drive. He stated that while he

could still see the filenames, the files themselves were empty. Mr. TB indicated the filenames included "preteen hardcore" and explicit and lascivious references to sexual acts involving minors. He also stated that the operating system on Appellant's computer, based on Appellant's interaction with the files, had created shortcut links to filenames in his "recent" folder containing the term "preteen hardcore" where additional filenames suggesting child pornography were also discovered. Mr. TB explained that in order to create the shortcut link, the user would have opened the files at one point in time. He also stated that the globally unique identifier (GUID) for the standard software on the ThinkPad was the same GUID listed by NCIS for the standard software from which the spanking video was obtained. Finally, Mr. TB confirmed the files were downloaded on both laptops between December 2019 and July 2020, but later deleted.

Contrary to his pleas, a panel of officer and enlisted members convicted Appellant of one specification of knowingly and wrongfully possessing child pornography, and one specification of knowingly and wrongfully distributing child pornography.

II. DISCUSSION

A. Mil. R. Evid 404(b)

Appellant argues the military judge abused his discretion by permitting the Government to introduce character evidence under Mil. R. Evid. 404(b). We find that the military judge did not abuse his discretion and that Appellant is not entitled to relief.

1. Additional Background

On 29 July 2021, the Defense submitted a request for a bill of particulars to the Government. Specifically, the Defense requested a list of the media filenames that the Government was alleging were child pornography and in Appellant's possession. On 9 August 2021, the Government responded with a chart containing 41 total filenames. On 1 October 2021, the Government amended its response by adding one more filename to the chart for a total of 42 files. These 42 files consisted of the three videos taken from the Lenovo laptop, one video taken from the Thinkpad laptop (the spanking video), and 38 other filenames that were in the recycling and recent folders on the Thinkpad laptop.[7]

On 11 August 2021, the Government provided the Defense with notice of its intent to offer evidence under Mil. R. Evid. 404(b). On 2 October 2021, two days before trial the Defense moved to exclude certain material from being offered under Mil. R. Evid. 404(b). The Government opposed the motion. The evidence the Government sought to introduce under Mil. R. Evid. 404(b), for the purpose of showing that Appellant had knowledge of possession and distribution of child pornography, included: (1) 28 child erotica videos and a foreign movie featuring scenes of unclothed children that were found on Appellant's Lenovo laptop; (2) evidence that Appellant possessed short VLC clips of scenes involving nude minors from various movies on his Lenovo laptop; and

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[7] The videos from the Lenovo laptop included the "Maladolescenza" video and the two videos depicting a preteen girl masturbating in a bathtub.

(3) an additional 97 deleted files with filenames indicative of child pornography on Appellant's ThinkPad laptop. On 4 October 2021, the military judge received additional evidence and heard arguments on the motion during an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session. During argument, Government counsel clarified that evidence found on Appellant's laptops included the 42 charged files as well as files they were attempting to offer under Mil R. Evid. 404(b). On 5 October 2021, the military judge issued a written ruling denying the defense motion.

a. Child Erotica

We first address the 28 files of child erotica found on Appellant's Lenovo laptop. The military judge determined the Lenovo laptop was owned and regularly used by Appellant; had one user-created profile with a username of "Charl"—the first portion of Appellant's name; the files were found on a device seized from Appellant's residence; and "there [was] no indication that Appellant did not have access to the device at the time files were downloaded." Furthermore, the military judge determined the only other occupants in Appellant's residence were his wife and two daughters. The military judge stated the evidence reasonably supported Appellant's possession and viewing of these files.

The military judge also determined the evidence was relevant to Appellant's knowing possession and distribution of child pornography, in that it may establish Appellant's sexual interest in minors, particularly minors engaged in sexual conduct, and that Appellant had a motive to have the files in his possession. He also found the filenames were relevant circumstantial evidence that Appellant knew he

possessed child pornography. The military judge found the probative value of the evidence was high due to the lack of other evidence in the case supporting Appellant's knowing possession and distribution. He found the danger of unfair prejudice was moderate, due in part to the number of files that contained alleged child erotica (28) as compared to the small number of files that contained alleged child pornography (3)—that is, the "Maladolescenza" film and two videos of a preteen girl in a bathtub. The military judge concluded, "Put more finely, the evidence contained in each [erotica] video file will become somewhat cumulative at a certain point, such that the danger of unfair prejudice may reach the point of substantially outweighing the collective probative value of the evidence . . . ."

b. VLC Video Clips

Next, we consider the three VLC video clips found on Appellant's Lenovo laptop indicating that Appellant spliced together movie clips of children in various stages of undress. The military judge found evidence supported a finding that Appellant used video editing software to compile short video clips of scenes involving nude minors. Consistent with his analysis of the child erotica, and supported by the testimony of Mr. TB, the military judge found that Appellant was responsible for either creating these clips using VLC software, or possessing these clips found on his computer. Again the military judge stated the evidence was relevant to the issue of whether Appellant knowingly possessed and distributed child pornography. The military judge determined the probative value of the evidence was high as it demonstrated that Appellant had

knowledge of the content of at least some of the files in question at or near the time the child pornography was downloaded onto his devices. The military judge assessed the danger of unfair prejudice from this evidence to be low.

c. Filenames of Deleted Files

Concerning the 97 deleted files with filenames indicative of child pornography found on Appellant's ThinkPad laptop data drive, the military judge incorporated the analysis above that the evidence indicated Appellant possessed files indicative of child pornography between December 2019 and July 2020 on his computer. He also concluded the evidence was relevant as it may demonstrate that Appellant had a sexual interest in minors, which would make his knowing possession and distribution more likely. He also determined that the fact the files were deleted went to the weight of the evidence. The military judge found the probative value of this evidence was moderate, noting that while the contents of the files would have offered a higher probative value, there was probative value in that the deleted files were located on the same laptop as the video downloaded by law enforcement using the modified software. The military judge assessed the danger of unfair prejudice as low to moderate, and ultimately concluded that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence.

2. Law

A military judge's ruling under Mil. R. Evid. 404(b) and Mil. R. Evid. 403 will not be disturbed except for a clear abuse of discretion. *United States v. Morrison*, 52 M.J. 117, 122 (C.A.A.F. 1999) (citation omitted). "A

military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) [ ] incorrect legal principles were used; or (3) [ ] his application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010) (citing *United States v. Mackie*, 66 M.J. 198, 199 (C.A.A.F. 2008) (per curiam)). Stated another way, an abuse of discretion occurs when the military judge's decision is "outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008) (citation omitted).

Mil. R. Evid. 404(b) provides that evidence of a crime, wrong, or other act by a person is not admissible as evidence of the person's character in order to show the person acted in conformity with that character on a particular occasion. Moreover, it cannot be used to show predisposition toward crime or criminal character. *United States v. Staton*, 69 M.J. 228, 230 (C.A.A.F. 2010). However, such evidence may be admissible for another purpose, including to show, *inter alia*, motive, intent, plan, absence of mistake, or lack of accident. *Id.*; Mil. R. Evid. 404(b)(2). The list of potential purposes in Mil. R. Evid. 404(b)(2) "is illustrative, not exhaustive." *United States v. Ferguson*, 28 M.J. 104, 108 (C.M.A. 1989).

We apply a three-part test to review the admissibility of evidence under Mil. R. Evid. 404(b): (1) Does the evidence reasonably support a finding by the factfinder that Appellant committed the other crime, wrong, or act? (2) Does the evidence of the other act make a fact of consequence to the instant offense more or less probable? (3) Is the probative value of the

evidence of the other act substantially outweighed by the danger of unfair prejudice under Mil. R. Evid. 403. *United States v. Reynolds*, 29 M.J. 105, 109 (C.A.A.F. 1989) (citations omitted). "If the evidence fails to meet any one of these three standards, it is inadmissible." *Id.*

Concerning the third *Reynolds* prong, our superior court has instructed that "the military judge enjoys wide discretion when applying [the] Mil. R. Evid. 403" balancing test. *United States v. Tanksley*, 54 M.J. 169, 176 (C.A.A.F. 2000) (internal quotation marks and citations omitted), *overruled in part on other grounds by United States v. Inong*, 58 M.J. 460 (C.A.A.F. 2003). They have also made clear that they will exercise great restraint in reviewing the decision and will give the decision maximum deference in determining whether there is a clear abuse of discretion when a military judge conducts Mil. R. Evid. 403 balancing on the record. *Id.* at 176–77.

3. Analysis

On appeal, Appellant contends that the military judge's application of legal principles to the facts was unreasonable. Specifically, Appellant argues the military judge reached the wrong conclusion concerning the third prong of the *Reynolds* test in finding the evidence's probative value was not substantially outweighed by the danger of unfair prejudice. We find that the military judge did not abuse his discretion.

In his written ruling, the military judge applied the first *Reynolds* prong— whether the evidence reasonably supported a finding that Appellant engaged in other acts—and was satisfied the

factfinder could reasonably determine Appellant was the person responsible for possessing the child erotica, video clips, and the deleted files found on the two devices that he owned and regularly used. We find the military judge's factfinding on the first *Reynolds* prong was supported by the evidence of record. Thus, we conclude that the military judge properly applied the first *Reynolds* prong.

The military judge applied the second *Reynolds* prong—whether the evidence of the other acts makes a fact of consequence to the instant offenses more or less probable—and found the uncharged acts were evidence of Appellant's sexual interest in minors and motive to have the files in his possession. The military judge properly recognized that primary facts of consequence in this litigated case were Appellant's knowing possession and distribution of child pornography. Evidence of Appellant's sexual interest in children, his possession of child erotica, video clips of children in various stages of undress, and deleted files with filenames indicative of child pornography made the facts that Appellant knowingly and wrongfully possessed child pornography more probable. Thus, we conclude that the military judge's application of the second *Reynolds* prong was not clearly unreasonable.

Applying the third *Reynolds* prong, the military judge found the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Here, the military judge provided written assessments of both the probative value and the potential prejudice on each of the individual pieces of uncharged evidence the Government sought to introduce. Exercising great restraint and providing

maximum deference to the military judge's decision, we find the military judge's written analysis is not outside the range of choices reasonably arising from the specific facts of this case and the law. *See Miller*, 66 M.J. at 307.

The military judge did not abuse his discretion in ruling the evidence that Appellant possessed 28 files of child erotica and spliced VLC clips showing children in various stages of undress, and that his laptop showed filenames of deleted files that were indicative of child pornography, was admissible for the limited purposes of showing Appellant's intent and motive to knowingly possess and distribute child pornography. His findings of fact were supported by the record and therefore were not clearly erroneous. Appellant has not shown the military judge incorrectly applied the law or that his ruling was arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *See United States v. Shields*, ___ M.J. ___, No. 22-0279, 2023 CAAF LEXIS 270, at *9 (C.A.A.F. 28 Apr. 2023) (articulating abuse of discretion standard); *see also Morrison*, 52 M.J. at 122.

B. Military Judge's Instructions

Appellant claims the military judge erred by providing a list of charged filenames that the Government alleged constituted child pornography in his instructions to the members. He claims that this instruction created confusion between which files were charged and which files were admitted solely pursuant to Mil. R. Evid. 404(b). We find Appellant waived any objections to the military judge's instructions and we are not persuaded to pierce waiver in this case.

1. Additional Background

During an Article 39(a), UCMJ, session concerning instructions, the military judge asked trial counsel if there were "any additional requests for special instructions" other than an unopposed request for an instruction on the definition of "masochism." To alleviate a concern expressed by trial defense counsel at an earlier hearing regarding the particular files meeting the definition of child pornography, trial counsel suggested highlighting the files on two prosecution exhibits—14 and 15—which would clarify what files the Government alleged met the definition of child pornography. The Government further suggested that highlighting the charged files would also clarify to the members that the non-highlighted files in the two exhibits were the uncharged files admitted only for Mil. R. Evid. 404(b) purposes. The military judge responded that he would rather provide the members with only a list of the charged files in his instructions. Trial defense counsel did not object or propose an alternative course of action to the military judge's proposal.

During a recess after discussing instructions, the military judge conducted a Rule for Courts-Martial (R.C.M.) 802 conference with counsel. Back on the record, the military judge described that during the conference both "counsel requested some clarification as far as the court's expectations as it relate[d] to the [P]rosecution's request to how best to identify what they are alleging as child pornography." Trial defense counsel did not voice a desire to supplement the military judge's summary of the conference, nor did they raise any issues or lodge any objections with respect to the identification of the charged child

pornography. The military judge then indicated that he was going to take a long recess to finalize the instructions and would provide the instructions to the parties for review. The military judge referenced trial counsel's request to include the specific filenames in the written instruction: "As we had discussed, I believe trial counsel indicated they were going to provide files, filenames that are at issue in this case to the court, to include in the written instructions. I'll be sure to include those once I receive them." Trial defense counsel again did not object, raise any issue, or lodge any objections to the military judge's proposed plan to insert the filenames in his written instructions to the members. The military judge then asked trial defense counsel, "[A]re there any other matters that we need to take up regarding instructions?" Trial defense counsel responded, "No, Your Honor." Subsequently, both trial and trial defense counsel had an opportunity to review the final instructions. Trial defense counsel did not express any objection to the list of filenames in the instructions.

The military judge provided the members a list of 42 filenames that the Government alleged met the definition of child pornography. After reading the instructions, and before the members retired to deliberate, the military judge asked, "Do counsel object to the instructions given or request additional instructions?" Trial defense counsel responded, "No, Your Honor."

2. Law

"Failure to object to an instruction or to omission of an instruction before the members close to deliberate forfeits the objection." R.C.M. 920(f). We review forfeited issues for plain error. *United States v.*

Davis, 79 M.J. 329, 331 (C.A.A.F. 2020). "[T]o establish plain error an appellant must demonstrate (1) error, (2) that is clear or obvious at the time of the appeal, and (3) prejudicial." *United States v. Long*, 81 M.J. 362, 369–70 (C.A.A.F. 2021) (internal quotation marks and citation omitted).

In contrast to forfeiture, an appellant waives a right to raise the issue on appeal where he "affirmatively declined to object to the military judge's instructions and offered no additional instructions." *Davis*, 79 M.J. at 331. "Whether an appellant has waived an issue is a legal question we review de novo." *Id*.

Generally, an affirmative waiver leaves "nothing left" to correct on appeal. *Id*. However, pursuant to Article 66(d)(1), UCMJ, Courts of Criminal Appeals (CCAs) have the unique statutory responsibility to affirm only so much of the findings and sentence that they find are correct and "should be approved." 10 U.S.C. § 866(d)(1). This includes the authority to address errors raised for the first time on appeal despite waiver of those errors at trial. *See, e.g.*, *United States v. Hardy*, 77 M.J. 438, 442–43 (C.A.A.F. 2018). A CCA assesses the entire record and determines "whether to leave an accused's waiver intact, or to correct the error." *United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016) (citation omitted).

"The military judge has an independent duty to determine and deliver appropriate instructions." *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008) (citing *United States v. Westmoreland*, 31 M.J. 160, 163–64 (C.M.A. 1990)).

3. Analysis

The threshold question is whether Appellant preserved, forfeited, or waived his allegation of error in the military judge's instructions. Trial defense counsel did not object to the challenged instructions, even when the military judge asked, so the issue was waived, and we decline to pierce that waiver.

The military judge involved counsel in the drafting and tailoring of his instructions. He listened to the concerns of counsel and determined what type of instructions counsel wanted, provided counsel with draft instructions, and solicited objections to and requests for additional instructions. After the military judge provided the instructions to the court members, he again asked counsel if they objected to any of the instructions, and received none. Because trial defense counsel affirmatively declined to object to the findings instructions and offered no additional instructions, Appellant expressly and unequivocally acquiesced to them, constituting waiver. *See United States v. Rich*, 79 M.J. 472, 476 (C.A.A.F. 2020) (citations omitted).

Finding waiver, we next consider whether to pierce Appellant's waiver relating to the instructions. Having reviewed the entire record, and mindful of our mandate to "approve only that which 'should be approved,'" we have determined to leave intact Appellant's waiver of the alleged error. *See Chin*, 75 M.J. at 223.

C. Legal and Factual Sufficiency

Appellant contends that the evidence is legally and factually insufficient to support the findings of guilty for both specifications. As discussed below, we find the evidence supporting Appellant's conviction for

possession of child pornography is both legally and factually sufficient. However, we find the evidence to support Appellant's conviction for distribution of child pornography is legally and factually insufficient.

1. Law

Issues of legal and factual sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). "Our assessment of legal and factual sufficiency is limited to the evidence produced at trial." *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citing *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993)), *rev. denied*, 82 M.J. 312 (C.A.A.F. 2022).

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). "The term reasonable doubt, however, does not mean that the evidence must be free from conflict." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). As a result, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (alteration in original) (citation omitted), *cert. denied*, 139 S. Ct. 1641 (2019).

The test for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011) (internal quotation marks omitted) (quoting *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)).

"The test for factual sufficiency is 'whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses,' [this] court is 'convinced of the [appellant]'s guilt beyond a reasonable doubt.'" *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *Wheeler*, 76 M.J. at 568 (alteration in original) (quoting *Washington*, 57 M.J. at 399).

As an evidentiary standard, proof beyond a reasonable doubt does not require more than one witness to testify "as long as the members find that the witness's testimony is relevant and is sufficiently credible." *United States v. Rodriguez-Rivera,* 63 M.J. 372, 383 (C.A.A.F. 2006).

To find Appellant guilty of possession of child pornography in violation of Article 134, UCMJ, the members were required to find the following elements beyond a reasonable doubt: (1) that between on or about 8 December 2019 and on or about 9 July 2020,

at or near Kadena Air Base, Okinawa, Japan, Appellant knowingly and wrongfully possessed child pornography, that is, visual depictions of minors, or what appears to be minors, engaging in sexually explicit conduct; and (2) that under the circumstances, Appellant's conduct was of a nature to bring discredit upon the armed forces. *See Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 95.b.(1).

To find Appellant guilty of distribution of child pornography in violation of Article 134, UCMJ, as charged, the members were required to find the following elements beyond a reasonable doubt: (1) that between on or about 8 December 2019 and on or about 9 July 2020, at or near Kadena Air Base, Okinawa, Japan, Appellant knowingly and wrongfully distributed child pornography, that is, a visual depiction of a minor, or what appears to be a minor, engaging in sexually explicit conduct; and (2) that under the circumstances, Appellant's conduct was of a nature to bring discredit upon the armed forces. *See MCM*, pt. IV, ¶ 95.b.(3).

Child pornography is "material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct." *MCM*, pt. IV, ¶ 95.c.(4). "Sexually explicit conduct" means actual or simulated:

> (a) sexual intercourse or sodomy, including genital to genital, oral to genital, anal to genital, or oral to anal, whether between persons of the same or opposite sex;
>
> (b) bestiality;

(c) masturbation;

(d) sadistic or masochistic abuse; or

(e) lascivious exhibition of the genitals or pubic area of any person.

MCM, pt. IV, ¶ 95.c.(10). A minor is "any person under the age of 18 years." *MCM*, pt. IV, ¶ 95.c.(7).

To be convicted of possession or distribution of child pornography, an appellant must be "aware that the images were of minors, or what appeared to be minors, engaged in sexually explicit conduct. Awareness may be inferred from circumstantial evidence such as the name of a computer file or folder . . . [or] the number of images possessed" by the appellant. *MCM*, pt. IV, ¶ 95.c.(5).

Our court recently addressed service discrediting conduct as the terminal element:

> "Whether any given conduct [is service discrediting] is a question for the trier of fact to determine, based upon all the facts and circumstances; it cannot be conclusively presumed from any particular course of action." "[T]he degree to which others became aware of the accused's conduct may bear upon whether the conduct is service discrediting," but actual public knowledge is not a prerequisite. "The trier of fact must determine beyond a reasonable doubt that the conduct alleged actually occurred and must also evaluate the nature of the conduct and determine beyond a reasonable doubt that [the appellant]'s conduct would tend to bring the service into disrepute if it were known."

United States v. Heppermann, 82 M.J. 794, 801 (A.F. Ct. Crim. App. 2022) (alterations in original) (quoting *United States v. Phillips*, 70 M.J. 161, 165, 166 (C.A.A.F. 2011)) (additional citation omitted), *rev. denied*, 83 M.J. 103 (C.A.A.F. 2022).

2. Analysis

a. Wrongful Possession of Child Pornography (Specification 1)

Appellant contends his conviction for possession of child pornography is both legally and factually insufficient. Specifically, Appellant argues (1) the deleted files had no content; (2) the spanking video did not constitute child pornography; (3) compelling circumstantial evidence indicated that any possession of child pornography was unknowing; and (4) no evidence was presented to prove the terminal element of the offense. We find the evidence legally and factually sufficient and that no relief is warranted.

Our review of the record finds that the Government introduced convincing evidence for a rational factfinder to find beyond a reasonable doubt Appellant guilty of possessing child pornography between 8 December 2019 and 9 July 2020. At trial, the Government provided sufficient evidence that Appellant possessed three videos containing child pornography, specifically the "Maladolescenza" video and the videos of a preteen girl masturbating in a bathtub. We address the spanking video in more detail below. Most significant was the testimony of the Government's digital forensic expert (Mr. TB) who testified that the videos were found on two password-protected devices owned and primarily used by Appellant. Furthermore, the expert testified his

forensic examination showed that Appellant individually downloaded the three videos on separate days and saved the videos to a separate folder on his computer. Furthermore, he testified that Appellant interacted with the videos by clicking on the files, opening the files, and moving the files to a separate folder—thus creating a "link file" on the computer's directory. The three videos in question plainly show visual depictions of minors, or what appear to be minors, engaged in sexually explicit behavior. The Government also presented other evidence in the form of multiple files and videos of child erotica, spliced video clips of children in various stages of undress, and deleted files with filenames indicative of child pornography on Appellant's devices. This circumstantial evidence allowed the members to find Appellant had a sexual interest in children and a motive to possess child pornography, and helped establish that Appellant knowingly possessed child pornography.

We next turn to Appellant's more specific contentions. First, Appellant contends that he cannot be sure which videos he was ultimately convicted of possessing, and that it is possible that he was convicted of possessing the deleted files that did not have any content on the basis of their filenames. We find Appellant's argument unpersuasive. Under the general verdict rule, this court does not require the factfinder in a child pornography case to specify which videos generated the guilty verdict. *See United States v. Piolunek*, 74 M.J. 107, 111–12 (C.A.A.F. 2015) (citing *United States v. Rodriguez*, 66 M.J. 201, 204 (C.A.A.F. 2008)) (additional citations omitted) (discussing the deep-rooted common law rule that when a factfinder returns a guilty verdict on an

indictment charging several acts, the verdict stands if the evidence was sufficient with respect to any one of the acts charged). Here, the members did not have to specify which videos constituted child pornography, as long as they found that one of the videos amounted to child pornography.

Appellant also argues there was compelling circumstantial evidence that demonstrated his possession of child pornography was unknowing. Specifically, Appellant argues the fact that only 2 of the 27 devices seized contained child pornography is compelling circumstantial evidence that his possession of the three videos was unknowing. A rational factfinder could have determined that Appellant knew he possessed child pornography, based on the testimony of the Government's forensic examiner and the substantial other-acts evidence offered at trial that tended to show Appellant had a sexual interest in children and a motive to possess child pornography. Appellant also states the Government did not show that he interacted with the three videos. However, the testimony from the Government's forensic expert disputes such an argument and, in fact, provides direct evidence that Appellant did interact with videos.

Finally, Appellant argues the Government offered no evidence to support that Appellant's possession of child pornography "was of a nature to bring discredit upon the armed forces." Appellant states that he raises this issue as an attempt to have our superior court reevaluate its decision in *Phillips*.

In *Phillips*, the United States Court of Appeals for the Armed Forces found that for an offense charged in violation of Clause 2 of Article 134, UCMJ, "proof of

the conduct itself may be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that, under all the circumstances, it was of a nature to bring discredit upon the armed forces." *Phillips*, 70 M.J. at 163. Appellant claims the factfinder could not just infer from the facts and circumstances surrounding the offense that the Clause 2 language was met beyond a reasonable doubt in his case. He claims the factfinder was required to be presented with direct evidence.

We begin our analysis by noting we disagree with Appellant's contention that only direct evidence is sufficient to prove the terminal element of the charged offense. In this case, the members were presented with evidence that Appellant was a member of the United States Air Force, living in a local community off-base in Japan, and that Appellant used a civilian Japanese ISP to find and download child pornography. The evidence also demonstrated that Appellant provided his military rank and work location on Kadena Air Base when he signed up for Internet service. Additionally, the evidence showed local Okinawan police participated in the lawful search of Appellant's residence, where two laptops were seized that contained evidence of child pornography. The factfinder could use this evidence to determine whether Appellant's conduct tended to discredit the service.

Moreover, the factfinder could consider evidence of the crimes themselves in determining whether Appellant's conduct tended to discredit the service, including the content of the videos found on Appellant's laptop. *See United States v. Anderson*, 60 M.J. 548, 555 (A.F. Ct. Crim. App. 2004) (finding, after

its review of graphic images of child pornography, that they "remove any reasonable doubt that they are . . . of a nature to bring considerable discredit upon the armed forces"); *see also United States v. Richard*, 82 M.J. 473, 477–79 (C.A.A.F. 2022) (finding evidence that only *tends* to prejudice good order and discipline is not sufficient proof of that element, in contrast to conduct of a nature to bring discredit upon the armed forces in a case involving Article 134, UCMJ). We find the members had a sufficient basis from the evidence introduced at trial to determine beyond a reasonable doubt that Appellant's conduct was of a nature to bring discredit upon the armed forces.

In conclusion, when viewing the evidence offered at trial in the light most favorable to the Government, a rational factfinder could readily find the essential elements of the offense—possession of child pornography—for which Appellant was convicted beyond a reasonable doubt. We therefore conclude the evidence is legally sufficient to support Appellant's conviction. *See Robinson*, 77 M.J. at 297–98. Additionally, giving the appropriate deference to the trial court's ability to see and hear the witnesses, and after our own independent review of the record, we ourselves are convinced of Appellant's guilt beyond a reasonable doubt. *See Reed*, 54 M.J. at 41.

b. Wrongful Distribution of Child Pornography (Specification 2)

Appellant alleges the finding of guilty for wrongful distribution of child pornography is both legally and factually insufficient. Appellant argues, *inter alia*, that the spanking video does not constitute child pornography in that it does not depict a minor engaged in sexually explicit conduct. We agree.

Our review of the evidence offered at trial, including our objective review of the spanking video, finds that the video itself does not depict a minor engaged in sexually explicit conduct as defined in the *MCM*, to include sadistic or masochistic abuse. As described earlier, the video in question depicts an adult male spanking the bare bottom of what appears to be a child. The view of the camera is from the side. Nothing in the video suggests that either party in the video is receiving any sexual gratification from the spanking. Therefore, viewing the evidence offered at trial in the light most favorable to the Government, we conclude that a rational factfinder could not find the essential elements—that Appellant wrongfully distributed child pornography, that is a visual depiction of a minor, or what appears to be a minor, engaging in sexually explicit conduct—beyond a reasonable doubt. Furthermore, after our own independent review of the record, we ourselves are not convinced of Appellant's guilt beyond a reasonable doubt. Accordingly, we conclude Appellant's conviction for distribution of child pornography is both legally and factually insufficient and we set aside Appellant's conviction of that offense.

Having set aside Appellant's conviction for Specification 2, we have considered whether we may reliably reassess Appellant's sentence in light of the factors identified in *United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013). We conclude that we can.

First, we find that setting aside Appellant's conviction for distribution of child pornography results in a dramatic change to the penalty landscape and Appellant's exposure, as our action reduces the

maximum imposable term of confinement for the combined convictions from 30 years to 10 years; the remaining elements of the maximum punishment are unchanged. Here Appellant's distribution of child pornography conviction carried the highest maximum term of confinement—20 years. The military judge imposed 16 months' confinement for that offense, to be served concurrently with the term of confinement for the possession of child pornography conviction. The possession conviction carried a 10-year maximum term of confinement, for which the military judge also imposed 16 months' confinement. *See MCM*, pt. IV, ¶ 93.d.

That said, we find the remaining *Winckelmann* factors favor reassessment. First, Appellant was sentenced by a military judge alone, who, as stated above, imposed specific terms of confinement for each offense—16 months—to be served concurrently. Next, we find the affirmed offense fairly "capture[s] the gravamen of [the] criminal conduct included within the original offenses," namely conduct involving child pornography. *Winckelmann*, 73 M.J. at 16. Finally, the remaining offense is a type with which the judges of this court have "experience and familiarity." *Id.* Accordingly, we are confident we can determine what sentence the military judge would have imposed had Appellant been convicted of only the possession of child pornography offense. *See id*. at 15 (holding CCAs may reassess a sentence if it "can determine to its satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity") (quoting *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986)).

Based on our experience and familiarity, and taking all factors into consideration, we conclude that the military judge would have imposed a sentence of at least 16 months' confinement, a bad-conduct discharge, and reduction to E-1 for Appellant's possession of child pornography conviction. Accordingly, we reassess the sentence to consist of a bad-conduct discharge, confinement for a total of 16 months, and reduction to the grade of E-1.

III. CONCLUSION

The finding of guilty as to Specification 2 of the Charge is **SET ASIDE**. Specification 2 of the Charge is **DISMISSED WITH PREJUDICE**. We reassess the sentence to a bad-conduct discharge, confinement for 16 months, and reduction to the grade of E-1. The remaining findings of guilty and the sentence, as reassessed, are correct in law and fact, and no other error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the remaining findings and the reassessed sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court