IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.	Docket No. ARMY 20220575
Captain (O-3) **ROSS E. DOWNUM,** United States Army, Appellant	Tried at Fort Hood,[1] Texas, on 25 July, 19 August, and 7–10 November 2022, before a general court-martial convened by Commander, Headquarters, 1st Cavalry Division, Steven Henricks and Scott Hughes, military judges, presiding.

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

Assignment of Error I[2]

WHETHER TRIAL COUNSEL'S IMPROPER ARGUMENTS CONSTITUTED PLAIN ERROR.

Assignment of Error II

WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

---

[1] On 2 June 2023, Fort Hood officially changed its name to Fort Cavazos.

[2] The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. Should this court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

Panel No. 3

Assignment of Error III

WHETHER APPELLANT'S CONVICTION IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE THE GOVERNMENT FAILED TO CALL THE TESTING EXPERT OR ADMIT ANY TESTING DOCUMENTS.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court of the United States

Court of Appeals for the Armed Forces

Court of Military Appeals

Service Courts of Criminal Appeals

Statutory Provisions

Uniform Code of Military Justice

Other Authorities

Statement of the Case

On 9 November 2022, an officer panel, sitting as a general court-martial, convicted appellant, contrary to his plea, of one specification of wrongful use of a controlled substance, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912 (2019) [UCMJ]. (R. at 617; Statement of Trial Results [STR]). The military judge sentenced appellant to be reprimanded, to forfeit $1,000 pay per month for one month, and to be restricted for thirty days to the limits of Fort Hood, Texas. (R. at 678; STR). On 13 December 2022, the convening authority reduced the portion of the sentence restricting appellant to Fort Hood, Texas.[1] (Action). On 16 January 2023, the military judge entered judgment. (Judgment).

Statement of Facts

Appellant spent Labor Day weekend, 3–5 September 2021, in Austin with his two friends, [redacted] and [redacted], drinking on [redacted]'s boat, and going to a local bar called Buford's. (R. at 363–64). On Sunday, 5 September 2021, appellant totaled his vehicle when he fell asleep at the wheel driving home to Belton from Austin. (R. at 365). Appellant was excused by his supervisor, the S3, from work that week in order to purchase a new vehicle. (R. at 366). On Wednesday, 8 September 2021,

[1] The convening authority reduced the "portion of the sentence of restriction by restricting the accused to Fort Hood and Bell County." (Action).

there was a 100 percent urinalysis [UA] formation. (R. at 366). That morning, appellant was notified of the UA via a group text message that included officers and senior noncommissioned officers [NCO]. (R. at 366). Appellant was excused from the UA in order to go car shopping. (R. at 382).

On Saturday, 11 September 2021, appellant returned to Austin to spend time with [redacted] and [redacted] for [redacted]'s birthday. (R. at 387–89). Appellant spent the day on [redacted]'s boat, drinking alcohol, listening to music, and talking with friends. (R. at 389, 391). Appellant then ate a meal with [redacted] and [redacted], before going to Buford's bar. (R. at 392). At Buford's, [redacted] had arranged a special area of the bar where the group would receive bottle service for his birthday. (R. at 392–93). Appellant was drinking cocktails that he mixed himself throughout the night. (R. at 394).

At trial, appellant testified that the following occurred: appellant made himself a new Red Bull and vodka, took one sip, put it down on the table where he was sitting, and went to the bathroom. (R. at 396). Upon returning from the bathroom, appellant picked up his drink, took "a pretty good sip" and then "tasted something unfamiliar." (R. at 396). He then looked at his glass and "noticed that there was some type of substance in it." (R. at 396). Appellant thought somebody poured salt in his drink as a joke. (R. at 396). Appellant said the substance in his glass was white. (R. at 396). When asked to describe the texture appellant replied, "it wasn't, like you take a sip of something that you think is a liquid, it was not a

liquid. I don't want to say it was salt because it was too fine to be salt or even sand or something like that." (R. at 397). Appellant said he first noticed the taste and texture. (R. at 397). However, appellant later stated that there was no difference to the taste. (R. at 401). Appellant stated he looked towards [redacted] and gestured nonverbally, "what is this?" (R. at 399, 412). Appellant then stated he set the drink down, turned to [redacted], and "plainly asked him if he saw anybody mess with my drink while [he] was at the bathroom." (R. at 400). Appellant said he put the drink down and stopped drinking after that point. (R. at 400).

Appellant testified on direct that he did not bring up the substance in his drink again to either [redacted] or [redacted] because he thought it was a "bad joke." (R. at 401). However, appellant then stated that over the "next couple of days" he thought more about how "peculiar" the incident was and started to suspect that someone drugged him. (R. at 401, 403). The day after the UA, appellant said that the incident was "screaming in the back of [his] mind" to the point that he felt obligated by his personal morals to come forward to his company commander. (R. at 403–04, 416). On cross examination, appellant confirmed that he never brought up the incident again to either [redacted] or [redacted]. (R. at 414).

Mr. [redacted] recalled the evening similarly to appellant. (R. at 429–34). However, [redacted] did not recall appellant approaching him or asking him any questions about someone putting something in his drink. (R. at 435). Mr. [redacted] stated, "It

seems like I would have remembered that." (R. at 435). Later on in [redacted]'s direct, defense counsel asked [redacted] once again about appellant approaching him about something in his drink. (R. at 438). Trial counsel objected on the basis that the question was asked and answered. (R. at 438). Defense counsel proffered to the court that, "based on my prior interview of this witness, I think I might not have asked the question specifically . . . I'd like a little latitude." (R. at 438). Mr. [redacted] stood by his original statement that he did not remember appellant directly asking him about his drink. (R. at 438). Defense counsel again asked whether [redacted] did not recall the details or the conversation at all, and [redacted] replied, "I don't recall a conversation at all." (R. at 438–39).

Mr. [redacted] did not notice any difference in appellant's behavior or demeanor based on his prior observations of appellant. (R. at 436–37). Appellant did not testify that he felt the effects of the drug. Mr. [redacted] was sober that evening because he was the designated driver. (R. at 441). Appellant, [redacted], and [redacted], all testified that they believed there was frequent drug use at Buford's. (R. at 408, 443, 473).

Mr. [redacted] recalled appellant making a hand gesture to him at some point in the evening but did not know what appellant was referencing. (R. at 474–75). Mr. [redacted] said there was a good chance they discussed the incident afterwards, but he has no recollection of any such conversation. (R. at 476, 483). Mr. [redacted] did recall appellant calling him later that week and telling him that he tested positive for

cocaine. (R. at 483). Mr. [redacted] was unsure exactly when this call occurred. (R. at 484).

On Monday, 13 September 2021, appellant was notified that he would be providing a sample for the UA that he had previously missed on 8 September 2021. (R. at 385). Appellant testified that he had no prior "heads up" or "clue" that there was going to be a make-up UA on Monday, 13 September 2021. (R. at 385). However, based on his "past observations" missing personnel were "generally" called upon to take the make-up UA when they were present. (R. at 385).

Staff Sergeant [SSG] [redacted] was the unit prevention leader [UPL] in charge of UA testing who conducted the UA on 13 September 2021 for appellant. (R. at 209, 211). When asked about the unit's policy for make-up UAs, SSG [redacted] replied, "It depends." (R. at 212). He elaborated that if multiple personnel missed a test, then the commander would have a majority of those personnel come in on a "certain date." (R. at 212). No person testified to any policy that would require personnel to come in and test on their first duty day back after missing a UA—in fact, SSG [redacted]'s testimony suggested the opposite. (Appellant's Br. 16). SSG [redacted], when asked, "if you miss the UA, you wouldn't know if you were going to take it the day you got back or two weeks later," replied, "Correct." (R. at 260). SSG [redacted] testified to the authenticity of the Alpha Roster showing appellant's urine sample

was the one that was provided to Tripler for testing. (Pros. Ex. 2; R. at 215–17, 243).

Dr. [redacted] testified as an expert in forensic toxicology and drug testing. (R. at 282). Dr. [redacted] is the technical director of Tripler Army Medical Center [Tripler], and although she was not the expert who conducted the testing on appellant's sample, she was familiar with the findings and oversaw the process. (R. at 312, 318). Appellant's UA sample was received on 15 September 2021 and not opened by the processing technician until 2 October 2021. (R. at 306). As the record custodian and director, Dr. [redacted] testified as to the chain of custody of appellant's sample. (R. at 306–08). Dr. [redacted] was familiar with appellant's specific case because she reviewed all the physical evidence associated with his testing and came to her own conclusion that appellant's urine sample tested positive for cocaine. (R. at 318–20).

Assignment of Error I

WHETHER TRIAL COUNSEL'S IMPROPER ARGUMENTS CONSTITUTED PLAIN ERROR.

Standard of Review

"When the accused objects to an improper argument during his court-martial, [this court] review[s] the issue de novo." *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021). If the accused fails to object during the court-martial, this court reviews the matter for plain error. *Id.* Under this standard, appellant has

the burden of establishing "(1) there was error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *Id.* (quoting *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011) (cleaned up).

Additional Facts

During opening statements, defense counsel explained that appellant's actions and statements following his alleged accidental ingestion were exculpatory: "He thinks somebody is just messing with him, putting something in his drink . . . . But he has no explanation from either one of his friends. So . . . he does what a good officer should do. He tells those over him. . . . [H]e's doing as you would expect a proper Army Captain to do, to keep his chain of command informed." (R. at 204–05). During appellant's direct examination, he explained that after his alleged accidental ingestion he turned to two different friends to ask them if someone put something in his drink. (R. at 397–99). He later stated on direct that he went to his company commander out of an obligation based on his "personal morals." (R. at 403, 405). Defense echoed this theme during closing argument: "if its drugs, how do you und[o] that, you don't. You just tell your boss, which is what he did." (R. at 595).

During closing argument, trial counsel argued that appellant's actions and statements were not exculpatory, but rather indicative of guilt. (R. at 577–78). "He didn't go to Mr. [redacted] and ask him if he had put anything in his drink that

night. He just shrugged at him from across the table . . . . He didn't bring it up to his chain of command until the day after his urinalysis. He didn't even try to figure out what happened when he was notified several weeks later that he had tested positive for cocaine . . . . And why would he have not inquired into how he could have tested positive, because he knew he was going to test positive, because he knowingly used cocaine that weekend."[2] (R. at 577–78).

Law & Argument

"Improper argument is one facet of prosecutorial misconduct." *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017). Such misconduct is defined as behavior that "oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005) (quoting (*Berger v. United States*, 295 U.S. 78, 84 (1935)). "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.'" *Norwood*, 81 M.J. at 19 (quoting *United States v. Andrews*, 77 M.J. 393,

[2] Defense counsel did not object during the government's closing argument. The Civilian Defense Counsel did request to reopen its case-in-chief to recall Dr. [redacted] as a witness. (R. at 584-86). The military judge did not approve this request. (R. at 586).

401–02 (C.A.A.F. 2018). The misconduct must actually impact a substantial right of the appellant. *Fletcher*, 62 M.J. at 178.

"[A] material prejudice to the substantial rights of the accused occurs when an error creates 'an unfair prejudicial impact on the [court members'] deliberations.' In other words, the appellant 'must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different.'" *Id.* (quoting *United States v. Lopez*, 76 M.J. 151, 154 (C.A.A.F. 2017) (cleaned up). In assessing prejudice this court looks to three factors: "(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. "[T]he third factor [alone] may so clearly favor the government that the appellant cannot demonstrate prejudice." *Id.* (quoting *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017)).

In *United States v. Baer*, the CAAF provided the following framework: "the argument by a trial counsel must be viewed within the context of the entire court-martial. The focus of our inquiry should not be on words in isolation, but on the argument as 'viewed in context.'" 53 M.J. 235, 238 (C.A.A.F. 2000) (quoting *United States v. Young*, 470 U.S. 1, 16 (1985)). "[I]t is improper to 'surgically carve' out a portion of the argument with no regard to its context." *Id.* "To turn a criminal appeal into a quest for error no more promotes the ends of justice than to

acquiesce in low standards of criminal prosecution." *Id.* (quoting *Johnson v. United States*, 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring).

Trial counsel's argument was not improper, but a fair commentary on the evidence that came out at trial. Appellant's assertions of improper argument fail to view the argument within the context of the trial. Appellant failed to consider or address 1) the fact that appellant put his actions and statements at issue when appellant introduced and argued that his statements and actions corroborated his innocence; and 2) that there are reasonable interpretations from the evidence that contradict appellant's theory of the case. Appellant's failure to object during argument constituted forfeiture. Under a plain error analysis, even if this court were to find some of trial counsel's arguments were erroneous, they were not plain and obvious, and appellant cannot show material prejudice.

1. Trial counsel's arguments commenting on appellant's inaction were proper.

"In order to determine whether or not comments are fair, 'prosecutorial comment must be examined in context.' Such analysis invokes the 'invited response' or 'invited reply' rule." *United States v. Gilley*, 56 M.J. 113, 121 (C.A.A.F. 2001). Contrary to the assertions in appellant's brief, trial counsel's arguments regarding appellant's actions and behavior after his UA were fair commentary on the evidence and a fair rebuttal of appellant's theory of the case.

(Appellant's Br. 13–15). Appellant put his actions and statements after his alleged accidental ingestion at issue when he made it a central theme of his defense.

For example, defense counsel first introduced this theme during his opening statement: "He thinks somebody is just messing with him, putting something in his drink . . . . But he has no explanation from either one of his friends. So . . . he does what a good officer should do. He tells those over him. . . . [H]e's doing as you would expect a proper Army Captain to do, to keep his chain of command informed." (R. at 204–05). During appellant's direct examination, he explained that after his alleged accidental ingestion he turned to two different friends to ask them if someone put something in his drink. (R. at 397–99). He later stated on direct that he went to his company commander out of an obligation based on his "personal morals." (R. at 403, 405). Defense echoed this theme during closing argument: "if its drugs, how do you und[o] that, you don't. You just tell your boss, which is what he did." (R. at 595).

In *United States v. Robinson*, the Supreme Court held that where defense counsel put appellant's failure to testify at issue, the government did not violate the accused's rights when they commented on the accused's decision not to testify. 485 U.S. 25, 26 (1988). In *Robinson*, the Court clarified that although it is "improper for either the court or the prosecutor to ask the jury to draw an adverse inference from a defendant's silence[,] . . . [the court did not believe that] the

protective shield of the Fifth Amendment should be converted into a sword that cuts back on the area of legitimate comment by the prosecutor on the weaknesses in the defense case." 485 U.S. at 32 (quoting *United States v. Hastings*, 461 U.S. 499, 515 (1983) (Stevens, J. concurring). The CAAF has adopted this principle as the invited "reply rule." *Gilley*, 56 M.J. at 121 (holding that when the argument was "viewed within the context of the entire trial, defense counsel's comments 'clearly invited the reply'"). Appellant's case is analogous. At trial, appellant asserted his actions and statements corroborated his innocence. (R. at 204–05; 400, 403, 405). It was a fair and "legitimate comment" for the trial counsel to argue that appellant's actions and inactions actually showed he knowingly used cocaine. (R. at 607–08).

Appellant compares his case to ones in which the government directly commented on appellant's right to remain silent to police questioning. (Appellant's Br. 6–8). Not only are *United States v. Clark* and the other cases cited for the same proposition distinguishable, but *Clark* expressly acknowledges that a general exception is when an appellant "otherwise invites the evidence." 69 M.J. 438, 445 (C.A.A.F. 2011) (citing *Robinson*, 485 U.S. at 32–34). In *Clark*, the government repeatedly commented on appellant's silence in response to accusatory statements by officers during his arrest. 69 M.J. at 443 (finding that although this argument was improper, the impact was harmless beyond a reasonable doubt).

That is a far cry from what occurred here. Trial counsel's argument—appellant failed to follow-up with his friends or his command after the UA results—was a fair reply to defense's assertion in their opening that after not getting a sufficient response from his friends, he "was doing as you would expect a proper Army Captain to do, to keep his chain of command informed." (R. at 204–05).

In *Clark*, the court specifically stated that "this is *not* a scenario where Appellant testified to making an exculpatory statement to the police after his arrest, when in fact he did not." 69 M.J. at 447 (emphasis added). Here, that is exactly what occurred. The government rebutted appellant's assertion that he behaved in an exculpatory manner by "challeng[ing] the defendant's testimony as to his behavior following [the suspicion of a crime]." *Id.* (quoting *Gilley*, 56 M.J. at 120).

Importantly, in *Clark*, the CAAF distinguished testimonial evidence from nontestimonial evidence, holding that testimonial evidence, or evidence that is in response to police questioning, generally is inadmissible under the Fifth Amendment. 69 M.J. at 444–45. Here, however, there is no suggestion that appellant's failure to follow-up with his friends or his command were testimonial in nature. Lastly, in *Clark*, defense counsel objected to at least part of trial counsel's argument, partially preserving the error, which is not the case here. *Id.*

"It is one thing to hold, as [the Supreme Court] did in *Griffin*, that the prosecutor may not treat a defendant's exercise on his right to remain silent at trial as substantive evidence of guilt; it is quite another to urge, as defendant does here, that the same reasoning would forbid the prosecutor from fairly responding to an argument of the defendant by adverting to that silence." *Robinson*, 485 U.S. at 34.

2. Trial counsel did not burden shift.

Likewise, appellant's assertion that trial counsel's argument constituted burden shifting is without merit. (Appellant's Br. 15). The trial counsel's argument cannot be characterized as burden shifting when the government is appropriately replying to an assertion that appellant's statements and actions were exculpatory. Contrary to appellant's arguments on appeal, *United States v. Carter* is not analogous to this case. 61 M.J. 30 (C.A.A.F. 2005). In *Carter*, trial counsel "repeatedly made the comments in the context of Appellee's decision not to testify." *Id.* at 34. As the CAAF noted in *Carter*, "Trial counsel may not argue that the prosecution's evidence is unrebutted if the only rebuttal could come from the accused." *Id.* at 33. Here, not only did appellant testify, but his defense relied, in part, on his alleged exculpatory actions and statements immediately following his misconduct. (R. at 205, 595, 597).

Appellant attempts to analogize his case with *Carter* to suggest that the government's actions constituted plain error by shifting the burden. However, *Carter* expressly acknowledged:

> It is well established that the government may comment on the failure of a defendant to refute government evidence or to support his own claims. A constitutional violation occurs only if either the defendant alone has the information to contradict the government evidence referred to or the jury naturally and necessarily would interpret the summation as comment on the failure of the accused to testify.

Id. at 33 (quoting *United States v. Coven*, 662 F.2d 162, 171 (2d Cir. 1981).

Unlike *Carter*, this is a case where the appellant invited a reply from the government by putting his actions and statements at issue.[3] *Id.* He testified and was appropriately subject to cross examination regarding his actions and inactions following his suspicion of wrongdoing. (R. at 413, 415). Moreover, the trial counsel's arguments were "tailored" to the defense's argument that appellant's actions and statements following his alleged accidental ingestion were exculpatory. *Compare* R. at 577, *with Carter*, 61 M.J. at 34 ("[T]rial counsel's comments were not tailored to address any weaknesses in the defense's cross-examination of [the victim]."). In sum, not only is appellant's case distinguishable from the case law

[3] Trial counsel's comment on appellant's inconsistencies and implausible story likewise did not constitute burden shifting. (Appellant's Br. 15). The government did not rest on those inconsistencies alone (R. at 575), and unlike the cases cited by appellant, the appellant actually testified in his court-martial. (R. at 407–17).

cited in his brief, but his case is analogous to the very exceptions recognized by the case law he cited. Accordingly, this court should affirm.

3. Trial counsel's argument did not go beyond the evidence.

At trial, defense counsel argued that appellant knew he would be subject to a UA on his first day back to duty, and thus any suggestion that he knowingly ingested cocaine on 11 September was not reasonable. (R. at 587). During closing, defense counsel mischaracterized SSG [redacted]'s testimony, asserting that he was "unequivocal" that "everybody knew and was informed that you would do a [UA] afterwards, soon there afterwards, if you missed 100 percent." (*compare* R. at 587, *with* R. at 260 ("Q. So, if you miss the UA, you wouldn't know if you were going to take it the day you got back or two weeks later? A. Correct.").

On appeal, appellant similarly bases his assertion on a faulty premise unsupported by the record—"*All the evidence* presented at trial supported the conclusions that this was, in fact, the SOP within the unit." (Appellant's Br. 16). Rather, the evidence suggested that there was no specific standard of procedure [SOP] regarding make-up UAs, merely that people would eventually take a make-up and that was at the discretion of the commander and the availability of the personnel. (R. at 258–60).

Trial counsel's comment—"Generally, after a 100 percent UA even if you've been excused for a valid reason, you know that you won't be tested again

for some time"—was a fair argument based on SSG [redacted]'s testimony. (*Compare* R. at 581, with R. at 260 (Q. "How long, generally, after somebody's missed a hundred percent do you try to schedule their make up? A. So again, it varies depending on when the first sergeant or commander wants to get the person over there coming back from whatever their reason was.")). Even appellant's own testimony on direct created a reasonable inference that appellant did not believe he would immediately be taking a make-up UA upon return to duty—"from my observations, if you miss a 100 percent [UA] . . . you're going to make up for it at *some point*." (R. at 382) (emphasis added). At "some point" could mean upon his return to duty or it could mean in a few weeks or a few months.

Appellant admitted that he had no foreknowledge of a make-up UA or a unit SOP that would require him to take the UA immediately upon returning to duty. "Q. Okay. Did you have any heads up there was going to be another [UA] other than when you received the screenshot on Monday? A. Negative, sir." (R. at 385). It was not until defense counsel asked appellant for a third time, "Okay. So, you had no clue that there was going to be a [UA] after the 8th?" when appellant recalled his "past observations" that "generally" personnel were recalled "the duty day they were present." (R. at 385). Not only was this opinion *not* based on his particular unit's SOP, but it was ostensibly based on his time in the military "generally"—the same general perspective that he now contends was an improper

basis for the panel to consider when weighing his credibility. (R. at 385; Appellant's Br. 16). In other words, appellant plainly put the practical function of the Army's UA testing procedures—generally—at issue for the panel to consider when determining the reasonableness of his actions.

3. The argument was based on common knowledge within the community.

Even if this court were to find that trial counsel asked the panel to consider matters outside of the evidence introduced at trial, this argument represents an exception to that general rule. Although "a court-martial must reach a decision based only on the facts in evidence . . . . [t]here is, however, an exception to this general rule. *Fletcher*, 62 M.J. at 183 (citing *United States v. Bouie*, 9 C.M.A. 228, 233 (C.M.A. 1958)). The CAAF has held that it is proper for a trial counsel to comment during argument on "contemporary history or matters of common knowledge within the community." *Id.*

"In the past, 'common knowledge' has included 'knowledge about routine personnel actions,' *United States v. Stargell*, 49 M.J. 92, 94 (C.A.A.F. 1998); knowledge of ongoing military actions overseas, *United States v. Meeks*, 41 M.J. 150, 158-59 (C.M.A. 1994); knowledge of the Navy's 'zero tolerance' policy for drug offenses, [*United States v. Kropf*, 39 M.J. 107, 108–09 (C.A.A.F. 1994)]; the existence in the United States of a 'war on drugs,' *United States v. Barrazamartinez*, 58 M.J. 173, 175–76 (C.A.A.F. 2003); and any other matter

'upon which men in general have a common fund of experience and knowledge, through data notoriously accepted by all.'" *Fletcher*, 62 M.J. at 183. In *United States v. Murphy*, the Court of Military Appeals acknowledged that the UA program and its design generally is a "common experience in the military." 23 M.J. 310, 311 (C.M.A. 1987).

Here, the government's argument asked panel members to consider something that can only be fairly described as a "routine personnel action." *Fletcher*, 62 M.J. at 183. The government asked panel members to use their general experience in the military with UAs to conclude that appellant did not reasonably believe he was going to be subject to a UA immediately upon his return to duty. (R. at 581–82). This was in accordance with the military judge's instruction to the panel. (R. at 573). Ultimately, not only was this a reasonable conclusion based on the testimony of SSG [redacted] and appellant, but it was also a matter upon which the panel members had "a common fund of experience and knowledge." *Fletcher*, 62 M.J. at 183.

4. Trial counsel's argument did not disparage appellant or his counsel.

Appellant asserts that trial counsel's repeated use of the term "the defense wants you to believe . . . disparaged appellant, his counsel, and his defense, suggesting that the defense was trying to deceive the panel." (Appellant's Br. 21). Appellant concludes that this improperly commented on the motives of counsel

and created the danger of turning the trial into a popularity contest. (Appellant's Br. 21).

Trial counsel's prefatory statement that "defense wants you to believe" is a far cry from what the court warned of in *Fletcher*. In *Fletcher*, "trial counsel referred to [the appellants] arguments as 'fiction' at least four times and called one of [the appellant's] arguments a 'phony distraction.' 62 M.J. at 183. She also called the defense case "that thing they tried to perpetrate on you." *Id.* at 182. The CAAF found that ultimately "*when combined* with the erroneous comments made about defense counsel's style, the trial counsel's other comments disparaging defense counsel constitute error that was plain and obvious." *Id.* (emphasis added). However, the Court found that although language characterizing appellant as a liar was improper, it was not plain and obvious error and did not merit relief. *Id.*

Here, even if this court were to impute the malintent appellant suggests, these statements do not amount to plain and obvious error warranting relief. Rather, they are far more akin to the comments that the CAAF expressly found were improper, but not plain and obvious error. *Id.* ("Although the trial counsel should have avoided characterizing Fletcher as a liar and confined her comments instead to the plausibility of his story, her comments were not so obviously improper as to merit relief in the absence of an objection from counsel.").

3. There was no material prejudice to appellant's substantial rights.

Appellant has not shown "a reasonable probability that, but for the error, the outcome of the proceeding would have been different.'" *Id.* (quoting *United States v. Lopez*, 76 M.J. 151, 154 (C.A.A.F. 2017) (cleaned up). Appellant cannot show such a material prejudice for two reasons. First, even if there was some error with trial counsel's argument, it was not severe. *E.g.*, *Fletcher*, 62 M.J. at 182 (finding that characterizing appellant as a liar was improper, but did not amount to plain error or merit relief); *Gilley*, 56 M.J. at 123 ("[T]he lack of defense objection is relevant to a determination of prejudice because the lack of a defense objection is some measure of the minimal impact of a prosecutor's improper comment.") (citations omitted). Second, as discussed *infra*, the weight of the evidence supporting the conviction so clearly favors the government that appellant cannot demonstrate prejudice. *Sewell*, 76 M.J. at 18. In sum, even if this court finds that the argument was improper, this court should find that relief is not warranted because there is not a reasonable probability that, but for the error, the outcome of the proceeding would have been different.

Assignment of Error II

WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Standard of Review

This court reviews allegations of ineffective assistance of counsel de novo. *United States v. Furth*, 81 M.J. 114, 117 (C.A.A.F. 2021).

Additional Facts

1. Appellant's defense at trial.

At trial, defense counsel spent significant time on a study where a scientist ingested twenty-five milligrams of pure cocaine (the equivalent of 1/40th of a sweet and low packet) and recorded 360 nanograms per milliliter in his urine 48-hours after ingestion. (R. at 329–30). Defense counsel argued that this study suggested a very small amount of cocaine in appellant's drink could have been the cause of appellant's positive UA. (R. at 589–90).

However, this study was done using one single test subject, there was no accounting for weight/size/age or other idiosyncrasies, and it was done using one-hundred percent pure cocaine without any evidence that the cocaine was mixed with a cup full of liquid. (R. at 328, 330–31, 340). Dr. [redacted] testified that the cocaine normally found on the street was not pure but cut with various substances. (R. at 341). Additionally, appellant testified that he allegedly noticed the substance in his drink due to the dramatic difference in texture and only took one sip of a drink that was nearly full. (R. at 396–97). Dr. [redacted] testified that the amount of cocaine in appellant's system was nearly exactly the median amount that was

found in all the subjects who tested positive in 2021—negating a theory that appellant had a uniquely low amount of cocaine in his system. (R. at 337). The argument made by defense counsel was that the science corroborated that appellant may have accidentally ingested a small amount of cocaine resulting in his positive UA. (R. at 589–90).

2. Appellant's sworn declaration.[4]

In appellant's sworn declaration, he states the following: 1) "[he] was aware that [the interviews with [redacted] and [redacted] were] recorded," but "did not listen to the recording;" 2) "[d]uring the course of appellate review, [he] learned that [[redacted]] had stated during the audio-recorded pre-trial interview that he *did not* recall [appellant] mentioning anything about [his] drink;" 3) he was copied on an email exchange where his trial defense counsel denied any knowledge that [redacted] would contradict him; 4) his trial defense counsel never responded to requests for the recordings; and 5) if he had known that [redacted] was going to contradict him, "that definitely would have factored into [his] decision to testify at court-martial." (Def. App. Ex. A).

[4] App. Ex. A is titled "Affidavit". However, it is better characterized as a declaration.

Law & Argument

Military courts evaluate ineffective assistance claims using the Supreme Court's framework from *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* "Under *Strickland*, an appellant bears the burden of demonstrating that (a) defense counsel's performance was deficient, and (b) this deficient performance was prejudicial." *Id.* (quoting *Strickland*, 466 U.S. at 687).

"With respect to the first prong of this test, courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) (quoting *Strickland*, 466 U.S. at 689, 694). This presumption can be rebutted by "showing specific errors that were unreasonable under prevailing professional norms." *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001) (citations omitted).

"[A]s to the second prong, a challenger must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." *Captain*, 75 M.J. at 103. A reasonable probability is one "sufficient to undermine confidence in the outcome." *Strickland*, 466 M.J. at 694. In other words, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). "The benchmark for judging any claim of ineffectiveness must be whether

counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

Appellant has failed to overcome the strong presumption that his counsels' conduct was reasonable under prevailing professional norms because 1) appellant's declaration lacks critical details, is speculative, and fails to provide documents or evidence substantiating his claims, and 2) it is clear from the record that the trial defense counsel was understandably surprised by [redacted]'s response to his question based on his reference to his prior interview with the [redacted]. However, even if [redacted]'s testimony was the result of counsels' deficiency, it cannot be said to have had a substantial impact on the proceeding. *See Captain*, 75 M.J. at 103 (stating that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed") (cleaned up). Appellant merely speculates that knowledge of [redacted]'s testimony would have "factored in" to his decision to testify, failing to establish a substantial likelihood of a different result. *Richter*, 562 U.S. at 112. Additionally, the defense's theory for accidental ingestion was highly improbable and the evidence against appellant was overwhelming.[5]

[5] If this court "finds that allegations of ineffective assistance and the record contain evidence which, if unrebutted, would overcome the presumption of competence"

1. Appellant's declaration

When challenging the performance of counsel, the appellant bears the burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance. *See United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). This court "need not determine whether any of the alleged errors [in counsel's performance] establish[] constitutional deficiencies under the first prong of Strickland . . . [if] any such errors would not have been prejudicial under the high hurdle established by the second prong of Strickland." *United States v. Saintaude*, 61 M.J. 175, 183 (C.A.A.F. 2005).

In appellant's declaration he alleges the following: 1) "[he] was aware that [the interviews with [redacted] and [redacted] were] recorded," but "did not listen to the recording;" 2) "[d]uring the course of appellate review, [he] learned that [[redacted]] had stated during the audio-recorded pre-trial interview that he *did not* recall [appellant] mentioning anything about [his] drink;" 3) he was copied on an email exchange where his trial defense counsel denied any knowledge that BL would contradict him; 4) his trial defense counsel never responded to requests for the recordings; and 5) if he had known that [redacted] was going to contradict him, "that

---

then the government would respectfully request that this court order "a response from trial defense counsel in order to properly evaluate the allegations" in accordance with *United States v. Melson*, 66 M.J. 346, 350¬51 (C.A.A.F. 2008).

definitely would have factored into [his] decision to testify at court-martial." (Def. App. Ex. A).

Appellant asserts that his defense counsel were deficient because the defense called a witness, [redacted], who impeached appellant's testimony on direct examination, and knowing this would "have factored into [his] decision to testify." (Appellant's Br. 30; Defense App. Ex. A). Although [redacted] testified that he had no recollection of the conversation with appellant and that it is likely one he would have remembered (R. at 435), defense counsel asserted on the record that the witness's response differed from his "prior interview." (R. at 438). Appellant asserts in his sworn declaration that his defense counsel's assertions on the record were untrue but fails to elaborate how he knows the contents of recorded interviews between the witness and his defense counsel or provide any substantiating documents or evidence.

Appellant's assertions lack critical details and substantiating documents that appellant allegedly had access to when drafting his declaration. Appellant's declaration does not elaborate on how he knew the interviews were recorded; or how he knows the contents of the recordings if he never listened to them. Additionally, appellant failed to include the email communications that allegedly corroborate his claims. *See United States v. Gunderman*, 67 M.J. 683, 687 (Army Ct. Crim. App. 2009) ("In addition, appellant should provide additional supporting documents to substantiate those claims raised in appellant's submissions."); *see*

also United States v. Gosser, 64 M.J. 93, 98 (C.A.A.F. 2006) (criticizing the appellant's prejudice arguments for failing to provide any substantive evidence "from persons with direct knowledge of the pertinent facts"); *United States v. Bush*, 68 M.J. 96, 100-01 (C.A.A.F. 2009) (rejecting claims of prejudice from posttrial delay for appellant's failure to provide independent corroborating evidence). Therefore, even if this court grants appellant's motion and considers his declaration, it should be given little weight. *See Gosser*, 64 M.J. at 98.

2. Any claim of prejudice is speculative.

Importantly, the ultimate impact of this alleged deficiency is highly speculative considering all of this merely would have "factored in to [appellant's] decision to testify." Assuming appellant's assertions are true, this merely would have been one factor that he considered in his decision to testify. Appellant does not say that he would *not* have testified, nor does he allege that the government would have been unable to bring in his prior statements to his company and battalion commanders. (R. at 403; MFR, 20 Apr. 2022; MFR, 14 Sep. 2021). Ultimately, appellant fails to establish that the absence of his in-court testimony would have had a substantial likelihood of impacting the proceedings. *Richter*, 562 U.S. at 112 ("The likelihood of a different result must be substantial, not just conceivable."). Appellant's "conclusory argument" that he was prejudiced and thus the impact on the trial was substantial is "legally inadequate" and insufficient

to meet his burden of prejudice. *United States v. Ginn*, 47 M.J. 236, 247 (C.A.A.F. 1997).

3. Assuming ineffective assistance, appellant has not shown prejudice.

A. Appellant's theory was implausible.

Appellant's theory of innocence was that an unknown person spiked his drink with such a large quantity of cocaine that a single sip caused him to test positive for cocaine approximately thirty-six hours later. (R. at 204–06). Appellant was locked into this narrative because he told his company commander this story several hours after taking his UA. (R. at 405). The evidence that appellant had cocaine in his system, coupled with his implausible story, left the panel without any reasonable doubt that appellant knowingly used cocaine.

B. The panel was properly instructed.

The panel was properly instructed regarding appellant's innocent ingestion defense. (R. at 568) ("[I]gnorance, no matter how unreasonable it might have been, is a defense and deciding whether the accused was ignorant of the fact he actually knew he used cocaine, you should consider the probability or improbability of the evidence presented on this matter."). Even if appellant had not testified, he had made numerous statements to his chain of command that the government could have admitted in place of his testimony. (Memorandum for Record [MFR], 20 Apr. 2022; MFR, 14 Sep. 2021); *see also United States v.*

Quezada, 82 M.J. 54, 59 (C.A.A.F. 2021) ("[A] false exculpatory statement also may provide relevant circumstantial evidence, namely, evidence of a consciousness of guilt.").

C. Appellant's statement to [redacted] was highly inculpatory.

Additionally, although [redacted] equivocated on redirect examination as to the timing, he initially testified that appellant called him later that week and told him he tested positive for cocaine. (R. at 483). According to Dr. [redacted], appellant's test results would not have been tested until several weeks later. (R. at 306). Thus, appellant would not have known the substance was cocaine at that time unless he had knowingly ingested it. Trial counsel argued this in closing. (R. at 579).

D. The probative value of [redacted]'s testimony was low.

Appellant implies that a single exculpatory hearsay statement made by appellant and recalled by his friend was the crux of this case. It was not. Had [redacted] corroborated appellant's account that would have had minimal probative value to begin with. [redacted]'s failure to recall appellant's alleged exculpatory hearsay statement did not corroborate appellant's testimony, but it certainly was not outcome determinative. Appellant asserts that because trial counsel forcefully argued this inconsistency in closing argument, it was highly prejudicial. (Appellant's Br. 32). In *United States v. Morrison*, 98 F.3d 619, 625 (D.C. Cir. Ct. App. 1996), the circuit court of appeals expressly rejected such an argument:

"[T]he simple fact that the government used evidence in its closing argument does not prove that the jury found the evidence compelling or determinative." *Id.*

Here, because appellant's theory of accidental ingestion was so implausible, it cannot be said that this one statement materially impacted the trial. Ultimately, a single self-exculpatory hearsay comment made by appellant and recalled by his friend would have had minimal probative impact. The absence of it has far less.

E. Appellant's other theories of innocence were unsupported.

Appellant's theory that he never would have knowingly used cocaine because he knew he was pending an immediate make-up UA was not supported by the evidence. Despite defense counsel's best efforts to characterize it otherwise, SSG [redacted]'s testimony clearly diminished this theory. (R. at 258–60). The panel was properly instructed on the elements of the offense, the inferences they were permitted to draw, and on the available defenses, ultimately rejecting appellant's theory of the case. (R. at 566–68).

Although appellant's character references were not contested, the implausible nature of appellant's story combined with the lack of corroborating evidence and the overwhelming evidence that appellant had cocaine in his system made the prejudicial impact of [redacted]'s testimony very low. In other words, appellant has not shown a reasonable probability that but for the error, the outcome of the proceeding would have been different. *Captain*, 75 M.J. at 103. The panel heard

all of the evidence and was properly instructed regarding its use, but rejected appellant's defense. So to should this court.

Assignment of Error III

APPELLANT'S CONVICTION IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE THE GOVERNMENT FAILED TO CALL THE TESTING EXPERT OR ADMIT ANY TESTING DOCUMENTS.

Standard of Review

Findings of guilt are legally sufficient when "any rational fact-finder could have found all essential elements of the offense beyond a reasonable doubt." *United States v. Nicola*, 78 M.J. 223, 226 (C.A.A.F. 2019) (citations omitted). When this court conducts a legal sufficiency review, it is obligated to draw "every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Robinson*, 77 M.J. 294, 298 (C.A.A.F. 2018) (citations omitted). "As such, the standard for legal sufficiency involves a very low threshold to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (cleaned up).

"Once an appellant makes a specific showing of a deficiency in proof, [this court] will conduct a de novo review of the controverted questions of fact." *United States v. Scott*,__M.J.__ (Army Ct. Crim. App. 27 Oct. 2023). After such a showing is made, "the Court may weigh the evidence and determine controverted questions of fact subject to [] appropriate deference to the fact that the trial court

saw and heard the witnesses and other evidence; and [] appropriate deference to findings of fact entered into the record by the military judge. [If] 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." William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542 (1 Jan. 2021) [FY21 NDAA].

Law & Argument

Appellant's convictions are legally and factually sufficient and should be affirmed. Appellant's convictions are not clearly against the weight of the evidence and any rational fact-finder could have found all essential elements of the offense beyond a reasonable doubt. Accordingly, this court should affirm the findings and sentence.

1. Appellant conceded that cocaine was detected in his UA at trial.

"[T]his case is not about whether or not there was BZE, the acronym for the metabolite for cocaine, in [appellant's] urine when he submitted it on the 13th of September of last year at a [UA]. . . ." (R. at 201). Appellant conceded this issue at trial, because there was no question that his sample tested positive for cocaine. In fact, this was part of his innocent ingestion defense: "[Appellant] somehow got exposure to, probably, a relatively small amount of cocaine and it is ingested in his system." (R. at 207). Despite appellant's concessions, the government produced

four witnesses who testified to the testing procedures (R. at 208–60), the chain of custody of appellant's sample (R. at 261–74), and the results of the UA (R. at 277–320).

2. The evidence clearly supports that appellant had cocaine in his system.

In addition to establishing the reliability of the results through extensive chain of custody testimony (R. at 208–74), the government called the necessary expert witness to interpret the results and the raw data—Dr. [redacted]. (R. at 277); *Murphy*, 23 M.J. at 312 ("Expert testimony interpreting the tests or some other lawful substitute in the record is required to provide a rational basis upon which the factfinder may draw an inference that marihuana was used."). Dr. [redacted] was the technical director of Tripler. (R. at 277). Dr. CO worked at Tripler for twenty-nine years and was "in charge of all the testing sections of the laboratory." (R. at 277). Dr. [redacted] was recognized as an expert in "forensic toxicology and drug testing." (R. at 282). Dr. [redacted] reviewed all the evidence associated with appellant's case file and concluded that the sample he provided tested "positive for BZE at 295 nanograms per milliliter." (R. at 320, 340). Appellant's cross examination of Dr. [redacted] focused on alternative explanations in support of his accidental ingestion defense but did not question the substance of her findings. (R. at 323–29).

3. Appellant's argument is unpersuasive.

Appellant argues that although the results actually confirm Dr. [redacted]'s conclusion, the government's failure to include this document reiterating Dr. [redacted]'s conclusions creates a deficiency in proof or renders the court's finding legally insufficient. (Appellant's Br. 38; Pros. Ex. 8 for ID). Appellant's reasoning is flawed for two reasons: 1) the case law appellant cites for this proposition is distinguishable; and 2) the alleged deficiency in proof does not rise to a level that suggests this court should be clearly convinced that the finding of guilty was against the weight of the evidence. Considering this document was cumulative with Dr. [redacted]'s testimony, "any rational fact-finder could have found all essential elements of the offense beyond a reasonable doubt" without the document's inclusion in the record. *Nicola*, 78 M.J. at 226. Thus, this clearly did not create a legal deficiency.

Appellant cites numerous cases for the proposition that raw medical data must be accompanied by appropriate expert testimony explaining the results in order to provide a legally sufficient basis to draw a permissive inference of knowing and wrongful use. (Appellant's Br. 36–39); *e.g. United States v. Green*, 55 M.J. 76, 81 (C.A.A.F. 2001). However, appellant cites no case law that a qualified expert interpreting the results of the test is legally or factually insufficient to sustain a finding of guilt—even under the old and more favorable Article 66

standard. *E.g.*, *United States v. Hunt*, 33 M.J. 345, 347 (C.A.A.F. 1991) ("If the prosecution fails to offer sufficient *expert evidence* from which the members *may rationally find wrongful use*, its case is defective, and a conviction thereon may not stand.") (emphasis added).

Murphy and its progeny stand for the proposition that expert testimony is required to explain scientific results outside the purview of common understanding. *Murphy*, 23 M.J. at 311–12. This does not mean that the documentary evidence that was the basis of the expert opinion must be admitted to survive a legal or factual sufficiency review. *See* Mil. R. Evid. 702. Here, the government introduced the findings of the scientific results *through* the testimony of a qualified expert. Dr. [redacted] actually testified as to the contents of the document that defense asserts is missing from the record and allegedly constitutes a deficiency in proof. (Appellant's Br. 38–39); *compare* R. at 320 *with* Pros. Ex. 8 for ID. Dr. [redacted]'s testimony was legally and factually sufficient evidence for the panel to find appellant wrongfully ingested cocaine.

Ultimately, appellant has failed to make a specific showing of a *deficiency in proof* and failed to show that the absence of the physical document is legally insufficient. Appellant has failed to show how expert testimony as to the contents of a document materially differs from introducing the document itself. *See* Mil. R. Evid. 702. Even if this court finds that appellant the absence of the document is a

deficiency in proof, appellant has not established that the absence of this document should clearly convince this court that the finding of guilty was against the weight of the evidence. Nor has appellant established that the absence of this document creates a legal deficiency. Accordingly, this court should affirm the findings and sentence.

Conclusion

WHEREFORE, the government respectfully requests this honorable court affirm the findings and sentence.

[redacted]

ANTHONY J. SCARPATI
CPT, JA
Appellate Attorney, Government
Appellate Division

[redacted]

CHRISTOPHER B. BURGESS
COL, JA
Chief, Government
Appellate Division

[redacted]

CHASE C. CLEVELAND
MAJ, JA
Branch Chief, Government
Appellate Division

APPENDIX

United States v. Coe

United States Army Court of Criminal Appeals

August 17, 2023, Decided

ARMY 20220052

Reporter
2023 CCA LEXIS 354 *

UNITED STATES, Appellee v. Private E2 MATTHEW L. COE, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: **[*1]** Headquarters, U.S. Army Maneuver Center of Excellence. Trevor I. Barna, Military Judge, Colonel Javier E. Rivera, Staff Judge Advocate.

Counsel: For Appellant: Lieutenant Colonel Dale C. McFeatters, JA; Major Joyce C. Liu, JA; Captain Andrew R. Britt, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Bryan A. Osterhage, JA; Captain Andrew R. Britt, JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Pamela L. Jones, JA; Lieutenant Colonel Anthony 0. Pottinger, JA (on brief).

Judges: Before PENLAND, ARGUELLES,[1] and MORRIS Appellate Military Judges. Senior Judge PENLAND concurs. Judge MORRIS dissenting.

Opinion by: ARGUELLES

Opinion

SUMMARY DISPOSITION

ARGUELLES, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault in violation of *Article 120(b), Uniform Code of Military Justice, 10 U.S.C. § 920(b)* [UCMJ]. The military judge sentenced appellant to a dishonorable discharge, confinement for twenty-four months, and reduction to the grade of E-1. The convening authority took no action on the sentence.

This case is before the court for review pursuant to *Article 66, UCMJ*. Appellant raises one assignment of error, which merits discussion but no relief. **[*2]** [2]

BACKGROUND

While in airborne training, the victim, appellant, and several other soldiers decided to spend an afternoon at the river. On the way to the river, they stopped to buy brandy. Almost immediately after arriving at the river, and before the heavy drinking started, appellant and the victim had consensual sex in a wooded area away from the group. Over the course of the afternoon the victim and a few (but not all) of the soldiers drank the brandy straight from the bottle, and the victim had sex with at least one of the other male soldiers and one of the female soldiers. When last

[1] Judge ARGUELLES decided this case while on active duty.

[2] We have also considered the matters personally raised by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, and find them to be without merit. We address appellant's factual sufficiency claim in greater detail below.

observed by the others at the end of the day, the victim, who appeared to be very intoxicated, was having sex with another soldier in the presence of appellant. Although there were no witnesses to the act, appellant admitted to having sex with the victim for a second and final time at the end of the day, which formed the basis for the charge in this case.

The next time witnesses observed the victim, appellant and another soldier were helping her put her bathing suit bottoms back on and cleaning her off in the river. Multiple witnesses testified that the victim had trouble walking and appeared to be very **[*3]** intoxicated at that point. Her friends flagged down two non-affiliated soldiers who were in a car by the river. These soldiers helped carry the victim back to their car, where she sat for a while in the air conditioning and drank water. While in the car, the victim borrowed a friend's phone and made several attempts to call a male soldier. Although multiple witnesses testified that the victim and the soldier she tried to call in the car were in a serious relationship, the victim claimed that they were just friends.

At some point, one of the male soldiers in the group (not appellant) directed the driver of the car to take the victim to a hotel. Concerned for her safety, the driver instead took the victim back to her barracks, where other soldiers say she showed up disheveled and intoxicated, with her clothes all dirty, scratches on her back and legs, and twigs and dirt in her hair. There was also evidence that while at the barracks, the victim attempted to string up a hair dryer cord for the purpose of hanging herself.

The victim testified at trial that after the drinking games started she became highly intoxicated and "blacked out . . . in and out of conscience." When asked the next **[*4]** thing she remembered, the victim testified:

V: Next thing I remember is looking up with my clothes off, looking at [appellant] saying "I do not want this," and then I blacked out again.

TC: Who was — what was happening at the time?

V: At the time, [another male soldier] was in front of me, sir, and then [appellant] was off to the side penetrating [another female soldier].

TC: What's the next thing you remember?

V: Next thing I remember is being in a vehicle.

As noted above, there is no dispute that appellant had sex with the victim after she stated "I do not want this" while looking at him.

A sexual assault forensic nurse also testified that the victim told her "that she remembers her clothes coming off, she doesn't remember who took them off, and she told them 'no stop,' and she looked into their eyes and they saw that she was scared and then she blacked out." Although the nurse did not clarify who the "them" was, this evidence tracks the victim's testimony about the statements she made to appellant and the other male soldier when she woke up with her clothes off, while appellant was having sex with another female.

The evidence at trial also revealed that appellant made several admissions: **[*5]** (1) he told the Army Criminal Investigation Command (CID) agent that he did not look at victim when he had sex with her the second time because "she was super drunk and it was wrong;" (2) when asked by the CID agent if he felt the victim "was coherent enough to give consent for sexual acts," appellant responded "No; " (3) another soldier testified that on the same night after the assault, appellant was "downhearted" and "emotionally drained" and that he told her he "f—d up" by not waiting to have sex with the victim "until they were sober;" and, (4) in a pretext text message stating that the victim was too drunk to consent, appellant replied "Yes she was. She

was wasted."

LAW AND DISCUSSION

Appellant, who was charged with one specification of violating *Article 120(b)(2)(A)*, sexual assault without the consent of the other person, now alleges that because the government's theory of the case, and the bulk of the evidence, pertained to the victim's level of intoxication, the government violated his due process rights. Specifically, appellant asserts that it was error for the government to charge him under one theory of liability for sexual assault (without consent), but to then convict him under a different **[*6]** non-charged theory of sexual assault, that is upon a person who is incapable of consenting due to impairment by intoxicant in violation of *Article 120(b)(3)(A)*.

Another panel of our colleagues recently addressed this very issue in *United States v. Roe, ARMY 20200144, 2022 CCA LEXIS 248 (Army Ct. Crim. App. 27 April 2022)*, pet. denied, *83 M.J. 83 (C.A.A.F. 2022)*. Although *Roe* was a nonbinding memorandum opinion, we agree with both the reasoning and holding of that case, and find it to be dispositive here. The court in *Roe* started its analysis by noting that the due process claim before it turned on the single question of whether the government may carry its burden of proving sexual assault "without consent" in violation of *Article 120(b)(2)(A)* by presenting "mainly, but alongside other evidence, the fact of the victim's extreme intoxication at the time of the sexual act?" *Id.* at *11. And in answering that question in the affirmative, the court explained:

> There is likewise no dispute that the government's theory of the case was that the victim's high degree of intoxication at the time of the sexual act was important evidence that she did not consent. Our essential holding here is that this was one of the many permissible ways for the government to attempt to prove "without consent."

*Id. at *13-14*. The court in *Roe* also noted that because the **[*7]** government in any event presented additional evidence of "without consent" above and beyond the victim's intoxication, it was not required to "decide whether 'without consent' can be proved *solely* through showing an inability to consent because of intoxication or some other reason." *Id.* at *17.

Applying the holding of *Roe* to this case: (1) it was permissible to prove lack of consent by introducing evidence of the victim's intoxication level; and (2) there is also additional evidence of lack of consent beyond intoxication level in this case. Among other things, the victim testified that she told appellant "I do not want this" before they had sex for the second time, she reported to the sexual assault nurse that she told "them" "no, stop." Likewise, although appellant's admissions to the CID agent and his statements to his fellow soldiers pertain to the victim's level of intoxication, they are nonetheless further evidence of his consciousness of guilt and the fact that he knew she was not a consenting partner. *Cf. United States v. Smith, M.J. , 2023 CAAF LEXIS 470 at *24 (C.A.A.F. 12 Jul. 2023)*. ("And although Appellant told AFOSI that SrA HS was an active, willing participant in the sexual activity, grinding on him and making out with him until he pulled away, he **[*8]** also admitted that he knew it was wrong to engage in sexual activity with her because she was drunk.").[3]

---

[3] With respect to appellant's factual sufficiency claim, we note that even as amended, the most recent version of ***Article 66(d)*** still requires that in weighing the evidence we give "appropriate deference to the fact that the trial court saw and heard the witnesses and evidence." *See United States v. Davis, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015)*, *aff'd on other grounds* *76 M.J. 224 (C.A.A.F. 2017)* (holding that "the

As such, and like the court in *Roe*, we hold that because the military judge convicted appellant of the offense as charged, and not some other uncharged offense, appellant's due process claim is without merit.

CONCLUSION

Upon consideration of the entire record, the findings of guilty and the sentence are AFFIRMED.

Senior Judge PENLAND concurs.

Dissent by: MORRIS

Dissent

Judge MORRIS dissenting:

I respectfully disagree with the majority opinion in this case for two reasons: (1) the government's charging decision violated appellant's due process right to fair notice; and (2) in any event, the evidence is factually insufficient. As such, appellant's conviction and sentence should be set aside.

FACTUAL SUFFICIENCY

Appellant asserts in his *Grostefon* matters that his conviction is factually insufficient. *Article 66(d)(1)(B)*, as amended by the *National Defense Authorization Act for Fiscal Year 2021* provides:

> (B) FACTUAL SUFFICIENCY REVIEW
> (i) In an appeal of a finding of guilty under *subsection (b)*, the Court [of Criminal Appeals] 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) **[*9]** After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to-
> (1) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
> (2) 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.

Pub. L. No. 116-283, § 542(b), 134 Stat. 3611-12. The amendment to *Article 66(d)(1)(B)* applies only to courts-martial, as here, where every finding of guilty in the Entry of Judgment is for an offense that occurred on or after 1 January 2021. *Id.* at 3612.

The question is whether we are clearly convinced the finding of guilty, which required the military judge to find beyond a reasonable doubt that that the sexual activity occurred

---

degree to which we 'recognize' or give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witnesses is at issue"); *United States v. Crews, ARMY 20130766, 2016 CCA LEXIS 127 at *11-12 (Army Ct. Crim. App. 29 Feb. 2019 (mem. op.)* ("The deference given to the trial court's ability to see and hear the witnesses and evidence — or "recogni[tion] as phrased in ***Article 66, UCMJ*** — reflects an appreciation that much is lost when the testimony of the live witnesses is converted into the plain text of a trial transcript . . . . [the factfinder] hears not only a witness's answer, but may also *observe* the witness as he or she responds.") (emphasis in original). While we recognize that there are certainly alternative interpretations of the evidence that could support a finding of not guilty, we emphasize that our factual sufficiency review is *not* a *de novo* review in which we substitute ourselves for the factfinder and decide what verdict we would have rendered. In sum, after reviewing the entire record, to include the evidence supporting the guilty verdict as set forth immediately above, and giving deference to the military judge who was able to see and hear each witness, including the victim, as they testified, we respectfully disagree with our dissenting colleague that the finding of guilt was "against the weight of the evidence."

without the consent of the victim, was against the weight of the evidence. I do not believe the government satisfied its burden of proving the victim's lack of consent beyond a reasonable doubt and therefore, I am convinced that the finding of guilty was **[*10]** against the weight of the evidence.

The testimony from the victim and other soldiers who testified during appellant's court-martial established that a group of Airborne School students went down to the river to hang out and drink. Shortly after arriving at the river, appellant and the victim headed into the wood line and engaged in consensual sexual activity. Once they returned to their group of friends, appellant, the victim and one other soldier started playing drinking games and kissing. This kissing led to the victim and the other soldier engaging in consensual sexual activity, while appellant was nearby and continuing to kiss the victim's body. At some point two additional soldiers arrived, one male and one female, and the victim asked the female soldier to join, which she did. After she performed some sexual acts with the victim, the other female soldier began to have sexual intercourse with appellant. At some point, the victim who was at the time engaging in sexual acts with another soldier looked over to appellant and said, "I do not want this" and then the victim blacked out. When she woke up, she was crying and stated that she was disgusted with herself because she knew what **[*11]** happened. Others testified that she was yelling that she had cheated on her boyfriend. On cross-examination, the victim acknowledged that she could have said "yes to the group."

Other than the statements identified by the majority that appellant made to a CID agent in an interview where the agent used highly suggestive and manipulative interrogation techniques, the only direct evidence the government presented that the victim may not have been consenting was her statement that she looked at the appellant and said "I do not want this." Then, in the very next question when the assistant trial counsel asked her what was going on, she answered that the other soldier was in front of her and appellant was on her side having sex with the other female soldier. Just because the victim was looking at appellant does not mean that he saw or heard her. It is completely unclear if appellant ever heard the victim say "I do not want this" or had any idea at all that she was no longer consenting. Even worse, the military judge also confused this point. In response to the defense counsel's statement that the victim did not say "I do not want this," the military judge confirmed that "she did testify as **[*12]** such. That did come up when she made eye contact with Private Coe at some point." Only, that is not what the victim testified to. The victim said she looked at appellant, not that he made eye contact with her. She further testified that at the time appellant was having sexual intercourse with someone else, so it seems unlikely he would have made eye contact with the victim or been focusing on her at that moment. The military judge's mistaken characterization of the victim's testimony is particularly problematic because he was also the factfinder. Sometimes, as in this case, our ability to read the verbatim transcript affords us the opportunity to detect inconsistencies missed or misinterpreted by the factfinder.

Further conflicting evidence concerning consent came during the testimony of the sexual assault forensic nurse. Apparently, the victim told the nurse she did not remember who took her clothes off, but she told "them" "no, stop" and she looked into their eyes and they saw that she was scared and then she blacked out. It is not clear who "they" is in this statement. Adding to the confusion, this testimony from the nurse is also a different version of the "I do not want this" statement. **[*13]** And more confusing still is

the fact that there were people around who were not involved in the sexual acts, who could have intervened, but did not, because at least from their perspective, it appeared the victim was enjoying the exchange.

The best evidence against appellant are the statements he made to CID in which the CID agent used highly suggestive and manipulative tactics and refused to take a "no" or alternate version of the facts when appellant tried to deny the agent's suggestions. The agent essentially told appellant if appellant did not agree with the agent's version of events, then maybe this was not a "one time mistake" and appellant was someone "that takes advantage and preys on girls that are drunk." Worse still, most of the negative characterizations recounted by the trial counsel in argument and again by the majority here came from appellant's statements to the CID agent which initiated with the agent as he was pressuring appellant to agree. On these facts, it is not clear how the factfinder found appellant guilty of sexual assault. The victim was capable of consenting at the outset of the activities. From a mistake of fact as to consent perspective, it is unreasonable **[*14]** to assume that any of the soldiers involved on this day could have ascertained when the line of incapable of consenting was crossed. The statements appellant made to his friends and to the CID agents after the fact were as his defense counsel argued, in retrospect. As another colleague pointed out in his dissent on factual sufficiency grounds in *United States v. Moellering, ARMY 20130516, 2015 CCA LEXIS 270, at *29 (Army Ct. Crim. App. 29 June 2015) (Mem. Op.)* (Haight, J., dissenting) circumstances are fluid in the "heat of the moment." It is highly unlikely appellant was that enlightened in the "heat of the moment."

While the majority believes the comments appellant made to another female soldier and during a pretext text communication were evidence of his consciousness of guilt, it is just as likely he was acknowledging a sexual best practice—that because the victim had been drinking, he should have waited. Another reasonable conclusion is that his responses were a showing of compassion for the victim because he witnessed her expressing regret about the sexual activity. Instead of piling on and further damaging the victim's reputation, appellant was honest about his own regrets and acknowledging her intoxication. However unartfully expressed, even if appellant's statement about waiting was taken **[*15]** literally, it was not a matter of waiting for sexual activity as his comment suggested, sexual activity was ongoing, so this statement on which the majority places so much emphasis does not make sense in the context of what was occurring at the time.

Unlike the sleeping victim in *Roe*, where despite finding the evidence factually sufficient, the majority claimed the factual sufficiency was a close call, here the victim was actively participating in and initiating the sexual activity. *See United States v. Roe, ARMY 20220144, 2022 CCA LEXIS 248, (Army Ct. Crim. App 27 April 2022)* (mem. op.). Then, despite declaring that she blacked out during the approximately 15-minute period, she seemed to remember enough about the sexual activity to exclaim that "she knew what happened," had "cheated on her boyfriend," and could have said "yes to the group." These statements from the victim are strong indications of consent. While it is abundantly clear that the victim regretted the sexual activity, it is less than clear that she ever manifested a lack of consent. Appellant's expressions of regret over the sexual activity have been used as evidence of consciousness of guilt. But regret for making poor decisions concerning sexual activity is not the same as committing a sexual assault. In **[*16]** light of the amount of evidence contrary to a finding that the victim did not consent to the ongoing

sexual activity, I am clearly convinced that the finding of guilty was against the weight of the evidence.

UNITED STATES V. ROE

On its face, the charging decision made by the Government in this case is similar to the charging decision made by the Government in *Roe*. Specifically, in both cases, the Government elected to charge appellant with a specification of violating *Article 120(b)(2)(A)*, when the Government's theory of the case was instead that the victim did not consent because she was incapable of consenting. In *Roe*, the Government's theory was the victim was asleep, which is captured in *Article 120(b)(2)(B)*. In this case, the Government's theory was the victim was impaired by intoxication, which is captured in *Article 120(b)(3)(A)*. As my esteemed colleague highlighted in her dissent in *Roe*, "the statutory context, alone, dictates that *Article 120(b)(2)(A)*, *120(b)(2)(B)*, and *120(b)(3)(A), UCMJ*, are separate and distinct theories of liability for the offense of sexual assault." *Id. at *24* (Walker, J., dissenting). The elements the government is required to prove beyond a reasonable doubt in *Articles 120(b)(2)(A)* and *120(b)(3)(A)* are separate and distinct. While *Article 120(b)(2)(A)* simply requires lack of consent to the sexual act, when charged, **[*17]** *Article 120(b)(3)(A)* requires the government to prove beyond a reasonable doubt both that the victim is incapable of consenting to the sexual act due to impairment by an intoxicant and that the accused knew or reasonably should have known of that condition. *See 10 U.S.C. § 920(b)(3)(A)*.

Allowing the Government to in effect merge all theories of liability into one gives the Government an even greater unfair advantage and the ability to shore up weak evidence as to any element without also having to prove the other required elements of that overall offense. The majority in *Roe* seems to suggest that *Article 120(b)(2)(A)* carries a "heavier burden" of affirmatively proving a lack of consent when intoxication is at issue. *Roe at *15*. If that is the case, then the Government is arguably using proof of the lesser burden of incapable of consent to prove that heavier burden. Even worse, the Government is proving the victim is incapable of consent without also having to prove appellant knew or reasonably should have known of the victim's inability to consent. This unfair advantage gives the government more than just the "discretion to charge one of multiple offenses" as the majority suggests in *Roe*, but it allows the government to unfairly "cherry pick" which elements **[*18]** from a group of similar offenses it would like to prove up, without giving appellant fair notice of which elements he must defend against. *Id.* (citing *United States v. Morton, 69 M.J. 12, 16 (C.A.A.F. 2010)* (It is the Government's responsibility to determine what offense to bring against an accused.").

The facts of this case better illustrate the risk of allowing the government to convict on a theory other than the one charged. Unlike the victim in *Roe*, the victim in this case was engaging in ongoing sexual acts with a group of fellow soldiers. In fact, it is undisputed that on the day in question, she had participated in consensual sexual activity with appellant before consuming large amounts of alcohol. Then, while continuing to consume alcohol with the group, she invited another woman to engage in sexual activity with her and started having sexual intercourse with yet another man. When that woman became uncomfortable and attempted to break away from the group, the victim knee-crawled over to encourage her to continue participating.

On this evidence, either theory adjudicated separately and distinctly would likely have failed, and thus appellant was materially

prejudiced by the government's charging decision. Because the Government could **[*19]** not prove appellant's guilt beyond a reasonable doubt on either individual theory, it used elements from the uncharged theory to convict appellant of the charged theory. In other words, because the Government's evidence that the victim did not consent was weak, it used evidence that she was incapable of consenting to shore up the lack of consent element. In doing so, appellant's due process rights were violated by the government's election to charge him with sexual assault with a person unable to consent and then proving their case on a theory that the victim was too intoxicated to consent, which resulted in material prejudice to appellant.

In *Roe*, where material prejudice was not found, the facts supporting that victim's inability to consent were overwhelming. The victim in that case was sleeping and a team of fellow soldiers, including the accused, had set up a guard schedule to watch and care for her throughout the night. In this case, the facts concerning lack of consent or even inability to consent are weak at best and only shored up by the improperly merged theories. Thus, appellant was materially prejudiced by the Government's ability to merge theories of liability and elements **[*20]** of multiple offenses to prove lack of consent.

I would set aside appellant's finding of guilty and the sentence.

End of Document

United States v. Scott

United States Army Court of Criminal Appeals

October 27, 2023, Decided

ARMY 20220450

Reporter
2023 CCA LEXIS 456 *; __ M.J. __

UNITED STATES, Appellee v. Private First Class JUSTIN M. ***SCOTT***, United States ***Army***, Appellant

Prior History: [*1] Headquarters, III Corps and Fort Cavazos. Tiffany D. Pond and Joseph T. Marcee, Military Judges, Colonel Runo C. Richardson, Staff Judge Advocate.

Counsel: For Appellant: Lieutenant Colonel Dale C. McFeatters, JA; Major Mitchell D. Herniak, JA (on brief); Colonel Philip M. Staten, JA; Major Mitchell D. Herniak, JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Major Justin L. Talley, JA; Captain Lisa Limb, JA; Ms. Julianna Battaglia (on brief).

Judges: Before PENLAND, HAYES, and MORRIS, Appellate Military Judges. Senior Judge PENLAND and Judge HAYES concur.

Opinion by: MORRIS

Opinion

OPINION OF THE ***COURT***

MORRIS, Judge:

Appellant asserts the evidence is factually insufficient to support a finding of guilty where appellant raised the affirmative defense of mistake of fact as to age. We disagree.

BACKGROUND

A military judge sitting as a general ***court***-martial convicted appellant, contrary to his pleas, of one specification of sexual abuse of a child in violation of *Article 120b, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920b*. The military judge sentenced appellant to a reprimand, reduction to the grade of E-1, sixty days restriction, sixty days hard labor without confinement, and a dishonorable discharge. The convening authority took no action on the findings or sentence. **[*2]**

There is little dispute about the incident which formed the basis of the offense. After several months of playing on-line video games with the 15-year old female victim, appellant first sent the victim a private Snapchat message saying "So if I 'accidentally' send you a dic[k] pic, would that be ok?" and then subsequently sent her a picture of his clothed groin area. Appellant and the victim disagree about the contents of the picture. The victim testified that the photograph appellant sent showed an outline of his erect penis. Appellant's friend, Private First Class (PFC) [TEXT REDACTED BY THE ***COURT***] testified that when he confronted appellant about the picture, appellant stated the contents were "insinuating." Appellant testified that while the picture he sent did not depict an erection, he was "horny" and "testing the waters."

Appellant asserted the affirmative defense of mistake of fact as to age. Both the victim and PFC [TEXT REDACTED BY THE ***COURT***], who had introduced appellant to the victim for the purpose of the group playing online video

games together, testified they had each told appellant the victim's specific age of 15 and reiterated her youth many times. To the contrary, appellant insisted, they only ever described her as **[*3]** underage and that if accurate, the birthdate listed on the victim's Facebook profile, would have meant she was 18.

LAW AND DISCUSSION

This ***court*** reviews questions of factual sufficiency de novo. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*. Additionally, the *National Defense Authorization Act for Fiscal Year 2021* amended *Article 66(d)(1)(B)* regarding our factual sufficiency review reads as follows:

> (B) FACTUAL SUFFICIENCY REVIEW
>
> (i) In an ***appeal*** of a finding of guilty under *subsection (b)*, the ***Court*** of ***Criminal Appeals*** 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 —
>
> (1) appropriate deference to the fact that the trial ***court*** saw and heard the witnesses and other evidence; and
> (2) 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.

Pub. L. No. 116-283, § 542(b), 134 Stat. 3611-12. The amendment to *Article 66(d)(1)(B)* applies only to ***courts***-martial, as here, where every finding **[*4]** of guilty in the Entry of Judgment is for an offense that occurred on or after 1 January 2021. *Id.* at 3612.

Vital to appellant's factual insufficiency claim is his assertion of the mistake of fact as to age defense. Mistake of fact is available to a military accused if he honestly and reasonably, but mistakenly, believed the victim was at least 16 and if the acts would otherwise be lawful if the victim were at least 16. *United States v. Zachary, 63 M.J. 438, 442 (C.A.A.F. 2006)*; *see also United States v. Strode, 43 M.J. 29, 33 (C.A.A.F. 1995)*. Further, the ignorance or mistake could "not be based on negligent failure to discover true facts." Dep't of ***Army***, Pam. 27-9, Legal Services: Military Judge's Benchbook, para. 3-45b-2, note 3 (15 August 2023) [Benchbook].

Given the testimony on the record credibly establishing the victim was at the very least underage, it was negligent for appellant not to inquire as to her specific age before engaging in conduct that would be unlawful if the victim had not attained the age of at least 16. The testimony on the record established appellant had been told the victim was between 14-15 years old. No one told appellant the victim was 16. A reasonable person observing conflicting information between the birthdate listed on social media and statements from the victim and PFC [TEXT REDACTED BY THE ***COURT***] would have been on notice that he needed to confirm her age. Because he negligently failed to **[*5]** discover true facts about the victim's age, appellant's mistake of fact defense fails. Since we are not clearly convinced the finding of guilty was against the weight of the evidence, we find the trial ***court***'s findings in this case to be factually sufficient.

The government cites to a recent published opinion from the Navy-Marine Corps ***Court*** of

Criminal ***Appeals*** for the proposition the new *Article 66* creates a presumption of guilt in our factual sufficiency review. We find no support for that conclusion. While we agree with much of our sister ***court***'s analysis in *United States v. Harvey*, we disagree that "Congress has implicitly created a rebuttable presumption that in reviewing a conviction, a ***court*** of ***criminal appeals*** presumes that an appellant is, in fact, guilty." *United States v. Harvey, 83 M.J 685, 693 (N.M. Ct. Crim. App. 23 May 2023)*. Once appellant makes a specific showing of a deficiency in proof, we will conduct a de novo review of the controverted questions of fact. While we hold the new burden of persuasion with its required deference makes it more difficult for one to prevail on ***appeal***, we stop short of finding an implicit creation of a rebuttable presumption of guilt and will continue to adhere to the de novo standard of review articulated by our superior **[*6]** ***court***.

CONCLUSION

On consideration of the entire record, the findings of guilty and sentence are AFFIRMED.

Senior Judge PENLAND and Judge HAYES concur.

End of Document

CERTIFICATE OF SERVICE U.S. v. DOWNUM (20220575)

I certify that a copy of the foregoing was sent via electronic submission to Mr. Daniel Conway, civilian appellate defense counsel, at [redacted], and the Defense Appellate Division, at [redacted], on this 17th day of November 2023.

[redacted]

DANIEL L. MANN
Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0822
daniel.l.mann.civ@army.mil