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

United States,
Appellee

USCA Dkt. No. 26-0213/AF
Crim.App. No. 40617

v.

ORDER DENYING PETITION

Jonathon V. Tyson,
Appellant

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is by the Court, this 29th day of July, 2026,

ORDERED:

That the petition is hereby denied.

For the Court,

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

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40617

Misc. Dkt. No. 2026-02

UNITED STATES
Appellee

v.

Jonathon V. TYSON
Senior Airman (E-4), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 13 April 2026

Military Judge: David M. Cisek (arraignment and motions); Dayle P. Percle (trial).

Sentence: Sentence adjudged 16 December 2023 by GCM convened at Minot Air Force Base, North Dakota. Sentence entered by military judge on 2 February 2024: Bad-conduct discharge, confinement for 1 year, and reduction to E-1.

For Appellant: Major Samantha M. Castanien, USAF.

For Appellee: Colonel G. Matt Osborn, USAF; Lieutenant Colonel J. Peter Ferrell, USAF;

Lieutenant Colonel Jenny A. Liabenow, USAF; Major Vanessa Bairos, USAF; Major Kate E. Lee, USAF; Major Jocelyn Q. Wright, USAF; Major Catherine D. Mumford, USAF; Captain Donnell D. Wright, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, DOUGLAS, and MCCALL, *Appellate Military Judges*.

Senior Judge DOUGLAS delivered the opinion of the court, in which Chief Judge JOHNSON and Judge MCCALL joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

DOUGLAS, Senior Judge:

Contrary to his pleas, a general court-martial composed of officer and enlisted members found Appellant guilty of six specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928b.[1,2] Appellant's intimate partner, MR, is the named victim in all specifications. The members sentenced

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[1] All references in this opinion to the UCMJ, the Rules for Courts-Martial (R.C.M), and the Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] Consistent with his pleas, the same general court-martial found Appellant not guilty of three specifications of domestic violence in violation of Article 128b, UCMJ.

Appellant to a bad-conduct discharge, confinement for one year, and reduction to the grade of E-1.[3] The convening authority took no action on the findings or the sentence. Appellant requested suspension, commutation, or reduction of the adjudged reduction in pay grade, which was denied due to the severity of the crimes. Appellant requested waiver of automatic forfeitures, which was also denied.

Appellant raises 13 issues on appeal, which we have rephrased, whether: (1) he was denied meaningful cross-examination of MR in violation of his Sixth Amendment[4] right to confrontation when the trial judge excluded evidence offered under Mil. R. Evid. 608(c); (2) his conviction for strangling MR is factually sufficient; (3) his conviction for kicking MR in the legs on divers occasions is legally and factually sufficient; (4) his conviction for punching MR in the arms and torso on divers occasions is legally and factually sufficient; (5) his conviction for destroying MR's cellphone is legally and factually sufficient; (6) his conviction for destroying a variety of MR's belongings is legally and factually sufficient; (7) his conviction for threatening MR on divers occasions is legally and factually sufficient; (8) trial counsel committed prosecutorial misconduct during the findings argument; (9) omission of 14 files in Preliminary Hearing Exhibit 16 is a substantial omission that requires remand; (10) the 172-day delay from sentencing to docketing warrants relief; (11) he was deprived of his constitutional right to a

[3] Appellant was credited with 246 days of pretrial confinement.

[4] U.S. CONST. amend. VI.

unanimous verdict; (12) he was subject to vindictive prosecution; and (13) barring him from multiple Air Force installations while on appellate leave constitutes unlawful punishment or otherwise violates the law.[5] We also considered one additional issue not raised by Appellant, but identified during this court's Article 66(d), UCMJ, 10 U.S.C. § 866(d), review: whether (14) Appellant is entitled to relief for facially unreasonable appellate delay in accordance with *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006), or Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2).

On 23 January 2026, Appellant petitioned for a new trial pursuant to Article 73, UCMJ, 10 U.S.C. § 873. The court docketed Appellant's petition the same day. The Government filed its timely response on 23 February 2026, and Appellant filed a reply to the Government's response on 9 March 2026. Therefore, we consider Appellant's petition for a new trial with his other assertions of error.

We have combined our review and analysis of Appellant's issues (2) through (7) because they relate to the legal and/or factual sufficiency of Appellant's convictions. Similarly, we have combined our review and analysis of issues (10) and (14) because they both relate to post-trial processing delay.

Four issues are resolved with brief explanation. With respect to issue (9), we find the omission of 14 audio and visual files provided to the preliminary hearing officer (PHO) as Preliminary Hearing Exhibit

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[5] Appellant personally raises issues (12) and (13) pursuant to *United States v. Grostefon*, 12 M.J. 431, 436 (C.M.A. 1982).

16 is not substantial. *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014). On 5 November 2025, the court granted a government motion to attach documents. We now consider those attachments, including a declaration submitted by one of the legal office paralegals, Technical Sergeant (TSgt) VP, as well as four additional files not otherwise found in the record of trial.[6] The 14 audio and visual files provided as Preliminary Hearing Exhibit 16 were corrupted upon assembly of Appellant's record of trial. However, they are each described in detail in TSgt VP's declaration, and either exist elsewhere in the record of trial, the report of investigation by the Air Force Office of Special Investigations (OSI), or are now attached. Appellant does not allege prejudice. The PHO report is properly attached to the record of trial, and the report briefly summarizes Exhibit 16 as 14 audio and visual files. Their omission as Preliminary Hearing Exhibit 16 does not affect our ability to complete appellate review of Appellant's convictions and sentence.

As to issue (11), Appellant is not entitled to relief. *See United States v. Anderson,* 83 M.J. 291, 302 (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).

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[6] *See United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020).

[7] U.S. CONST. amend. V.

As to issue (12), we have carefully considered Appellant's personally raised concern that the OSI conducted a biased investigation, leading to a discriminatory or vindictive prosecution. This concern is raised for the first time on appeal. On 8 September 2025, the court granted Appellant's motion to attach a declaration by Appellant, dated 27 August 2025. We now consider this declaration.[8] In his declaration, Appellant asserts OSI did not sufficiently investigate whether the named victim, MR, was being truthful with various aspects of her statements.

"By advancing [a] selective prosecution argument, [A]ppellant asserts a defect in the preferral and referral of the charges." *United States v. El-Amin*, 38 M.J. 563, 564 (A.F.C.M.R. 1993) (citations omitted). At trial, Appellant was required to raise any objections to defects in the preferral and referral of his charges prior to entering his pleas. Rule for Courts-Martial (R.C.M.) 905(b)(1). Failure to do so constitutes forfeiture. R.C.M. 905(e)(1). If not forfeiture, Appellant's concern of discriminatory or vindictive prosecution fails because even after considering Appellant's declaration, the record is devoid of evidence of discriminatory or vindictive prosecution.

> To support a claim of selective or vindictive prosecution, an accused has a "heavy burden" of showing that "others similarly situated" have not been charged, that "he has been singled out for prosecution," and that his "selection . . . for prosecution" was "invidious or in bad

[8] *See Jessie*, 79 M.J. at 444.

> faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights."

United States v. Argo, 46 M.J. 454, 463 (C.A.A.F. 1997) (quoting *United States v. Garwood*, 20 M.J. 148, 154 (C.M.A. 1985)). We find no error materially prejudicial to Appellant's substantial rights as to this concern. Articles 59(a), UCMJ, 10 U.S.C. § 859(a).

With respect to issue (13), we have carefully considered Appellant's personally raised perspective that post-trial barments from military installations are errors in post-trial processing for which we can order appropriate relief under Article 66(d)(2), UCMJ. However, we find the matter is collateral and beyond this court's statutory authority to review. A Court of Criminal Appeals (CCA) "may act only with respect to the findings and sentence as entered into the record under [Article 60c, UCMJ, 10 U.S.C. § 860c]." 10 U.S.C. § 866(d)(1). Consequently, Appellant's post-trial barments from one or more military installations do not require further discussion or warrant relief. *See United States v. Matias,* 25 M.J. 356, 361 (C.M.A. 1987).

As to the remaining issues, we find no error materially prejudicial to Appellant's substantial rights, and we affirm.[9] Further, we deny Appellant's petition for a new trial.

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[9] The panel was properly assembled; however, the trial judge neglected to announce the proper assembly as required by R.C.M. 911. Appellant does not allege prejudicial error, and we find none.

I. BACKGROUND

Appellant met MR, an adult female civilian, while he was assigned to Minot Air Force Base, North Dakota. Shortly after meeting her, she moved into his house on base, and they began a two-year romantic relationship. That relationship ended on 14 April 2023.

On that day, MR, who worked as a base medical appointment clerk, called her military supervisor to explain that she would not be coming into work again, for the third day in a row. Captain (Capt) AR, MR's military supervisor, became concerned, because MR sounded like she was crying and he could hear another person walking around in the background. The call dropped. Capt AR could not reach MR again. So Capt AR, the first sergeant, and two members of Appellant's unit conducted a welfare check at Appellant's house.

Upon arrival, MR answered the door, disheveled and with a noticeable bruise on her exposed, right thigh. Appellant's unit members requested Appellant come to the door; when he refused, law enforcement was called and responded. Appellant was detained, and MR was medically evaluated. Photographs taken at the hospital revealed extensive bruising on MR's body, including her neck. Photographs taken at the house revealed damage to numerous personal items. These photographs were admitted as evidence in Appellant's court-martial.

II. DISCUSSION

A. Excluded Evidence, Mil. R. Evid. 608(c)

1. Additional Background

During cross-examination of MR, trial defense counsel attempted to establish MR had a motive to fabricate the source of her injury as alleged in Specification 3 of the Charge, by cutting her own leg with scissors. Trial defense counsel advocated the source of this cut on MR's leg was MR's own self-inflicted harm with scissors. The basis for this theory was a ten-year-old event, between MR and her ex-husband, the facts of which were deemed by the trial judge as failing to meet a direct nexus to Appellant's case, citing *United States v. Sullivan*, 70 M.J. 110, 115 (C.A.A.F. 2011). Despite Appellant's acquittal of this specification, Appellant maintains on appeal that the trial judge abused her discretion by excluding evidence offered under Mil. R. Evid. 608(c), *Evidence of Bias*, because it demonstrates MR fabricated all the allegations by creating and manipulating evidence.

2. Law

We review a trial judge's decision to exclude evidence for abuse of discretion. *United States v. St. Jean*, 83 M.J. 109, 112 (C.A.A.F. 2023) (citing *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019)). "This abuse of discretion standard is a strict one, calling for more than a mere difference of opinion—[t]he challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *Id.* (alteration in original) (quoting *United States v. Hendrix*, 76 M.J. 283, 288 (C.A.A.F. 2017)).

The confrontation clause of the Sixth Amendment preserves the right of an accused "to be confronted with the witnesses against him." U.S. CONST. amend. VI.

"Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Mil. R. Evid. 608(c).

> An accused does not have a right to cross-examine a witness on any subject solely because he describes it as one of credibility, truthfulness, or bias. There must be a direct nexus to the case that is rooted in the record. That is, the evidence must be logically relevant as required by [Mil. R. Evid.] 401, and it must also be legally relevant in accordance with the [Mil. R. Evid.] 403 balancing test. In short, the right to cross-examine is the right to question where the proffer establishes a real and direct nexus to a fact or issue at hand.

Sullivan, 70 M.J. at 115.

3. Analysis

The trial judge did not abuse her discretion when she determined the facts, as presented, did not establish a nexus in Appellant's case. Outside the presence of members, the trial judge allowed the trial defense counsel to explore their theory of MR's motive to fabricate, specifically their proffered facts, through specific cross-examination of MR regarding the details of the ten-year-old event, which resulted in a security

forces report. Further, the trial judge allowed the trial defense counsel to call and directly examine one of the security forces members responding to MR's residence at the time of the report of domestic violence between her and her ex-husband. The contradictory and unconfirmed evidence gathered in this hearing outside the presence of the members was well characterized by the trial judge as failing to have a direct nexus to Appellant's case. *See Sullivan*, 70 M.J. at 115. The trial judge did not abuse her discretion. Given all the evidence presented to her, her ruling was reasonable. *See St. Jean*, 83 M.J. at 112.

B. Sufficiency of Convictions

1. Additional Background

The members convicted Appellant of six specifications of domestic violence against MR, his intimate partner: by unlawfully strangling her with his hands on 14 April 2023; by kicking her legs on divers occasions between 1 May 2022 and 14 April 2023; by punching her arms and torso on divers occasions between 1 May 2022 and 14 April 2023; by destroying a cellular device on 12 April 2023; by destroying MR's non-military personal property including clothing, shoes, hair appliances, toiletries, bags, a cooler, makeup items, eyeglasses, and other household items, on divers occasions, between 1 December 2022 and 14 April 2023; and by communicating a threat to MR on divers occasions between 1 December 2022 and 14 April 2023, to wit: "I'm going to have to kill you" and "I'm going to blow your brains out."

On appeal, Appellant challenges the factual sufficiency of the strangling conviction of MR on 14

April 2023. He challenges the remaining convictions due to lack of both legal and factual sufficiency. Appellant asserts MR is not "credible" for a variety of reasons, but primarily for being untruthful. All the reasons offered for MR's lack of credibility on appeal were explored at trial.

In early May 2022, Appellant returned home from temporary duty, after approximately three months of absence. MR observed her relationship with Appellant deteriorate "to the bad side." She described Appellant as getting "angrier over the littlest things." He began to destroy her belongings, kicked her on her legs and punched her on both arms, starting with her left arm. On 6 May 2022, MR asked Appellant to take her to the hospital for chest pains. While at the hospital, and later while at home, MR took photographs of herself. Five photographs were admitted at trial, demonstrating bruises to her arms, wrist, and leg. MR also took a 13-second video of her legs, which demonstrated a variety of bruises on both of her legs. This video was also admitted at trial.

On 6 May 2022, while MR was checking herself into the hospital, Appellant discovered MR had been lying to him about her age. At trial, MR admitted she had presented herself to Appellant as approximately six years younger than she was, in part because she was always told she looked younger than her age, and in part because she understood that Appellant was not interested in dating older women.

The physical abuse continued and during a verbal argument on 26 July 2022, Appellant grabbed MR's arm, leaving visible bruises. MR took photographs of her arm, which demonstrated several smaller bruises

on the inside and outside of her arm. Two photographs were admitted at trial from this event.

In February 2023, MR's relationship with Appellant continued to deteriorate. They were discussing potential separation and MR moving out of Appellant's house. However, MR mistakenly thought she was married to Appellant. She wore a ring on her left hand and recalled a specific proposal. She also recalled signing a specific piece of paper that she had not read, but Appellant insisted could, and would, be mailed to a different state which would form the basis of a legal marriage.

On 11 and 26 February 2023, MR recorded short videos of verbal arguments with Appellant, wherein MR is asking Appellant not to damage her candle holder with his hands and an icemaker with a multi-tool knife. Both videos were admitted at trial.

During the spring of 2023, MR explained that Appellant threatened her by saying things such as "I'm going to have to kill you," and "I'm going to blow your brains out." MR described the arguments and threats as happening "every day" or "every other day." Sometime in March 2023, MR recorded another video of Appellant and her arguing over him damaging her personal belongings. In this video, Appellant can be seen using a handheld tool and breaking a "charger" to MR's cell phone along with other items from the kitchen counter. The video ends with Appellant physically pushing and grabbing or punching MR; this video was also admitted at trial.

At work, MR's supervisor suspected personal or relationship issues and asked her about them. MR explained to her supervisor that she and Appellant

were seeking assistance through the Family Advocacy Program (FAP) to dissuade her leadership from intervening. MR would miss work because of the fights, and Appellant and MR agreed to use FAP appointments to explain why she was not at work.

On 11 April 2023, MR again recorded a video of her and Appellant arguing in their home, which was admitted at trial. Appellant was telling MR to get out of the house, or he was going to go on a "rampage" and destroy her personal belongings. During the trial, MR explained that during that week, Appellant destroyed her property. He "[d]umped it. Cut it. Shredded it." On 12 and 13 April 2023, MR said Appellant "bang[ed] [her cell phone] on the metal bed frame" until "it was completely shattered, in[side] and out[side]." On those same days, MR stayed home from work due to a rib injury she believed she suffered when Appellant was on top of her and they both heard a "snap." She was in significant pain and did not believe she could work. Text messages admitted at trial corroborated MR's concern about her rib and her request for Appellant to help her seek medical treatment.

MR described a series of violent events on 14 April 2023 throughout the house and garage. Appellant had "thrown [MR] around a little bit . . . ." Appellant ripped one of MR's sweaters he found in the laundry room. Appellant locked MR in the garage. Appellant had duct-taped the lock of one door and ratchet-strapped the second front door to the house to keep MR from getting back inside. Appellant grabbed her arm to throw her outside, after she managed to get inside the house. Appellant threatened to damage more of her personal belongings and went upstairs to the second floor of the house. MR followed him to try

and prevent him from damaging her things, and Appellant threw MR on the floor. MR got up and Appellant threatened to kill MR. Appellant grabbed MR by the neck, using both his hands, and then he "puts a lot of force into it." Appellant said, "I have to kill you, [MR]. It's the only way." MR thought to herself, "okay, maybe this is where it ends for me." The doorbell rang. Appellant threw MR into the next room and told her to answer the door. That is when MR's supervisor, first sergeant, and Appellant's unit members had arrived to check on them.

Photographs taken at the hospital of MR's body on 14 April 2023 were admitted at trial and demonstrated significant and extensive bruising all over her body, including her neck and chin. Additional photographs taken at the residence on 14 April 2023 were admitted in trial and demonstrated damage to MR's cell phone and personal belongings.

A forensic pathologist testified for the Defense and said that she could not rule out self-harm or accidental injury as a source of MR's injuries. An officer in the medical group also testified for the Defense stating that in her opinion, MR is not a truthful person.

In its rebuttal case, the Government called a forensic pathologist to testify. Disagreeing with the Defense's forensic pathologist, the Government's expert testified the pictures of MR's neck clearly showed evidence of strangulation and the injuries, in her opinion, were not self-inflicted.

2. Law

a. Standards of Review

We review questions of legal sufficiency de novo. *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (citation omitted). We review questions of factual sufficiency when an appellant asserts an assignment of error and shows a specific deficiency in proof. *United States v. Harvey*, 85 M.J.127, 129 (C.A.A.F. 2024) (citing Article 66(d)(1)(B)(i), UCMJ, 10 U.S.C. § 866(d)(1)(B)(i)).

b. Legal and Factual Sufficiency

"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). "[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." *King*, 78 M.J. at 221 (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)).

Article 66(d)(1), UCMJ, provides:

> (B) FACTUAL SUFFICIENCY REVIEW.
>
> (i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.
>
> (ii) After an accused has made such 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(d)(1), *Manual for Courts-Martial, United States* (2024 ed.) (2024 *MCM*). The factual sufficiency standard applies to courts-martial in which every finding of guilty in the entry of judgment is for an offense occurring on or after 1 January 2021. *See* The National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(e)(2), 134 Stat. 3388, 3612–13 (1 Jan. 2021).

The requirement of "appropriate deference" when a CCA weighs the evidence and determines controverted questions of fact "depend[s] on the nature of the evidence at issue." *Harvey*, 85 M.J. at 130. This court has discretion to determine what level of deference is appropriate. *Id*. at 131. "[T]he quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is proof beyond a reasonable doubt, the same as the quantum of proof necessary to find an accused guilty at trial." *Id*. (internal quotation marks omitted). In order for this court "to be clearly convinced that the finding of guilty was against the weight of the evidence, two requirements must be met." *Id.* at 132. "First, [we] must decide that the evidence, as [we] weighed it, does not prove that the appellant is guilty beyond a reasonable doubt. Second, [we] must be clearly convinced of the correctness of this decision." *Id.* (emphasis omitted). "[T]he factfinder 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).

c. Offenses

In order to convict Appellant of domestic violence by strangulation of MR as charged in Specification 1

of the Charge, the Government was required to prove that at or near Minot Air Force Base, North Dakota, on or about 14 April 2023: (1) Appellant assaulted MR, the intimate partner of Appellant; (2) Appellant did so by unlawfully strangling MR with his hands; and (3) that the strangulation was done with unlawful force or violence. *Manual for Courts-Martial*, *United States* (2019 ed.) (*MCM*), App. 2, at A2-45–46; *see also* Exec. Order. No. 14,062, 87 Fed. Reg. 4763, 4778 (31 Jan. 2022).[10] The term "'strangulation' means intentionally, knowingly, or recklessly impeding the normal breathing or circulation of blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim." 87 Fed. Reg. at 4772.

In order to convict Appellant of domestic violence by commission of a violent offense against MR as charged in Specification 4 of the Charge, the Government was required to prove that at or near Minot Air Force Base, North Dakota, between on or about 1 May 2022 and on or about 14 April 2023, on divers occasions: (1) Appellant committed a violent offense, to wit: assault consummated by battery by kicking MR's legs with his feet; and (2) that the violent offense was committed against MR who was, at the time of the violent offense, an intimate partner of Appellant. *MCM*, App. 2, at A2-45–46; Exec. Order. No. 14,062, 87 Fed Reg. at 4779. The term "violent offense" includes a violation of Article 128, UCMJ, 10

[10] This executive order established the elements and definitions for domestic violence, now found in the 2024 *MCM*, pt. IV, ¶ 78a.

U.S.C. § 928, assault consummated by a battery. 87 Fed. Reg. at 4780.

In order to convict Appellant of domestic violence by commission of a violent offense against MR as charged in Specification 5 of the Charge, the Government was required to prove that at or near Minot Air Force Base, North Dakota, between on or about 1 May 2022 and on or about 14 April 2023, on divers occasions: (1) Appellant committed a violent offense, to wit: assault consummated by battery by punching MR's arms and torso with his fists; and (2) that the violent offense was committed against MR who was, at the time of the violent offense, an intimate partner of Appellant. *MCM*, App. 2, at A2-45–46; 87 Fed. Reg. at 4778. The term "violent offense" includes a violation of Article 128, UCMJ, assault consummated by a battery. 87 Fed. Reg.at 4780.

To convict Appellant of domestic violence by commission of a violent offense against MR as charged in Specifications 4 and 5 of the Charge, the Government was also required to prove each underlying offense of assault consummated by a battery, in violation of Article 128, UCMJ. Specifically, taken together, the Government was required to prove that at or near Minot Air Force Base, North Dakota, between on or about 1 May 2022 and on or about 14 April 2023, on divers occasions: (1) Appellant did bodily harm to MR by kicking her legs with his feet, and by punching her arms and torso with his fists; (2) that the bodily harm was done unlawfully; and (3) that the bodily harm was done with force or violence. *MCM*, pt. IV, ¶ 77.b.(2)(a)–(c).

In order to convict Appellant of domestic violence by commission of an offense against property with the intent to threaten or intimidate MR as charged in Specification 7 of the Charge, the Government was required to prove that at or near Minot Air Force Base, North Dakota, on or about 12 April 2023: (1) Appellant committed an act in violation of the UCMJ, to wit: destroying non-military property in violation of Article 109, UCMJ, 10 U.S.C. § 909; (2) that Appellant committed the act against a cellular device, the property of MR; and (3) that Appellant committed the act with the intent to threaten and intimidate the intimate partner, MR, of the Appellant. *MCM*, App. 2, at A2-45–46; 87 Fed. Reg. at 4778–79.

In order to convict Appellant of domestic violence by commission of an offense against property with the intent to threaten or intimidate MR as charged in Specification 8 of the Charge, the Government was required to prove that at or near Minot Air Force Base, North Dakota, between on or about 1 December 2022 and on or about 14 April 2023, on divers occasions: (1) Appellant committed an act in violation of the UCMJ, to wit: destroying non-military property in violation of Article 109, UCMJ; (2) that Appellant committed the act against clothing, shoes, hair appliances, toiletries, bags, a cooler, makeup items, eye-glasses, and other household items, the property of MR; and (3) that Appellant committed the act with the intent to threaten and intimidate the intimate partner, MR, of the Appellant. *MCM*, App. 2, at A2-45–46; 87 Fed. Reg. at 4778–79.

In order to convict Appellant of domestic violence by commission of an offense against property with the intent to threaten or intimidate MR as charged in

Specifications 7 and 8 of the Charge, the Government was also required to prove the underlying offenses of destroying non-military property, in violation of Article 109, UCMJ. Specifically, taken together, the Government was required to prove that at or near Minot Air Force Base, North Dakota, on or about 12 April 2023, and between on or about 1 December 2022 and on or about 14 April 2023 on divers occasions: (1) Appellant willfully and wrongfully destroyed the certain non-military property as alleged; (2) that the property belonged to MR; and (3) that the property was of some value. *MCM*, pt. IV, ¶ 45.b.(3)(a)–(c).

In order to convict Appellant of domestic violence by commission of an offense with the intent to threaten or intimidate MR as charged in Specification 9 of the Charge, the Government was required to prove that at or near Minot Air Force Base, North Dakota, between on or about 1 December 2022 and on or about 14 April 2023, on divers occasions: (1) Appellant committed an act in violation of the UCMJ, to wit: communicating a threat in violation of Article 115, UCMJ, 10 U.S.C. § 915; (2) that Appellant committed the act against MR; and (3) that Appellant committed the act with the intent to threaten and intimidate the intimate partner, MR, of the Appellant. *MCM*, App. 2, at A2-45–46; 87 Fed. Reg.at 4778.

To convict Appellant of domestic violence by commission of an offense with intent to threaten or intimidate MR as charged in Specification 9 of the Charge, the Government was also required to prove the underlying offense of communicating a threat in violation of Article 115, UCMJ. Specifically, that at or near Minot Air Force Base, North Dakota, between on or about 1 December 2022 and on or about 14 April

2023, on divers occasions: (1) Appellant communicated certain language, to wit: "I'm going to have to kill you" and "I'm going to blow your brains out," or words to that effect, expressing a present determination or intent to injure MR, presently or in the future; (2) that the communication was made known to MR; and (3) the communication was wrongful. *MCM*, pt. IV, ¶ 53.b.(1)(a)–(c). A communication is "wrongful" if Appellant transmitted it "for the purpose of issuing a threat or with the knowledge that the communication would be viewed as a threat." *MCM*, pt. IV, ¶ 53.c.(2).

3. Analysis

a. Strangulation

Regarding the factual sufficiency of domestic violence by strangulation, Appellant has made a request for a factual sufficiency review and has asserted a showing of a deficiency of proof in that MR is not credible, primarily that she is untruthful. This is the same deficiency Appellant alleges for every conviction. We have considered whether Appellant's claims are specific enough to trigger further analysis. We decide Appellant's claims of deficiency is sufficiently specific for our analysis of this offense, as well as the other offenses.

We find Appellant's conviction for domestic violence by strangulation committed against MR, his intimate partner, factually sufficient. MR testified that on 14 February 2023, Appellant used his two hands, grabbed her neck, and used force on her neck. Photographs taken on 14 February 2023 demonstrate bruises and other marks along both sides of her neck. Appellant submits the marks could have been self-

inflicted. While this argument is supported by a defense expert at trial offering that she could not rule out self-inflicted harm, the testimony was opposed by a government expert who opined the injuries on MR's neck were not self-inflicted. The weight of the evidence is that Appellant committed domestic violence by strangulation.

After weighing all the evidence and having given appropriate deference to the fact that the panel members saw and heard the witnesses, this court does not conclude that the findings of guilty were against the weight of the evidence as to Specification 1 of the Charge. Thus, those findings of guilty are factually sufficient. *See* Article 66(d)(1)(B)(i)–(ii), UCMJ (2024 *MCM*).

b. Kicking Legs and Punching Arms and Torso

Viewing the evidence in the light most favorable to the Government, the panel members rationally found Appellant guilty of domestic violence by commission of violent offenses, including the underlying offenses of assault consummated by a battery of MR, his intimate partner, beyond a reasonable doubt. Therefore, the findings of guilty as to Specifications 4 and 5 of the Charge, and to the Charge are legally sufficient. *See Robinson*, 77 M.J. at 297–98.

We find Appellant's convictions for domestic violence by commission of violent offenses, including the underlying assaults consummated by batteries of MR are factually sufficient. MR testified that on multiple occasions, between May 2022 and April 2023, Appellant kicked her legs with his feet and punched her arms and body with his fists. She recorded her

injuries with photographs and videos, which were admitted at trial. On 14 April 2023, numerous photographs were taken of her body which clearly demonstrate extensive bruising, in various stages of healing, on her arms, torso, and legs. According to the testimony of both the defense and government experts, neither believed these extensive injuries were caused by self-harm.

After weighing all the evidence and having given appropriate deference to the fact that the panel members saw and heard the witnesses, this court does not conclude that the findings of guilty were against the weight of the evidence as to Specifications 4 and 5 of the Charge, and to the Charge. Thus, those findings of guilty are factually sufficient. *See* Article 66(d)(1)(B)(i)–(ii), UCMJ (2024 *MCM*).

c. Destroying Non-Military Property

Viewing the evidence in the light most favorable to the Government, the panel members rationally found Appellant guilty of domestic violence by commission of an offense against property, including the underlying offenses of damaging MR's non-military property, beyond a reasonable doubt. Therefore, the findings of guilty as to Specifications 7 and 8 of the Charge, and to the Charge are legally sufficient. *See Robinson*, 77 M.J. at 297–98.

We find Appellant's convictions for domestic violence by commission of an offense against MR's non-military property, as charged in Specifications 7 (cellular device) and 8 (clothing, shoes, hair appliances, toiletries, bags, a cooler, makeup items, eyeglasses, and other household items) are factually sufficient. MR testified that on 12 April 2023,

Appellant banged MR's cellular device against the metal frame of their bed multiple times, until it was no longer functional. A photograph admitted at trial corroborates the damage to the cellular device. Appellant complains that MR is not credible, and not truthful, and therefore cannot be believed. We find MR credible. She explained how and why Appellant destroyed her cellular device. As for every nontruth, MR provided a plausible explanation as to why she may have intentionally lied, or whether she was confused. Similarly, we find MR was not incentivized to destroy her own personal belongings on divers occasions between 1 December 2022 and 14 April 2023. In addition to MR's testimony that Appellant damaged her personal belongings, she recorded him in the act. Appellant specifically stated he was destroying her property, and would continue to do so, while being recorded damaging her personal belongings. On 14 April 2023, numerous photographs were taken by law enforcement of their shared residence, and damage can be seen to the items charged.

After weighing all the evidence and having given appropriate deference to the fact that the panel members saw and heard the witnesses, this court does not conclude that the findings of guilty were against the weight of the evidence as to Specifications 7 and 8 of the Charge, and to the Charge. Thus, those findings of guilty are factually sufficient. *See* Article 66(d)(1)(B)(i)–(ii), UCMJ (2024 *MCM*).

d. Communicating a Threat

Viewing the evidence in the light most favorable to the Government, the panel members rationally found

Appellant guilty of domestic violence by communicating a threat against MR, his intimate partner, with intent to threaten and intimidate MR beyond a reasonable doubt. Therefore, the findings of guilty as to Specification 9, and to the Charge are legally sufficient. *See Robinson*, 77 M.J. at 297–98.

We find Appellant's conviction for domestic violence by communication of a threat is factually sufficient. MR testified that on numerous occasions, including 14 April 2023, Appellant threatened to kill her by using the words, "I'm going to have to kill you," and "I'm going to blow your brains out," or words to that effect. MR testified that these words, combined with Appellant's hands on her neck, applying force, on 14 April 2023, brought her to believe she was not going to survive the day. We find MR credible. These words combined with his actions indicate Appellant's intent to threaten and intimidate MR and convey his intent to injure her.

After weighing all the evidence and having given appropriate deference to the fact that the panel members saw and heard the witnesses, this court does not conclude that the findings of guilty were against the weight of the evidence to Specification 9 of the Charge, and to the Charge. Thus, those findings of guilty are factually sufficient. *See* Article 66(d)(1)(B)(i)–(ii), UCMJ (2024 *MCM*).

We therefore conclude that Specifications 1, 4–5, and 7–9 of the Charge and the Charge are factually and legally sufficient.

C. Prosecutorial Misconduct: Argument

Appellant complains for the first time that trial counsel made several improper arguments at trial. His brief raises three categories of alleged improper argument, including: expressing personal beliefs and opinions, to include vouching; disparaging opposing counsel; and commenting on Appellant's right to not testify. Appellant further advocates that the cumulative impact of all three categories of error result in prejudicing Appellant's substantial rights.

1. Law

"Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (citations omitted). A prosecutor's interest "in a criminal prosecution is not that [the Government] shall win a case, but that justice shall be done." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

We review prosecutorial misconduct and improper argument de novo. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citation omitted). When no objection is made at trial, we review for plain error. *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018) (footnote and citation omitted). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Id.* at 401 (quoting *Fletcher*, 62 M.J. at 179).

"[A]rgument by a trial counsel must be viewed within the context of the entire court-martial. The focus of [the] inquiry should not be on words in isolation, but on the argument as 'viewed in context.'" *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000) (quoting *United States v. Young*, 470 U.S. 1, 16 (1985)) (additional citations omitted). In performing our review, "it is improper to 'surgically carve' out a portion of the argument with no regard to its context." *Id.*

> Appellate judges must exercise care in determining whether a trial counsel's statement is improper or has improper connotations. The [United States] Supreme Court has emphasized that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations."

United States v. Palacios Cueto, 82 M.J. 323, 333 (C.A.A.F. 2022) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974)). Thus, "[a] statement that might appear improper if viewed in isolation may not be improper when viewed in context." *Id.* (citing *Donnelly*, 416 U.S. at 645).

If we find a prosecutor's argument "amounted to clear, obvious error," we then determine "whether there was a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Voorhees*, 79 M.J. at 9 (internal quotation

marks and citations omitted). "For constitutional errors, rather than the probability that the outcome would have been different, courts must be confident that there was *no reasonable probability* that the error *might have contributed* to the conviction." *United States v. Tovarchavez*, 78 M.J. 458, 462 n.5 (C.A.A.F. 2019) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). That is, "where a forfeited constitutional error was clear or obvious, 'material prejudice' is assessed using the 'harmless beyond a reasonable doubt' standard set out in [*Chapman*]." *Id.* at 460 (quoting *United States v. Jones*, 78 M.J. 37, 45 (C.A.A.F. 2018)). In analyzing prejudice from a prosecutor's improper argument, we consider: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Andrews*, 77 M.J. at 402 (quoting *Fletcher*, 62 M.J. at 184).

"Absent evidence to the contrary, [we] may presume that members follow a military judge's instructions." *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000) (citations omitted).

"[T]he lack of a defense objection is 'some measure of the minimal impact of a prosecutor's improper comment.'" *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001) (quoting *United States v. Carpenter*, 51 M.J. 393, 397 (C.A.A.F. 1999)).

In a plain error analysis, the most straightforward way of resolving an allegation of prosecutorial misconduct may be to do so based on prejudice or lack thereof. *Palacios Cueto,* 82 M.J. at 335.

2. Analysis

Appellant offers three categories of alleged trial counsel improper argument, claiming one of the categories includes comments upon Appellant's lawful exercise of his constitutional right not to testify. All three categories of alleged improper argument stem from examples of those made in *Fletcher*. *See* 62 M.J. 175. We do not see the correlation to *Fletcher*. We also do not see any trial counsel comment or argument that could be remotely considered as implicating Appellant's constitutional rights.

We review for plain error and find no clear or obvious error. *Andrews*, 77 M.J. at 398. But if any comment or argument rises to a level of plain error, we do not find prejudice. Specifically, we find there is no reasonable probability that, but for the error, the outcome of the proceeding would have been different. *Voorhees*, 79 M.J. at 9. And if any error is deemed constitutional error, we are confident that there is no reasonable probability that the error might have contributed to the conviction. *Tovarchavez*, 78 M.J. at 462 n.5.

First, Appellant submits trial counsel vouched for MR by his frequent use of the words "we" and "we know." Taken in context, these words were not used by trial counsel to demonstrate "personal assurances" about MR, or any other witness, or evidence. *Fletcher*, 62 M.J. at 180. Instead, trial counsel was often referring to the collective understanding of the witness testimony and evidence properly admitted in trial, from the perspective of the government counsel. Appellant provides additional examples of what he characterizes as personal commentary on the

evidence; however, in context no additional analysis is warranted here.

Second, Appellant submits that trial counsel infringed upon Appellant's right not to testify, when trial counsel pointed out to the members that the Defense had proffered evidence of MR committing self-harm would be admitted at trial, when it was not. We do not view trial counsel's comments regarding the evidence trial defense counsel asserted would be admitted, as nearing the infringement of Appellant's constitutional right to not testify in his own defense. Appellant creates the nexus to a constitutional infringement by assertion, suggesting that only Appellant could be the source of evidence of MR's self-harm to complete this argument of prosecutorial misconduct. However, Appellant's trial defense counsel confronted MR, as well as the experts, on the viability of self-harm as a source of various injuries. "It is well established that the [G]overnment may comment on the failure of a defendant to refute government evidence or to support his own claims." *United States v. Webb*, 38 M.J. 62, 66 (C.M.A. 1993) (quoting *United States v. Coven*, 662 F.2d 162, 171 (1981)).

Third, Appellant contends trial counsel improperly disparaged trial defense counsel and the Defense more generally. For example, Appellant cites portions of the rebuttal argument where trial counsel described the trial defense counsel's arguments as "silly," described them as offering a "spin" that "ignores almost all of the evidence in this case," suggested they were "gaslight[ing]" MR, and asked the panel members to "not let [the Defense] continue to do what [Appellant] has done to [MR] for 2 years." In *Voorhees*, the United States Court of Appeals for the Armed Forces (CAAF) held that the trial counsel

clearly and obviously erred when he "maligned" the trial defense counsel and "made the defense theory of the case seem fantastical." 79 M.J. at 10 (citation omitted). Assuming for purposes of analysis that trial counsel's characterization of the defense argument was clear error, we nevertheless find no reasonable probability that it affected the outcome. *See id.* at 9. First, the severity of any error was low; the comments were relatively limited and were part of a larger argument that primarily focused on the evidence. *Cf. Gilley*, 56 M.J. at 123 (explaining the absence of objection is some indication of minimal impact). Second, the trial judge *sua sponte* provided significant additional limiting instruction following trial counsel's rebuttal, to the effect that they should disregard counsel's personal opinions.[11] Third, the evidence supporting the convictions was moderately strong. Accordingly, we are confident that the members convicted Appellant on the basis of the evidence alone. *See Andrews*, 77 M.J. at 403 (quoting *Fletcher*, 62 M.J. at 184); *see also United States v. Matti*, __ M.J. __, No. 25-0148, 2026 CAAF LEXIS 189,

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[11] The trial judge instructed the panel members as follows:

> If you believe that you heard either counsel express their personal opinion about a witness's character or the strength of the evidence, you may not consider it for that purpose. Counsel are not permitted to offer personal opinions; that was merely argument. Neither counsel's personal opinions, personal qualifications, or personal conduct in court are matters relevant for your consideration in resolving the matters before you. You, and you alone, determine the credibility of the witnesses and whether the [G]overnment has proven the elements of an offense beyond a reasonable doubt.

at *22 (C.A.A.F. 17 Feb. 2026) (holding that the trial counsel's improper statements during closing arguments "did not cause material prejudice and therefore were not plain error").

We find no error amounting to prosecutorial misconduct through argument. But if there is error, we find no prejudice because the severity of misconduct is low and the strength of the evidence is high. *Palacios Cueto,* 82 M.J. at 335.

D. Docketing and Appellate Review Delay

1. Additional Background

The court members sentenced Appellant on 16 December 2023, and the trial judge entered the judgment on 2 February 2024. Before docketing, the Air Force Appellate Records Branch returned the record of trial on 25 April 2024 for correction by the trial judge to Appellate Exhibit XXXI. The correction was made and certified by the trial judge on 16 May 2024. The record of trial was docketed with this court on 5 June 2024. Thereafter, Appellant requested and was granted 12 enlargements of time before filing his assignments of error on 8 September 2025. The Government filed its answer brief on 28 October 2025, after obtaining one enlargement of time; Appellant filed a reply to the Government's answer on 9 November 2025.

2. Law

"[C]onvicted servicemembers have a due process right to timely review and appeal of courts-martial convictions." *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citations omitted). In *Moreno*, the CAAF established a presumption of facially

unreasonable delay "where the action of the convening authority is not taken within 120 days of the completion of trial," "where the record of trial is not docketed by the [CCA] within thirty days of the convening authority's action," or "where appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the [CCA]." 63 M.J. at 142. In *United States v. Livak*, this court adapted the *Moreno* standard for cases referred to trial on or after 1 January 2019 and established an aggregated 150-day standard for facially unreasonable delay from sentencing to docketing with the CCA. 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020).

Where there is a facially unreasonable delay, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice [to the appellant]." *Moreno*, 63 M.J. at 135 (citations omitted). The CAAF identified three types of cognizable prejudice for purposes of the right to timely post-trial review: (1) oppressive incarceration; (2) "particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision;" and (3) impairment of the appellant's grounds for appeal or ability to present a defense at a rehearing. *Id.* at 138–40 (citations omitted). Where there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military

justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006).

We review de novo an appellant's entitlement to relief for post-trial delay. *Livak*, 80 M.J. at 633 (citing *Moreno*, 63 M.J. at 135).

3. Analysis

a. Docketing Delay

The record of trial was docketed with this court 172 days after sentencing, exceeding the 150-day *Livak* standard for facially unreasonable delay. Accordingly, we have considered the *Barker* factors, and under the circumstances of this case, we find no violation of Appellant's due process rights.

We note the record of trial in this case is voluminous, including 111 total exhibits and over 1,200 pages of transcript. According to the court reporter chronology and the base paralegal's declaration, the Government displayed diligence when creating the record of trial. Further, the Government displayed responsiveness once an error was identified with Appellate Exhibit XXXI. From the date the record was returned for correction to that Appellate Exhibit (25 April 2024), through the date the trial judge signed the certificate of correction (16 May 2024), 21 days elapsed. The length of delay and the reasons for the delay are reasonable and favor the Government.

Appellant requested "speedy post-trial processing" in his post-trial submission of matters to the convening authority on 26 December 2023. Requesting speedy post-trial processing at the time of submitting matters to a convening authority is

reasonable; this factor weighs slightly in Appellant's favor. Finally, Appellant has not suffered prejudice. Appellant proclaims that if his case was docketed more promptly, his case would have been reviewed more quickly. However, this is not cognizable prejudice from the delay in docketing with this court.

Absent prejudice, we find the post-trial delay involved in Appellant's case has not been so egregious as to adversely affect the perception of the military justice system. *See Toohey*, 63 M.J. at 362. Furthermore, recognizing our authority under Article 66(d)(2), UCMJ, we have also considered whether relief for excessive post-trial delay is appropriate in this case even in the absence of a due process violation. *See United States v. Valentin-Andino*, 85 M.J. 361, 366 n.4 (C.A.A.F. 2025). We conclude such relief is not warranted.

b. Appellate Review Delay

Over 18 months have elapsed since Appellant's record of trial was originally docketed with the court. Therefore, under *Moreno* there is a facially unreasonable delay; we note the 18-month threshold has been exceeded by just over 120 days. Accordingly, we have again considered the *Barker* factors and find no due process violation. Appellant has not specifically alleged cognizable prejudice from appellate delay. For the reasons stated above with respect to the docketing delay, we find no cognizable prejudice. Absent prejudice, we similarly find the post-docketing delay involved in Appellant's case has not been so egregious as to adversely affect the perception of the military justice system. Most of the delay was the result of defense requests for 12

enlargements of time in which to file the assignments of error. In addition, we have considered the large size of the record and the number and complexity of the issues Appellant raised. Accordingly, we find no egregious delay and no violation of Appellant's due process rights, *see Toohey*, 63 M.J. at 362; nor do we find any relief warranted in the absence of a due process violation under Article 66(d)(2), UCMJ.

E. Petition for a New Trial

1. Additional Background

After Petitioner[12] and MR ended their romantic relationship, MR entered a new romantic relationship with a civilian, AF. As MR and AF's relationship eroded, AF recorded certain statements MR made and provided them to his mother, who provided them to Petitioner.[13] Through his appellate defense counsel, and through his Petition for a New Trial, Petitioner offers 12 edited recordings to assert newly discovered

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[12] We refer to Appellant as Petitioner for this issue because he filed a Petition for a New Trial separately on 23 January 2026 from his brief for our Article 66, UCMJ, review; and the court docketed it this same date under Misc. Dkt. No. 2026-02.

[13] In addition to the recordings, Appellant provides three declarations. The first declaration is from AF's mother, who explains how she came to possess the recordings, and how she was able to contact Petitioner's appellate defense counsel. The second declaration is from AF. AF explains he began to record his conversations with MR because of her false allegations. He states the recordings began in May 2024 and continued through 2025, without specifying a timeframe within 2025. The third declaration is from an Air Force defense paralegal who assisted in an interview with MR's first husband.

evidence, which he says challenges MR's credibility at Petitioner's trial.

Notably, MR's statements in the recordings demonstrate she may be contemplating making false allegations of domestic violence against AF. For example, in one recording MR tells AF she "is going to set it up so that way it's going to look like you hit me and I'm going to call the cops and it's going to get really ugly really quick because that's what you deserve for f[**]king with me bro." In another recording, MR explains that she will have her brother "pinch the f[**]k out of" her, and then she will call the police and accuse AF of hitting her. In an additional recording, she briefly compares AF to Petitioner, suggesting both men accused her of creating false accusations of crimes. She quips that Petitioner was actually convicted of domestic violence.[14]

2. Law

A petitioner may petition for a new trial "on the grounds of newly discovered evidence or fraud on the court." Article 73, UCMJ, 10 U.S.C. § 873. A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that:

> (A) The evidence was discovered after the trial;
>
> (B) The evidence is not such that it would have been discovered by the petitioner at

[14] Specifically, AF confronts MR about threatening him through alleging false crimes against MR. AF states, "[you are] trying to falsely . . . accuse me of a crime." MR responds, "That's what—that's crazy cause [sic] that's exactly what [Petitioner] was saying, only for him to be found guilty of the crime."

> the time of trial in the exercise of due diligence; and
>
> (C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

R.C.M. 1210(f)(2) (2024 *MCM*); *see United States v. Luke*, 69 M.J. 309, 314 (C.A.A.F. 2011); *United States v. Johnson*, 61 M.J. 195, 198 (C.A.A.F. 2005). "[R]equests for a new trial . . . are generally disfavored," and are "granted only if a manifest injustice would result absent a new trial . . . based on proffered newly discovered evidence." *United States v. Hull*, 70 M.J. 145, 152 (C.A.A.F. 2011) (quoting *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993)).

3. Analysis

Petitioner asserts the 12 recordings constitute newly discovered evidence that warrants a new trial pursuant to Article 73, UCMJ. Petitioner suggests this new evidence demonstrates MR's capability to fabricate false claims of domestic violence. Petitioner further argues that this evidence, coupled with the excluded evidence under Mil. R. Evid. 608(c), clearly shows that MR has a "habit, common plan or scheme, and modus operandi of lying about and fabricating domestic violence allegations as seen before, during, and after [Petitioner's] court-martial." Petitioner asserts that "if considered by the court-martial in the light of all other pertinent evidence, [the new evidence] would probably produce a substantially more favorable result for [Petitioner]." We find Petitioner has failed to meet his burden to

demonstrate a new trial is necessary to avoid a manifest injustice.

We accept that the newly discovered evidence was discovered after trial. We further accept that the evidence is not such that it would have been discovered by the Petitioner at the time of trial in the exercise of due diligence. This, of course, is because the recordings were created after Petitioner's 16 December 2023 trial.

However, we conclude Petitioner has failed to demonstrate the recordings of MR, "if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result" for Petitioner. We reach this conclusion for numerous reasons, and we highlight the most significant three below.

First, MR's recorded statements are made in emotional arguments with AF. AF is the target of her threats to fabricate allegations of domestic violence. Neither the recordings, nor the declarations, provide information that MR actually fabricated evidence, alleging any crime, against AF. Furthermore, MR does not indicate she testified falsely or otherwise fabricated evidence against Petitioner before or during Petitioner's court-martial.

Second, even if determined relevant, any probative value of these recordings "is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." Mil. R. Evid. 403.

Third, as discussed *supra*, MR's credibility was attacked thoroughly at trial. MR denied suggestions that she fabricated the allegations against Petitioner and that her injuries were self-induced, accidental, or came from other sources. A witness testified that MR was an untruthful person. MR admitted that she had lied about her age. Nonetheless, substantial evidence was presented at trial which corroborated MR's allegations. Indeed, MR did not intend to initiate a complaint against Petitioner for domestic violence. Instead, she was encouraged to be medically evaluated upon the responders witnessing significant bruising on MR's legs.

Petitioner invites us to evaluate various theories of admissibility for the newly discovered evidence including Mil. R. Evid. 404(b), Mil. R. Evid. 406, and Mil. R. Evid. 608(c), but we need not as we do not believe the recordings survive the Mil. R. Evid. 403 balancing tests. Therefore, Petitioner has failed to demonstrate that the newly discovered evidence requires a new trial to avoid manifest injustice.

III. CONCLUSION

Appellant's Petition for a New Trial, dated 23 January 2026, is **DENIED**.

As entered, the findings are correct in law and fact. Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2024 *MCM*). In addition, the sentence as entered is corrected 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 the 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. 26-0220/AF Crim.App. No. 40746

v.

ORDER DENYING PETITION

Tylir D.
Cunningham,
Appellant

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is by the Court, this 5th day of August, 2026,

ORDERED:

That the petition is hereby denied.

For the Court,

/s/ David A. Anderson
Deputy Clerk of the Court

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40746

UNITED STATES
Appellee

v.

Tylir D. CUNNINGHAM
Airman Basic (E-1), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 24 April 2026

Military Judges: Julie L. Pitvorec (pre-trial motion); Matthew McCall (arraignment); Adam D. Bentz (trial).

Sentence: Sentence adjudged on 7 May 2024 by GCM convened at Goodfellow Air Force Base, Texas. Sentence entered by military judge on 20 January 2024: Dishonorable discharge and confinement for 30 months.

For Appellant: Major Jordan L. Grande, USAF.

For Appellee: Lieutenant Colonel Jenny A. Liabenow, USAF; Major Vanessa Bairos, USAF; Major Heather R. Bezold, USAF; Major Kate E.

Lee, USAF; Major Jocelyn Q. Wright, USAF; Mary Ellen Payne, Esquire.

Before GRUEN, KEARLEY, and MORGAN, *Appellate Military Judges.*

Senior Judge GRUEN delivered the opinion of the court,[1] in which Judge KEARLEY and Judge MORGAN joined.

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

GRUEN, Senior Judge:

A military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas, of one specification of absence without leave (Charge I), in violation of Article 86, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 886, and one specification of negligent dereliction of duty (Charge II), in violation of Article 92, UCMJ, 10 U.S.C. § 892.[2] The general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of sexual assault (Charge III), in

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[1] Ms. Gabrielle Esquer, an extern assigned to the court under the Air Force Internship/Externship Program and supervised by an attorney admitted to practice before this court, participated in the preparation of this opinion with Senior Judge Gruen.

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

violation of Article 120, UCMJ, 10 U.S.C. § 920. The members acquitted Appellant of one specification of assault (Charge IV), in violation of Article 128, UCMJ, 10 U.S.C. § 928. The military judge sentenced Appellant to confinement for 30 months and a dishonorable discharge. The convening authority took no action on the findings and the sentence.

Appellant raises two issues on appeal: (1) whether the evidence was factually insufficient for a finding of guilty of sexual assault; and (2) whether the special trial counsel committed prosecutorial misconduct during closing argument by conflating theories of liability, and thus eliminating a mistake of fact as to consent defense.

We affirm the findings and sentence and find no error that materially prejudiced Appellant's substantial rights.

I. BACKGROUND

The basis of the sexual assault charge starts with Appellant and AP, both in the same technical school at Goodfellow Air Force Base, Texas. They met through mutual friends and quickly became friendly and then intimate. AP and Appellant first hung out when Appellant picked up AP and they drove to get food in San Angelo, Texas sometime at the end of January or beginning of February 2023. The next time Appellant and AP hung out was at a club on 10 February 2023, where they talked and danced together. When they decided to end the events for the night, Appellant asked AP to come home with him. AP declined to go home with Appellant.

The next night, 11 February 2023, AP texted Appellant asking him to hang out and get food. Appellant picked her up and they purchased food. While in the car, AP mentioned that they would not be having sex because she had not shaved. The two returned to Appellant's dorm room sometime around 0200. After they ate the food they had purchased, both Appellant and AP got into his bed and cuddled while watching television. Cuddling then escalated to kissing, which led to consensual sex. Before having consensual sex, AP and Appellant discussed use of a condom in that it was mandatory for AP to know a condom would be used before she would consent to sex. During direct examination of AP by the special trial counsel, the following colloquy took place:

> [AP]. And we were like, taking our clothes off and stuff, and I didn't want to have — I didn't want to have sex without a condom.
>
> [Special Trial Counsel (STC)]. Did ya'll discuss that?
>
> [AP]. Yes. I asked him to if he had a condom . . . but he was kind of fighting me, asking for a condom. But I was really adamant on it because I— I didn't want to sleep with him without a condom. . . . [M]y body language at least was kind of like you need a condom to sleep with me, I'm not going to sleep with you without a condom.
>
> [STC]. Did you make it clear to him that there was no sex without a condom?

> [AP]. Yes, yes, he knew that.
>
> [STC]. You would not have had sex with him without a condom?
>
> [AP]. Absolutely not, no.

Appellant and AP proceeded to have consensual sex, and then after the sexual acts they redressed and went to bed. AP testified that it was weird that Appellant was really quiet during sex. AP testified that the next thing she remembered that it was at 0900 when she "woke up that mor — that next morning, um, and he was trying to penetrate me." AP further testified that Appellant was

> still behind me, but he's in a position where he's kind of like on his knees I — I never saw what position he was in, but I would assume he was like on his knees, and kind of like maneuvered himself in a way where I like wouldn't be aware that he was moving other than obviously the feeling of his stuff.

AP explained that she did not move and that she pretended to be asleep through the whole act, and she did not believe that Appellant ever saw her face. Appellant was not wearing a condom during the non-consensual sexual act and finished on AP's leg, meaning, he ejaculated and semen was deposited on her leg. After the sexual act, Appellant cleaned AP's leg and went back to sleep. AP stated that after 5 to 10 minutes, Appellant pretended to wake up for the first time while AP scrolled on her phone in the bed. Appellant scrolled on his phone after awaking with

neither one saying a word about what happened. The direct examination of AP continued:

> [STC]. So, throughout this entire period, up to the point that you woke up, after you went to sleep. You didn't say anything to him?
>
> [AP]. No.
>
> [STC]. Why?
>
> [AP]. I think I was really scared. Do you mean like while it was going on?
>
> [STC]. Right.
>
> [AP]. I just — I don't — I don't think I really understood what was going on. And I think I just kind of froze. Like I don't know.

Later that morning, both Appellant and AP went to Dunkin' Donuts to have breakfast together. After breakfast, AP asked Appellant to drive her back to her dorm room. AP went back to her dorm room and showered. It was at that point that she decided to call the Sexual Assault Prevention Response (SAPR) hotline. The hotline representative told her to come to the office and AP called another Airman, BJ, to drive her there. While at the SAPR office, she filed a restricted report, but AP omitted the fact that she and Appellant had consensual sex the night before. AP then called JC another Airman from technical school who she considered to be a friend, to be with AP at the hospital for the Sexual Assault Forensic Examination (SAFE). At the hospital, AP again only talked about the assault. The SAFE nurse took swabs of the vulva, vagina, and on the leg for DNA analysis. Once AP got

back to her dorm room, she did not leave for the rest of the day.

At some point after the incident, AP communicated with Appellant via text message, wherein they texted about what happened the morning of the sexual assault. Appellant admitted that, "[he understood] it was a big misunderstanding on [his] end," and "[he] didn't think AP was sleeping when [he] did it. So yes [he understood he] was dead wrong. Especially since [he] didn't even use protection." He then apologized "for not thinking straight and just doing it."

II. DISCUSSION

A. Factual Sufficiency

Appellant argues that the conviction for sexual assault is factually insufficient because the Government failed to disprove Appellant had a reasonable mistake of fact as to consent when he penetrated AP while she was sleeping.

1. Law

a. Standard of Review

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) (citation omitted).

We are neither required nor empowered to review the factual sufficiency of the evidence unless an appellant both (1) asserts an assignment of error and (2) shows a specific deficiency in the proof. *United States v. Harvey*, 85 M.J. 127, 130 (C.A.A.F. 2024).

The current version of Article 66(d)(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(d)(1)(B), *Manual for Courts-Martial, United States* (2024 ed.) (2024 *MCM*).

"[T]he requirement of 'appropriate deference' when a [Court of Criminal Appeals (CCA)] 'weigh[s] the evidence and determine[s] controverted questions of fact' . . . depend[s] on the nature of the evidence at issue." *Harvey*, 85 M.J. at 130 (third and fourth alterations in original). It is within this court's

discretion to determine what level of deference is appropriate. *Id*. at 131.

"[T]he quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is proof beyond a reasonable doubt, the same as the quantum of proof necessary to find an accused guilty at trial." *Id*. at 131 (internal quotation marks omitted). For this court "to be 'clearly convinced that the finding of guilty was against the weight of the evidence,' two requirements must be met." *Id*. at 132. First, we must decide that evidence, as we weigh it, "does not prove that Appellant is guilty beyond a reasonable doubt." *Id*. Second, we "must be clearly convinced of the correctness of this decision." *Id*.

b. Article 120(b)(2)(A), UCMJ

In order to convict Appellant of sexual assault without consent in violation of Article 120(b)(2)(A), UCMJ, 10 U.S.C. § 920(b)(2)(A), the Government was required to prove: (1) that Appellant committed a sexual act upon AP by penetrating her vulva with his penis; and (2) that Appellant did so without the consent of AP. *See Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 60.b.(2)(d).

A sexual act is "penetration, however slight, of the penis into the vulva or anus or mouth." *MCM*, pt. IV, ¶ 60.a.(g)(1)(A).

c. Without Consent

Consent is defined as

> 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. Lack of verbal or physical resistance does not constitute consent. . . . A current or previous . . . sexual relationship by itself . . . does not constitute consent.

MCM, pt. IV, ¶ 60.a.(g)(7).

In *United States v. Mendoza*, our superior court established that the Government could not "charge one offense under one factual theory and then argue a different offense and a different factual theory at trial" without violating an appellant's constitutional rights, as "[d]oing so robs the defendant of his constitutional 'right to know what offense and under what legal theory he will be tried and convicted.'" 85 M.J. 213, 220 (C.A.A.F. 2024) (quoting *United States v. Riggins*, 75 M.J. 78, 83 (C.A.A.F. 2016)).

United States v. Casillas elaborated that if the victim wakes up during the sexual act, they are thus capable of consent, and the correct theory of liability would be without consent. 86 M.J. 94, 101 (C.A.A.F. 2025).

d. Mistake of Fact

"[I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense." R.C.M. 916(j)(1). If the mistake goes to an element requiring general intent or knowledge, it "must have existed in the mind of the accused and must have been reasonable under all the circumstances." *Id.* Therefore, an honest and reasonable mistake that the

victim consented to the charged sexual contact is an affirmative defense to the charged offense. *See, e.g.*, *United States v. McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2019) (considering the defense of mistake of fact to a charge of sexual assault). Once raised, the Government bears the burden to prove beyond a reasonable doubt that the defense does not exist. R.C.M. 916(b)(1); *see McDonald*, 78 M.J. at 379.

In considering whether the defense of mistake of fact as to consent was raised at trial, we "consider the totality of the circumstances at the time of the offense" and consider "whether the record contains some evidence of an honest and reasonable mistake to which the [factfinder] could have attached credit if they had so desired." *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003) (citation omitted). While the quantity of evidence required is low, the record must contain evidence supporting both the subjective "honest" and the objective "reasonable" mistaken belief. *See United States v. Davis*, 76 M.J. 224, 228–30 (C.A.A.F. 2017) (citation omitted) ("[W]hile Appellant's statement may constitute a scintilla of evidence about his 'honest belief,' . . . there is not an iota of evidence that such a belief was reasonable."); *see also United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995) (citation omitted) ("The testimony relied on by appellant tended to show objective circumstances upon which a reasonable person might rely to infer consent. However, they provided no insight as to whether appellant actually or subjectively did infer consent based on these circumstances.").

2. Analysis

Appellant claims that the Government (1) failed to prove the factual sufficiency of the sexual assault charge and (2) did not meet its burden to disprove that Appellant had a reasonable mistake of fact regarding consent. The Government counters that (1) Appellant failed to show a specific deficiency in proof and (2) that the Government proved that Appellant sexually assaulted AP without consent. We find Appellant indeed showed a specific deficiency in proof and thus we will analyze factual sufficiency.

Appellant admitted to the non-consensual sex act in Snapchat messages saying that he was "dead wrong" and it "was a big misunderstanding," especially since the sex act occurred "without protection." In admitting that the sex act, while AP was sleeping, was "without protection," Appellant essentially concedes that he knew that AP would not consent to sex without the use of a condom. AP and Appellant discussed the importance of using a condom before their first sexual encounter, the consensual sexual encounter which happened during this same night, wherein AP insisted on, and Appellant used, a condom. The fact that the second sexual act took place without the use of a condom supports AP's contention that she did not consent to Appellant penetrating her while she was sleeping or otherwise in a state of non-consent.

AP immediately reported the non-consensual sexual act that occurred on 13 February 2023. The fact that she had breakfast with Appellant does nothing to vitiate her report that Appellant sexually assaulted her. Despite the fact that, when she reported the

assault, AP omitted the consensual sex act, her accounts were consistent throughout the reporting process. Minor discrepancies in AP's testimony are not enough to render AP someone without credibility, as Appellant now alleges.

For a mistake of fact defense to be valid, Appellant must have held both an honest and reasonable belief that the victim consented to the sexual act. AP and Appellant had a discussion the night before about how a condom was required before AP would engage in sexual acts. Because of her insistence, Appellant complied and wore a condom during their first sexual encounter that AP agrees was consensual. Despite knowing, and admitting to knowing, AP would not consent without the use of a condom, Appellant engaged in sexual acts with AP without a condom, not knowing if AP was sleeping or awake. The Snapchat messages that followed the non-consensual sexual acts support AP's claim that Appellant knew that he had acted without AP's consent and indicate that he was aware that the sexual acts without protection were not consensual. Simply put, Appellant did not have an honest belief that the sexual acts were consensual.

Appellant's claim of mistake of fact is not reasonable. AP testified that when she awoke during the non-consensual sexual act, she was unable to see Appellant's face, meaning it was likely he too could not see her face. Additionally, AP did not move during the non-consensual sexual acts and did not say anything to give Appellant any indication that she consented to the sexual act. A reasonable person in Appellant's position would not have been able to discern if there was consent given the totality of the circumstances,

and could not have concluded that there was consent given for the sexual conduct.

B. Prosecutorial Misconduct

1. Additional Background

Appellant alleges misconduct regarding the following two sections of special trial counsel's closing statement, to which he provides emphasis:

> [W]hen you go back there and look at this Article 120 offense, read closely through the messages, think about her testimony. And when you do and you make those comparisons, you're going to see that it's clear beyond reasonable doubt that he sexually assaulted her, and that she did not consent, and that he — he — or at least there was no reasonable mistake of fact to her consent. She is laying there asleep. She wakes up, he's starting to penetrate her, she just lays there. *And whether or not she's asleep or awake at this point, is irrelevant because he still doesn't have consent.*
>
> Lying there without moving. She didn't resist. She didn't say anything. She didn't fight. She didn't fight back. And she didn't stop him. She just laid there. The law doesn't allow somebody to go, you didn't resist you just laid there. *Oh, you asleep, I didn't want to wake you up to ask for consent.*

There were no objections by trial defense counsel, nor were any sua sponte curative instructions given by the military judge.

2. Law

We review prosecutorial misconduct and improper argument de novo and where, as here, no objection is made, we review for plain error. *United States v. Matti*, CAAF LEXIS 189 (C.A.A.F. 2026). *See also United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018) (citations omitted). "The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Baer,* 53 M.J. 235, 237 (C.A.A.F. 2000) (citations omitted).

The standard for determining prosecutorial misconduct was established in *Berger v. United States*, in which the Supreme Court stated that trial counsel "may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." 295 U.S. 78, 88 (1935). Trial counsel is entitled "to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *Baer*, 53 M.J. at 237 (citation omitted). However, the Rules for Courts-Martial and existing case law both establish that it is error for trial counsel to make arguments that "unduly . . . inflame the passions or prejudices of the court members." *United States v. Marsh*, 70 M.J. 101, 102 (C.A.A.F. 2011) (omission in original)

(quoting *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007)); R.C.M. 919(b), Discussion.

"When a trial counsel makes an improper argument during findings, 'reversal is warranted only when the trial counsel's comments taken as a whole were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone.'" *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021) (quoting *Andrews*, 77 M.J. at 401–02). In general, appellate courts "weigh three factors to determine whether trial counsel's improper arguments were prejudicial: '(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction.'" *Andrews*, 77 M.J. at 402 (quoting *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005)).

Where an error is of constitutional dimensions, an appellate court may not affirm the result unless the error was "harmless beyond a reasonable doubt." *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004) (citation omitted). This inquiry requires the Government to demonstrate that there was no reasonable possibility that the error might have contributed to the conviction. *United States v. Tovarchavez*, 78 M.J. 458, 462 n.5 (C.A.A.F. 2019) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

3. Analysis

a. Section 1 of Special Trial Counsel's Argument

The first contested section of special trial counsel's argument regarding the relevance of "whether or not

[JP] is asleep or awake at that point" was not erroneous because the Article 120, UCMJ, violation was charged as sexual assault without consent. In *Casillas*, it was established that if the victim awoke during the sexual act, a correct theory of liability could be without consent. *Casillas*, 86 M.J. at 101. The victim testified that she was awake at some point during the non-consensual penetration and so the special trial counsel was well within the parameters of proper argument when he argued that her state of awareness at the time of the non-consensual act does not change the fact that she was, at some point, awake and able to consent and Appellant did not have her consent.

b. Section 2 of Special Trial Counsel's Argument

The second contested statement of special trial counsel's closing argument, "[o]h, you asleep, I didn't want to wake you up to ask for consent," was also not error because in the context of counsel's preceding sentence about the law, it explained the law regarding consent, which the members were instructed they had a duty to examine in their deliberations. Assuming without finding the statement could be error, the statement was not prejudicial because it was not severe, as it only happened once, and again since it was in closing argument, the military judge provided an instruction stating members were not to regard closing statements as evidence, which both cures any potential improper argument and goes to show the lack of weight given to the statement. Considering the totality of the evidence provided during trial, this statement, if it was error, was harmless beyond a reasonable doubt.

c. Eliminating Mistake of Fact as a Defense

Appellant argues that the contested statements made by the special trial counsel effectively eliminated mistake of fact as a defense. Given we find both contested statements were proper and did not amount to error, we further find that if arguably erroneous, there was no prejudice to Appellant. There is no conflation of theories of liability, and there is a very low likelihood that given all the evidence the members heard at trial and the length of the Government's closing argument covering 18 pages of transcript, two statements in the closing argument did not prejudice Appellant and had no harmful effect on the conviction. Thus, we find no prosecutorial misconduct.

III. CONCLUSION

The findings are correct in law and fact. *See* Article 66(d), UCMJ, 10 U.S.C. § 866(d) (2024 *MCM*). In addition, the sentence as entered is correct in law and fact, and no error materially prejudicial to Appellant's substantial rights 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. 26-0160/AF
Crim.App. No. 40655

v.

ORDER

Dioderson Augustin, Appellant

On consideration of Appellant's petition for reconsideration of this Court's order issued May 4, 2026, the motion to submit matters pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the *Grostefon* matters themselves, Appellant's original filings, and the entire record of trial, it is, by the Court this 3rd day of June, 2026,

ORDERED:

That the petition for reconsideration is hereby granted;

That the motion to file *Grostefon* matters is granted; and

That the petition for grant of review is denied.

For the Court,

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

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

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

United States,
Appellee

USCA Dkt. No. 26-0160/AF
Crim.App. No. 40655

v.

ORDER DENYING PETITION

Dioderson Augustin,
Appellant

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is by the Court, this 4th day of May, 2026,

ORDERED:

That the petition is hereby denied;

For the Court,

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

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40655 (f rev)

UNITED STATES
Appellee

v.

Dioderson AUGUSTIN
Senior Airman (E-4), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 21 January 2026

Military Judge: Tyler B. Musselman.

Sentence: Sentence adjudged 29 March 2024 by GCM convened at Tyndall Air Force Base, Florida. Sentence entered by military judge on 2 July 2024: Dishonorable discharge, confinement for 36 months, and reduction to E-1.

For Appellant: Major Trevor N. Ward, USAF; Mr. Frank J. Spinner, Esquire.

For Appellee: Colonel Matthew D. Talcott, USAF; Lieutenant Colonel Jenny A. Liabenow, USAF; Major Vanessa Bairos, USAF; Major Kate E. Lee, USAF; Major Jocelyn Q. Wright, USAF; Captain

Donnell D. Wright, USAF; Mary Ellen Payne, Esquire.

Before GRUEN, PERCLE, and MORGAN, *Appellate Military Judges*.

Judge PERCLE delivered the opinion of the court, in which Senior Judge GRUEN and Judge MORGAN joined.

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

PERCLE, Judge:

Appellant was found guilty, at a general court-martial consisting of officer members, contrary to his pleas, of two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, and one specification of indecent conduct in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1,2] The military judge sentenced Appellant to a dishonorable discharge, confinement for 36 months, and reduction to the grade of E-1. Appellant requested the convening authority defer the automatic forfeitures until entry of judgment. The convening authority denied his request. Appellant

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[1] Unless otherwise stated, all references to the UCMJ and Rules for Courts-Martial are to the *Manual for Courts-Martial*, *United States* (2019 ed.).

[2] Appellant was acquitted of three other Article 120, UCMJ, specifications.

also requested waiver of all automatic forfeitures for the benefit of his dependent, and the convening authority waived all automatic forfeitures for a period of six months. The convening authority took no action on the findings and the sentence.

On 13 November 2025, we ordered the Government to show cause as to why we should not remand the record for correction due to an error on the entry of judgment (EoJ). On 19 November 2025, the Government conceded error but asked this court to find no prejudice or to cure the error ourselves. On 20 November 2025, we remanded the case for correction of the record by the Chief Trial Judge or delegee. The record was returned to the court on 16 December 2025 with a corrected EoJ and re-docketed with this court this same date.

Appellant raises two issues on appeal, which we have reworded: (1) whether Appellant's convictions are factually insufficient, and (2) whether the convening authority impermissibly considered the gender of potential court members when detailing court members to his court-martial. We have carefully considered issue (2). We do not find this issue requires discussion or relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987). As to issue (1), we find no prejudicial error and affirm.

I. BACKGROUND

A. Background

Appellant originally migrated to the United States. He was born in 1986 and raised in Haiti but later moved to the Dominican Republic after an earthquake. Then, in 2013, Appellant moved to the

United States to continue his education and work. Eventually in 2017, inspired in part by all the help the United States gave his family as a child in Haiti, Appellant joined the United States Air Force. While a member of the Air Force, Appellant became a citizen of the United States.

The victim, RY,[3] also immigrated to the United States. She was born and raised in Kenya but came to the United States in 2021 at the age of 23 after winning a "green card" lottery. RY was inspired to join the Air Force a year later in March 2022, in part because she was grateful for all the aid the United States sent her family as she grew up in Kenya.

Several times during her in-court testimony, RY highlighted the differences between her culture in Kenya and the culture of the United States. For example, she noted that she was raised in a village where neighbors were all close and created a friendly community. She also testified,

> In Kenya, anytime you [sic] dating, it's something that your family has to agree with the other family and to know that you guys are dating is never a secret. And the ladies are more preserved [sic]. Anytime you're dating, they would like to see the guy — like to see them during the day. They don't — they don't support like even in like meetings and all that. Unless it's a matter of they trusted the guy and maybe go married so you can go

[3] At the time of the offense and when she testified at trial, RY was an active-duty enlisted member of the Air Force.

> outside anytime you want to, but if maybe you're, like dating, they don't — they don't appreciate you taking the girl anytime you want to.

B. Pre-Assault Interactions between Appellant and RY

During the holiday period of 2022, RY was volunteering at the Tyndall Air Force Base shopping exchange by wrapping gifts. It was there she first met Appellant when he was a customer of the gift-wrapping table. RY asked Appellant if he was from Africa given his accent—Appellant shared he was Caribbean. Appellant mentioned he had a colleague from Kenya, so RY gave Appellant her phone number "so [Appellant could] give the number to [the colleague] so [she] can be able to talk to him." During this conversation, RY told Appellant she had no friends or family in the area, had been at the base for four months, and had never been off base.[4]

RY did not have Appellant's telephone number until Appellant texted RY that same night. In their initial text conversation, Appellant asked questions about the gift-wrapping table where RY volunteered. Appellant returned to the gift-wrapping table the next day, where he again saw RY. After the latest encounter at the gift-wrapping table, Appellant and RY continued to text each other almost daily—from 21 December 2022 until 25 December 2022. The record indicated Appellant and RY exchanged 31 pages of text messages, including several pages of photographs

[4] In a conversation soon after, RY told Appellant she did not have a driver's license or know how to drive.

of food. At first the topics of conversation were benign—the two shared Christmas plans, and Appellant mentioned he was going to visit Maryland, a place of which RY had never before heard. Text exchanges continued frequently on topics ranging from food and daily hobbies and eventually to each other's dating history. RY told Appellant she was single and had happily been single for approximately four years.

RY testified at trial that she perceived that at some point Appellant started "flirting" with her over these text messages. Often RY would "switch topics" and "dodge questions in a friendly way." For example, on 22 December 2022, the following exchange occurred:[5]

> [RY:] Okay, have a great day at work, stay out of trouble.
>
> [Appellant:] same to you. Thanks.
>
> [RY:] You very welcome.
>
> [Appellant:] you still at pt?
>
> [RY:] Just done now
>
> [Appellant:] nice, go home take a nice shower. and eat
>
> [RY:] Exactly, am cold, picking breakfast now heading to my room
>
> [Appellant:] u cold… u wanna cuddle?
>
> [Appellant:] lol

---

[5] Unless otherwise noted, all referenced text messages are copied verbatim from Prosecution Exhibit 2, which was admitted substantively at trial without limitation.

> [RY:] [laughing crying emojis][cover eyes emojis]
>
> [Appellant:] what?
>
> [RY:] Am noting just mixture of blushing and laughing

Later the same day, when Appellant was driving to his home, the following text exchange occurred:

> [RY:] I don't wanna text you, cause I need you to focus on the road lol.
>
> [Appellant:] Okay
>
> [Appellant:] [heart emoji]
>
> [RY:] [smiley face emoji]
>
> [Appellant:] mmmmmmmmm
>
> [RY:] Thank you for the love imogy [smiley face emoji]
>
> [Appellant:] you re welcome
>
> [RY:] You make me smile,
>
> [RY:] Stil in traffic?
>
> [Appellant:] i do? yes i am
>
> [RY:] Yeap, sorry about that,
>
> [RY:] Don't be too sweet to me, I don't wanna fall in love,
>
> [Appellant:] [big eye emoji]
>
> [Appellant:] it s Ok to fall inlove.
>
> [RY:] Am scared of falling in love,
>
> [Appellant:] why

> [RY:] because I don't wanna get hurt, I hate pain remember because people do change
>
> . . . .
>
> [RY:] I just told you don't be too sweet, I don't want you to make me feel like am on cloud 9 then I woke up to realize I was in a world of fantasy, what a pity.
>
> [Appellant:] yeah. i am not sure what to say.
>
> [Appellant:] sorry. [sad face emoji]
>
> [RY:] [laughing crying emojis]
>
> [RY:] You don't have to say anything sometimes lol [smiley face emoji]
>
> [Appellant:] lol
>
> [RY:] Am here, are you upset lol?
>
> [RY:] Did I hurt your feelings? Be honest.
>
> [Appellant:} not at all
>
> [RY:] I wanted to make sure lol, I treasure honesty and friendship, thsys shy I wanted to make sure I did hurt my friend.ssil on traffic?

On 24 December 2022, the following exchange occurred:

> [Appellant:] I m drinking coffee.lol
>
> [RY:] At least it keeps you warm.
>
> [RY:] Am planning to get up and make breakfast .

[Appellant:] yummy

{RY:} [Laughing crying emojis]

[Appellant:] you ll be my breakfast.if was there [big eye emoji][laughing crying emoji]

[RY:] Oooh my God!how can a human being be a breakfast. You eat people [grimace emoji]

. . . .

[Appellant:] sometimes i do

[RY:] Oooh my God, you scaring me.

[Appellant:] really

[Appellant:] fun

[Appellant:] ny

[RY:] How can I hung out with someone who the next minute is gonna make me his food, that's dangerous , am scared

[RY:] I will start being careful when it comes to you [laughing crying emoji]

[Appellant:] lol

[Appellant:] you might eat me first

[Appellant:] endup

[RY:] Nooo I don't think so

[RY:] I have no feelings they died long a go.

[Appellant:] really?

[Appellant:] what happened?

[RY:] Yeah

[RY:] Been so busy until I forgot about love stuff, and the cells and hormones ended up dying.

[Appellant:] when they come back i might not able to handle them

[RY:] I don't think if they will come back, they are one for good lol.

[Appellant:] what u think I should do?

[RY:] No thank you, I don't think if there is something you can do about it.

[Appellant:] i am sorry

[RY:] Noo you don't have to be sorry lol, it not your fault [smiley face emoji]

[Appellant:] lol

[Appellant:] big talk

You have so long no sexual feeling for man nor woman?

[RY:] Oooh my God [cover eye emoji]

[Appellant:] answer please

[RY:] I don't know what to say.

Appellant and RY then briefly discussed Appellant's prior marriage. RY texted Appellant two times on 26 December 2022, but Appellant did not respond.

C. The Charged Conduct

1. Background

Text conversations between RY and Appellant resumed on 2 January 2023, when Appellant

reappeared in the conversation and apologized for leaving his phone in another state. Appellant called RY around 2300 and asked if she wanted to "hang out" that same night. RY noted it was late at night but Appellant assured her they could still spend time together. RY hesitated and asked Appellant what they would be doing together. Appellant said they would be "chilling, watching video games, watching movies." RY asked what time he would drive her back to base, and he mentioned RY could just stay the night at his place. Appellant assured RY he had two bedrooms and two bathrooms and that RY could spend the night in the guest room. After that, RY agreed to have Appellant pick her up from the dormitories. Appellant picked RY up around midnight and took her off base to his house. This was the first time RY had been off the base since she was new to the base and could not drive.

2. RY's Testimony

During the car ride, Appellant started to "caress" RY's hair, neck, and shoulders. RY told him to stop, and Appellant relented. When they arrived at Appellant's house, Appellant and RY went to Appellant's living room where RY sat on the edge of the couch and Appellant started playing video games. RY tried to strike up a conversation with Appellant while he played, but she got curt responses from Appellant. After about ten minutes, RY asked to be shown the guest room so she could just go to sleep and try the conversation again tomorrow. Appellant said to RY, "[A]re you not gonna hug me?" RY responded, "[N]o, I don't know you and I'm uncomfortable with

you."[6] After, Appellant took RY upstairs. She started to enter the guest room, but Appellant turned her body to face him and hugged her, which made her more nervous. Appellant "pretended like it was just a friendly grab and he was pretending to be cracking [RY's] back." RY responded that it did not look like he was doing that and asked Appellant to stop because it was making her "nervous."

RY tried again to enter the guest room, but Appellant grabbed her arm and asked her to stay the night in his bedroom with him instead. RY declined. Appellant persisted and started to physically pull RY into his room while RY resisted. Appellant then lifted RY up, carried her into his bedroom, and threw her onto the bed. RY said to Appellant, "[P]lease don't do this," prompting Appellant to respond, "[D]on't you want to play a little bit with me?" RY responded by asking what kind of games are played in bed and telling Appellant, "this is not what [she] was expecting." Appellant told her he was waiting for the right "mood" and RY said to him again that she did not want to be in bed with him and that this was not what she thought "hanging out" meant.

During this discussion, Appellant repeatedly tried to spread open RY's legs and disrobe her, but RY resisted his efforts and continued to tell him, more and more forcefully, "I don't want to do this. This is not hanging out. I don't know how you guys call it in the States, but the way, you know, by hanging out, it doesn't mean this way." Appellant was unsuccessful

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[6] RY explained the car ride there made her uncomfortable, but she still believed that Appellant could be trustworthy because he was an Airman.

in removing RY's clothes. After this "battle" Appellant said to RY, "I'm done with you;" RY testified that she took this to mean "you're so trouble- troublematic [sic]." RY then left Appellant's bedroom and went to the guest room.

a. Specification 4 of the Charge

Appellant followed RY into the guest room, laid on the bed, and told RY, "I want to cuddle with you for this night." RY again told Appellant to stop. Then RY said the following to Appellant:

> [Y]ou got married for a long time for you to get more than enough cuddles. What's new that you don't know about cuddles? . . . I don't want anything to do with cuddles. I don't want you to be on my bed. . . . [T]his was in the agreement. You didn't tell me you were gonna cuddle me. You didn't tell me you gonna be on my bed. . . . [W]hat was the reason for you to tell me that you had two bathrooms, two bedrooms, if you were gonna spend night in my bed[?]

Appellant responded to RY's comments by saying "[Y]ou ladies usually pretend like you don't want something, but in real sense, you want it." RY responded to him, "I don't know what kind of ladies are those. I'm totally your friend." RY also told him, "I come from a different place." Even so, Appellant tried to remove RY's clothes. RY continued to tell Appellant that she did not want to do anything with him, and Appellant responded by saying "you know what, shut up" and "you've been too loud. You're talking too

much." Appellant tried to silence her by keeping his mouth on her mouth.

Eventually, the much older and physically larger Appellant was able to remove RY's clothes. RY believed Appellant was still trying to get her in the "mood" by licking her neck and ears while she was "battling" and telling him to stop repeatedly. Appellant licked RY's vagina and digitally penetrated her after forcefully spreading her legs apart and holding her in place. RY did not want to be "too much aggressive" because she did not want to hurt Appellant during the "battle," so she did not "bang his head" and hurt him. Appellant also tried to put his penis in her vagina during this encounter but was unable to given RY's resistance.

After successfully prohibiting Appellant from penetrating her vagina, RY tearfully recounted what happened next:

> He didn't want to have conversation with me. He was into action. That's what he was doing. And then, he was like, "you know what, anything I'm trying to do to you, you don't want to do it." So you know what, this penis should get somewhere." I was like, "where do you want to get the penis?" He told me, "I'm gonna show you." What he did, he come closer to my chest and then he insert the penis — he did hold my hands — like he did kept his hands on my head like this and he did hold my head so tight like this, and then came closer to my chest and kept his dick and he was thrusting in my mouth.

For about one minute, Appellant continued thrusting his penis in RY's mouth. To stop Appellant, RY acted like she was "throwing up" with a "gagging" sound and then Appellant stopped. RY walked to the bathroom and kept the lights off. Appellant followed her into the bathroom, turned on the lights and when he saw she was not actually throwing up, Appellant called RY a "liar." RY remained in the bathroom to wash her mouth and face and compose herself. RY verbally confronted Appellant again asking why he did this and told him this was not what "hanging out" meant and that this was not their "agreement." Appellant just stared coldly at RY and silently returned to his room. These facts formed the basis of Specification 4 of the Charge, violation of Article 120, UCMJ, alleging Appellant penetrated RY's mouth with his penis, without her consent.[7]

RY went to the guest room and tried to sleep, although she did not sleep well or fall asleep quickly. RY had her phone with her, but at the time the only local contact she had saved in the phone besides Appellant was her supervisor. RY thought she was "in trouble" and did not want to "involve" her supervisor with her trouble so RY did not call anyone. RY also thought about leaving, but she was worried things could get worse if she did. RY was also concerned that it was dark, and she had never been off base, could not drive, and did not know where she was.

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[7] The members acquitted Appellant of both Specifications 2 and 3 of the Charge which alleged Appellant penetrated TY's vulva with his tongue, without her consent, and penetrated TY's vulva with his fingers, with an intent to gratify his sexual desire, without her consent.

b. Specification 5 of the Charge

Around 0800 hours the following day, RY knocked on Appellant's bedroom door and nicely asked if he could take her back to base.[8] Appellant told her he wanted to sleep a bit more, so she should "prepare herself" and when she was done, he would take her back to base. RY went to take a shower in the guest bathroom. She returned to the guest room in a towel after her shower, and Appellant unexpectedly entered the guest room. RY was surprised and asked Appellant what he was doing in her room—but Appellant was silent and "didn't look friendly" but "scary." Then Appellant said, "[Y]ou think you are — you are — you gonna leave my house just like that?" RY responded, "[W]hat do you want to do? Like I thought you asked me to go get prepared and you're gonna take me to the base?"

Appellant then pushed RY, clad in only her towel, down onto the bed. RY clutched at the towel trying to keep it on. RY described what happened next:

> He was able to — because he was vigorous like, he was using all his energy, and I was using all my energy. So he was moving my towel after taking it back by. He was too energetic than me. So he was able to take off the towel. So after he took — he took off the towel, I

[8] RY explained that she was calm and kind in the morning, despite what Appellant had done the night before, because she did not want things to escalate and she hoped her kindness would ensure Appellant took her home safely without further incident.

was like trying to run towards the headboard as well.

. . . .

Yes, and still — he was also coming towards me. And then that's when he — now it was like — it was like a serious battle. This person, it's like he was so determined. And remembering that yesterday we had the same battle trying to keep my — trying to spread my legs and to keep my legs together, my pelvic side was tired because it was too much battle. I felt so tired, like I was fighting. That's how I felt it. So in the morning, I was also so tired. Though I tried to bring my legs — he'll kicking my legs — he'll spreading my legs — I was bringing my legs together, but I was [indiscernible] because of the yesterday battling bringing my legs back and forth, back, and forth . . . .

. . . .

. . . I was telling him, "stop." I can't stress enough. . . . I told him, "stop, don't do this." I told him, "I feel like you tricked me — why do you have to tell me that you have some bathrooms? Why did you have to tell me that I have my own place? That means I should trust you." I'm like, "why are you doing this? You're violating the trust that I had towards you." . . . So when he done then — so he was able to

> insert in to penetrate me. And I couldn't fight back . . . .

RY confirmed that it was Appellant's penis that penetrated her vagina. These facts formed the basis of Specification 5 of the Charge, violation of Article 120, UCMJ, alleging Appellant committed a sexual act upon RY by penetrating her vulva with his penis, without her consent.

c. The Additional Charge and Specification

RY continued to ask Appellant to stop thrusting his penis into her vagina, but Appellant told RY "he couldn't stop because it was sweet. It was like — it was a good feeling." When Appellant was done, he ejaculated on RY's chest and said, "[I]t was so good." Appellant then lay on the bed next to RY and threw a towel to RY for her to clean off her chest He then went back to his room to sleep while RY wept in the guestroom. These facts formed the basis of the Specification of the Additional Charge, violation of Article 134, UCMJ, alleging Appellant committed indecent conduct by ejaculating on RY's chest without her consent, and that said conduct was to the prejudice of good order and discipline in the armed forces.[9]

d. After the Charged Conduct

RY soon went downstairs and waited for Appellant to reappear and take her back to base. Again, RY

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[9] The members acquitted Appellant of Specification 1 of the Charge which alleged Appellant touched RY's breast with his hand, with an intent to gratify his sexual desire, without her consent.

considered leaving the house, but she did not know where she was. RY messaged with her family back in Kenya during this time but did not tell them what had just happened because she did not want to break that news to them so far away. Around 1500 hours, RY knocked on Appellant's bedroom door and again calmly asked him to take her to base. Appellant originally told her he would take her back at 1800 hours, but then again tried to change the time and say he would take her back the next day. RY insisted she go back sooner. Appellant told RY if she gave him a kiss he would take her back to base. RY relented, kissed Appellant and eventually Appellant took RY back to her dorm room on base.

On the car ride back, RY was silent and Appellant said to her, "[A]nd so now you're not going to talk to me?" RY responded by saying to Appellant, "I never believed you could do something like that after I had trusted you." RY continued, "[Y]ou know what, you'll never hear anything from me. I will never text you. I will never call you. And I'm gonna block your number." Appellant responded by saying, "I'll also definitely do the same. You won't hear from me." The two never spoke again.

RY returned to her dorm room and showered. She again spoke to her family in Kenya but given the time difference she chose not to tell them what had happened. RY then slept until morning. The next morning, on 4 January 2023, RY searched online for words to the effect of "hotline for sexual assault" and called a number which appeared in response to her search—she was then transferred to the military base victim advocate team. On 4 January 2023, RY autonomously started the reporting process of

investigative interviews and eventually submitted to a hospital examination and treatment.

During their testimony, both the examining nurse at the hospital and RY's supervisor recounted substantially similar versions of RY's assault and the convicted misconduct as RY had reported to them right after the incident.[10]

The nurse who examined RY described RY as "pretty timid and upset" during the exam. During the post-assault examination, the nurse noted one bruise on RY's left breast. The nurse did not recall seeing any scratches or vaginal lacerations or bruising but testified that in her experience of over 125 sexual assault examinations, "it's very common to not have injury with sexual assault." The nurse also recalled that RY showered "more than she could count" after the assault and prior to her exam, which could impact DNA results as "[t]he amount of time and the amount of showers washes away DNA."

RY chose to file an unrestricted report of sexual assault against Appellant, cooperated with the Office of Special Investigations (OSI), and soon told her supervisor what had happened. RY's supervisor testified to the court members about RY's description of the assault in the days following the assault. RY's supervisor immediately noticed a change in RY's demeanor after she began to talk about the night with Appellant. He also observed that RY had lost her normal "bubbly" personality—instead RY seemed "depressed" and as if "sadness, like overwhelmed her."

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[10] These post-assault statements made by RY were admitted substantively without objection or limitation at trial.

RY's supervisor testified to the emotional breakdown RY had while recounting the incident. RY's testimony at trial was also often interrupted by emotion while recounting the events of the night at Appellant's house.

During its investigation, OSI went to Appellant's home and collected a bed comforter, bedding sheets, pillowcases, a towel from the guest bedroom, and a SAFE kit, which were all sent off for lab testing. The SAFE kit contained some DNA swabs taken from various locations on RY's body and the towel was tested for both RY and Appellant's DNA. A laboratory expert testified with a high degree of certainty that Appellant's DNA was found on RY's body and that RY's skin cells and Appellant's semen cells were found on a stained hand towel from Appellant's guest room.

3. Appellant's Testimony

Appellant testified in his own defense at trial. Appellant's recall of the events leading up to the night in question were substantially similar to RY's, including how they met at the gift-wrapping table and exchanged text messages in the days to follow.

Appellant testified that it was RY who had the idea to come over to his off-base house the night in question and stated he thought the plan was to "cook food" at his place. Appellant denied touching RY in the car while driving to his place, except to say "hi" and greet RY. Appellant testified that when they arrived at his house off base, he and RY sat on the couch in the living room and played video games. Soon after they arrived at his place, Appellant testified he was tired and wanted to go to bed, so he took RY upstairs to show her the guest room. Appellant mentioned he wanted

to shower first, and that RY said to him, "[D]o you want me to take a shower with you?" Appellant told RY that was not "appropriate." Appellant said he showered and came out to RY waiting for him in the hallway in her pajamas. Appellant recounted that RY said she had been "working out a lot" and asked Appellant to "crack her back." Appellant hesitated because he was worried about "being close to [her] body like that," but RY said it was "fine," so he did crack her back.

Appellant testified that shortly after cracking RY's back he was trying to go to bed, but RY was "disappointed" because she came to "hang out" so they kept chatting in the hallway. Appellant stated that at this point the conversation was "almost like purely sexual" and then he and RY went to the guest room. Appellant said they were "kissing, [they] end [sic] up being in bed together and [they] did have sex." Appellant testified to some foreplay between the two, where RY removed both her own and Appellant's clothes. During the sex he said occurred that night, Appellant described himself in the plank position[11] above RY, and that RY was doing "upside down movement with [his] penis" where "[RY] ha[d] her hand and moving [his] penis up, down with her, in[to] her vagina." Appellant said after five to ten minutes his body hurt and he asked RY to stop. She did, and Appellant went to his bed. RY followed him to his bed, and they slept together in Appellant's bed.

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[11] During re-direct, trial defense counsel elicited testimony that Appellant had difficulty communicating sometimes, and that by "plank" Appellant meant he was in a "downward facing position on [his] knees and hands."

Appellant said he awoke around 1300 hours, went to get food, and heard RY showering. Appellant then invited her to eat food and watched her talk to her family while he played video games. He said the two stayed downstairs and ate, and at some point, Appellant's ex-girlfriend called his phone, revealing a heart emoji on the screen. Appellant said RY saw the incoming phone call and contact photograph and notified Appellant he had a call. Appellant perceived that RY seemed to "change" after that missed call and that RY asked to go home and seemed "mad." When Appellant dropped RY off at the dorm, he recalled she said, "[H]ey, please don't call me or text me anymore."

4. Other Facts

At trial, Appellant's defense counsel cross-examined RY on the versions of events that would later become Appellant's testimony. In fact, RY's cross-examination consisted almost entirely of asking RY leading questions about Appellant's version of the events. Where RY's and Appellant's versions of the evening diverged, RY unequivocally denied Appellant's version of the events on the night in question.

During Appellant's cross-examination, Appellant admitted he found RY physically attractive. Appellant admitted that "multiple times" during their text message exchanges, RY and he had "sexual conversations," and although he did not concede he initiated them he did not dispute the authenticity of the texts that were admitted at trial or discussed above. Where RY's and Appellant's versions of the evening diverged, Appellant generally denied RY's version of the night in question. Trial counsel asked

Appellant about his version of the alleged sexual act, culminating with the following question: "[S]o despite only ever planking for 1 or 2 minutes, in a situation where you were incredibly tired, had been up for over 24 hours, and we're not very interested in what was happening with [RY], you were able to plank for 5 to 10 minutes?" Appellant agreed "yes" that is what happened. Trial counsel also asked, "So you're aroused, you're on top of her, and she's willing to have sex with you, and you're just planking?" Appellant agreed with that assertion by responding, "Yes." Appellant alleged he did recall ejaculating during this sexual encounter.

In response to a member's question that inquired if "at any point, did you or [RY] ask for consent," Appellant responded:

> Because the way that we started our conversation, we did not. It's like, "hey, are you going to have that or am I going to have that." The conversation and touching and being close to each other — that while we're talking, no. But we — we never have a "no," while we doing it. Like say, "hey, I'm not doing that," or "hey, I'm not — I'm going to do that." No, there is no — any like fight or something, sir.

After Appellant's testimony, trial counsel called a witness who testified that Appellant told him about the upcoming court-martial, and that the reason he was being court-martialed was because Appellant "ended things" with RY and that RY then made up

false accusations against him because he ended things with her.

II. DISCUSSION

A. Law

1. Factual Sufficiency

We review questions of factual sufficiency only if (1) an appellant requests factual sufficiency review and (2) an appellant shows a specific deficiency in proof. *United States v. Harvey*, 85 M.J. 127, 129 (C.A.A.F. 2024) (citing Article 66(d)(1)(B)(i), UCMJ, 10 U.S.C. § 866(d)(1)(B)(i), *Manual for Courts-Martial, United States* (2024 ed.) (2024 *MCM*)). The current version of Article 66(d)(1), UCMJ, states:

> (B) FACTUAL SUFFICIENCY REVIEW. –
>
> (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 such 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(d)(1)(B) (2024 *MCM*). This factual sufficiency standard applies to courts-martial in which every finding of guilty in the entry of judgment is for an offense occurring on or after 1 January 2021. *See* National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(e)(2), 134 Stat. 3388, 3612–13 (2021).

"[T]he requirement of 'appropriate deference' when a [Court of Criminal Appeals] 'weigh[s] the evidence and determine[s] controverted questions of fact' . . . depend[s] on the nature of the evidence at issue." *Harvey*, 85 M.J. at 130 (second and third alterations in original). It is within this court's discretion to determine what level of deference is appropriate. *Id.*

"[T]he quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is proof beyond a reasonable doubt, the same as the quantum of proof necessary to find an accused guilty at trial." *Id.* at 131 (internal quotation marks omitted).

For this court "to be 'clearly convinced that the finding[s] of guilty [were] against the weight of the

evidence,' two requirements must be met." *Id*. at 132. First, we must decide that evidence, as we weighed it, "does not prove that the appellant is guilty beyond a reasonable doubt." *Id*. Second, we "must be clearly convinced of the correctness of this decision." *Id*.

2. Elements

In order to convict Appellant for sexual assault, as alleged in Specification 4 of the Charge, the Government was required to prove: (1) that Appellant committed a sexual act upon RY by penetrating RY's mouth with Appellant's penis; and (2) that Appellant did so without RY's consent. *See Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 60.b.(2)(d).

In order to convict Appellant for sexual assault, as alleged in Specification 5 of the Charge, the Government was required to prove (1) that Appellant committed a sexual act upon RY by penetrating RY's vulva with Appellant's penis; and (2) that Appellant did so without RY's consent. *See MCM*, pt. IV, ¶ 60.b.(2)(d).

"Sexual act" is defined, as relevant here, as "the penetration, however slight, of the penis into the vulva or anus or mouth." *MCM*, pt. IV, ¶ 60.a.(g)(1)(A).

In order to convict Appellant for indecent conduct, as alleged in the Specification of the Additional Charge, the Government was required to prove (1) that Appellant engaged in certain conduct, to wit: ejaculated on RY's chest without her consent; (2) that the conduct was indecent; and (3) that under the circumstances, the conduct of Appellant was to the

prejudice of good order and discipline in the armed forces. *See MCM*, pt. IV, ¶ 104.b.

"Indecent" is defined as "that form of immorality relating to sexual impurity, which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." *MCM*, pt. IV, ¶ 104.c.(1). "This provision is not intended to regulate wholly private consensual sexual activity. In the absence of an aggravating circumstance, private consensual sexual activity . . . is not punishable as indecent conduct." M*ilitary Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 1634 (29 Feb. 2020) (*Benchbook*).

Conduct "prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. *Benchbook*, at 812 and 1633.

Relevant to all specifications of which Appellant was convicted, consent is defined as "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. Lack of verbal or physical resistance does not constitute consent." *MCM*, pt. IV, ¶ 60.a.(g)(7)(A). "Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent." *Id*. "A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent." *Id*. "All the surrounding circumstances are to be considered in

determining whether a person gave consent." *MCM*, pt. IV, ¶ 60.a.(g)(7)(C).

3. Defense of Mistake of Fact as to Consent

The military judge determined mistake of fact as to consent was a possible defense to all specifications of which Appellant was convicted.

"[I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense." Rule for Courts-Martial (R.C.M.) 916(j)(1). If the mistake goes to an element requiring general intent, it "must have existed in the mind of the accused and must have been reasonable under all the circumstances." *Id*. Therefore, an honest and reasonable mistake that the victim consented to the charged sexual contact is an affirmative defense to the charged offense. *See*, *e.g.*, *United States v. McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2019) (considering the defense of mistake of fact to a charge of sexual assault). Once raised, the Government bears the burden to prove beyond a reasonable doubt that the defense does not exist. R.C.M. 916(b)(1); *McDonald*, 78 M.J. at 379.

In considering whether the defense of mistake of fact as to consent was raised at trial, we "consider the totality of the circumstances at the time of the offense" and consider "whether the record contains some evidence of an honest and reasonable mistake to which the [factfinder] could have attached credit if they had so desired." *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003) (citations omitted). While the quantity of evidence required is low, the record

must contain evidence supporting both the subjective "honest" and the objective "reasonable" mistaken belief. *See United States v. Davis*, 76 M.J. 224, 230 (C.A.A.F. 2017) (citation omitted) ("[W]hile [the a]ppellant's statement may constitute a scintilla of evidence about his 'honest belief,' . . . there is not an iota of evidence that such a belief was reasonable."); *see also United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995) (citation omitted) ("The testimony relied on by appellant tended to show objective circumstances upon which a reasonable person might rely to infer consent. However, they provided no insight as to whether appellant actually or subjectively did infer consent based on these circumstances.").

When determining what is reasonable, we know that "'[d]ue care' is 'such care as would be exercised by an ordinarily prudent [person] when sober.'" *United States v. Harrington*, No. ACM 39825, 2021 CCA LEXIS 524, at *17 (A.F. Ct. Crim. App. 14 Oct. 2021) (unpub. op.) (second alteration in original) (quoting *United States v. Bragg*, 4 C.M.R. 778, 782 (A.F.C.M.R. 1952); and then citing RESTATEMENT (SECOND) OF TORTS § 283C cmt. d (AM. LAW INST. 1965) (explaining that if a drunken person's "conduct is not that of a reasonable man who is sober, his voluntary intoxication does not excuse" conduct that would otherwise be negligent)), *rev'd on other grounds*, 83 M.J. 408 (C.A.A.F. 2023); *see also United States v. Moore,* No. ACM S32477, 2018 CCA LEXIS 560, at *12 (A.F. Ct. Crim App. 11 Dec. 2018) (unpub. op.) (citation omitted) ("This defense has two elements: one subjective and one objective. For the subjective element, ignorance or mistake must have existed in

[the a]ppellant's mind. For the objective test, the ignorance or mistake must be reasonable under all the circumstances as assessed by an ordinary, prudent, sober adult.").

The concept of "reasonably prudent person" is an objective standard. *Harrington*, unpub. op. at *17. "The actor is required to do what this ideal individual would do in his place. The reasonable man is a fictitious person, who is never negligent, and whose conduct is always up to standard." *Id.* at *17–18 (citing RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (AM. LAW INST. 1965)); s*ee also Benchbook*, at 1425 ("A reasonable belief is one that an ordinary, prudent, sober adult would have under the circumstances."). "Voluntary intoxication does not permit what would be an unreasonable belief in the mind of a sober person to be considered reasonable because the person is intoxicated." *Benchbook*, at 1425–26.

In *United States v. Greaves*, 40 M.J. 432, 437 n.5 (C.M.A. 1994), our superior court stated,

> It would seem that one is not being reasonable if one is being reckless or negligent. Thus it would seem that for one reasonably to believe something, one must have taken such measures as to not be reckless or negligent with respect to the truth of the matter. In other words, one must be seen as exercising due care with respect to the truth of the matter in issue.

"If a mistake is honest yet 'patently unreasonable,' the defense is unavailable to an appellant." *United States*

v. Rodela, 82 M.J. 521, 526 (A.F. Ct. Crim. App. 2021) (quoting *Davis*, 76 M.J. at 230).

4. Evidence

"Testimony 'need not be completely consistent to still be sufficiently reliable to sustain a conviction, and we do not confine our analysis to merely the testimony of a single witness in performing our factual sufficiency review under Article 66, UCMJ.'" *United States v. Gere*, No. ACM 39697, 2020 CCA LEXIS 429, at *25 (A.F. Ct. Crim. App. 24 Nov. 2020) (unpub. op.) (quoting *United States v. McFadden*, No. ACM 38597, 2015 CCA LEXIS 520, at *11 (A.F. Ct. Crim. App. 18 Nov. 2015) (unpub. op.) (additional citation omitted).

Sexual assault cases often turn on the fact finder making a witness credibility determination because of conflicting testimony between the victim and the accused. "'[H]owever, the mere fact that appellant testifies to a different or exculpatory version of the incident does not necessarily mean that there is a 'fair and rational hypothesis other than guilt.'" *United States v. Hale*, ARMY 20190614, 2021 CCA LEXIS 245 at *13 (A. Ct. Crim. App. 19 May 2021) (quoting *United States v. Ross*, ARMY 20190537, 2020 CCA LEXIS 353, at *12 (A. Ct. Crim. App. 30 Sep. 2020) (mem. op.)).

B. Analysis

At trial and on appeal, Appellant does not dispute that some sexual act occurred between him and RY, but he does dispute the nature and extent of their sexual encounter. Appellant argues his convictions are factually insufficient due to (1) "the contradictions of, and inconsistent statements made by [RY]," (2)

RY's "motive to misrepresent," (3) RY "fe[eling] used, betrayed, and led on for weeks" by Appellant, and (4) "the findings in the SANE[12] report" which do not indicate evidence of trauma. The Government argues, *inter alia*, that "RY was forthcoming and admitted to the inconsistency" and "RY's honesty about the inconsistency made her more credible, not less."

Appellant has made a request for a factual sufficiency review. We assume without deciding that 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(d)(1)(B)(i), UCMJ (2024 *MCM*). However, having given appropriate deference to the fact that the members saw and heard the witnesses and other evidence, we are not clearly convinced that Appellant's convictions are against the weight of the evidence. Thus, we conclude the findings are factually sufficient.

Since RY and Appellant both testified at trial to different events on the night in question, the trier of fact necessarily had to weigh the credibility of both Appellant and RY prior to entering findings. After giving appropriate deference to the findings of the members at trial who saw and heard the witnesses, in our own review of the evidence we are convinced of

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[12] Our review of the record indicates SANE stands for Sexual Assault Nurse Examiner. We also note that while the actual SANE report was not entered into evidence at trial, there was some relevant testimony adduced by the examining nurse related to injuries, or lack thereof, during the exam. As always, we limited our factual sufficiency review to the evidence presented on the merits to the members.

Appellant's guilt beyond a reasonable doubt. RY's testimony, coupled with other corroborating evidence, proved every element of the Government's case beyond a reasonable doubt despite Appellant's contradictory testimony.

RY was a sympathetic and compelling witness. RY was young at the time of the assault and trial, a fact compounded by the reality that Appellant was nearly twice her age. RY was naive, vulnerable, and inexperienced in ways that made her version of the events in question much more credible. For example, Appellant had been in the United States for nearly a decade prior to meeting RY and was much more familiar with American "culture" than RY. The text messages admitted at trial, like those which discussed Appellant "eating" RY for dinner, highlight the differences between the two in both their vernacular and cultural understanding as well as how Appellant made RY uncomfortable and RY tried to avoid potentially sexual discussions with Appellant.

The admitted text exchanges like the one discussed above set the scene for analogous details contained in RY's account of the event in question. These texts also documented RY's naivety, a key aspect to understating her testimony. RY's recall of details like "what kind of game do we play on a bed" and "this is not what hanging out" means are believable when the entirety of their communication is considered. This bolsters the remaining testimony related to the charged conduct, describing the sexual act and the expression of non-consent before and during each act. In court, RY's diminutive tone of voice and repeated expressions of emotion at trial, weighed in favor of her credibility.

Beyond that, RY's testimony was corroborated by several other facts. RY's supervisor corroborated the fact that RY was very new to the base and had no friends and could not drive at the time of the assault. Both RY's supervisor and the examining nurse recounted RY's version of events during her out-cry statements to them. The DNA results, both on her body and the towel, also corroborated RY's version of events. While the SANE report did not indicate evidence of injury, this does not make RY's account inconsistent, rather it is explainable by the fact that most sexual assaults do not result in visible physical injury. RY also reported the assault close in time to it occurring and without motive for personal gain at work or otherwise. Additionally, RY had a consistent and compelling demeanor throughout these multiple reports and trial testimony—a visceral and emotional response to the assault. Such facts support RY's credibility and undermine Appellant's suggestion that she fabricated her allegation of the assault.

Regarding RY's credibility, apart from Appellant's own testimony, the evidence at trial fails to suggest RY had any motive to fabricate the allegations—she denied even seeing the phone call Appellant says created the motive in the first place. Even if she did see the phone call, there is no other evidence to suggest RY would be jealous of Appellant receiving that call or "leading her on." RY knew Appellant less than one month before the assault, repeatedly referred to him as a "friend," and indicated she was not interested in romance with Appellant or otherwise. Further, the text messages admitted at trial show Appellant had previously stopped talking to her for days in December with no explanation.

During that period RY did not show any indication she was jealous of or angry at Appellant for ceasing communication with her, and nothing in the evidence suggests a missed phone call would have changed RY's lack of feelings regarding Appellant to the point of falsifying allegations against him.

As we have said before, there can be "simple misunderstandings that result in inconsistencies among many witnesses as a result of the witness's memory and perceptions of the events. These inconsistencies do not necessarily make witness testimony less credible." *Gere*, unpub. op. at *24–25. We have considered the discrepancies in versions of events noted by Appellant, along with the alleged motive advanced by Appellant, and are not persuaded they shift the greater weight of the evidence. *Id*.

The Prosecution's evidence at trial was straightforward, logical, consistent, and persuasive. However, unlike RY's reasonable account of the events, Appellant's testimony was unreasonable under the circumstances as it was riddled with inconsistencies, vague, lacking detail, and at times patently unreasonable. We further note Appellant's inherent bias in testifying the way he did.

Appellant's self-serving version of the sexual encounter fails to hold water. Appellant's age and life experiences, including many more years in the United States and as someone who was previously married cut against his unbelievable account of planking over an attractive, naked, single woman in his house who wanted sexual relations with him at midnight and, by his account, was doing everything she could to have

sex with him. Even assuming fatigue was a factor in his account, it is simply implausible that Appellant would be a rigid non-participant in the sexual act as he described under the circumstances.

Appellant also did much to hurt his own credibility. Rather than his account being corroborated by evidence, Appellant's account was contradicted by his own statement to a friend about why RY reported the assault. At trial, Appellant highlighted the fact that he thought RY saw his ex-girlfriend's call, became jealous, and was so angry about being led on and rejected that she falsely reported that Appellant sexually assaulted her. However, Appellant told his friend that RY falsified the assault because Appellant broke up with her. While we are not convinced that either of these scenarios, if true, would compel RY to falsely report a sexual assault against Appellant, the mere fact that Appellant did not keep his own story straight undercuts his credibility. Also, there are numerous indications that, in the weeks preceding the sexual assault, RY rebuffed Appellant's repeated efforts to sexualize the conversation or relationship, which directly contradicts Appellant's assertion that RY was the initiator and perpetuator of any sexual acts between the two.

Appellant also made several key damaging admissions and concessions under cross-examination. He admitted that he found RY attractive but still stated he rebuffed her advances. Appellant also did not specifically recall ejaculating during his version of the sexual act even though RY stated that he ejaculated on her chest. As such, Appellant's story does not account for the guest room towel. The lab

report indicated there was a single towel stain containing both Appellant's semen and RY's DNA, which corroborates RY's version of events and cuts against Appellant's testimony he did not ejaculate. While it is understandable that Appellant's semen would be found in his home and on his towels at any given time and any given place, the testimony of the expert undercuts any random inference his semen would appear in the same place as RY's DNA on the towel in the guest room.

We also considered the defense of mistake of fact as to consent for each offense and conclude that Appellant did not hold an honest or reasonable mistake as to RY's consent to any of the conduct of which he was convicted. Even if one were to find the defense raised, the Government disproved this defense beyond a reasonable doubt for all specifications of which Appellant was convicted. We note that when a court member asked Appellant if consent was asked for and given that night, he gave a long-winded and nonsensical answer to this important, and simple, question.

In conclusion, while the testimony of the victim and the Appellant differed significantly in this case, and after giving the members appropriate deference, we agree with the members' implicit conclusion that RY was more credible and there was proof beyond a reasonable doubt as to Appellant's guilt. *See, e.g.*, *Hale*, unpub. op at *14.

III. CONCLUSION

The findings as entered are correct in law and fact. Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2024 *MCM*). In addition, the sentence as entered is correct

in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), Uniform Code of Military Justice (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. 26-0255/AF Crim.App. No. 40810

v.

ORDER DENYING PETITION

Derrick E. Braddy,
Appellant

On consideration of the petition for grant of review of the decision of the Unites States Air Force Court of Criminal Appeals, it is by the Court, this 10th day of September, 2026,

ORDERED:

That the petition is hereby denied;

For the Court,

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

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40810

UNITED STATES
Appellee

v.

Derrick E. BRADDY
Master Sergeant (E-7), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 5 June 2026

Military Judge: Thomas A. Smith;[1] Willie J. Babor.

Sentence: Sentence adjudged 20 December 2024 by GCM convened at Scott Air Force Base, Illinois. Sentence entered by military judge on 16 January 2025: Dishonorable discharge, confinement for 60 months, and reduction to E-1.

For Appellant: Captain John M. Fredericks, USAF (on brief); Brad Simon, Esquire (on brief);

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[1] Hearing concerning applications for prereferral warrants pursuant to Article 30a, Uniform Code of Military Justice, 10 U.S.C. § 830a.

Major Trevor N. Ward, USAF; Scott R. Hockenberry, Esquire.

For Appellee: Colonel G. Matt Osborn, USAF (on brief); Colonel Matthew D. Talcott (on brief); Mary Ellen Payne, Esquire (on brief); Major Vanessa Bairos, USAF; Major Heather R. Bezold, USAF; Major Jocelyn Q. Wright, USAF.

Before GRUEN, MENDELSON, and KUBLER, *Appellate Military Judges.*

Judge MENDELSON delivered the opinion of the court, in which Senior Judge GRUEN and Judge KUBLER joined.

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

MENDELSON, Judge:

A general court-martial consisting of a military judge convicted Appellant, contrary to his pleas, of three specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b.[2,3] The military judge sentenced Appellant

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[2] Unless otherwise noted, references in this opinion to the UCMJ, Rules for Courts-Martial, and Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

[3] One specification of Article 120b, UCMJ, was withdrawn and dismissed without prejudice. Appellant was found not guilty of

to a dishonorable discharge, confinement for 60 months, and reduction to the paygrade of E-1. The convening authority took no action on the findings or sentence.

Appellant raises three issues on appeal, which we consolidate and restate as two issues: (1) whether the findings of guilty are factually sufficient; and (2) whether Specification 3 of Charge I is legally sufficient. We find no error and affirm.

I. BACKGROUND

A. Convicted Offenses Involving EH (Appellant's Niece)

Appellant's niece, EH, is the victim of Appellant's convicted offenses of sexual abuse of a child. At the time of the offenses, EH was 11 or 12 years old.

While Appellant was stationed at Scott Air Force Base, Illinois, he would frequently see family members, including EH, who resided at the family farm in Piedmont, Missouri, about two-and-a-half hours away. Appellant and his sister JC—EH's mother—would frequently watch each other's children, and the children would spend time at each other's homes. Appellant was considered the "fun uncle" and was particularly close with EH. The other

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one specification of touching the buttocks of a child, EH, under the age of 16 years with his hand in violation of Article 120b, UCMJ; one specification of unlawfully giving alcohol to a child, EH, under the age of 18 years in violation of Article 134, UCMJ, 10 U.S.C. § 934; and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920, involving a different charged victim.

children in the family would tease EH that she was Appellant's "favorite."

At trial, EH testified about two separate incidents that happened while staying at Appellant's home.

1. First Incident (Specification 1 of Charge I)

The first incident occurred one night in the spring of 2022, when EH was either 11 or 12 years old. On that night, while EH and Appellant were watching a movie, Appellant gave EH different sleep aids so that she would go to bed—first a Melatonin pill, then a Melatonin gummy, and then NyQuil—as he normally would when EH stayed at his house. EH felt "[d]rowsy, really sleepy," and fell asleep on the couch after finishing the movie. The next thing EH remembered was waking up with Appellant's penis in her outstretched hand "moving back and forth." At trial, EH described the feeling of Appellant's penis in her hand "[l]ike a bone with like skin on it." EH tried "not to hold [her] hand in the position that he would put it in" but when her "fingers would fall . . . he would fix [her] fingers" to curl them back together. EH "fluttered [her] eyes" but did not open her eyes because she was "scared . . . [she] was going to get in trouble and [she] didn't know what to do." EH, however, knew it was Appellant because "[h]is hands were like calcified, like dry and he was doing his like usual breathing after he was like done playing the game or like during playing the game because he screams, or when he drinks." The "heavy breathing" did not sound like anyone else and the only other people in the home that night were EH's 13-year-old brother, her 10-year-old male cousin (Appellant's son), and her 14-year-old female cousin (Appellant's

daughter). EH did not "say anything" to Appellant because she was "scared" and "figured if [she] would've said something, he would've got mad and then . . . tell [her] mom that [she] did something." EH also did not initially tell anyone what had happened because they "wouldn't have believed [her]." This incident formed the basis for the charge of sexual abuse of a child under the age of 16 years of age "by causing [EH] to touch his penis with her hand, with an intent to gratify his sexual desires" (Specification 1 of Charge I).

After this first incident, EH did not want to go back to Appellant's house but "was scared to tell [Appellant] why [she] didn't want to go up there." EH's mother, JC, testified that she noticed a change in EH's behavior during this timeframe, in that EH no longer wanted to go to Appellant's house and EH "seemed a little reclused." Appellant and EH did, however, exchange numerous text messages following the first incident. Appellant repeatedly urged EH to "go up" to his house. EH repeatedly responded that she did not want to go to Appellant's house, telling him at various points in the text message conversation: "I don't think I want to be going up there as much," "I just don't want to go up there," "I haven't been wanting to go up there for a little while," "What if I just don't want to go up there anymore," and "I don't want to talk tomorrow or ever." Appellant repeatedly probed EH asking why she did not want to come to his house. After EH avoided answering by saying she did not know why, Appellant messaged that "[n]othing will change about how I feel towards you." Appellant elaborated by messaging: "I can't say you are a favorite. But I do see your struggles and I try to show you that you are loved

and you are pretty and you do matter." At a later point, Appellant again texted to EH, "I love you, you are pretty, and you need to know both, I only try to put you first sometimes because you feel you are last a lot of times."

2. Second Incident (Specifications 3 and 4 of Charge I)

The second incident happened when EH did eventually go back to Appellant's house during the end of June 2022. On that day, EH was playing on her virtual reality headset when Appellant approached her with a glass of soju.[4] EH recalled that it tasted "[l]ike rubbing alcohol" and "it burnt [her] entire mouth." After drinking the soju from the glass slowly, Appellant asked EH if it would be "easier" if she took a shot. After EH agreed it would be easier, Appellant poured shot glasses and told EH to get off of her virtual reality headset so that it could "just be him and [EH]." Over the course of the next hour-and-a-half to two hours, EH recalled that Appellant poured her anywhere from 6 to 15 shots. EH felt dizzy to the point that she would not have been able to play on her virtual reality headset if she had tried. At one point, Appellant brought out a breathalyzer to test EH. The second time EH used the breathalyzer, Appellant told EH she was at ".06." At that point, Appellant put away the shot glasses and then asked EH to play a game of "truth or dare." At first the game "was pretty normal." But then the game started to make EH uncomfortable. The first time EH felt uncomfortable was when she

[4] Appellant testified that he purchased the soju from a Korean restaurant and explained that soju is a wine with 13% alcohol content.

chose a "dare" and Appellant dared her "to take off your underwear but you can put your shorts back on when you're done taking them off." EH refused to do the dare. Appellant responded, "Oh, okay," with "a deep sigh, breath in, breath out," and appeared disappointed. On Appellant's next turn, he chose a "dare" and EH dared Appellant to spin around in a circle, which he did. Then on EH's next turn, she chose "truth" and Appellant asked, "What is the type of porn you watch?" EH refused to answer. After that, the game "was just back to normal Truth or Dare." Appellant's "dare" and "truth" formed the basis for the charges of sexual abuse of a child under the age of 16 years of age "by daring [EH] to take off her pants and underwear" (Specification 3 of Charge I) and by "intentionally communicating indecent language" to EH by asking her about pornography (Specification 4 of Charge I).

After playing one more round of "truth or dare," EH asked for a glass of water. Appellant left the room to get the glass of water, but EH fell asleep in bed before he ever returned. When she fell asleep, EH was wearing a sports bra, underwear, shorts, and a sleep shirt with a koala on it. She woke up the next morning in entirely different clothes—a different sports bra, pair of underwear, shorts, and shirt—but had no recollection of ever changing clothes. The different shorts and shirt that EH woke up in previously belonged to Appellant's deceased wife. That morning, EH told her female cousin that she was "kind of weirded out because . . . I went to sleep in such and such clothes, and I woke up in those clothes." EH did not, however, tell her cousin about the events of the night before.

3. EH's Disclosures

EH did not immediately disclose what Appellant had done. She first made a partial disclosure in August 2022, when she told her mother, JC, that Appellant gave her alcohol to drink. EH told JC about the drinking because she "thought [she] did something wrong for agreeing to drink." JC immediately became angry and upset. EH testified at trial that, during this initial conversation with her mother, she did not tell her mother about any sexually inappropriate behavior. JC reapproached EH later the same day to ask for more details about the drinking. During that second conversation with her mother, EH provided additional details about the "truth or dare" game, including the "dare" to take off her underwear and the "truth" question about pornography.

After EH made the initial disclosure about drinking alcohol and the "truth or dare" game, JC confronted Appellant. Appellant admitted to JC that he did provide alcohol to EH and explained that he breathalyzed EH to "make sure that she wasn't drunk." Appellant also admitted that he did play "truth or dare" with EH, but insisted that "nothing sexual happened." When JC asked why EH woke up in different clothes, Appellant said it was possible EH "could've taken a bath or possibly thrown up on herself."

EH's testimony at trial did not pinpoint exactly when she initially disclosed the first incident that occurred in the spring of 2022 (when she woke up on the couch to Appellant's penis in her hand). EH testified that "one of the first times" she told anyone in detail about the night of the first incident was in

September 2022, when she typed a note on a tablet for her stepmother, CH (her biological father's wife), to read. The note reads:

> Things I don't want to speak of but need y'all to no?
>
> [Appellant] got me drunk [redacted text] the next day I was in different clothes like every thing wasn't the same my underwear and bra I took like 12 shots on I couldn't move with out falling over it was like 11pm to i think 1am he asked me if I wanted to play truth or dare and I said I guess and one of the dare's was me to take my underwear off and and truth was what kind of porn/pron I watch and one time he picked me up and held me in he's arms and then smack my [peach emoji][5] bc I was laughing at my phone and I don't know if it's a dream but he picked up my hand and put he's [eggplant emoji][6] in it and was putting it in and out of my hand but it felt like it was real like I felt it in my hand [redacted text].[7]

(Redacted texts in original).

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[5] EH testified that she meant the peach emoji to represent a "[b]utt."

[6] EH testified that she meant the eggplant emoji to represent a "[p]enis."

[7] Unless otherwise noted, the note is copied verbatim from Prosecution Exhibit 5.

During her trial testimony, EH explained that she wrote the note on the tablet because it was difficult to talk about and she wanted her stepmother to show the note to her father. EH's stepmother, CH, also testified at trial about the note EH typed on the tablet. CH explained that prior to the note, she kept asking EH if she was alright because EH was "acting a little weird" on their family vacation. Eventually, EH told CH that there was something she needed to talk about without her father around, and she wrote down "what happened" as a note on the tablet. Once EH told CH about what happened with Appellant, CH messaged JC, who told CH that "she already knew."

In November 2022, EH underwent a Child Forensic Interview (CFI). During the CFI, EH initially said she was not sure whether the first incident—when she woke up on the couch with Appellant's penis in her hand—was a vivid dream. At trial, EH was confronted with her prior statement:

> [Senior Defense Counsel (SDC)]. Now thinking back to 2022, when you reported this incident, specifically the penis in the hand incident, you would agree with me that it's completely possible that this could've just been a vivid dream, correct?
>
> [EH]. No.
>
> . . . .
>
> [SDC]. And so, is it your testimony today that this was not a dream?
>
> [EH]. This was -- that was not a dream.

> [SDC]. But isn't it true that when you conducted your Child Forensic Interview, in November of 2022, you said that you weren't sure if it was a vivid dream or not?
>
> . . . .
>
> [EH]. Yes, because me and him had I thought the perfect relationship other than those two incidents . . . . But I was hoping that it was a dream.
>
> [SDC]. Okay. And so -- so --
>
> [EH]. -- And it wasn't. It wasn't. I've never had a dream like that.

EH also acknowledged that three years before the first incident occurred with Appellant, "[she] had previously had this happen to [her] by [her] cousin."[8]

B. Uncharged Offenses of Child Molestation of Other Family Members

At trial, the Government presented evidence that Appellant committed other uncharged offenses of child molestation of other family members, pursuant to Mil. R. Evid. 414 and 404(b).[9]

1. SA (Appellant's Stepsister)

Appellant's stepsister, SA, testified about an incident that occurred in 2004, when she was 12 years

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[8] This cousin was not one of the other children present at the home during the first incident.

[9] On appeal, Appellant does not challenge the admissibility of this evidence.

old, while Appellant was home on leave. SA fell asleep on the couch and woke up to Appellant kneeling down next to her with her "arm stretched out, and his penis was in [her] hand." SA testified she was positive it was Appellant because she opened her eyes and saw him and his penis in her hand. SA pulled her arm in to "avoid it, and tried rolling over to just go back to sleep." She dozed off, but Appellant kept waking her up. At some point, SA told Appellant she did not feel well, and Appellant brought her NyQuil pills to take. SA tried to avoid Appellant by going into her bedroom, but discovered Appellant sitting on her bed. Appellant eventually left her bedroom, and SA was able to shut and lock her bedroom door.

SA did not initially tell anyone what happened with Appellant because she was "afraid that nobody would believe [her]." She testified that she did not confront Appellant, "[o]ut of fear of what would happen." The first time SA told anyone was about 5 years later, when she was 17 years old, when she first told her daughter's father. Other than possibly telling her best friend, SA did not tell anyone else until September 2022, when JC messaged asking to talk. JC asked SA whether "anything weird had ever happened when [SA] was younger," and SA disclosed what had happened with Appellant. At the time of this conversation, SA was not aware of any allegations against Appellant.

2. HB (Appellant's Daughter)[10]

HB is one of Appellant's daughters.[11] HB testified about an incident that occurred in 2008, when she was 7 years old, where Appellant took HB and her two brothers to a swimming hole at a creek. After a couple of hours of swimming, Appellant told HB and her brothers that it was time to take a nap. Appellant told HB that she had to nap in the front seat of his pickup truck, while HB's brothers napped in the back seat. HB fell asleep and woke up to Appellant's hand between her legs and touching her under her underwear, with his "fingers penetrating [her]." HB was scared and confused. Once Appellant realized she was awake, he "quickly jumped" and "said that he needed to go pee." After this incident, HB's mother took her to seek medical care and the doctors "determined that something had happened," but for reasons HB cannot remember there were no "court proceedings."

C. Knowledge of the Other Family Members' Allegations

In September 2022, after EH made her initial disclosure about Appellant giving her alcohol and the "truth or dare" game, JC (Appellant's sister/EH's

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[10] This section discusses HB's testimony about an uncharged incident that occurred when she was 7 years old that was admitted at trial under Mil. R. Evid. 414 and 404(b). HB also testified about a separate incident that occurred when she was 17 years old that formed the basis of the specification for sexual assault in violation of Article 120, UCMJ, *see* n.3 *supra*, for which Appellant was found not guilty.

[11] HB is not the same daughter who was present at Appellant's home at the time of EH's first incident in the springtime of 2022.

mother) messaged SA to ask if "anything weird had ever happened when [SA] was younger." JC and SA then had a conversation in person during which SA disclosed what Appellant did to her. During her conversation with SA, JC did not bring up "specifics" of what EH had disclosed. JC testified that she never discussed with EH what SA disclosed, but she did share the information with several other family members. JC also testified that, after her conversation with SA, she eventually became "aware of additional sexual misconduct involving [EH] and [Appellant]."

At the time EH initially disclosed to JC that Appellant gave her alcohol, JC was already aware that HB had made allegations of sexual assault against Appellant, but thought that the investigation had been closed. EH also became aware of HB's allegations, although the exact timing is unclear. EH initially testified that she was unsure whether she spoke with HB before EH had her CFI. Later in her testimony, however, EH acknowledged that at the time of her CFI, she was aware of the details of HB's allegations against Appellant. EH also acknowledged that since her disclosure she spoke with HB "once or twice" and HB gave her "support and encouragement to report [Appellant]."

D. Appellant's Testimony

Appellant testified at trial, denying that anything of a sexual nature ever happened with EH, denying ever placing his penis in SA's hand, and denying ever sexually assaulting his daughter HB.

1. Convicted Offenses Involving EH

Appellant testified that, prior to EH's allegations, the family—including "the kids"—were aware that Appellant was under investigation for allegations made by his daughter HB. Despite the family's knowledge of the investigation relating to HB, JC's children still regularly stayed at Appellant's house. Appellant and EH had a "good relationship," but Appellant denied that EH was his favorite. He did, however, acknowledge that the other children perceived that he favored EH, and that JC expressed concerns to Appellant about the perceived favoritism because the other children teased EH about it.

Appellant and EH would exchange messages on Facebook Messenger[12] daily or every other day, which was usually initiated by EH. When asked about messages he exchanged with EH, in which he told her "[n]othing will change about how I feel towards you" and "I try to show you that you are loved and you are pretty and you do matter," Appellant explained that telling EH she was pretty was not "sexual" but was in response to her brother always calling her names.

With respect to the first incident EH testified to—when she woke up on the couch to Appellant's penis in her hand—Appellant testified there was no truth to the allegation, that when he first learned of the allegation he had no idea what she was talking about, and that there has never been a time that he sexually abused EH. Appellant did admit that he frequently

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[12] Appellant explained that the farm did not have cell phone service, and Facebook Messenger was a simple application to use on a wireless network.

gave "the kids" sleeping aids such as melatonin pills or melatonin gummies.

With respect to the second incident EH testified to—when Appellant gave her alcohol and they played "truth or dare"—Appellant corroborated many of the events of that night but with materially different details. Appellant testified that EH asked to try soju. According to Appellant, he and JC had an agreement that the children could drink alcohol in "limited amounts."[13] Appellant estimated that he provided EH in total about half a cup of "straight or pure" soju, but diluted it with ginger ale and provided it to her in about six shot glasses over about an hour-and-a-half to two hours.[14] To ensure that EH did not become "intoxicated," Appellant used a breathalyzer on EH two or three times. The highest reading Appellant observed on the breathalyzer was ".06." At that point, Appellant told EH she was done drinking because "that was too close to being 0.08, the legal limit." Appellant testified that he did not ever observe signs of intoxication from EH.

After Appellant "cut [EH] off from drinking," EH went back to playing on her virtual reality headset

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[13] In the Government's rebuttal case, JC testified that she never had an agreement with Appellant that EH was allowed to drink alcohol.

[14] Although Appellant admitted to giving alcohol to EH, the military judge found him not guilty of the Article 134, UCMJ, offense of unlawfully giving alcohol to a child under 18 years. The military judge took judicial notice of an Illinois criminal statute that the Defense argued allowed persons standing in *loco parentis* to provide alcohol to a person under 21 years of age in the privacy of a home.

"for a little bit," watched television, and hung out. When Appellant later checked on EH, she complained that she was "bored" and wanted to play the game *Cards Against Humanity*.[15] Appellant told EH it would be boring to play *Cards Against Humanity* with only two people, and then EH said she wanted to play a game of "truth or dare."

When asked about EH's testimony that he "dared" her to remove her shorts and underwear and put back on her shorts with no underwear, Appellant denied that the dare had anything to do with "taking off underwear." Instead, Appellant testified he dared EH to "[t]ake a pair of [her] underwear and put them on over [her] shorts." Appellant explained that EH was into "cosplay" and he "was trying to be supportive of her hobbies." He elaborated that he "thought it would be cute . . . [like] the Superman look, inside out . . . [or like] SpongeBob had one of those where he did an inside out day." Appellant denied that he was trying to arouse his sexual desires and instead maintained "[i]t was just supportive fun, like ha ha." Appellant did, however, admit that in daring EH to put a pair of her underwear over her shorts he "didn't clarify that it wasn't the pair that she was wearing." Appellant testified that EH said she did not want to do the dare.

When asked about the "truth" EH testified to—where Appellant asked her what type of pornography she watches—Appellant denied asking that as a

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[15] Appellant testified that *Cards Against Humanity* is a game that discusses topics such as ejaculation, penises, vaginas, and rape. However, Appellant did not consider the game to be a "sexual game" and said that the family often played the game together.

"truth" during the game, but did admit to asking that question in a different context. Appellant explained that they were discussing that EH's brother and male cousin had been "caught" with pornography and EH was "making fun of them for having some sort of weird porn." Appellant's response was to ask EH, "well, what kind of weird porn do you watch," as a way to teach her "don't throw stones, like, don't make fun of them whenever, you know, you do the same thing." Appellant testified, "There was nothing sexual or gratifying about that."

2. Uncharged Offenses Involving SA and HB

Appellant recalls the night SA, his stepsister, testified about the sexual abuse incident, but denies ever putting his penis in SA's hand while she was sleeping on the couch or ever making "sexual" contact with SA. According to Appellant, SA was on the couch and he was talking to her "about the complete dysfunction of the family." While he was talking to SA, she stretched out on the couch and kicked Appellant. That was the only "physical interaction" that they had on the couch, and it was not sexual in nature. Appellant testified that he first learned of SA's allegations after EH disclosed to her mother, JC, that Appellant gave her alcohol.

Appellant also recalls taking HB and her brothers to the swimming hole at the creek, when HB was 7 years old. Appellant drove the children in his truck and was the only adult present. The children swam for "a couple of hours" and became tired. On the drive back to the farm, HB fell asleep in the front seat of Appellant's truck, while the two boys fell asleep in the back. Once they got back to the farm, the children

"woke up and continued playing." Appellant denied ever sexually assaulting HB. Appellant testified that he became aware that HB complained of vaginal discomfort after the day at the swimming hole. HB underwent a medical examination, which determined that she had a yeast infection.

E. Expert in Forensic Psychology

The Defense also presented the testimony of Dr. WJ, an expert in the field of forensic psychology. Dr. WJ explained the concept of "false memories" in which a person genuinely believes an event or details of an event to be true when it did not actually occur. "Suggestibility" puts a person at risk for a false memory. Children aged 3 to 6 years old are most susceptible to suggestibility; while all children are at risk for suggestibility, older children "have developed stronger cognitive skills and abilities." An authority figure "can further put [children] at risk for suggestibility."

Dr. WJ opined that, based upon reviewing EH's CFI and observing her trial testimony, multiple risk factors for suggestibility were present. The CFI occurred approximately two-and-a-half months after the "initial outcry of an allegation of sexual abuse," which put EH at risk for suggestibility from family members in the intervening time. Dr. WJ explained that the "neutral interview" should have happened "shortly after, as quickly as possible," and that the more time that passes the child will be exposed to more risk factors for suggestibility.

Dr. WJ also testified that EH was subject to repetitive questioning from family members, which is another risk factor for suggestibility. Moreover,

because EH reported to family members with their own history of sexual abuse, it created a risk of confirmation bias in which those family members ask questions to confirm their pre-existing belief that something in fact must have occurred. Additionally, EH's own prior experience of sexual abuse three years earlier created a risk of "an alternate source of knowledge." Dr. WJ also testified that the negative stereotyping of Appellant and EH's initial statement that she was not sure whether it was a vivid dream are further risk factors of suggestibility.

On cross-examination, Dr. WJ testified that salient memories, such as experiencing a sexual assault, are more strongly encoded in a person's memory. Dr. WJ agreed that children under 5 years old are at the highest risk for suggestibility, and that the presence of a positive relationship reduces the risk of suggestibility. Moreover, the presence of a risk factor does not mean that the risk factor had an effect. Factors that decrease the risk of suggestibility include consistency of the memories that are recalled and a spontaneous statement made by a child in "language that was akin to a child." Dr. WJ agreed that incremental disclosures—in which the person initially gives some details, but then provides additional details upon further questioning—is a common observance, especially with children. An incremental disclosure does not, by itself, mean that a memory is a false memory. Dr. WJ also agreed that dreams typically "don't have a logical flow to them" and are "kind of random . . . all over the place." Moreover, "typically a person would not recall a sensory detail of an experience, if that experience was a dream."

II. DISCUSSION

On appeal, Appellant challenges the factual sufficiency of his convictions. Appellant also challenges the legal sufficiency of the specification charging indecent "conduct" by daring EH to take her pants and underwear off, where the "actus reus exclusively involved language."

A. Factual Sufficiency

1. Law

We are neither required nor empowered to review the factual sufficiency of the evidence unless an appellant both (1) asserts an assignment of error and (2) shows a specific deficiency in the proof. *United States v. Harvey*, 85 M.J. 127, 130 (C.A.A.F. 2024). The current version of Article 66(d)(1)(B), UCMJ, FACTUAL SUFFICIENCY REVIEW, provides:

> (i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.
>
> (ii) After an accused has made such 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(d)(1)(B), *Manual for Courts-Martial, United States* (2024 ed.) (2024 *MCM*).

"[T]he requirement of 'appropriate deference' when a [Court of Criminal Appeals (CCA)] 'weigh[s] the evidence and determine[s] controverted questions of fact' . . . depend[s] on the nature of the evidence at issue." *Harvey*, 85 M.J. at 130 (third and fourth alterations in original). It is within this court's discretion to determine what level of deference is appropriate. *Id*. at 131.

"[T]he quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is proof beyond a reasonable doubt, the same as the quantum of proof necessary to find an accused guilty at trial." *Id*. at 131 (internal quotation marks omitted). For this court "to be 'clearly convinced that the finding of guilty was against the weight of the evidence,' two requirements must be met." *Id*. at 132. First, we must decide that evidence, as we weigh it, "does not prove that the appellant is guilty beyond a reasonable doubt." *Id*. Second, we "must be clearly convinced of the correctness of this decision." *Id*.

2. Analysis

a. Specification 1 of Charge I - Causing EH to Touch Appellant's Penis

In order to convict Appellant of Specification 1 of Charge I, the Government was required to prove: (1) Appellant committed a lewd act upon EH, by causing EH to touch his penis with her hand; (2) Appellant did so with the intent to gratify his sexual desires; and (3) EH was a child who had not attained the age of 16 years. *See Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 62.b.(3); *see also MCM*, pt. IV, ¶ 62.a.(h)(5) (defining "lewd act"); *MCM*, pt. IV, ¶ 62.a.(h)(4) (defining "child"). Appellant contends the Government failed to prove beyond a reasonable doubt that the lewd act occurred or, if it did, that Appellant was the one who committed it. He presents several arguments in support of this contention, which we find to be a sufficiently "specific showing of a deficiency in proof" to empower this court to review the factual sufficiency. *See* Article 66(d)(1)(B)(i), UCMJ.

First, Appellant points to EH's statements, made in the note typed on the tablet and initially during the CFI, that she was unsure whether the incident was a vivid dream. Appellant contends that because he gave EH sleep aids prior to the incident, and because she was the victim of a prior similar assault by her cousin, it increased the possibility that she was recalling a dream because "[d]reams, of course, are a reflection of past experiences." We are unpersuaded. While we acknowledge that the defense expert testified that EH's initial statements that she was unsure whether the incident was a dream increased her risk for

suggestibility, EH was clear and firm in her testimony at trial that she knew the incident was not a dream. EH explained her prior statements questioning whether it was a dream as a coping mechanism in that she was "hoping that it was a dream." We find it perfectly reasonable that a child who looks up to their uncle would not want to believe that he sexually abused her.

Moreover, EH described in graphic detail what she felt and heard upon waking up to Appellant's penis in her hand—explaining that the penis felt "like a bone with like skin on it," describing the sensation of "back and forth" movement, feeling Appellant's "calcified, like dry" hands rearranging her fingertips to "curl them back" into a closed hand around his penis, and the sound of Appellant's "heavy breathing" just like how he sounds after screaming during a game or when he drinks. The defense expert, Dr. WJ, agreed that "typically a person would not recall a sensory detail of an experience, if that experience was a dream." Furthermore, the logical flow of EH's recollection weighs against finding it was only a dream because, as Dr. WJ agreed, dreams typically "don't have a logical flow to them" and are "kind of random . . . all over the place." While Dr. WJ did testify that EH's prior experience of sexual abuse three years earlier created a risk of "an alternate source of knowledge," she did not indicate that it created a risk of a false memory based upon a dream. Additionally, there is no support for Appellant's assertion that the sleeping aids made it more likely that EH had a dream that created a false memory, nor is there any support for Appellant's assertion that "[d]reams, of course, are a reflection of past experiences."

Next, Appellant cites to evidence that EH never actually saw Appellant commit the charged act and that there were "several of the male children" in the house at the time. EH testified that while she "fluttered" her eyes, she did not open her eyes because she was scared. While visual identification may be a more reliable identifier, we are nonetheless persuaded by EH's ability to identify Appellant (who she frequently spent time with) by his "calcified, like dry" hands and the familiar sound of his heavy breathing. Just prior to falling asleep on the couch, Appellant gave EH "sleep aids" and was watching a movie with her. We find EH's description of the penis—"like a bone with like skin on it"—as more consistent with an adult male's penis than that of the only two other males present in the home, EH's 13-year-old brother and her 10-year-old male cousin. Furthermore, we find the evidence of the strikingly similar incident involving SA lends additional weight to the identity of Appellant.

Appellant also cites to what he characterizes as "crosstalk" between various family members and contends that it was only after SA shared her allegation with EH's mother, JC, that "EH then alleged the exact same thing." The trial testimony does establish that JC learned of SA's allegation in September 2022. However, JC testified that she never discussed SA's allegation with EH, although she did share the information with other family members. At trial, EH was not asked whether she was aware of SA's allegation. Mere speculation that EH may have been aware of SA's allegation, because JC and other family members knew, is not persuasive. Moreover, even if we were to assume that EH was aware of SA's

allegation, we do not find any basis to believe that EH fabricated her allegation on the basis of SA's allegation. While the allegations are strikingly similar in the respect that Appellant placed his penis in each child's sleeping hand, the similarity is just as likely to show Appellant's motive, intent, or plan.

In support of his argument, Appellant points to the fact that EH only disclosed that Appellant gave her alcohol in her initial disclosure to JC in August 2022 and, at that time, did not disclose the first incident of waking up to Appellant's penis in her hand. We do not, however, find EH's partial disclosure to raise a reasonable doubt. Dr. WJ agreed that the doctrine of incremental disclosure is a common observance in psychology, especially with children, and that an incremental disclosure does not, by itself, mean that a memory is a false memory.

Finally, Appellant points to Dr. WJ's testimony that EH presented multiple risk factors for suggestibility or false memory. Dr. WJ testified that EH's initial statement that she was unsure whether it was a vivid dream, the passage of two-and-a-half months between EH's initial disclosure and the CFI, repetitive questioning, potential for confirmation bias, EH's prior experience of sexual abuse, and negative stereotyping of Appellant, were all risk factors for suggestibility and a false memory. However, Dr. WJ also agreed that countervailing indications existed weighing against the risk of suggestibility such as EH's age, consistency of the memory recalled, spontaneous statement made in "language that was akin to a child," and positive relationship with Appellant. Moreover, Dr. WJ agreed that the presence

of a risk factor does not mean that the risk factor had an effect.

Appellant's argument does not contest that EH's testimony, if true, is factually sufficient to sustain his conviction for this offense. In assessing EH's credibility, we are persuaded for several reasons. First, we find persuasive EH's graphic detail of the sensations she felt—"like a bone with like skin on it," "back and forth" movement, Appellant's "calcified, like dry" hands, and the sound of Appellant's "heavy breathing." We also note the corroborating evidence that EH suddenly no longer wanted to go to her "fun uncle's" house, which is evidenced by the text messages in which EH responded to Appellant's repeated requests that she come to his house by stating that she "did not want to." Both EH's mother, JC, and her stepmother, CH, noticed a change in EH's demeanor in which she no longer wanted to go to Appellant's house, seemed "reclused," and was "acting a little weird." We are also persuaded by EH's spontaneous disclosure in "language that was akin to a child" by typing on the tablet that "he picked up my hand and put he's [eggplant emoji] in it and was putting it in and out of my hand but it felt like it was real like I felt it in my hand." Moreover, we find Appellant's strikingly similar past molestation of his sleeping 12-year-old stepsister SA, as well as his past molestation of his sleeping 7-year-old daughter HB, to be strong propensity evidence. *See United States v. Fetrow*, 76 M.J. 181, 188 (C.A.A.F. 2017) ("The very nature of propensity evidence is to permit the trier of fact to infer that since the accused has acted previously in a certain fashion, he was inclined to

have acted in conformity with that conduct with respect to the charged offenses.").

The military judge, unlike this court, had the opportunity to observe the demeanor of both EH and Appellant in their testimony and to assess their credibility firsthand. In finding Appellant guilty, the military judge evidently found EH sufficiently credible. We find it appropriate to give substantial deference to the military judge's determination of credibility, *Harvey*, 85 M.J. at 130, and we ourselves are not clearly convinced that the finding of guilty was against the weight of the evidence, Article 66(d)(1)(B), UCMJ (2024 *MCM*).

b. Specifications 3 and 4 of Charge I – "Truth or Dare" Game

Appellant argues that his own testimony at trial presented "a perfectly plausible account in the context of a game of truth or dare and would clearly not constitute a lewd act." In support of this argument, he contends EH's perception of the events "could have resulted from a misunderstanding due to her alcohol consumption and . . . her exposure to multiple family members talking negatively about [Appellant]." We find Appellant's arguments to be a sufficiently "specific showing of a deficiency in proof" to empower this court to review the factual sufficiency. *See* Article 66(d)(1)(B)(i), UCMJ. Nonetheless, we are unpersuaded.

i) Specification 3 of Charge I – the Dare

In order to convict Appellant of Specification 3 of Charge I, the Government was required to prove: (1) Appellant committed a lewd act upon EH, by engaging

in indecent conduct, to wit: daring EH to take her pants and underwear off; (2) which was intentionally done in the presence of EH; (3) which conduct amounted to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common society and tends to excite sexual desire or deprave morals with respect to sexual relations; and (4) EH was a child who had not attained the age of 16 years. *See MCM*, pt. IV, ¶ 62.b.(3); *see also MCM*, pt. IV, ¶ 62.a.(h)(5)(D) (defining "lewd act"); *MCM*, pt. IV, ¶ 62.a.(h)(4) (defining "child").

In his own testimony, Appellant admits he provided numerous "shots" of alcohol to EH and then played a game of "truth or dare" with her. He also admits that, during the game, he dared EH to do something that involved her underwear, but claims a different version of the "dare." EH testified that Appellant dared her "to take off your underwear but you can put your shorts back on when you're done taking them off." The dare made EH "uncomfortable" and she refused to do it. EH testified that Appellant sounded disappointed when she refused. Appellant testified to a different version, claiming he did not dare her to take off her underwear, but rather dared her to put a pair of underwear on over her shorts. In his testimony, Appellant contended the dare was not for his sexual gratification but was simply to be "cute" and "fun." Under EH's version of the "dare," we have no reasonable doubt that an uncle daring his 12-year-old niece to take off her underwear is a lewd act.

We are not persuaded by Appellant's argument that EH misunderstood the dare due to her alcohol consumption or was biased by the negative stereotyping of Appellant by other family members.

EH testified to her detailed recollection of the night, including a description of the soju—how it tasted "[l]ike rubbing alcohol" and "burnt [her] entire mouth"—and how many "shots" Appellant poured, which was generally consistent with Appellant's own testimony. Both Appellant and EH testified that the highest breathalyzer reading was .06, which Appellant described as "less than the legal limit" for intoxication, albeit for an adult. Moreover, Appellant testified that EH did not show signs of intoxication. EH did not indicate any inability to recall in her testimony, and in fact testified to the specific wording of the "dare." Finally, there was no direct evidence that EH was aware of the other family members' allegations at the time of the "truth or dare" game or at the time of her disclosure to her mother, JC.

With conflicting testimony between EH and Appellant, the military judge had to make a credibility determination between EH's version of the dare and Appellant's version of the dare. In our review, we find EH's version more credible, particularly in light of the surrounding circumstances in which Appellant first plied EH with numerous shots of soju, which he mixed with ginger ale to make it "easier" for her to keep drinking. Applying appropriate deference to the military judge, who assessed witness credibility firsthand, we are not clearly convinced that the finding of guilty was against the weight of the evidence.

ii) Specification 4 of Charge I – the Truth

In order to convict Appellant of Specification 4 of Charge I, the Government was required to prove: (1)

Appellant committed a lewd act upon EH, by intentionally communicating indecent language to her, to wit: asking what kind of pornography she watches; (2) with an intent to gratify his sexual desires; and (3) EH was a child who had not attained the age of 16 years. *See MCM*, pt. IV, ¶ 62.b.(3); *see also MCM*, pt. IV, ¶ 62.a.(h)(5)(C) (defining "lewd act"); *MCM*, pt. IV, ¶ 62.a.(h)(4) (defining "child").

Appellant admits that he indeed asked EH what kind of pornography she watches. However, Appellant claims that the question was not part of the "truth or dare" game but rather came up in a "wholly different context" when EH was making fun of her brother and cousin who had been caught watching "weird porn." According to Appellant's testimony, he was teaching EH, "don't throw stones, like, don't make fun of them whenever, you know, you do the same thing." On appeal, Appellant argues, "there was nothing inherently improbable in [his] story." Even under Appellant's "story," we have no reasonable doubt that asking his 12-year-old niece what kind of pornography she watches was indecent language with the intent to satisfy his sexual desires.

B. Legal Sufficiency of Specification 3 of Charge I – the Dare

For the first time on appeal, Appellant contends that Specification 3 of Charge I is legally insufficient because it charges indecent *conduct* based on communication of indecent *language*, which Appellant contends is a separate theory of criminal liability for a lewd act.

1. Law

"In most legal sufficiency cases, which we review de novo, the [c]ourt asks 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. Mendoza*, 85 M.J. 213, 217 (C.A.A.F. 2024) (internal quotation marks and citation omitted). The court draws every reasonable inference from the evidence in favor of the prosecution, 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 and citation omitted).

But, as in *Mendoza*, "[t]his case . . . departs from the usual 'reasonable trier of fact' analysis because [the a]ppellant challenges the legal sufficiency of his . . . conviction on . . . unusual grounds." 85 M.J. at 217. Like *Mendoza*, Appellant "argues that his conviction was legally insufficient . . . by conflating two different theories of criminal liability . . . ." *Id.* This is a question of statutory interpretation, which the court reviews de novo. *Id.* at 218.

> The first step in statutory interpretation cases is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. [I]f the statutory language is unambiguous and the statutory scheme is coherent and consistent, the inquiry is done. Whether the statutory language is ambiguous is

> determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.
>
> When we engage in this analysis, the [c]ourt typically seeks to harmonize independent provisions of a statute. To this end, this [c]ourt employs the surplusage canon, which requires that, if possible, every word and every provision is to be given effect and that no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision or to have no consequences.

Id. (first alteration in original) (citation modified).

The relevant statute at 10 U.S.C. § 920b provides:

> (c) SEXUAL ABUSE OF A CHILD.—Any person subject to this chapter who commits a lewd act upon a child is guilty of sexual abuse of a child and shall be punished as a court-martial may direct.
>
> . . . .
>
> (h)(5) LEWD ACT.—The term "lewd act" means—
>
> > (A) any sexual contact with a child;
> >
> > (B) intentionally exposing one's genitalia, anus, buttocks, or female areola or nipple to a child by any means, including via any

> communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person;
>
> (C) intentionally communicating indecent language to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or
>
> (D) any indecent conduct, intentionally done with or in the presence of a child, including via any communication technology, that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

In their arguments, both parties rely heavily on our superior court's opinion in *United States v. King*, 71 M.J. 50 (C.A.A.F. 2012), which predates Article 120b, UCMJ. In *King*, the court reviewed the legal sufficiency of a specification of an indecent act under Article 120(k), UCMJ, *Manual for Courts-Martial, United States* (2008 ed.) (2008 *MCM*). *Id.* The specification at issue in *King* alleged that the accused engaged in an indecent act by requesting that his stepdaughter expose her breasts so that he could view them on a web camera. *Id.* at 51. At the time, Article

120(k), UCMJ, provided that any person who engaged in "indecent conduct" is guilty of an indecent act. 2008 *MCM*, pt. IV, ¶ 45.a.(k). "Indecent conduct," in turn, was defined in part as "that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." 2008 *MCM*, pt. IV, ¶ 45.a.(t)(12). At the time, indecent liberty with a child was also an offense under Article 120(j), UCMJ. 2008 *MCM*, pt. IV, ¶ 45.a.(j). "Indecent liberty" was defined as "indecent conduct, but physical contact is not required. . . . [It] may consist of communication of indecent language as long as the communication is made in the physical presence of the child." 2008 *MCM*, pt. IV, ¶ 45.a.(t)(11).

On appeal, King challenged the legal sufficiency of the specification charging an indecent act. *King*, 71 M.J. at 50. "[T]he crux of King's argument [was] that asking his fourteen-year-old stepdaughter to lift her shirt so that he could see her breasts constituted 'indecent language' and 'indecent language' is not included under the definition of 'indecent conduct.'" *Id.* at 52. The United States Court of Appeals for the Armed Forces (CAAF) noted that "this court has held that 'language' can be, or be part of, 'conduct' in a particular case." *Id.* at 52 n.3 (citing *United States v. Brinson*, 49 M.J. 360, 364–65 (C.A.A.F. 1998)) (concluding that use of coarse language constituted disorderly conduct); *United States v. Littlewood*, 53 M.J. 349, 352, 353–54 (C.A.A.F. 2000) (finding a variety of offenses, including indecent language, to be indecent conduct of a nature to bring discredit upon the armed forces and prejudicial to good order and

discipline); *United States v. Lofton*, 69 M.J. 386, 390 (C.A.A.F. 2011) (holding that sexual comments made by an officer to a female enlisted Airman constituted conduct unbecoming an officer). The court, however, found it "unnecessary to address the . . . issue" of whether the language charged could be "conduct" because it concluded that "at a minimum, the facts support an attempted indecent act." *Id.* at 52–53. In reaching that conclusion, the court reasoned that "King's request was an 'overt act' that constituted 'direct movement toward the commission' of an indecent act. But for his stepdaughter's refusal to lift her shirt, King would have 'view[ed]' his stepdaughter's breasts using the webcam." *Id.* at 52 (alteration in original).

A panel of this court followed *King,* 71 M.J. 50, in considering a similar specification under Article 120(k), UCMJ (2008 *MCM*), where the accused requested a 13-year-old girl send him an image of her breasts. *United States v. Capps*, No. ACM 38160, 2013 CCA LEXIS 842, at *13 (A.F. Ct. Crim. App. 9 Oct. 2013) (unpub. op.). The court noted, "*King* does not stand for the proposition that a request to view a young teenager's breasts via electronic means can *never* constitute a completed indecent act." *Id.* at *13. However, like the CAAF in *King*, the court nonetheless did "not find it necessary to hold that the appellant completed an indecent act" because "[c]onsistent with our superior court's example, we affirm the lesser included offense of an attempted indecent act, which does not change the sentencing landscape." *Id.*

2. Analysis

In relevant part, Specification 3 of Charge I alleges that Appellant committed a lewd act upon EH "by engaging in indecent *conduct*, to wit: *daring* EH to take her pants and underwear off, intentionally done in the presence of EH . . . ." (Emphasis added). Appellant argues that, under the precedent of *King*, the "dare" charged in the specification is "language" and "not conduct itself." According to Appellant, interpreting "conduct" to include language "would render an entire statutory provision superfluous" because the statute "clearly delineates indecent language from indecent conduct." Appellant contends that the misconduct charged in the specification "would be at most an *attempt* to engage in indecent conduct," but unlike *King*, "no lesser included offense is available based on the charging language."[16] The Government counters that, as a panel of this court found in *Capps*, unpub. op. at *13, "*King* does not stand for the proposition that a request . . . can never constitute a completed indecent act." The Government urges this court to find that the "dare" was "conduct" that was a completed offense the moment Appellant communicated his request to EH. In the alternative, the Government requests that we affirm a lesser included offense of "an attempted lewd act via indecent conduct."

We agree with the Government that "at a minimum" we could affirm the lesser included offense of attempt—under the theory that the "dare" was

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[16] Nonetheless, Appellant does concede that "affirming [a lesser included offense] of attempt would not result in a reduction of sentence."

attempted indecent conduct because, but for EH's refusal, Appellant would have seen EH take off her pants and underwear—in line with *King*, 71 M.J. 50, and *Capps*, unpub. op. We also agree with the Government, and as Appellant concedes, that affirming the lesser included offense of attempt would not change the sentencing landscape. However, we find it unnecessary to affirm the lesser included offense of attempt, because we find the specification alleges *completed* indecent conduct—the act of the verbal request itself.

Because the CAAF ultimately found it "unnecessary to address the . . . issue" of whether the language charged in *King* (requesting that his stepdaughter expose her breasts so that he could view them on a web camera) could be "conduct," it does not squarely answer the question before us. We disagree with Appellant's argument that the "dare" charged in the specification could not be "conduct itself." As instructed in *Mendoza*, "our analysis begins, as it must, with the text of the statute." 85 M.J. at 219. The language of subsection (h)(5)(D) of 10 U.S.C. § 920b does not expressly foreclose the Government from proving that Appellant engaged in "conduct" by the act of making a verbal request. Indeed, subsection (h)(5)(D) includes "any" indecent conduct. Looking beyond the specific statutory language and examining "the specific context in which that language is used, and the broader context of the statute as whole," *Mendoza*, 85 M.J. at 218, we believe that Appellant reads subsection (h)(5)(D) too narrowly in excluding the possibility that language may be conduct in a particular case.

The common understanding of "conduct" includes verbal acts. *See Conduct,* BLACK'S LAW DICTIONARY (12th ed. 2024) (defining "conduct" as "[p]ersonal behavior, whether by action of inaction, *verbal* or nonverbal; the manner in which a person behaves; collectively, a person's deeds" (emphasis added)). In line with this common understanding, the CAAF "has held that 'language' can be, or be part of, 'conduct' in a particular case." *King*, 71 M.J. at 52 (citations omitted). We find that the verbal request as charged in the specification amounts to conduct within its common meaning. In making this determination, we heed the CAAF's admonition that "context matters" when evaluating language. *United States v. Avery*, 79 M.J. 363, 369 (C.A.A.F. 2020) (citing *United States v. Green*, 68 M.J. 266, 270 (C.A.A.F. 2010)). The specification does not merely charge language, but instead charges the "dare," which is the verbal act of a challenge.[17] In making the "dare," Appellant was not merely communicating language but rather was actively engaging in "conduct" by making a verbal request to EH to take her shorts and underwear off. In other words, the gravamen of the offense is the act of the verbal request itself (*daring* EH to take off her pants and underwear), not the indecency of the language (pants and underwear). Appellant completed his "conduct" by making the verbal request itself. The fact that EH did not comply with the request does not negate the "conduct" of the request itself.

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[17] The definition of "dare" is "to challenge to perform an action esp[ecially] as a proof of courage." *Dare*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1996).

We also disagree with Appellant's contention that by finding certain "language" in a particular context to be "conduct" we render subsection (h)(5)(C) of 10 U.S.C. § 920b (indecent language) surplusage. While "'language' can be, or be part of, 'conduct' in a particular case," *King*, 71 M.J. at 52, not all language itself is conduct. For example, language communicating a desire, thought, or an observation is unlikely to be conduct. By finding some language—such as the verbal request for EH to take off her pants and underwear—to be conduct does not render subsection (h)(5)(C) "practically devoid of significance" or "relegat[ed] . . . to mere surplusage without any purpose or effect." *Mendoza*, 85 M.J. at 220 (citation omitted).

III. CONCLUSION

The findings as entered are correct in law and fact. Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2024 *MCM*). In addition, the sentence as entered is correct in law and fact, and no error prejudicial to the substantial rights of the 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