No. _____

IN THE

Supreme Court of the United States

DENNIS A. GEORGE, JR.,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

Application to the Hon. John G. Roberts, Jr. for Extension of Time to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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Application to the Hon. John G. Roberts, Jr. for Extension of Time to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

Pursuant to Supreme Court Rules 13(5), 22, and 30, the Applicant, Dennis A. George, Jr., requests a 60-day extension of time, to and including December 18, 2025, to file a Petition for a Writ of Certiorari. Unless an extension is granted, the deadline for filing the Petition will be October 19, 2025. This Application is being filed more than 10 days before that date.

In support of this application, Applicant states the following:

1. The Court of Appeals for the Armed Forces (CAAF) rendered its decision on July 21, 2025. This Court has jurisdiction under 28 U.S.C. § 1259(1). A copy of the CAAF's decision is attached to this application.

2. Applicant, a member of the United States Air Force, was tried by a general court-martial composed of officer and enlisted. Contrary to his pleas, he was convicted of one specification of attempted sexual assault without consent, in violation of 10 U.S.C. § 880. The Air Force Court of Criminal Appeals (AFCCA) reviewed the Applicant's case and affirmed the findings and the sentence. *United States v. George*, __ M.J. __, 2025 CAAF LEXIS 577, at *1 (C.A.A.F. Jul 21, 2025).

3. Applicant petitioned the CAAF to review the AFCCA's decision. The CAAF granted review of the case. On July 22, 2025, the CAAF issued its decision for the case and affirmed the AFCCA's decision.

4. Applicant's latest Air Force Appellate Defense Counsel, Major Megan Crouch, is Applicant's military counsel for the purposes of his Petition for a Writ of Certiorari, but she is also detailed to 19 other cases, including three cases that will also be filing a petition for a writ of certiorari before this Court. Since the CAAF's decision, counsel's statutory obligations in representing other clients required her to complete briefing in a variety of other cases before the AFCCA and the CAAF.

5. Additionally, the Air Force Appellate Defense Division currently does not have paralegal support to assist with formatting petitions for this Court or filings before any other court. Applicant's appellate defense counsel will be responsible for formatting the lower courts' decisions for this petition and the other petitions to be filed before this Court. The reduction of paralegal support has severely hampered the Division's ability to prepare petitions before this Court.

6. Further, the printing process required for Applicant's petition must be processed through a federal government agency (the Air Force), which has payment and processing requirements a private firm does not. The procurement process for a printing job cannot be forecasted with certainty, often has delays, and cuts approximately two weeks out of undersigned counsel's time to finalize the petition for a writ of certiorari. The close of the fiscal year and federal agency budgetary limitations are also adding to the normal delays and constraints associated with processing printing through the Air Force.

7. Applicant thus requests a 60-day extension for counsel to prepare a petition that fully addresses the issues raised by the decision below and frames those issues in a manner that will be most helpful to the Court.

For the foregoing reasons, Applicant respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari up to, and including, December 18, 2025.

Respectfully submitted,

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September 30, 2025

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

Dennis A. GEORGE Jr., Senior Airman
United States Air Force, Appellant

No. 24-0206
Crim. App. No. 40397

Argued December 10, 2024—Decided July 21, 2025

Military Judge: Michael A. Schrama

For Appellant: *Major Samantha P. Golseth* (argued); *Megan P. Marinos*, Esq.

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

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

Judge SPARKS delivered the opinion of the Court.

A general court-martial composed of officers and enlisted members convicted Appellant, contrary to his pleas, of one specification of attempted sexual assault without consent, in violation of Article 80, Uniform Code of Military Justice, 10 U.S.C. § 880 (2018). The military judge sentenced Appellant to a dishonorable discharge, five months of confinement, reduction to E-1, and a reprimand. The convening authority took no action on the findings, disapproved the reprimand, and upheld the rest of the sentence. On appeal, the United States Air Force Court of Criminal Appeals (AFCCA) affirmed the findings and sentence. The first granted issue requires us to decide whether "Appellant's conviction for attempted sexual assault was legally insufficient because the Government did not prove the alleged overt act."[1] We hold that the reading of the specification adopted by the parties at trial is determinative, and, as such, Appellant's conviction was legally sufficient. We therefore affirm the decision of the AFCCA. *United States v. George*, No. ACM 40397, 2024 CCA LEXIS 224, at *15, 2024 WL 2874133, at *6 (A.F. Ct. Crim. App. June 7, 2024) (unpublished).

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[1] The following additional issues were granted by this Court:

> II. Whether the government can prove that 18 U.S.C. § 922 is constitutional as applied to Appellant when he was convicted of a nonviolent offense.
>
> III. Whether the United States Court of Appeals for the Armed Forces has jurisdiction to direct modification of the 18 U.S.C. § 922 prohibition noted on the staff judge advocate's indorsement to the entry of judgment.

United States v. George, 85 M.J. 133 (C.A.A.F. 2024) (order granting review). In accordance with this Court's decision in *United States v. Johnson*, __ M.J. __ (C.A.A.F. 2025), we find that because this Court lacks the authority to act on the § 922 indication in the entry of judgment, Appellant's constitutional challenge to 18 U.S.C. § 922 is moot.

I. Background

Appellant and WMB were coworkers stationed together at Joint Base Langley-Eustis, Virginia. On the evening of July 3, 2021, WMB, Appellant, and other coworkers—BL, LC, and QG—went to a local bar. Later in the evening, Appellant stood in front of WMB and asked if she was trying to give him "head." WMB testified that she understood the term "head" to mean oral sex. WMB tried to defuse this situation by laughing off Appellant's advances and replied "no." At that time, WMB was sitting down in a booth, and Appellant was standing in front of her with his crotch at her eye level. At trial, WMB testified that, at that time, she was not sure if Appellant was joking when he asked her for "head." She stated she did not want to escalate the situation by being aggressive toward Appellant, which caused her to discuss the situation with QG, and WMB suggested they leave because Appellant was "getting kind of drunk."

In the car, WMB sat in the middle back seat with Appellant to her left and QG to her right. Appellant put his right arm around WMB and stated he really wanted her to give him "head." He whispered in her ear, "I am being dead ass. I really want head." WMB testified that she took this to mean that Appellant was serious. WMB again told Appellant, "no." Appellant once again told WMB that she should give him "head," and when she continued to refuse, Appellant grabbed the back of WMB's neck and forced her head towards his crotch. WMB resisted and was able to push herself away. Appellant then grabbed her again, and more forcefully pushed her toward his crotch. This time her cheek touched what WMB believed to be Appellant's crotch because she could feel his zipper. WMB then used her hand to alert QG, who was leaning over the front seat, to the situation. QG heard WMB in a "panicked" state tell Appellant to "get the fuck off" her. That was when QG noticed what was going on. QG saw Appellant's hand on the back of WMB's head and that Appellant was trying to force WMB's head down onto his lap, and he intervened. Due to the commotion in the back seat, the driver, BL, stopped the car. When Appellant exited the vehicle, WMB and LC noticed

that Appellant's pants were unzipped, and his underwear was visible.

Appellant was charged with the following:

> SENIOR AIRMAN DENNIS A. GEORGE, . . . did, at or near Newport News, Virginia . . . attempt to commit a sexual act upon Senior Airman [WMB] by penetrating her mouth with his penis without her consent.

The military judge provided the following instruction with regard to the alleged offense:

> Charge I, Attempt, Sexual Assault without Consent. That, at or near Newport News, Virginia, on or about 4 July 2021, [Appellant] did a certain overt act, that is: attempt to commit a sexual act upon [WMB] by penetrating her mouth with his penis without her consent; that the act was done with specific intent to commit the offense of sexual assault without consent; That the act amounted to more than mere preparation, that is, it was substantial, excuse me, it was a substantial step and a direct movement toward the commission of the intended offense of sexual assault without consent, that is, the act apparently would have resulted in the actual commission of the offense of sexual assault without consent except for [WMB's] physical and or verbal protestation, which prevented completion of the offense.

The military judge instructed on preparation as follows:

> Preparation consists of devising or arranging the means or measures necessary for the commission of the attempted offense. To find the accused guilty of this offense, you must find beyond a reasonable doubt that [Appellant] went beyond preparatory steps, and his act amounted to a substantial step and a direct movement toward the commission of the intended offense. A substantial step is one that is strongly corroborative of the accused's criminal intent and is indicative of his resolve to commit the offense.

Prior to providing findings instructions to the members, the military judge consulted with counsel from both sides

and asked that they "specifically affirm that the instructions are correct statement[s] of the law to the best of [the parties'] understanding." Counsel for each side responded in the affirmative. The military judge specifically asked if there were any objections to the instructions, to which trial counsel and trial defense counsel answered, "no." The military judge provided the elements of the underlying attempted offense as follows:

> That at or near Newport News, Virginia, on or about 4 July 2021, [Appellant] committed a sexual act upon [WMB], by penetrating her mouth with his penis; and that [Appellant] did so without the consent of WMB.
>
> The definitions of the attempted offense are:
>
> Sexual act means the penetration, however slight, of the penis into the vulva or anus or mouth.
>
> Consent means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent.

Trial counsel argued during closing argument on findings that two specific overt acts occurred: (1) the act of holding WMB's head down toward his lap; and (2) the act of undoing his pants prior to holding WMB's head down toward his crotch. Defense counsel failed to object to trial counsel's assertion that these acts could satisfy the overt act requirement.

On appeal, Appellant, for the first time, argued that the completed offense language in the specification constituted the overt act the Government was required to prove. The AFCCA summarized Appellant's argument, and its conclusion, as follows:

> Specifically, Appellant argues that the highlighted language denotes the overt act element, meaning the Government was required to prove that Appellant actually penetrated WMB's mouth with his penis. We disagree and find that the language in the specification was designed to, and did in fact, place Appellant on notice of the nature of the underlying predicate offense—that he

> attempted to sexually assault WMB without her consent.

George, 2024 CCA LEXIS 224, at *14, WL 2874133, at *5 (footnote omitted).

II. Discussion

Appellant has framed this case as an issue of legal sufficiency. However, rather than a claim of insufficiency of the evidence, the real issue appears to be a dispute between Appellant on appeal and the parties at trial as to how to interpret the wording of the specification as drafted, and whether Appellant was provided the requisite notice to defend against the allegation. We review issues of legal sufficiency de novo. *United States v. Harrington*, 83 M.J. 408, 414 (C.A.A.F. 2023). The test for legal sufficiency is whether, "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). The legal sufficiency assessment "draw[s] every reasonable inference from the evidence of record in favor of the prosecution." *Id.* at 298 (alteration in original) (internal quotation marks omitted) (quoting *United States v. Plant*, 74 M.J. 297, 301 (C.A.A.F. 2015)). Thus, "[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) (internal quotation marks omitted) (citation omitted).

A specification is sufficient if it fairly informs an accused of the offense he must defend against and enables the accused to "plead an acquittal or conviction in bar of future prosecutions for the same offense." *United States v. Norwood*, 71 M.J. 204, 206 (C.A.A.F. 2012) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). "A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication . . . ." Rule for Courts-Martial 307(c)(3) (2019 ed.).

Appellant's reading of the specification requires us to believe that the Government charged an attempted sexual

assault and pleaded the complete offense as the overt act. It is implausible to think that the Government would have charged an attempt in lieu of the completed offense if the attempt required them to prove the completed offense.

"Both [the Fifth and Sixth] amendments ensure the right of an accused to receive fair notice of what [they are] being charged with." *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011). Because there was no objection at trial, the scope of our review is limited to whether there was plain error. *See United States v. Warner*, 73 M.J. 1, 3 (C.A.A.F. 2013) (reviewing defects in charges—such as claims of lack of fair notice—for plain error "[w]hen not objected to at trial"). Under plain error review, Appellant has the burden of demonstrating that: "(1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of [Appellant]." *United States v. Rocha*, 84 M.J. 346, 349 (C.A.A.F. 2024) (internal quotation marks omitted) (quoting *United States v. Wilkins*, 71 M.J. 410, 412 (C.A.A.F. 2012)). "[A]n error is 'plain' when it is 'obvious' or 'clear under current law.' " *Warner*, 73 M.J. at 4 (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)).

First, we must address whether there was any error at all. Here, we are presented with a specification that may have multiple interpretations. In such a case, where there is no objection to the wording of the specification and no claim of a lack of notice at trial, we will adopt the reading of the charge and specification that it appears the parties at trial adopted if that interpretation is reasonable.[2] It appears that both parties at trial reasonably understood that the challenged language did not describe an expressly alleged overt act but instead served to provide proper notice of the predicate offense.

[2] While this is a new approach, it is not dissimilar from how this Court has addressed ambiguities in the pretrial agreement context. *See United States v. Acevedo*, 50 M.J. 169, 172-74 (C.A.A.F. 1999) (holding that the actions of the participants at trial can resolve ambiguous terms in pretrial agreements).

At trial, defense counsel did not move for a bill of particulars, made no objection based on a lack of notice as to what to defend against, and did not object to the military judge's instructions to the members regarding the specification. Finally, Appellant has made no claim of ineffective assistance on the part of his trial defense counsel for not doing so.[3] Appellant's counsel never objected to the military judge's instruction to the members that "by penetrating" was part of the predicate offense. His trial defense counsel spent much of his closing argument arguing that the two overt acts the Government ultimately proved—the act of holding WMB's head down toward his lap and the act of undoing his pants prior to holding WMB's head down toward his crotch—did not occur.

All of this indicates that the parties at trial understood that the challenged language did not describe an expressly alleged overt act, but instead served to provide proper notice of the predicate offense. To be clear, the specification could have been drafted more clearly; however, it is not so poorly drafted that there is no conceivable interpretation that renders the charge valid, nor does it appear any of the parties viewed it as invalid at the trial. Here, there is no error, plain or otherwise.

Having established Appellant had sufficient notice, the Court can now answer Appellant's legal sufficiency claim using the reading of the charge that was adopted at trial. In this case, the Government argued that the evidence established both that Appellant undid his pants and forced WMB's head down toward his lap. Appellant does not dispute that these were proven at trial. And either of these actions provide the overt act necessary to prove a charge of attempted sexual assault. Thus, viewing this evidence in a

[3] We might speculate whether Appellant, a lay person, could have conceivably expressed his confusion to his counsel regarding his reading of the specification. However, in the absence of a claim of ineffective assistance, we must presume that if there were any such concerns, they were allayed by counsel and that Appellant was satisfied with the advice of his counsel.

light most favorable to the prosecution, Appellant's conviction was legally sufficient.

III. Conclusion

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40397

UNITED STATES
Appellee

v.

Dennis A. GEORGE, Jr.
Senior Airman (E-4), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 7 June 2024

Military Judge: Michael A. Schrama.

Sentence: Sentence adjudged on 19 August 2022 by GCM convened at Joint Base Langley-Eustis, Virginia. Sentence entered by military judge on 17 October 2022: Dishonorable discharge, confinement for 5 months, and reduction to E-1.

For Appellant: Major Samantha P. Golseth, USAF.

For Appellee: Colonel Zachary T. Eytalis, USAF; Lieutenant Colonel Thomas J. Alford, USAF; Lieutenant Colonel J. Peter Ferrell, USAF; Major Jocelyn Q. Wright, USAF; Mary Ellen Payne, Esquire.

Before ANNEXSTAD, DOUGLAS, and MASON, *Appellate Military Judges*.

Senior Judge ANNEXSTAD delivered the opinion of the court, in which Judge DOUGLAS and Judge MASON joined.

ANNEXSTAD, Senior Judge:

Appellant was tried and convicted, contrary to his pleas, by a general court-martial composed of officer and enlisted members, of one specification of attempted sexual assault without consent, in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880.[1,2] The military judge sentenced Appellant to a dishonorable discharge, confinement for five months, reduction to the grade of E-1, and a reprimand. The convening authority took no action on the findings, disapproved the reprimand, and approved the remainder of the sentence.[3]

Appellant raised seven issues on appeal, which we have reworded: (1) whether Appellant's conviction for attempted sexual assault is legally and factually sufficient; (2) whether the military judge erred in instructions to the members on the elements of the offense; (3) whether Appellant was denied his right to a unanimous verdict; (4) whether 18 U.S.C. § 922 is constitutional; (5) whether the military judge erred in denying a defense challenge for cause; (6) whether the military judge erred in refusing to instruct the members on a witness's prior inconsistent statement; and (7) whether the victim's written unsworn statement contained impermissible content.[4,5]

We find Appellant affirmatively waived issue (2). *See United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) ("[By] affirmatively declin[ing] to object to the military judge's instructions and offer[ing] no additional instructions[,] . . . [a]ppellant waived all objections to the instructions, including in regard[ ] to the elements of the offense." (Citations omitted)). Given the changes to Article 66(d)(1)(A), UCMJ, 10 U.S.C. § 866(d)(1)(A), in which Congress removed the phrase "should be approved," we no longer have the ability to pierce waiver with regard to findings to address what would otherwise be

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[1] References to the punitive articles are to the *Manual for Courts-Martial, United States* (2019 ed.). Unless otherwise noted, all other references to the UCMJ are to the *Manual for Courts-Martial*, *United States* (2024 ed.).

[2] Appellant was found not guilty of one specification of abusive sexual contact in violation of Article 120, UCMJ, 10 U.S.C. § 920.

[3] The convening authority denied Appellant's request to reduce his confinement by a month.

[4] Appellant personally raised issues (5), (6), and (7) pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[5] This court specified one additional issue (8) whether the specification for attempted sexual assault without consent failed to state an offense by omitting a necessary element of the inchoate offense, to wit: a certain overt act. We have carefully considered this issue and find it does not require discussion or warrant relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

prejudicial error.[6] *See United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016) (citation omitted) (holding service Courts of Criminal Appeals' (CCA) ability to pierce waiver was predicated on the phrase "should be approved" in the prior versions of the *Manual for Courts-Martial* under Article 66, UCMJ); *see also United States v. Coley,* ARMY 20220231, 2024 CCA LEXIS 127, at *8–9 (A. Ct. Crim. App. 13 Mar. 2024) (unpub. op.) (holding the 2021 amendment to Article 66(d), UCMJ, abrogated the CCAs' ability to pierce waiver as to errors associated with findings (citations omitted)).

As to issue (3), Appellant is not entitled to relief. *See United States v. Anderson,* 83 M.J. 291 (C.A.A.F. 2023) (holding that a military accused does not have a right to a unanimous verdict under the Sixth Amendment, the Fifth Amendment's due process clause, or the Fifth Amendment's component of equal protection[7]), *cert. denied*, 144 S. Ct. 1003 (2024).

We have carefully considered issue (4). As recognized in *United States v. Lepore,* 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021) (en banc), this court lacks the authority to direct modification of the 18 U.S.C. § 922(g) prohibition noted on the staff judge advocate's indorsement. *See also United States v. Vanzant*, __ M.J. __, No. ACM 22004, 2024 CCA LEXIS 215, at *24 (A.F. Ct. Crim. App. 28 May 2024) (concluding that "[t]he firearms prohibition remains a collateral consequence of the conviction, rather than an element of findings or sentence, and is therefore beyond our authority to review").

With respect to issues (5), (6), 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).

After considering the remaining issue (1) of factual and legal sufficiency, we find no error that materially prejudiced a substantial right of Appellant and affirm the findings and sentence.

I. BACKGROUND

Appellant and WMB were co-workers stationed together at Joint Base Langley-Eustis, Virginia. On the evening of 3 July 2021, WMB, Appellant, and some fellow co-workers—BL, LC, and QG—went out to a local bar. At one point in the evening Appellant stood in front of WMB and asked if she was trying to give him "head." WMB testified that she understood the term "head" to mean

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[6] Under the most recent changes to Article 66(d)(1)(A), UCMJ, this court "may affirm only such findings of guilty as the Court finds correct in law, and in fact." 10 U.S.C. § 866(d)(1)(A); *see also* The National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116-283, § 542(b)(1)(A), 134 Stat. 3388, 3661–62 (1 Jan. 2021).

[7] U.S. CONST. amends. V, VI.

oral sex. WMB tried to laugh it off to defuse the situation and said "no." At that time, WMB was sitting down, and Appellant was standing in front of her with his groin at her eye level. At trial WMB testified that she was not sure if Appellant was joking when, as she interpreted, he asked her for oral sex. She stated she did not want to escalate the situation by being aggressive toward Appellant, which caused her to discuss the situation with QG and suggest they leave because Appellant was "getting kind of drunk."

During the ride home from the bar, WMB sat in the middle backseat with Appellant to her left and QG to her right. While in the car, Appellant put his right arm around WMB and stated he really wanted her to give him "head." WMB testified that Appellant whispered in her ear and said, "I am being dead a[*]s. I really want head." WMB took this to mean that Appellant was serious about his request. WMB again told Appellant "no." Subsequently, Appellant grabbed the back of WMB's neck and pushed her head toward his groin. WMB was able to resist and pushed herself away, but before she could say anything to stop him, Appellant grabbed her again and, with more force, pushed her head back towards his groin. WMB explained at trial that it was a lot harder for her to push away the second time. She also described that this time her cheek touched what WMB believed to be Appellant's crotch because she could feel his zipper.

WMB then explained how she used her hand to alert QG, who was leaning over the front seat, to the situation. QG testified that he remembered WMB asking Appellant on the ride home "why is [his] d[**]k out" but did not notice anything alarming at that point. Shortly thereafter, QG stated he heard WMB in a "panicked" state tell Appellant to "get the f[**]k off" her. That was when QG noticed what was going on and intervened to get Appellant to let go of WMB. Specifically, on this point, QG stated that he saw Appellant's hand on the back of WMB's head and that Appellant was trying to force WMB's head down onto his lap. After QG intervened, WMB started yelling at Appellant and attempted to hit him with her hands. Because of the commotion in the back seat the driver, BL, stopped the car at a convenience store. When Appellant exited the vehicle, WMB and LC noticed that Appellant's pants were unzipped, and his underwear was visible. BL then took Appellant home and left QG, LC, and WMB at the convenience store. A friend of LC's came by and gave LC, QG, and WMB a ride home.

II. DISCUSSION

A. Legal and Factual Sufficiency

On appeal, Appellant contends his conviction is legally and factually insufficient. Specifically, Appellant makes two arguments: (1) that the Government alleged Appellant committed specific act—penetrating WMB's mouth with his

penis—in an attempt to commit a sexual assault, and failed to prove that specific act occurred; and (2) that the Government failed to prove beyond a reasonable doubt that Appellant intended to sexually assault WMB without her consent. Appellant requests we set aside the findings and sentence. We disagree with Appellant's contentions and find no relief is warranted.

1. Additional Background

The attempted sexual assault without consent of WMB (Charge I and its Specification) provided that Appellant: "did, at or near Newport News, Virginia, on or about 4 July 2021, attempt to commit a sexual act upon [WMB] by penetrating her mouth with his penis without her consent."

During findings instructions related to Charge I and its Specification, the military judge provided the following instructions to the court members:

> Charge I, Attempt, Sexual Assault without Consent. That, at or near Newport News, Virginia, on or about 4 July 2021, the accused did a certain overt act[ ], that is: attempt to commit a sexual act upon [WMB] by penetrating her mouth with his penis without her consent; That the act was done with specific intent to commit the offense of sexual assault without consent; That the act amounted to more than mere preparation, that is, it was substantial, excuse me, it was a substantial step and a direct movement toward the commission of the intended offense; and that such act apparently tended to bring about the commission of the offense of sexual assault without consent, that is, the act apparently would have resulted in the actual commission of the offense of sexual assault without consent except for [WMB's] physical and or verbal protestation, which prevented completion of that offense.

The military judge then instructed the members on preparation as follows:

> Preparation consists of devising or arranging the means or measures necessary for the commission of the attempted offense. To find the accused guilty of this offense, you must find beyond a reasonable doubt that the accused went beyond preparatory steps, and his act amounted to a substantial step and a direct movement toward the commission of the intended offense. A substantial step is one that is strongly corroborative of the accused's criminal intent and is indicative of his resolve to commit the offense.

2. 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).

"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). 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) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1973)).

The National Defense Authorization Act for Fiscal Year 2021 significantly changed how CCAs conduct factual sufficiency reviews. Pub. L. No. 116-283, § 542(b)(1)(B), (c), 134 Stat. 3388, 3612 (1 Jan. 2021). "Congress undoubtedly altered the factual sufficiency standard in amending the statute, making it more difficult for a [CCA] to overturn a conviction for factual sufficiency." *United States v. Harvey*, 83 M.J. 685, 691 (N.M. Ct. Crim. App. 2023), *rev. granted*, ___ M.J.___, No. 23-0239, 2024 CAAF LEXIS 13 (C.A.A.F. 10 Jan. 2024). Previously, the test for factual sufficiency required the court, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, to be convinced of the appellant's guilt beyond a reasonable doubt before it could affirm a finding. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). "In conducting this unique appellate role, we [took] '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 (second alteration in original) (quoting *Washington*, 57 M.J. at 399).[8]

The current version of Article 66(1)(B), UCMJ, FACTUAL SUFFICIENCY REVIEW, states:

> (i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon a request of the accused if the accused makes a specific showing of a deficiency of proof.
>
> (ii) After an accused has made a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—
>
> (I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
>
> (II) appropriate deference to findings of fact entered into the record by the military judge.
>
> (iii) If, as a result of the review conducted under clause (ii), *the Court is clearly convinced that the finding of guilty was against the weight of the evidence*, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

10 U.S.C. § 866(1)(B) (emphasis added).

"[T]he finder of fact at the trial level is always in the best position to determine the credibility of a witness." *United States v. Peterson*, 48 M.J. 81, 83 (C.A.A.F. 1998).

Appellant was charged with attempted sexual assault of WMB without consent, which required the Government to prove the following elements beyond a reasonable doubt: (1) that Appellant did a certain overt act; (2) that such act was done with the specific intent to sexually assault WMB by penetrating her mouth with Appellant's penis without her consent, an offense in violation of

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[8] The court is mindful that there are contours of the new factual sufficiency review standard that arguably could impact applications of the rule as discussed by this court and our sister service courts. *See United States v. Coe*, __ M.J. __, 2024 CCA LEXIS 52, at *15 (A. Ct. Crim. App. 1 Feb. 2024) (en banc); *Harvey*, 83 M.J. at 685; *see also United States v. Csiti,* No. ACM 40386, 2024 CCA LEXIS 160, at *11 (A.F. Ct. Crim. App. 29 Apr. 2024) (unpub. op.). These contours are not dispositive in this particular case as the evidence does not make factual sufficiency of the conviction a close call. Even if we applied our previous factual sufficiency review standard, we would not grant relief as we ourselves are convinced of Appellant's guilt of the specification at issue beyond a reasonable doubt.

Article 120, UCMJ; (3) that such act amounted to more than mere preparation; that is, it was a substantial step and a direct movement toward the sexual assault of WMB; and (4) that the act apparently tended to effect the commission of the intended offense. *See* 10 U.S.C. § 920; *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*), pt. IV, ¶ 4.b. That is, the act apparently would have resulted in the actual commission of the offense of sexual assault without consent except for a circumstance unknown to Appellant or an unexpected intervening circumstance which prevented completion of that offense. *See Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 1017–18 (12 Apr. 2024).

The elements to the underlying offense of sexual assault without consent in this case are: (1) that Appellant committed a sexual act upon WMB, by penetrating WMB's mouth with Appellant's penis; and (2) Appellant did so without WMB's consent. 2019 *MCM*, pt. IV, ¶ 60.b.(2)(d).

In charging an attempted offense under the UCMJ, it is not necessary to allege the overt act or the elements of the underlying predicate, or target offense, as long as the accused is adequately on notice of the nature of the offense. *United States v. Norwood*, 71 M.J. 204, 206–07 (C.A.A.F. 2012) (citations omitted).

3. Analysis

Regarding the offense of which Appellant was convicted, we find the Government introduced sufficient evidence of Appellant's guilt during his court-martial.

In the court's view, the most significant evidence came directly from the victim, WMB, who described in convincing detail, the progression of Appellant's actions on the night of the offense. WMB testified that Appellant requested oral sex from her on one occasion while at the bar, and a couple more times on the car ride home. She also testified that he told her he was serious about his desire for her to perform oral sex on him. Additionally, WMB testified that she told Appellant "no" while at the bar, and also told him "no" multiple times in the car. WMB's testimony was sufficiently clear that after she rejected him, Appellant grabbed the back of her neck and forced her head into his groin close enough to his penis that her cheek pressed against the zipper of his pants. WMB explained that when she resisted, he applied more force to her neck. WMB described how she had to get the attention of QG to break free of Appellant's grasp. We find WMB's testimony alone is sufficient to support conviction for the charged offense. As an evidentiary standard, proof beyond a reasonable doubt does not require more than one witness to testify credibly. *See United States v. Rodriguez-Rivera,* 63 M.J. 372, 383 (C.A.A.F. 2006) (holding that the testimony of a single witness may satisfy the Government's burden to prove

every element of a charged offense beyond a reasonable doubt (citations omitted)).

That stated, there was also evidence presented that corroborated crucial portions of WMB's testimony, including testimony from QG who witnessed Appellant's actions in the back seat of the car and intervened on WMB's behalf. QG also testified that he had to restrain WMB in the backseat of the car as she was attempting to hit Appellant. Additionally, testimony from LC also corroborated WMB's testimony that Appellant's pants were unzipped and his underwear was visible when Appellant exited the car. Finally, there was testimony from multiple witnesses who testified that after they stopped at the convenience store, they observed WMB was upset with Appellant.

Appellant's first contention on appeal is that the wording in the specification required the Government to prove that Appellant attempted to commit a sexual act upon WMB *by penetrating her mouth with his penis without her consent*. Specifically, Appellant argues that the highlighted language denotes the overt act element, meaning the Government was required to prove that Appellant actually penetrated WMB's mouth with his penis.[9] We disagree and find that the language in the specification was designed to, and did in fact, place Appellant on notice of the nature of the underlying predicate offense—that he attempted to sexually assault WMB without her consent.

Additionally, Appellant argues that the Government did not sufficiently prove that Appellant intended to have WMB perform oral sex on him without her consent. Again, as we highlighted *supra,* both direct and circumstantial evidence were presented at trial including testimony from WMB that she clearly communicated her lack of consent to Appellant, and that, after she communicated her lack of consent, Appellant grabbed the back of her neck and forced her head towards his groin.

We conclude that viewing the evidence in the light most favorable to the Prosecution demonstrates that a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Robinson*, 77 M.J. at 297–98. As to the factual sufficiency of this offense, Appellant properly made a request for a factual sufficiency review by asserting a specific showing of a deficiency of proof as required under Article 66(1)(B)(i), UCMJ, *supra.* However, having given appropriate deference to the fact that the court members saw and heard the witnesses and other evidence, the court is not clearly

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[9] Appellant's argument is essentially that we should conclude that the Government was required to prove the completed offense before we can find the conviction for the attempted offense factually sufficient. We decline to view the specification or the evidence in that light.

convinced that the finding of guilty was against the weight of the evidence. Thus, the finding is factually sufficient.

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

FLEMING E. KEEFE, Capt, USAF
Acting Clerk of the Court