IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20200645
Private First Class (E-3) **WILLIS A. GRANT** United States Army Appellant	Tried at Fort Stewart, Georgia, on 19 March and 6 August 2019, and 14 January and 12-13 November 2020, before a general court-martial appointed by Commander, Headquarters and Fort Stewart, Colonels David H. Robertson and Christopher Martin, and Lieutenant Colonel Trevor Barna, military judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Specified Issue

WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY SUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION FOR SPECIFICATION 3 OF CHARGE II.

Statement of the Case

This court received and docketed the case on 19 July 2021. (Referral Letter). Appellant filed his initial brief on 6 February 2022. The government responded on 4 April 2022. Appellant replied on 11 April 2022. This court then specified the above issue on 17 May 2022 and ordered briefs. (Order dated 17 May 2022).

PANEL NO. 3

Additional Facts

In addition to the facts in the Brief on Behalf of Appellant, the following facts are relevant to deciding the specified issue. In February 2018, appellant was living at [redacted] home in Hinesville, Georgia because he and [redacted] were not living together at that time. (R. at 176, 180). During February 2018, [redacted] was in Georgia visiting appellant, and the family went to a movie with friends. (R. at 177). After the movie appellant, [redacted], and [redacted] daughter went back to the [redacted] home. (R. at 178, 180). Appellant and [redacted] went into appellant's room at the [redacted] while [redacted] daughter played video games with appellant's friend "[redacted]" in the next room. (R. at 180).

[redacted] claims that while she and appellant were in appellant's room talking, out of nowhere, appellant "smack[ed] [her] so hard that [she] fell off the bed." (R. at 180–81). She admits they were not even arguing at the time. (R. at 180–81). She also testified that she "screamed", but no one came "rushing in or anything like that." (R. at 181).[1] Contrary to [redacted] testimony, [redacted] testified that he did not hear any kind of violent interaction between [redacted] and appellant that night. (R. at 261).

[1] "[redacted]" did not testify at the court-martial.

Standard of Review

This court reviews factual and legal sufficiency issues de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Craion*, 64 M.J. 531, 534 (Army Ct. Crim. App. 2006).

Law

The test for legal sufficiency is "whether, considering the evidence in a light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003); *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

The test for factual sufficiency is, "whether after weighing the evidence in the record of trial, and making allowances for not having personally observed the witnesses, [this court is] convinced of [appellant's] guilt beyond a reasonable doubt." *Walters*, 58 M.J. at 395. Beyond those allowances, there is no deference to the trial court for factual sufficiency review. *United States v. Billings*, 58 M.J. 861, 867–68 (Army Ct. Crim. App. 2003). Rather, the evidence is given a "fresh, impartial look." *Id.* at 867. This review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and subject to cross-examination. UCMJ, art. 66(c); *United States v. Bethea,* 46 C.M.R. 223, 224–25

(C.M.A. 1973); *see also United States v. Stokes*, 65 M.J. 651 (Army Ct. Crim. App. 2007) (discussing *Bethea*).

"In sum, to sustain appellant's conviction, [this court] must find that the government has proven all essential elements and, taken together as a whole, the parcels of proof credibly and coherently demonstrate that appellant is guilty beyond a reasonable doubt." *United States v. Gilchrist*, 61 M.J. 785, 793 (Army Ct. Crim. App. 2005) (*citing United States v. Roukis*, 60 M.J. 925, 930 (Army Ct. Crim. App. 2005)). The term "reasonable doubt" does not mean that the evidence must be free from conflict. *United States v. Reed*, 51 M.J. 559, 562 (N-M. Ct. Crim. App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). It does, however, mean that the government must prove guilt of every element beyond "an honest, conscientious doubt" and beyond "mere conjecture." R.C.M. 918c, Discussion.

For Specification 3 of Charge II, the government had to prove the following elements:

1) That between on or about 1 February 2018 and on or about 19 February 2018, at or near Fort Stewart, Georgia appellant did bodily harm to [redacted];

2) That he did so by pushing [redacted] in the torso with his hands and slapping [redacted] on the face with his hand; and

3) That appellant did so unlawfully.

(Charge Sheet).

Argument

1. The government's evidence for Specification 3 of Charge II was weak.

As appellant asserted in his matters pursuant to *United States v. Grostefon*, [redacted] never testified to being pushed on her torso during her testimony with regards to this incident. (R. at 181; Appellant's Matters, p. 9 of 19). Moreover, [redacted] testimony was not specific as to where appellant allegedly struck her and whether it was with his open hand or closed hand. (R. at 180–81). All she testified to was a "smack." (R. at 180–81). Even if the panel could find a "smack" can be commonly understood as striking someone with a hand, [redacted] still did not testify to where this "smack" landed on her body. There are just too many variances from the charged language for the panel's finding to be legally and factually sufficient. *See United States v. English*, 79 M.J. 116, 121 (C.A.A.F. 2019). Finally, [redacted] credibility with regard to this incident, specifically, is damaged by her own admission that her daughter and their adult friend "[redacted]" were in the next room, but, inexplicably, did not come running once [redacted] allegedly screamed. (R. at 180, 181). [redacted] also did not hear any violent outbursts between [redacted] and appellant that night. (R. at 261). [redacted] could not even allege a motive for the "smack." While the government does not have to prove motive, the lack of even an alleged motive harms [redacted] credibility with regard to this allegation.

2. [redacted] lack of overall credibility undermines her weak testimony with regard to Specification 3 of Charge II.

The specific deficiencies of proof above, combined with [redacted] demonstrated motive to fabricate, [redacted] being caught in six lies during the court-martial, and her inconsistent statements present more than sufficient reasonable doubt as to whether the government proved Specification 3 of Charge II. (*See* Appellant's Matters, p. 6–9 of 19).

a. [redacted] had a motive to fabricate and/or misrepresent.

[redacted] had a motive to misrepresent her allegations against appellant because of her intent to divorce him. (R. at 220–21). Compounding this intent to divorce appellant was her complimentary desire to receive spousal support (of which transitional compensation is one form). (R. at 309). Finally, it is notable that [redacted] most serious allegations against appellant only arose after he retrieved his car from her on 20 April 2018 after he returned from Korea, leaving her without a vehicle. (R. at 213, 288, 307, 308–11).

b. Defense counsel caught [redacted] in multiple lies.

i. [redacted] lied about showing the photo that later became Pros. Ex. 2 to other people.

On cross-examination, [redacted] insisted she did not show the photo that later became Prosecution Exhibit 2 to anyone other than her mother, her grandparents, [redacted], "[t]he people at Leavenworth," and one girl at work. (R. at 217).

She flatly denied showing other friends. (R. at 217). She even specifically denied showing it to [redacted]. (R. at 218). However, during the defense's case in chief, [redacted] testified that [redacted] showed him the photo that later became Pros. Ex. 2. (R. at 294).

ii. [redacted] *lied about dating other people while separated from appellant.*

On cross-examination, [redacted] claimed she did not see other people romantically while she and appellant were geographically separated. (R. at 212, 213). However, [redacted] testified that he witnessed [redacted] on dates with three people while she was separated from appellant. (R. at 271–72).

iii. [redacted] *lied about when she reported her allegations to CID.*

On cross-examination, [redacted] insisted she never contacted the Army about spousal support, and it was months after appellant took back the car that she reported her allegations to the Army. (R. at 214–15). She could not have been more clear in denying that she did not report this incident to the Army a week after appellant took the car. (R. at 215).

However, Captain [redacted], appellant's company commander, testified that he spoke with [redacted] in early 2018 because she made an inspector general complaint against appellant about nonpayment of spousal support. (R. at 307–09). He also clearly testified that the investigation into the alleged sexual

assaults and physical assaults began 27 April 2018, one week after appellant traveled home to retrieve his car from [redacted]. (R. at 288–89; 310–11).

iv. [redacted] *lied about striking appellant.*

On cross-examination, [redacted] was unequivocal that she did not strike appellant while he attempted to retrieve his car, and, in fact, had never stuck him period. (R. at 213–14). However, [redacted] testified that [redacted] struck appellant when he retrieved his car, and on more than one occasion prior to that. (R. at 293–94). [redacted] even testified that during the car incident, [redacted] struck appellant in the face and backed the car into appellant. (R. at 278, 279). [redacted] also testified that he saw [redacted] "hitting [redacted] in the back" during a group trip to Jekyll Island. (R. at 254).

v. [redacted] *lied about performing oral sex on appellant.*

On cross-examination, [redacted] repeated her accusation that appellant forced her to perform oral sex on him as charged in Specification 3 of Charge I. However, a natural reading of Pros. Ex. 1 shows that she refused to perform oral sex on appellant that night. (R. at 209–10; Pros. Ex. 1).

vi. [redacted] *lied about getting drunk in Savannah.*

On direct examination, [redacted] clearly stated she was not feeling the effects of alcohol on the night out with other couples in Savannah in the spring of 2017. (R.

at 162). However, [redacted] testified that he observed [redacted] on that evening drinking alcohol, and she was visibly intoxicated. (R. at 250).

c. Defense counsel confronted [redacted] regarding inconsistent statements.

In a pre-trial interview, [redacted] first said, on one occasion, she laid down and allowed appellant to have sex with her out of fear. At trial, describing that same incident, she said that appellant held her down. (R. at 199). Also, as discussed above, [redacted] did not testify to any "push" to prove up Charge II, Specification 3. (R. at 181).

Conclusion

Ultimately, this court should find Specification 3 of Charge II legally and factually insufficient due to the weak evidentiary basis, the variances of her testimony from the charged language, and [redacted] overall lack of credibility. Moreover, there is neither a legal basis for *where* appellant allegedly struck [redacted] nor if he did so with an open or closed hand. There is also no evidence that he pushed her *at all* during the incident alleged in this specification.

Therefore, this court set aside the findings with regards to Specification 3 of Charge II as both legally and factually insufficient and reassess the sentence. Alternatively, this court must, at least, strike the words "push [redacted] in the torso with his hands and," "on the face," and "slap" from the finding for Specification 3 of Charge II, substituting therefore, the word "smack" for "slap."

Even if the court opts for this alternative remedy, the court should still reassess the sentence because of the stricken language.[2]

[redacted]

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[2] Appellant's position is that simply dismissing Specification 3 of Charge II is the appropriate remedy because changing modalities can substantially change the nature of the offense. *See English*, 79 M.J. at 121.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on May 31, 2022.

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