IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,	Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.		Docket No. ARMY 20230030
Sergeant (E-5) **TYRESE S. CAMPBELL**, United States Army,	Appellant	Tried at Fort Bliss, Texas, on 3 October 2022 and 18–22 January 2023, before a general court-martial convened by the Commander, 1st Armored Division and Fort Bliss, Colonel Robert L. Shuck, Military Judge, presiding.

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

Assignments of Error[1]

I.

WHETHER APPELLANT'S CONVICTION FOR DOMESTIC VIOLENCE IS FACTUALLY INSUFFICIENT.

[1] The government has reviewed appellant's *Grostefon* matters and submits that they lack merit. Should this court find any of appellant's *Grostefon* matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

PANEL NO. 4

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING A 911 CALL AND BODY CAMERA FOOTAGE CONTAINING THE COMPLAINING WITNESS'S STATEMENTS AS RESIDUAL HEARSAY.

III.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ALLOWING THE TRIAL COUNSEL AND SPECIAL VICTIM'S PROSECUTOR TO COMMENT ON APPELLANT'S RIGHT TO SILENCE DURING CLOSING ARGUMENT AND SENTENCING, RESPECTIVELY.

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Statement of the Case

On 21 January 2023, an enlisted panel, sitting as a general court-martial, convicted appellant, contrary to his pleas, of one specification of domestic violence, in violation of Article 128b, Uniform Code of Military Justice, 10 U.S.C. § 928b (2018) [UCMJ].[2] (R. at 1073). On 22 January 2023, the military judge sentenced appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 120 days, and to receive a bad-conduct discharge. (R. at 1156). On 3 February 2023, the convening authority approved the findings and sentence as adjudged. (Action). On 13 February 2023, the military judge entered judgment. (Judgment).

Statement of Facts

A. Appellant struck his wife, Mrs. [redacted], in the mouth with a shoe during an argument.

1. Appellant and Mrs. [redacted] grew up together, dated, and got married.

Mrs. [redacted] grew up with appellant in the same community and dated as they got older. (R. at 465, 467). She later moved to the United States and got married to appellant in 2021. (Pros. Ex. 2; R. at 465, 467). Mrs. [redacted] is from Jamaica, where her parents live and where she owns a business. (R. at 465–66).

[2] Appellant was acquitted of three specifications of domestic violence under Article 128b, UCMJ, and of one specification of obstructing justice under Article 131b, UCMJ, 10 U.S.C. § 931b (2018). (App. Exs. XXVI, XXX; R. at 1073).

Mrs. [redacted] worked in El Paso, Texas, as a tax associate and assistant manager. (R. at 466; Pros. Ex. 2). She testified that she probably makes more money than appellant does. (R. at 466). Though not a United States citizen, she has a visa, which was issued in 2015, and expires in 2025. (R. at 466, 547; Pros. Ex. 32).

After getting married, appellant became abusive. (R. at 469). When the couple had disagreements, "things could get physical[.]" (R. at 469). Appellant engaged in "controlling" behavior like wanting to search Mrs. [redacted]'s phone. (R. at 469, 821). Mrs. [redacted] is five feet tall and weighs about 140 pounds; appellant is six feet, four inches tall and weighs 209 pounds. (R. at 489, 864; Pros. Ex. 1).

2. Appellant attacked Mrs. [redacted] on 18 July 2022.

On 18 July 2022, early in the morning, appellant returned from a twenty-four-hour "CQ" (Charge of Quarters) shift to his apartment in El Paso, Texas; upon appellant's return, he and his wife got into an argument after appellant brought back food only for himself. (R. at 374, 385, 469–70, 489, 530, 825–26; Pros. Ex. 2). During the argument, according to Mrs. [redacted]'s testimony, she accused appellant of "not being a real man"; and appellant flipped the bed Mrs. [redacted] was lying on, caused her to fall on her shoulder, pushed her, and called her an "ungrateful bitch."

(R. at 470, 530–31). Mrs. [redacted] testified that after appellant pushed her, she slapped him in the face; and then appellant strangled her.[3] (R. at 470, 494–95, 860–61).

Later, appellant pushed and dragged Mrs. [redacted] out of the apartment, and then he locked the door. (R. at 519–20, 973). She was outside her apartment "[a]fter 4 in the morning" when "like everyone is inside." (R. at 522–23). While outside of her own apartment, Mrs. [redacted] was "in like night shorts with [her] buttocks outside, no shoes, like a small tank top"; and she was "half naked outside" and "exposed." (R. at 852–53, 856–57, 966). Mrs. [redacted] recounted, "I wanted clothes. I was in my nightwear. I was outside like a crazy person, barefoot." (R. at 520, 853, 966). She then pounded on the apartment door and kicked it because she wanted to get certain belongings, including her passport and phone. (R. at 520–21, 855).

Mrs. [redacted] eventually got back into the apartment, intending to get her bags and go to "a motel, a hotel, anywhere," to get away; but after getting her bags, the shoe stand fell, and "that's when the argument started again." (R. at 853–55).

During this second argument, appellant put Mrs. [redacted] in a headlock and chokehold. (R. at 856). Mrs. [redacted] told appellant that there was "no way you can love women and like treat your wife like that"; and she told appellant "he had faggot ways." (R. at 473). Appellant replied by telling Mrs. [redacted] that she was

[3] To be clear, appellant was acquitted of both strangulation-related specifications in Specifications 1 and 2 of Charge I; he was also acquitted of threatening Mrs. [redacted] and of obstructing justice in Specification 3 of Charge I and the Specification of Charge II, respectively. (Charge Sheet; App. Exs. XXVI, XXX; R. at 1073).

"nothing" and that she "should lick his shoe." (R. at 473). But when Mrs. [redacted] refused to lick his shoe, appellant took the shoe and struck her on the mouth with it while she was in a chokehold.[4] (R. at 473, 495, 856).

Appellant's strike to Mrs. [redacted]'s mouth was "[v]ery painful, especially with braces"; she felt pain "[a]ll on [her] top lip. Like [she] couldn't eat for like two days." (R. at 475). Mrs. [redacted] recounted, "When I felt the blood rushing from my mouth, like I tried going to the bathroom to look at like the impact on my mouth. And he [appellant] wouldn't allow me to look. And then I just grabbed my bag, and I left the apartment." (R. at 473–74). Later, on the morning of the attack, Mrs. [redacted] photographed the injury to her mouth; and during the trial, Mrs. [redacted] cried while identifying herself in the photographs. (R. at 474–79; Pros. Exs. 23, 24[5]).

B. Mrs. [redacted] called 911 and reported that appellant hit her mouth with a shoe.

After leaving the apartment, Mrs. [redacted] called 911 around 0630. (R. at 298, 479, 856). During the 911 call, she was still in physical pain and in a "bad state." (R. at 479, 532). According to a recording of the 911 call, Mrs. [redacted] said that appellant hit her in the mouth with a shoe; she also said she had a "burst" mouth. (Pros. Ex. 3 at 1:40 to 2:40, 3:20 to 4:15). When the 911 operator, Ms. [redacted], asked

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[4] Appellant's attack with the shoe against Mrs. [redacted] represents the specification for which he was convicted, renumbered as Specification 4 of Charge I. (Charge Sheet; App. Exs. XXVI, XXX; R. at 1073).

[5] The digital versions (on disks) of Prosecution Exhibits 18, 20, and 23, are in Prosecution Exhibits 19, 21, and 24, respectively.

when the attack occurred, Mrs. [redacted] said that she left the apartment "after four," after "the shoe" incident. (Pros. Ex. 3 at 1:40 to 2:40, 3:20 to 4:15; R. at 294, 298).

Ms. [redacted] testified that Mrs. [redacted] said that "she had been assaulted by her partner," who had hit her in the mouth with a shoe. (R. at 304). Mrs. [redacted] also told Ms. [redacted] that she had a "burst lip, caused from the shoe that hit her in the mouth." (R. at 305). And Ms. [redacted] understood "burst" to mean that Mrs. [redacted]'s lip was bleeding from the assault. (R. at 305). Ms. [redacted] noted that Mrs. [redacted] "sounded nervous, scared. It did sound like she had been crying when she was trying to explain to me what had happened to her." (R. at 299–300). And an expert in forensic nursing heard the 911 call and testified that it "sounded like she [victim] was reporting a stressful event." (R. at 596, 599, 628).

Of note, even though Mrs. [redacted] did call 911 after appellant's attack with the shoe, Mrs. [redacted] testified, "I never wanted to call 911 at all. Hence why I cancelled the call twice." (R. at 872). The 911 operator noted too that when Mrs. [redacted] called 911, Mrs. [redacted] hung up; and the 911 operator had to call Mrs. [redacted] back twice before speaking with Mrs. [redacted]. (R. at 299).

C. The responding Emergency Medical Technician met Mrs. [redacted] noted that Mrs. [redacted] stated that she was hit in the mouth with a shoe; and observed that Mrs. [redacted] was anxious, distraught, and had a bloody lip.

After the 911 call, an ambulance and fireman arrived at the apartment complex. (R. at 479–80). Mr. [redacted], an Emergency Medical Technician (EMT) and

firefighter, responded to the 911 call and met Mrs. [redacted] at the apartment complex (i.e., "at scene" and "at patient") around 0646. (Pros. Ex. 5 at bate-stamp page 00075; R. at 315, 321, 332). He testified that Mrs. [redacted] seemed "anxious," "distraught," and "like there was something upsetting her." (R. at 315, 321, 332). He saw that Mrs. [redacted] "had a bloody lip, she had an injury to her mouth." (R. at 322, 336, 340). In Mr. [redacted]'s report, he noted that Mrs. [redacted] had "stated she was also hit in the mouth with a shoe"; he also noted that she had a "bloody lip." (Pros. Ex. 5 at bate-stamp page 00080; R. at 330, 336, 340).

While Mr. [redacted] was responding to the 911 call on scene, appellant did not "come down to where his wife was[.]" (R. at 331, 333). After Mrs. [redacted]'s assessment, she was transported to the hospital and seen around 0715. (Pros. Ex. 22 at bate-stamp page 00057; R. at 330–31, 415).

D. Mrs. [redacted] told medical personnel that she was hit in the mouth with a shoe, and they also observed the injury to her mouth.

Dr. [redacted], who is the emergency-room physician that treated Mrs. [redacted] on the day of appellant's attack, testified that Mrs. [redacted] reported being hit in the mouth and that he observed the injury to her mouth. (R. at 410, 415–16, 418, 437–38; Pros. Ex. 22 at bate-stamp page 00061). When Dr. [redacted] viewed a photograph of Mrs. [redacted] from Prosecution Exhibit 18, he affirmed that Mrs. [redacted]'s injury looked like what was shown in the photograph; and he further testified, "And you can see the laceration or the cut that's on the top of her [victim's] lip. That just shows that it

was probably made by the metal brace that she had on her front teeth, something impacted the area." (R. at 437–38; Pros. Ex. 18 at p. 6).

Dr. [redacted]'s "objective evaluation" of the patient supported the "subjective history of present illness provided by the patient[.]" (R. at 439).

Ms. [redacted], a hospital nurse, also treated Mrs. [redacted] the same day. (R. at 445–47). Ms. [redacted] testified about how Mrs. [redacted] said that she had been "hit across the mouth with shoe by husband." (R. at 451; Pros. Ex. 22 at bate-stamp page 00063). Ms. [redacted] saw dry blood on Mrs. [redacted]'s mouth, around her lips; and Mrs. [redacted] "had some stains on her shirt." (R. at 453). And she confirmed that a photograph in an exhibit depicted Mrs. [redacted]'s injury to the mouth. (R. at 453; Pros. Ex. 18 at p. 6). Ms. [redacted] never saw appellant in the emergency room (ER). (R. at 459, 462).

E. In a police interview, Mrs. [redacted] recounted that appellant struck her in the mouth with a shoe; and the police observed injuries to Mrs. [redacted], but they observed no injuries on appellant.

1. The police interviewed Mrs. [redacted]

Later that morning, officers from the El Paso Police Department conducted a recorded interview of Mrs. [redacted] around 0720 in the emergency room; in a recording of the police interview, Mrs. [redacted] recounted that appellant struck her in the mouth with a shoe. (R. at 481; Pros. Ex. 31 at 0:00 to 1:10).

Officer [redacted], one of the police officers, interviewed Mrs. [redacted] who "cried throughout the interaction, not necessarily sobbing or anything like that, but

throughout the conversation she would cry from time, just let out a tear, just indicating she was sad." (R. at 342, 344–45, 348–49). He also saw "dried blood to her [victim's] both bottom and top lips"; and he did not "smell or suspect the use of alcohol on Mrs. [redacted] at all[.]" (R. at 349).

Another police officer, Officer [redacted], photographed Mrs. [redacted] at the hospital. (R. at 372, 374, 376–77; Pros. Ex. 18). Officer [redacted] saw that Mrs. [redacted] was "visibly upset, crying. You could tell that there was something—there was a lot of emotion attached to what had happened previously." (R. at 380). Mrs. [redacted] was "very emotional, almost to a state of disbelief, like she couldn't believe this had actually happened to her. She kind of didn't understand." (R. at 387).

Mrs. [redacted] told Officer [redacted] that she "had been struck in the mouth," and he saw blood on Mrs. [redacted]'s lip and photographed any "residual blood that was still on the mouth." (R. at 376–77, 380, 401). And Officer [redacted] saw photographs that Mrs. [redacted] took, around 0452, of herself on the day of appellant's attack. (R. at 384–86, 400; Pros. Exs. 20, 21). The photographs showed Mrs. [redacted]'s "injury from the assault while her lip is bleeding." (R. at 384–87; Pros. Exs. 20, 21). The injury was to the inside of Mrs. [redacted]'s lips possibly because of the braces on her teeth. (R. at 404). Officer [redacted] did not "smell or suspect the use of alcohol on [Mrs. [redacted].]" (R. at 388).

2. The police interviewed appellant.

During an interview with appellant, Officer [redacted] observed no physical injuries on appellant. (R. at 350–51). Officer [redacted] saw no scratches or bruises on appellant's face or neck; he did not see any defensive injuries or bleeding; appellant did not complain about being physically injured or in pain; nor did appellant request medical attention. (R. at 350–51). Officer [redacted] saw no physical injuries, scratches, bruises, defensive injuries, or "self-defense injuries" on appellant; appellant also did not complain about physical pain, was not bleeding at all, and did not request any medical attention. (R. at 390). And appellant told Officer [redacted] that there was "an altercation," that Mrs. [redacted] "attacked him first," and that "he [appellant] did hit her, he did strike her back, making the claim of self-defense." (R. at 389, 406).

Officer [redacted] admitted that he wished he had done more investigatory activity, but he believed that the police investigation was thorough enough to establish probable cause and that his investigatory activity was "within a normal investigation." (R. at 367). Officer [redacted] added that detectives usually follow up with his cases; and his role is to gather preliminary information, to establish probable cause in order to determine "if there is reason for arrest," and to accordingly make an arrest. (R. at 369).

F. During cross-examination of Mrs. [redacted], appellant elicited testimony about her prior statements that were apparently inconsistent with her testimony.

Appellant, through counsel, cross-examined Mrs. [redacted] about purported inconsistencies between her testimony and the statement she had given to the U.S. Army's Criminal Investigation Division (CID) on 19 October 2022. (R. at 533–34, 537, 586). And defense counsel also attempted to impeach Mrs. [redacted] he elicited testimony showing that Mrs. [redacted] purportedly told CID that "he [appellant] didn't do anything criminal" and "it was an accident"—statements that were allegedly similar to what Mrs. [redacted] earlier told civilian defense counsel on "August 11th and August 30th [of 2022]." (R. at 819, 839; Appellant's Br. 6).

But Mrs. [redacted] testified that she had lied to CID because she was pressured. (R. at 545). Mrs. [redacted] explained, "And my husband could probably be gone too. And I don't want that. So it's like it's me versus all the outside pressure." (R. at 543). Mrs. [redacted] added that people close to her and to appellant made her "feel guilty," as if "it was [her] fault[.]" (R. at 543–44). Mrs. [redacted] identified some people that pressured her: "his mother, his sister, and one of his sergeants[.]" (R. at 874).

In addition, appellant's family "constantly" called Mrs. [redacted] and her family, telling Mrs. [redacted] and her family that "you have to sign this non-prosecution." (R. at 832–33). Appellant's family even went to Mrs. [redacted]'s house in Jamaica and said that Mrs. [redacted] would "have to sign it" because appellant's family wanted the charges against appellant "dropped[.]" (R. at 833, 835, 837–38).

Mrs. [redacted] testified that she loved appellant and that she did not want him to go to prison. (R. at 493). Nonetheless, Mrs. [redacted] affirmed that her statements to 911, the El Paso police, and the medical providers were true. (R. at 544).

G. According to Sergeant First Class [redacted], Mrs. [redacted] allegedly said that the government was pressuring her and that she would change her testimony based on how the defense asked questions.

Sergeant First Class [redacted] and appellant deployed together from around 2020 to 2021; appellant "became [SFC [redacted]'s] Soldier" around 2020. (R. at 921, 931). SFC [redacted] was a mentor to appellant, and he looked up to her. (R. at 936).

Appellant called SFC [redacted] as a witness to impeach Mrs. [redacted]. (R. at 904). According to SFC [redacted]'s testimony, about a week before trial began, on 12 January 2023, SFC [redacted] got Mrs. [redacted]'s phone number from appellant and decided to call her. (R. at 922–23, 927, 933, 954; Pros. Ex. 34).

During the phone conversation, SFC [redacted] told Mrs. [redacted] that appellant still loved her, that he would want to be with her, and that "if you guys wanted, you know, to be together after this, like you guys could get through this." (R. at 925–26, 936). SFC [redacted] talked with Mrs. [redacted] about "the fact that [Mrs. [redacted]] was going to testify" and told Mrs. [redacted] that she could "plead the Fifth." (R. at 935).

According to SFC [redacted], Mrs. [redacted] allegedly said that "the government" was pressuring her, intimidating her, and "threatening" to hold her in contempt; in particular, "the major" from the government supposedly made statements that

pressured Mrs. [redacted] into testifying that certain marks on her neck were "strangulation marks." (R. at 922, 926–28, 942). SFC [redacted] also claimed that Mrs. [redacted] said that she would "change her testimony" based on the defense's questions during trial. (R. at 927, 944).

SFC [redacted] happened to serve as a Sexual Assault Response Coordinator (SARC) at the time of the phone call. (R. at 930, 936). And she admitted that, "in retrospect," calling Mrs. [redacted] "probably wasn't a good idea." (R. at 930, 936). SFC [redacted] further admitted that she now realized how her call with Mrs. [redacted] may have been perceived as pressure. (R. at 937–38).

Despite testifying about allegations of government pressure, SFC [redacted] said that she had no personal knowledge about conversations between Mrs. [redacted] and the government, that she had met Mrs. [redacted] only once before the phone call, and that she had never spoken with Mrs. [redacted]'s special victim counsel or any of the prosecutors. (R. at 937–39, 954). In contrast, SFC [redacted] had a mentor-mentee relationship with appellant, helped appellant move, offered to lend her truck to him for the move, and offered to put up her truck for his bail money. (R. at 923, 931–32). Indeed, shortly after appellant got out of jail, he went to see SFC [redacted]. (R. at 932). SFC [redacted] thinks of appellant "like a son[.]" (R. at 932).

Mrs. [redacted] provided additional details about her thirty-seven-minute phone conversation with SFC [redacted]. (R. at 954–56, 972; Pros. Ex. 34). For example, SFC

[redacted] told Mrs. [redacted] about how she herself had gone through a "similar situation" with her own husband in Hawaii; and in SFC [redacted]'s case, SFC [redacted] herself had pleaded "the Fifth" and had told the authorities that she lied "to get back at" her husband. (R. at 955–56). SFC [redacted] also told Mrs. [redacted] that "you could always say, you know, you were strangled because you're—it's a kink." (R. at 955–56).

Nonetheless, Mrs. [redacted] testified, "I told her [SFC [redacted]] I would not do the same thing that she did"; and Mrs. [redacted] told SFC [redacted], "I have to tell the truth" and "if he [appellant] really loves me, he needs to take accountability[.]" (R. at 956–57, 971–72). Mrs. [redacted] also told SFC [redacted], "I just want to find a reason, anything valid to not appear in court . . . . [T]he truth is going to incriminate Tyrese, so I don't want to go. And my lawyer was not able to get me out of the subpoena, so that got me frustrated." (R. at 974). Mrs. [redacted] denied ever saying, though, that she would "change [her] story" based on "how the defense asked questions." (R. at 971). Mrs. [redacted] also testified, "No one told me how to testify." (R. at 957).

H. Dr. [redacted], as an expert in domestic-violence dynamics, testified that Mrs. [redacted] s actions were consistent with counterintuitive victim behaviors.

Dr. [redacted] testified as an expert in domestic-violence victim dynamics. (R. at 564). She testified about "counterintuitive behaviors," i.e., "behaviors that we observe in victims of domestic violence that run counter to public expectations[.]" (R. at 565). Some of the "most common" counterintuitive behaviors include "after an incident has been reported, recanting that, their statements." (R. at 566).

Dr. [redacted] testified that "overall the research shows us that about 50 percent of individuals will recant an allegation of domestic violence after a report is made. And some studies put that as high as 80 percent." (R. at 568). When asked about why victims recant, Dr. [redacted] said, "I think first and foremost there is still love and emotional attachment to the spouse or for the spouse. There is a fear of getting involved in the legal system." (R. at 569). Dr. [redacted] added, "There can be family pressure, friend pressure, the spouse may pressure the individual to recant." (R. at 569). She also testified that "females who are of immigrant status are at especially high risk for domestic violence." (R. a 570).

Dr. [redacted] noted a phenomenon she observed "a lot": victims will take photographs of their injuries—though that "might seem strange to some people"—because the victims "either plan to maybe report at a later date, but they also keep them in order to show the abuser what they did." (R. at 575).

After reviewing the investigation, CID interview, medical records, photographs, and other evidence, Dr. [redacted] found that Mrs. [redacted] acted in ways that are consistent with "domestic violence victim's behaviors in the research," specifically "counterintuitive victim behaviors." (R. at 572–73, 576).

I. Ms. [redacted] an Army nurse and expert witness, testified that photographs of Mrs. [redacted] s lip were consistent with her testimony and 911 call; Ms. [redacted], the defense's expert witness, confirmed that there was evidence of a direct blow to Mrs. [redacted]'s mouth.

Ms. [redacted], a registered nurse and a forensic nurse with the Army, has been a nurse for about thirty-seven years, with thirty-five of those years at the William Beaumont Army Medical Center. (R. at 594–96, 599). She has testified as an expert about sixty times, with about half the times being for the government and the other half for the defense. (R. at 601). She has never been denied as an expert in the field of strangulation and nursing. (R. at 601). Here, she testified as an expert in the field of forensic nursing and strangulation. (R. at 601). Before testifying, Ms. [redacted] reviewed or viewed, among other things, Mrs. [redacted]'s 911 call, medical records, testimony, and El Paso police interview. (R. at 614).

After viewing photographs of Mrs. [redacted], Ms. [redacted] stated that Mrs. [redacted]'s injuries were "consistent with blunt force trauma that's coming from the outside." (R. at 620–21). When describing Mrs. [redacted]'s injuries to the mouth, Ms. [redacted] affirmed that blood was "pooling on the inside and then coming out," and that blood was "both on the inside of her [victim's] mouth and the outside of her mouth[.]" (R. at 620–21). Blunt force trauma to the mouth would "typically be painful." (R. at 619).

Similarly, Ms. [redacted], the defense's expert—who was trained and mentored by Ms. [redacted]—confirmed that there was evidence of a direct blow to Mrs. [redacted]'s mouth

and that the injury to the mouth was from blunt force trauma. (R. at 733, 740). Ms. [redacted], who reviewed photographs of Mrs. [redacted]'s injuries, agreed that Mrs. [redacted]'s mouth was struck by "something." (R. at 714–15, 721).

Ms. [redacted] claimed to have noticed no other injuries "with the mouth" of Mrs. [redacted] (R. at 716–18). And Ms. [redacted] premised that being hit with a shoe would have supposedly caused "other damage to the area." (R. at 716–18). But Ms. [redacted]'s opinions were influenced by the "hat brim theory." (R. at 716–18). And this theory focuses mainly on fall injuries, and the theory does not "talk about soft tissue injury." (R. at 730–31).

In comparison, Ms. [redacted] noted that one photograph of Mrs. [redacted] s injury depicted "dried blood around her [victim's] lips, with a little bit of swelling, probably" and "a little swelling and redness in her facial expression." (R. at 627–29; Pros. Ex. 18 at p. 2; Pros. Ex. 19 at p. 2). And Ms. [redacted] found that this photograph was consistent with Mrs. [redacted]'s testimony, with the 911 call, and "with the demeanor and effect that" Ms. [redacted] "might see from domestic violence victims in [her] ER[.]" (R. at 627–29; Pros. Ex. 18 at p. 2; Pros. Ex. 19 at p. 2).

Lastly, after Ms. [redacted] viewed another photograph depicting both the injuries to Mrs. [redacted]'s lip and Mrs. [redacted]'s looking upset, Ms. [redacted] testified that this photograph was also consistent with Mrs. [redacted]'s testimony and 911 call. (R. at 627, 630; Pros. Ex. 18 at p. 6; Pros. Ex. 19 at p. 6).

Assignment of Error I

WHETHER APPELLANT'S CONVICTION FOR DOMESTIC VIOLENCE IS FACTUALLY INSUFFICIENT.

Standard of Review

This court conducts a de novo review of factual sufficiency. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Scott*, ARMY 20220450, 2024 CCA LEXIS 126, at *3 (Army Ct. Crim. App. 14 Mar. 2024).

Law

A. Factual sufficiency.

Article 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B) (Supp. II 2021), states the following:

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

This court has explained that when "witness credibility plays a critical role in the outcome of trial, this court should hesitate to second-guess the trial court's

findings." *United States v. Stanley*, 43 M.J. 671, 674 (Army Ct. Crim. App. 1995). The degree to which the court gives 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.[6] *United States v. Jimenez-Victoria*, 75 M.J. 768, 771 (Army Ct. Crim. App. 2016).

B. Domestic violence.

Under Article 128b, UCMJ, the following are the elements for domestic violence through the commission of a violent offense against a spouse: "(a) That the accused committed a violent offense; and (b) That the violent offense was committed against a spouse . . . of the accused." Executive Order 14062, 2022 Amendments to the Manual for Courts-Martial, United States, 87 Fed. Reg. 4763 (Jan. 26, 2022) ("87 FR 4763") at 4778.[7]

The term "violent offense" includes a violation of Article 128, UCMJ, 10 U.S.C. § 928. 87 FR 4763 at 4780. And the elements for assault consummated by battery under Article 128, UCMJ, are the following: (1) that the accused did

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[6] Appellee maintains that Article 66(d), UCMJ, creates a presumption of guilt. *See United States v. Harvey*, 83 M.J. 685, 693 (N.M. Ct. Crim. App. 2023) ("[I]n reviewing a conviction, a court of criminal appeals presumes that an appellant is, in fact, guilty."). Because the U.S. Court of Appeals for the Armed Forces is currently deciding this issue, appellee will proceed in its brief, for the sake of argument, as if this presumption of guilt does not exist.

[7] This portion of the Executive Order regarding Article 128b, UCMJ, was later reprinted and incorporated in Manual for Courts-Martial, United States (2024 ed.), pt. IV, ¶78a.b.(1), ¶78a.c.(1)(i).

bodily harm to a certain person; (2) that the bodily harm was done unlawfully; and (3) that the bodily harm was done with force or violence. 10 U.S.C. § 928 (2018); Manual for Courts-Martial, United States (2019 ed.) [MCM 2019], pt. IV, ¶77.b.(2). "Bodily harm" means "an offensive touching of another, however slight." MCM 2019, pt. IV, ¶77.c.(1)(a).

Argument

A. The conviction was factually sufficient because Mrs. [redacted]'s testimony was corroborated by her statements to the 911 operator, medical personnel, the EMT, and police; by photographs; and by third-party observations—all from the same day as appellant's attack.

For his conviction under Article 128b, UCMJ, appellant's only dispute is with the violent-offense element.[8] And here, the prosecution established that appellant committed a violent offense by satisfying the three elements of assault consummated by battery under Article 128, UCMJ.

1. Appellant did bodily harm to his wife.

Through witness testimony and documentary evidence, the evidence shows that appellant did bodily harm to his wife under Article 128, UCMJ. Mrs. [redacted]'s testimony showed that appellant hit her in the mouth with a shoe, causing it to bleed. (R. at 473–74, 495, 856). Photographs from the same day of the attack show the injuries to Mrs. [redacted]'s bleeding mouth. (Pros. Exs. 18, 19, 20, 21, 23, 24). The responding EMT testified that he saw Mrs. [redacted]'s bloody lip and the injury to

[8] Appellant does not dispute that he was married to Mrs. [redacted]. (Appellant's Br. 8).

her mouth. (R. at 322, 336, 340). The hospital doctor and nurse who cared for Mrs. [redacted] on the day of appellant's attack also saw the injury to her mouth. (R. at 437, 453). And the responding El Paso police officers also saw Mrs. [redacted]'s injury to her mouth. (R. at 349, 376–77, 401; Pros. Ex. 18).

Indeed, appellant does not seem to contend that he did bodily harm to Mrs. [redacted], instead focusing on self-defense and accident. (Appellant's Br. 5–6, 10–12). Therefore, Mrs. [redacted] s testimony—especially when combined with corroborating photographs of her injuries and with testimonies of third-party witnesses who saw her on the same day as appellant's attack—provides strong evidence that appellant did bodily to her. (R. at 473–74, 495, 856).

2. Appellant did the bodily harm to his wife unlawfully.

The evidence shows that appellant did the bodily harm to Mrs. [redacted] unlawfully under Article 128, UCMJ, because Mrs. [redacted]'s testimony was corroborated by third-party testimony; by statements Mrs. [redacted] provided to the 911 operator, the EMT, medical personnel, and the police, all on the same day as appellant's attack; by documentary evidence; and by photographs of her injuries from the same day as the attack.

Mrs. [redacted] s testimony shows that appellant unlawfully struck her—he had no lawful reason, such as self-defense, for hitting her in the mouth. (R. at 473, 495, 856). Mrs. [redacted] testified that she verbally insulted appellant; and appellant reacted

by saying Mrs. [redacted] "should lick his shoe" and by then hitting her in the mouth with a shoe while she was in a chokehold, causing her mouth to bleed. (R. at 473–74, 495, 856). Upon leaving the apartment after 0400, Mrs. [redacted] documented the injury to her mouth by photographing herself. (R. at 474–79, 522–23; Pros. Exs. 23, 24).

The 911 operator's testimony corroborates Mrs. [redacted] s testimony. (R. at 294, 298, 304–05). Ms. [redacted] noticed that Mrs. [redacted] "sounded nervous, scared. It did sound like she had been crying when she was trying to explain to me [Ms. [redacted]] what had happened to her." (R. at 299–300). And while Mrs. [redacted] was in this nervous and scared state, she told Ms. [redacted] that her husband had hit her in the mouth with a shoe, and that she had a "burst" mouth. (Pros. Ex. 3 at 1:50 to 2:40, 3:20 to 4:15; R. at 294, 298, 304–05). This 911 call was recorded, and an expert witness in forensic nursing testified that the 911 call "sounded like she [victim] was reporting a stressful event." (R. at 596, 599, 628). Indeed, the fact that Mrs. [redacted] called 911 lends credence to her testimony about appellant's attack because, as one expert in forensic nursing testified, "You usually call 911 when there is a threat, or concerns for a medical emergency[.]" (R. at 615).

The EMT who responded to Mrs. [redacted]'s 911 call also provided testimony corroborating the fact that appellant struck his wife with a shoe. (R. at 330). Mr. [redacted], the EMT, arrived on scene and met Mrs. [redacted] around 0646; and he testified that Mrs. [redacted] stated that she was "hit in the mouth with a shoe." (Pros. Ex. 5 at bate-

stamp page 00075; R. at 330). He also documented Mrs. [redacted]'s statement in his written report. (Pros. Ex. 5 at bate-stamp page 00080).

After being seen by the EMT, Mrs. [redacted] was seen by the hospital around 0715—only about three hours after appellant's attack. (Pros. Ex. 22 at bate-stamp page 00057). Further corroborating Mrs. [redacted]'s testimony, the emergency-room physician who treated Mrs. [redacted] testified that Mrs. [redacted] reported being hit in the mouth. (R. at 437). And the treating hospital nurse testified that Mrs. [redacted] said that she had been "hit across the mouth with shoe by husband." (R. at 451). The hospital's medical records also document that Mrs. [redacted] said that her husband hit her with a shoe on the mouth. (Pros. Ex. 22 at bate-stamp page 00063).

El Paso police officers conducted a recorded interview of Mrs. [redacted] around 0720. (R. at 481; Pros. Ex. 31 at 0:00 to 1:10). During the interview, Mrs. [redacted] stated that her husband struck her in the mouth with a shoe. (R. at 481; Pros. Ex. 31 at 0:00 to 1:10). And an interviewing police officer, Officer [redacted], testified that Mrs. [redacted] "cried throughout the interaction." (R. at 348).

Officer [redacted] testified that Mrs. [redacted] said that she "had been struck in the mouth." (R. at 380). And Officer [redacted] took photographs of Mrs. [redacted]'s injuries at the hospital. (R. at 376–78; Pros. Exs. 18, 19). Officer [redacted] also gathered photographs that Mrs. [redacted] herself had taken of her mouth injuries around 0452 on the day of the attack. (R. at 382–83, 385; Pros. Exs. 20, 21).

Mrs. [redacted]'s testimony; the corroborating third-party testimony; the consistent statements Mrs. [redacted] provided to the 911 operator, the EMT, medical personnel, and the police; and the documentary and photographic evidence all provide compelling evidence that appellant unlawfully struck his wife's mouth with a shoe.

3. Appellant did the bodily harm with force and violence.

The evidence shows that the bodily harm to Mrs. [redacted] was done with force and violence under Article 128, UCMJ. (R. at 473–74). Mrs. [redacted] testified about how her husband struck her in the mouth with a shoe, resulting in "blood rushing from" her mouth. (R. at 473–74, 495, 856). As evidence of appellant's use of force and violence, Mrs. [redacted] detailed how the injury was "[v]ery painful, especially with braces." (R. at 475). She could not eat for "like two days." (R. at 475).

Mrs. [redacted]'s testimony provides convincing evidence of the force and violence of appellant's attack, especially when corroborated by, among other things, the testimonies of the 911 operator, EMT, medical personnel, and police; photographs of Mrs. [redacted]'s bloody mouth; medical documents; and the recorded 911 call. (Pros. Exs. 3 at 1:40 to 2:40, Pros. Ex. 5 at bate-stamp page 00080, 18, 19, 20, 21, Pros. Ex. 22 at bate-stamp page 00063, 23, 24, 31 at 0:00 to 1:10; R. at 294, 298, 304–05, 322, 330, 336, 340, 349, 376, 380, 401, 437, 451, 453, 481).

Therefore, because compelling evidence establishes all three elements of Article 128, UCMJ, and both elements of Article 128b, UCMJ, appellant's conviction must remain undisturbed.

B. Mrs. [redacted]'s counterintuitive victim behavior arose from pressure by appellant's mother and his sister, and from the fact that Mrs. [redacted] still loved her husband and did not want to see him go to prison.

After making at least four same-day reports about appellant's attack, Mrs. [redacted] demonstrated counterintuitive victim behavior by apparently telling CID (on 19 October 2022) and the civilian defense counsel (in August 2022) that appellant "didn't do anything criminal" and "it was an accident." (R. at 533–34, 819, 839).

But Mrs. [redacted] made such statements because of pressure from appellant, his mother, and his sister. (R. at 543–45, 698–99, 832–33, 835, 837, 874). For example, appellant's family "constantly" called Mrs. [redacted] and her family. (R. at 832–33). Appellant's family even went to her house in Jamaica in an attempt to get the charges against appellant dropped. (R. at 833, 835, 837–38).

In addition to enduring external pressure, Mrs. [redacted] also admitted that she loved her husband and that she did not want him to go prison. (R. at 493). This admitted love for appellant is consistent with the fact that, on the day of the attack, she hung up twice during her 911 calls and did not want to call 911. (R. at 872).

Given Mrs. [redacted]'s background and the evidence in this case, Dr. [redacted] also found that Mrs. [redacted]'s actions were consistent with "domestic violence victim's

behaviors in the research," specifically "counterintuitive victim behaviors." (R. at 569–70, 572–73, 575–76).

Furthermore, when Mrs. [redacted] spoke with CID about three months after the attack, her explanation of the injury to her mouth lacked the detail and consistency that were present in Mrs. [redacted]'s testimony and in the corroborating evidence—such as her statements to 911, the EMT, medical personnel, and police. (R. at 534). In the CID interview, Mrs. [redacted] apparently explained her mouth injury by saying that appellant had allegedly "walked out and broke a shoe rack," had been "bent over the shoe rack," and had then somehow "spun around, [and] made contact with" Mrs. [redacted], who had been behind him. (R. at 534). Not only does this statement to CID lack credible detail, it still incriminates appellant and fails to show how the strike was accidental or otherwise lawful; furthermore, no other piece of admitted evidence corroborates this later version of events given to CID. (R. at 533, 586).

Mrs. [redacted]'s statements to CID and to the civilian defense counsel lacked credible detail and were uncorroborated; whereas her detailed testimony was corroborated by, among other things, photographs; medical records; and statements to 911, the EMT, medical personnel, and police that all preceded the statements to CID or civilian defense counsel. (Pros. Exs. 3, Pros. Ex. 5 at bate-stamp page 00080, 18, 19, 20, 21, Pros. Ex. 22 at bate-stamp page 00063, 23, 24, 31; R. at 294, 298, 304–05, 322, 330, 336, 340, 349, 376, 380, 401, 437, 451, 453, 481).

C. Ms. [redacted], the defense expert, gave an opinion influenced by a theory that focused mainly on fall injuries and that did not deal with soft-tissue injuries.

Ms. [redacted], the defense expert, testified that the Mrs. [redacted]'s mouth was indeed struck by "something." (R. at 714–15). But she opined that being hit with a shoe would have supposedly caused "other damage to the area." (R. at 716–18). But Ms. [redacted]'s opinions were influenced by a theory that focuses mainly on fall injuries and that does not "talk about soft tissue injury." (R. at 716–18, 730–31).

Ms. [redacted] also claimed to have noticed no other injuries "with the mouth" of Mrs. [redacted]. (R. at 716–18). But Ms. [redacted] noted that one photograph depicted "dried blood around her [victim's] lips, with a little bit of swelling, probably" and "a little swelling and redness in her facial expression." (R. at 627–29; Pros. Ex. 19 at p. 2).

Notably, Ms. [redacted], the defense's expert—who was trained and mentored by Ms. [redacted], the prosecution's expert—still confirmed that there was evidence of a direct blow to Mrs. [redacted]'s mouth and that the injury to the mouth was from blunt force trauma. (R. at 733, 740).

D. Appellant's impeachment witness, Sergeant First Class [redacted], had attempted to influence Mrs. [redacted]'s testimony and showed her own bias.

Appellant called SFC [redacted] to impeach Mrs. [redacted] but her testimony revealed that she had attempted to influence Mrs. [redacted]'s testimony: during a phone call about a week before trial, SFC [redacted] told Mrs. [redacted] that appellant still loved Mrs. [redacted] that he would want to be with Mrs. [redacted], and that Mrs. [redacted] could "plead the Fifth." (R. at

904, 922, 925–26, 935–36). SFC [redacted] even admitted that she now saw how her phone call to Mrs. [redacted] may have been perceived as pressure. (R. at 937–38).

SFC [redacted] also showed her own bias because she had a mentor-mentee relationship with appellant, helped appellant move, offered to lend her truck to him for the move, and offered to put up her truck for his bail money. (R. at 923, 931–32). And she thinks of appellant "like a son[.]" (R. at 932).

E. The court-martial's findings merit greater deference, and appellant's conviction should remain undisturbed, because witness credibility played a critical role in the outcome.

Because Mrs. [redacted] was the victim of appellant's attack, her credibility certainly played a critical role in the outcome of trial; accordingly, "this court should hesitate to second-guess the trial court's findings." *Stanley*, 43 M.J. at 674. Here, the panel observed live testimony; and the military judge instructed the panel on the law about determining the believability of witnesses, telling the panel that it bore the sole responsibility of determining the credibility of Mrs. [redacted] and other witnesses. (R. at 1007–09).

To be sure, third-party testimony and other corroborating evidence support the conviction, but Mrs. [redacted] s credibility was often kept in mind, as evidenced by the fact that appellant continually attacked Mrs. [redacted]'s credibility, explicitly or implicitly, during his opening statement, direct examination of Mrs. [redacted], cross-examination of Mrs. [redacted], and closing argument. (R. at 284, 540, 803, 975, 1048).

Mrs. [redacted] testified on four separate occasions during trial (R. at 465, 698, 782, 949); and because the panel was able "to see and hear" the repeated testing of Mrs. [redacted]'s credibility throughout trial, the court-martial's findings merit greater deference and should be affirmed. *See Jimenez-Victoria*, 75 M.J. at 771; *see also Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891) ("There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony."); *United States v. Harrington*, 83 M.J. 408, 415 n.4 (C.A.A.F. 2023) ("credibility determinations are uniquely the province of the trier of fact").

Assignment of Error II

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING A 911 CALL AND BODY CAMERA FOOTAGE CONTAINING THE COMPLAINING WITNESS'S STATEMENTS AS RESIDUAL HEARSAY.

Additional Facts

A. The military judge preliminarily admitted Mrs. [redacted]'s 911 call and her recorded police interview under a ruling that was conditioned on the uncooperative nature of Mrs. [redacted].

The prosecution filed a motion in limine seeking to admit Mrs. [redacted]'s 911 call and the police bodycam video under Mil. R. Evid. 807. (App. Ex. XXI). The prosecution argued that the 911 call and bodycam video should be admitted

because of, among other things, Mrs. [redacted] s "on-and-off-willingness to participate" in the proceedings: on 28 July 2022, Mrs. [redacted] indicated that she would participate in the court-martial and testify if needed; on 30 August 2022, she filed an affidavit of non-prosecution with the City of El Paso, asking that the prosecution cease; on 19 October 2022, she told CID that appellant accidentally caused her injuries; on 9 November 2022, Mrs. [redacted] asked the chain of command to stop the prosecution; but on 23 November 2022, Mrs. [redacted] indicated that she would participate in the court-martial and testify as needed. (App. Ex. XXI at pp. 3, 5). Appellant opposed the motion; but, for purposes of litigating the motion, appellant stipulated to the facts regarding these various acts and statements by Mrs. [redacted] from 28 July 2022, to 23 November 2022. (App. Ex. XXI at p. 2–3; App. Ex. XXV at p. 1).

The military judge preliminarily admitted Mrs. [redacted]'s 911 call and portions of the bodycam video, under a Mil R. Evid. 807 ruling that was "conditional based on the uncooperative nature of the complaining witness."[9] (R. at 199).

Later, during the presentation of evidence to the panel—before Mrs. [redacted] ever testified—the prosecution moved to have the 911 call and the portions of the

[9] In support of the residual-hearsay motion, trial counsel here cited *United States v. Pruter*, NMCM 99 00748, 2000 CCA LEXIS 310, at *5 (N.M. Ct. Crim. App. 16 May 2000), in which the military judge granted a motion in limine admitting residual hearsay based partially on the "assumption that Mrs. Pruter [victim] would recant (as she strongly suggested she would do in her affidavit)." (R. at 28–29; App. Ex. XXI at p. 7).

bodycam video admitted; and defense counsel said he had no objection to either exhibit. (R. at 301, 347; Pros. Exs. 3, 31).

B. The military judge deemed the 911 call and the portions of the bodycam video to be prior consistent statements.

During appellant's first cross-examination of Mrs. [redacted], he impeached her with the apparently inconsistent statements she had made to CID on 19 October 2022. (R. at 533–34, 537–38, 586).

After Mrs. [redacted]'s first round of testimony, the prosecution requested a panel instruction on prior consistent statements, noting that "[t]here is four or five consistent statements here as well." (R. at 553). The military judge agreed stating, "Right. The consistent piece would also come from the stuff admitted under [Mil. R. Evid.] 807 that we discussed earlier. And I was going to include that. Thank you for the reminder." (R. at 553; Pros. Exs. 3, 31). Then the military judge asked if the parties had "anything else"; defense counsel indicated that it had "[n]othing," and defense counsel brought up neither objections nor disagreements. (Trial audio, at 5:44:40 to 5:45:30 of file named "CAMPBELL-20230119-OPEN-CM2.wav"; R. at 554). Indeed, after the military judge indicated that the 911 call and the portions of the bodycam video were prior consistent statements, appellant never voiced any type of disagreement or objection about prior consistent statements—but appellant disputed other aspects of the panel instructions, such as language about lesser-included offenses. (R. at 199–200, 553–54, 889–90, 894–903, 978–

88, 1007–08; Trial audio, at 5:44:40 to 5:45:30 of file named "CAMPBELL-20230119-OPEN-CM2.wav"; App. Ex. XXIX).

C. Appellant attacked Mrs. [redacted]'s credibility and impeached her with apparent prior inconsistent statements.

During opening statements, defense counsel asserted that Mrs. [redacted]—after she reported appellant to the police—actually "told the truth and admitted that this [appellant's crimes] never happened." (R. at 288). And Mrs. [redacted] was called to testify four separate times; and throughout trial, appellant continued to impeach Mrs. [redacted] with her apparent prior inconsistent statements to CID and civilian defense counsel. (R. at 540, 817–21, 823–24, 839, 975).

Appellant also called SFC [redacted] to impeach Mrs. [redacted]. (R. at 904). SFC [redacted] testified that, on 12 January 2023, Mrs. [redacted] allegedly said that she would "change her testimony" based on the defense's trial questions. (R. at 922–23, 927, 944). Mrs. [redacted] allegedly said that "the government" was pressuring her, intimidating her, and "threatening" to hold her in contempt; and that "the major" from the government supposedly made statements that pressured Mrs. [redacted] into testifying that certain marks on her neck were "strangulation marks." (R. at 922, 926–28, 942).

Standard of Review

Appellate courts "review a military judge's evidentiary rulings for abuse of discretion." *United States v. Kelley*, 45 M.J. 275, 279 (C.A.A.F. 1996).

Law

A. Prior consistent statements.

Under Military Rule of Evidence (Mil. R. Evid.) 801(d), a statement that meets the following conditions is not hearsay:

> (1) . . . The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
> . . .
> (B) is consistent with the declarant's testimony and is offered:
> (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
> (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; . . . .

The rule itself does not specify what types of attacks a prior consistent statement under Mil. R. Evid. 801(d)(1)(B)(ii) is admissible to rebut, but the drafters' analysis lists "charges of inconsistency" as one example. *United States v. Finch*, 79 M.J. 389, 395 (C.A.A.F. 2020); Manual for Courts-Martial, United States (2016 ed.), app. 22 at A22-61; *see also* MCM 2019, app. 16 at A16-6 ("This rule is taken from Rule 801 of the MCM (2016 edition) without amendment.").

When multiple motives to fabricate or multiple improper influences are asserted, the prior consistent statement "need not precede all such motives or influences, but only the one it is offered to rebut." *United States v. Ayala*, 81 M.J. 25, 29 (C.A.A.F. 2021) (quoting *United States v. Frost*, 79 M.J. 104, 110 (C.A.A.F. 2019)). Furthermore, the prior statement "need not be identical in every

detail" to the declarant's testimony at trial; rather, the prior statement need only be for the most part consistent with respect to facts "of central importance at the trial." *Ayala*, 81 M.J. at 28 (citation omitted); *see also United States v. Norwood*, 81 M.J. 12, 18 (C.A.A.F. 2021).

B. Residual hearsay.

Under Mil. R. Evid. 807(a), a hearsay statement is not excluded by the rule against hearsay—even if the statement is not specifically covered by a hearsay exception in Mil. R. Evid. 803 or 804—under the following circumstances:

> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
> (2) it is offered as evidence of a material fact;
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
> (4) admitting it will best serve the purposes of these rules and the interests of justice.

"A military judge's decision to admit residual hearsay is entitled to considerable discretion on appellate review." *United States v. Wellington*, 58 M.J. 420, 425 (C.A.A.F. 2003) (internal quotation marks omitted).

C. Excited utterance.

Under Mil. R. Evid. 803(2) a hearsay exception exists for a "statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." For hearsay to be admitted as an excited utterance: (1) the statement must be spontaneous, excited, or impulsive rather than

the product of reflection and deliberation; (2) the event that prompts the utterance must be startling; and (3) the declarant must be under the stress of excitement caused by the event. *United States v. Smith*, 83 M.J. 350, 356 (C.A.A.F. 2023).

D. Waiver and forfeiture.

Appellate courts generally "do not review waived issues because a valid waiver leaves no error to correct on appeal." *See United States v. Hardy*, 76 M.J. 732, 736 (A.F. Ct. Crim. App. 2017). In contrast, forfeiture is the "failure to make the timely assertion of a right" and is reviewed for plain error. *United States v. Rich*, 79 M.J. 472, 475–76 (C.A.A.F. 2020).

Argument

A. The 911 call and the portions of the bodycam video were admissible as prior consistent statements because, among other things, they were consistent with Mrs. [redacted] s testimony, they rebut the express and implied charges of improper influence and motive, and they rehabilitate Mrs. [redacted]'s credibility from charges of inconsistency.

Under Mil. R. Evid. 801(d) and *Finch*, 79 M.J. at 395, the 911 call and the portions of the bodycam video were admissible as prior consistent statements because Mrs. [redacted] s statements in these two exhibits (1) were consistent with Mrs. [redacted]'s testimony about facts of central importance because—in both the 911 recording and the bodycam video—Mrs. [redacted] stated that appellant hit her in the mouth with a shoe, which were all statements consistent with her testimony; (2) rebutted express and implied charges that Mrs. [redacted] was acting from an improper

influence or motive, such as the alleged pressure from "the government" or her alleged motive to change her testimony based on how the defense asked questions; and (3) rehabilitated Mrs. [redacted] from charges of inconsistency, such as the defense's impeachments of her based on her statements to CID and civilian defense counsel. (R. at 470, 473, 494–95, 533–34, 537–38, 586, 819, 839, 856, 860–61, 922, 926–28, 942, 944; Pros. Ex. 3 at 1:40 to 2:40, 3:20 to 4:15; Pros. Ex. 31 at 0:00 to 1:10).

Having taken place on 18 July 2022, the 911 call and bodycam video qualify as admissible prior consistent statements because they preceded the CID interview (19 October 2022), the statements to civilian defense counsel (August 2022), and the conversation with SFC [redacted] (12 January 2023). *See United States v. Coleman*, 72 M.J. 184, 188 (C.A.A.F. 2013) ("Where multiple motives to fabricate or multiple improper influences are asserted, the statement need not precede all such motives or inferences, but only the one it is offered to rebut." (citation omitted)).

The military judge acted well within his discretion by admitting these two exhibits; and even assuming that the military judge did not explicitly admit these two exhibits under Mil. R. Evid. 801(d), this court may affirm a military judge's ruling that "reached the correct result for the wrong reason." *See United States v. Vargas*, 83 M.J. 150, 156 (C.A.A.F. 2023) (citing *United States v. Bess*, 80 M.J. 1, 11–12 (C.A.A.F. 2020)).

Lastly, appellant waived any issue about whether the 911 call and bodycam video were prior consistent statements. After the military judge deemed these two exhibits to be prior consistent statements, the court asked counsel if they had anything to add; and defense counsel stated that it had "[n]othing," bringing up neither objections nor disagreements. (Trial audio, at 5:44:40 to 5:45:30 of file named "CAMPBELL-20230119-OPEN-CM2.wav"; R. at 553–54). In fact, appellant never voiced any disagreement or objection about prior consistent statements during trial. (R. at 199–200, 553–54, 889–90, 894–903, 978–88, 1007–08; App. Ex. XXIX). And if appellant did not waive this issue, he certainly forfeited it by failing to ever object when the military judge deemed Prosecution Exhibits 3 and 31 to be prior consistent statements. (R. at 553–54).

B. The 911 call and the portions of the bodycam video were admissible as residual hearsay because of, among other things, Mrs. [redacted]'s past statements showing her desire for non-prosecution and potential uncooperativeness.

The 911 call and the portions of the bodycam video satisfied the residual-hearsay requirements, because (1) these two exhibits were corroborated by documentary evidence, and these two exhibits contained trustworthy statements given to police and 911 emergency personnel within about three and a half hours of appellant's attack with the shoe; (2) the exhibits offered evidence of material facts detailing how appellant struck his wife with a shoe; (3) at the time of the military judge's ruling, these exhibits were the most probative piece of evidence

obtainable because the prosecution did not know to what extent Mrs. [redacted] would cooperate in the proceedings; (4) the admission of the exhibits would prevent Mrs. [redacted]'s past statements and her requests for non-prosecution from controlling the presentation of evidence, and thus admission of the exhibits served the purposes of the evidentiary rules and the interests of justice. *See* Mil. R. Evid. 807(a).

In *United States v. Haner*, 49 M.J. 72, 77 (C.A.A.F. 1998), the court upheld the military judge's decision to admit, as residual hearsay, a victim's statement given to investigators a week after the crime. The *Haner* court noted, "This statement was entirely hers. The events were recent, traumatic, and still fresh in Mrs. Haner's memory. She was still in fear that her husband might travel to Michigan to carry out his threats." *Id.* at 78 (citation omitted). Similar to the statement in *Haner*, Mrs. [redacted] s statements to 911 and police occurred within about three and a half hours—not within a week, as in *Haner*—of the attack while she was still under the stress of the event; and Mrs. [redacted]'s statements were corroborated by photographs and by other admissible statements to medical personnel and the EMT; and Mrs. [redacted]'s statements were made to emergency and law-enforcement personnel, which "enforced the serious nature of the statement[s]." *Id.* at 78; *see also United States v. Ortiz*, 34 M.J. 831, 835 (A.F.C.M.R. 1992) ("It is in the interest of justice to admit out-of-court statements from abused spouses when such

statements have the necessary 'indicia of reliability' and 'circumstantial guarantees of trustworthiness' to justify their admission." (citation omitted)).

Lastly, appellant waived this residual-hearsay issue during the presentation of evidence to the panel because he told the court he had no objection when the prosecution moved to admit Prosecution Exhibits 3 and 31—even before Mrs. [redacted] ever testified. (R. at 301, 347). The military judge had merely preliminarily admitted Prosecutions 3 and 31 under a ruling that was "conditional based on the uncooperative nature of the complaining witness." (R. at 199; Pros. Exs. 3, 31). So appellant could have objected based on the fact that the military judge's condition—that is, the demonstrated uncooperative nature of the complaining witness during court-martial—was clearly unmet, because Mrs. [redacted] had not even been called to testify at that point. (R. at 199, 301, 347). And if appellant did not waive this issue, then he certainly forfeited it by failing to object. (R. at 301, 347).

The military judge acted well within his "considerable discretion" by admitting these exhibits because Mrs. [redacted]'s statements in the 911 call and bodycam video were made with circumstantial guarantees of trustworthiness; provided material facts about appellant's attack; were the most probative pieces of evidence of appellant's attack, at the time of the two exhibits' preliminary admission; and were admitted to best serve the purposes of the Military Rules of Evidence and the interests of justice. *See Wellington*, 58 M.J. at 425.

C. The 911 call was admissible as an excited utterance because Mrs. [redacted] made those statements soon after the attack when she was still under the stress of the domestic violence.

Under *Smith*, 83 M.J. at 356, Mrs. [redacted]'s statements on the 911 call were also admissible as excited utterances because (1) the statements were excited rather than the product of reflection and deliberation; (2) appellant's attack, which prompted the utterance, was startling; and (3) Mrs. [redacted] was under the stress of excitement caused by appellant's attack.

First, Mrs. [redacted]'s statements were excited, without reflection or deliberation. For example, the 911 operator noted that Mrs. [redacted] "sounded nervous, scared. It did sound like she had been crying when she was trying to explain to me what had happened to her." (R. at 299–300).

Second, appellant's attack, which caused Mrs. [redacted]'s lip to burst and bleed, was startling. (R. at 305, 384–87; Pros. Exs. 20, 21). Mrs. [redacted] had just suffered a painful, bloody injury likely to cause stress and excitement; as Mrs. [redacted] testified, the injury to her mouth was "[v]ery painful, especially with braces," and she "couldn't eat for like two days." (R. at 473–75).

Third, Mrs. [redacted] was under the stress of excitement caused by the attack. Again, the 911 operator noted that Mrs. [redacted] "sounded nervous, scared." (R. at 299–300). During the 911 call, Mrs. [redacted] was still in physical pain and in a "bad state." (R. at 479, 532). And an expert witness in forensic nursing, who heard the

recorded 911 call, testified that the call "sounded like she [victim] was reporting a stressful event." (R. at 628). Therefore, the 911 call is also admissible as an excited utterance under Mil. R. Evid. 803(2).

D. Even if the 911 call and the portions of the bodycam video were admitted in error, no prejudice occurred.

Even if the 911 call and the portions of the bodycam video were admitted in error, no prejudice occurred, because the conviction was supported by Mrs. [redacted]'s testimony and other compelling pieces of corroborating evidence, including the testimonies of Mr. [redacted], Dr. [redacted], and Ms. [redacted]; the EMT report; photographs of Mrs. [redacted]'s bloody mouth; and medical documents. (Pros. Exs. 5 at bate-stamp page 00080, 18, 19, 20, 21, Pros. Ex. 22 at bate-stamp page 00063, 23, 24; R. at 294, 298, 304–05, 322, 330, 336, 340, 349, 376, 380, 401, 437, 451, 453, 473–74, 481).

Assignment of Error III

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ALLOWING THE TRIAL COUNSEL AND SPECIAL VICTIM'S PROSECUTOR TO COMMENT ON APPELLANT'S RIGHT TO SILENCE DURING CLOSING ARGUMENT AND SENTENCING, RESPECTIVELY.[10]

[10] Appellant seems to argue that the military judge should have declared a mistrial; indeed, he claims the trial court's purported error merits "setting aside [appellant's] findings and sentence." (Appellant's Br. 26). Accordingly, appellee will address whether the military judge's denial of a mistrial was within his proper discretion.

Additional Facts

A. Before and after trial counsel's comment, the military judge provided instructions about appellant's absolute right to not testify.

Before any presentation of evidence, the military judge confirmed with the panel members that they agreed with the principles that "the defense has no obligation to present any evidence or to disprove the elements of the offenses," and that the burden never shifts to the defense to establish appellant's innocence. (R. at 57, 222). The panel also swore to follow the applicable law, as usually set forth in the Discussion section of Rule for Courts-Martial 807(b)(2). (R. at 39, 208).

Later, right before closing arguments, the military judge instructed the panel about appellant's right to not testify: "The accused has an absolute right to remain silent. You may not draw any inference adverse to the accused from the fact that he did not testify as a witness. The fact that the accused has not testified must be disregarded by you." (R. at 1012). The military judge also told the panel that counsel's closing arguments "are not evidence" and that the panel must "apply the law as I instruct you." (R. at 1014).

During closing arguments, trial counsel discussed Mrs. [redacted]'s credibility and then moved on to discussing the merits of the defense's theories: "So the flip side of this is that [appellant] is not. Now he didn't testify, no comment on that." (R. at 1036). When defense counsel objected, trial counsel said, "He did not testify. That's okay." (R. at 1037). The military judge instructed, "Panel members, I

provided you an instruction. There's a lot of problems with that first statement, that the accused was not a witness in this case. And the fact that he was not a witness must be completely disregarded by yourself." (R. at 1037). The military judge then confirmed that the panel understood his instructions. (R. at 1037).

Trial counsel also apologized before the members and clarified that he was "referencing to the defense theories, not the witness himself." (R. at 1037). Appellant moved for a mistrial, which the military judge denied. (R. at 1037). After receiving the military judge's instructions, the panel deliberated and then acquitted appellant of all but one specification. (R. at 1073).

B. During sentencing argument, the assistant trial counsel argued that appellant failed to express remorse in his unsworn statement.

Appellant elected to be sentenced by the military judge alone. (R. at 1075). He then provided an unsworn statement to the court during the presentencing phase. (R. at 1127). Appellant's statement focused on his work performance; he neither touched upon the substance of his conviction nor expressed any remorse about his attack against his wife. (R. at 1127–33; Appellant's Br. 21).

During sentencing argument, the assistant trial counsel argued that appellant failed to show remorse in his unsworn statement.[11] (R. at 1135–37). Appellant

[11] Appellant does not dispute that he failed to show remorse during his "limited unsworn statement regarding his productivity in service." (Appellant's Br. 21).

moved for a mistrial, claiming that his Fifth Amendment rights were violated; but the military judge denied the motion and permitted the argument. (R. at 1135–48).

Standard of Review

Courts "will not reverse a military judge's determination on a mistrial absent clear evidence of an abuse of discretion." *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009).

Law

A. Commenting on right to remain silent.

"It is blackletter law that a trial counsel may not comment on the accused's exercise of his constitutionally protected rights, including his right to remain silent." *Id.* If a trial counsel makes an improper comment about the accused's exercise of his right to remain silent, the court must decide whether the error resulted in a miscarriage of justice requiring a mistrial. *Id.* If the error was of constitutional dimension, it "also must determine whether the error and the military judge's curative efforts rendered it harmless beyond a reasonable doubt." *Id.*

B. Commenting on an accused's refusal to admit guilt after findings.

However, "an accused's refusal to admit guilt after findings may be an appropriate factor" for consideration in sentencing deliberation on rehabilitation potential but only if a proper foundation has been laid. *United States v. Paxton*, 64 M.J. 484, 487 (C.A.A.F. 2007). "As a general rule, the predicate foundation is that

an accused has either testified or has made an unsworn statement and has either expressed no remorse or his expression of remorse can be arguably construed as being shallow, artificial, or contrived." *Id.* (quoting *United States v. Edwards*, 35 M.J. 351, 355 (C.M.A. 1992)).

Argument

A. The military judge acted well within his discretion by denying a mistrial after the trial counsel's comment because, among other reasons, the court had instructed the panel about appellant's right to remain silent, openly disapproved of trial counsel's comment, and reminded the panel to completely disregard appellant's declination to testify.

The military judge acted well within his discretion by denying a mistrial based on trial counsel's comment, because—after the presentation of evidence was finished—the court had instructed the panel about appellant's "absolute right" to remain silent, about the prohibition against drawing any adverse inference from the fact that appellant declined to testify as a witness, and about how appellant's exercise of such a right must be disregarded. (R. at 1012). The military judge also established himself as the authoritative source of applicable law by instructing the panel that counsel's closing arguments "are not evidence" and that the panel must "apply the law as I instruct you." (R. at 1014).

And immediately after trial counsel made his comment, the military judge took remedial action by condemning trial counsel's statement, advising the panel, "There's a lot of problems with that first statement[.]" (R. at 1037). Moreover, the

military judge provided a curative instruction to remind the panel of appellant's rights: "And the fact that he [appellant] was not a witness must be completely disregarded by yourself." (R. at 1037). He further remedied trial counsel's error by confirming that the panel members understood the court's instructions. (R. at 1037). Likewise, trial counsel also apologized before the panel. (R. at 1037).

Lastly, the military judge's remedial efforts were bolstered by steps taken near the beginning of trial—before the presentation of any evidence—when the military judge confirmed with the panel members that they agreed with the principles that "the defense has no obligation to present any evidence or to disprove the elements of the offenses," and that the burden never shifts to the defense to establish appellant's innocence. (R. at 57, 222). And the panel also took an oath to follow the applicable law. (R. at 39, 208).

Because mistrials are of an "extraordinary nature," military judges should explore the option of "taking other remedial action, such as giving curative instructions." *Ashby*, 68 M.J. at 122. And here, the military judge engaged in these remedial actions and curative instructions in order to address any harm from trial counsel's comment. (R. at 1037).

The military judge's remedial actions here were similar to those of the trial court in *Ashby*, a case (regarding an improper opening statement) in which the military judge took "immediate corrective action which included giving the

members a curative instruction, requiring trial counsel to redact her statements, and asking each member individually whether he could follow the military judge's instructions. He also reminded the members at the close of the evidence about Ashby's absolute right to remain Silent." *Ashby*, 68 M.J. 108, 122–23. Similarly, here, the military judge took immediate corrective actions by giving a curative instruction and openly disapproving of trial counsel's comment; the trial counsel apologized in the presence of the members and then never made any other similar statements about appellant's silence; and the military judge confirmed with the members that they must "completely disregard[]" the fact that appellant declined to testify. (R. at 1036–37). Before closing arguments, the military judge had instructed about appellant's "absolute" right to remain silent, had instructed that the "fact that the accused has not testified must be disregarded by" the panel, and had relatedly instructed the panel about how the defense has no obligation to either present any evidence or disprove the elements of the offenses. (R. at 57, 222, 1012). And of course, court members are presumed to follow the military judge's instructions. *United States v. Jenkins*, 54 M.J. 12, 20 (C.A.A.F. 2000).

Mistrial here is even less warranted than in *Ashby*, because the trial counsel in *Asbhy* provided even more problematic statements that seemed to suggest that the panel should consider—as relevant evidence—the accused's invocation of his right to remain silent: "You will hear testimony by these crew members that they

were told that they had a right to remain silent, similar to American law, and that they invoked that right to remain silent." *Ashby*, 68 M.J. at 121.

Moreover, the harmlessness of trial counsel's error, the panel's impartiality, and the panel's ability to follow court instructions were further demonstrated by the panel's decision to acquit of all but one specification. (R. at 1073).

Therefore, a mistrial would be inappropriate, especially because giving "a curative instruction, rather than declaring a mistrial, is the preferred remedy for curing error." *United States v. Barron*, 52 M.J. 1, 4 (C.A.A.F. 1999) (quoting *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990)); *see also United States v. Andreozzi*, 60 M.J. 727, 742–43 (Army Ct. Crim. App. 2004) (holding the following after the military judge himself made an improper comment: "We are satisfied beyond reasonable doubt that the military judge's instructions to disregard appellant's failure to testify cured any prejudice to appellant.").

B. Because appellant failed to show remorse during his unsworn statement, the prosecution could comment on that failure during sentencing argument.

The assistant trial counsel's argument about appellant's unremorseful unsworn statement was an appropriate point to make—and far from a ground for mistrial—because of appellant's "refusal to admit guilt after findings." *Paxton*, 64 M.J. at 487. Under *Paxton*, 64 M.J. at 487, a foundation for this type of sentencing argument was laid when appellant chose to make an unsworn statement lacking any remorse. (R. at 1127–33). And even if the prosecution's comment were

improper, the military judge would have presumably disregarded it. *See United States v. Criswell*, 78 M.J. 136, 143 (C.A.A.F. 2018) ("[W]e presume in the absence of clear evidence to the contrary, that military judges know the law and follow it.").

Conclusion

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

[redacted]

JOSEPH H. LAM
MAJ, JA
Appellate Attorney, Government
Appellate Division

[redacted]

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

[redacted]

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

APPENDIX

CORRECTED COPY

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
PENLAND, HAYES, and MORRIS
Appellate Military Judges

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

ARMY 20220450

Headquarters, III Corps and Fort Cavazos
Tiffany P. Pond and Joseph T. Marcee, Military Judges
Colonel Runo C. Richardson, Staff Judge Advocate

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).

14 March 2024

OPINION OF THE COURT ON REMAND [1] [2]

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.[3]

---

[1] Corrected

[2] On 1 February 2024, the Court of Appeals for the Armed Forces set aside our Opinion of the Court in this case, dated 27 October 2023, and remanded to this court for further review under Article 66, UCMJ. After further review, this new Opinion of the Court is issued.

[3] We have also given full and fair consideration to the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find they warrant neither discussion nor relief.

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.

There is little dispute about the incident that 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) [redacted], 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 [redacted], 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 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 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 [redacted] would have been on notice that he needed to confirm her age. Because he negligently failed to 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 conduct a de novo standard of review.

CONCLUSION

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

Senior Judge PENLAND and Judge HAYES concur.

FOR THE COURT:

[redacted]

STEVEN P. HAIGHT
Acting Clerk of Court

User Name: Joseph Lam
Date and Time: Tuesday, May 14, 2024 8:09:00PM EDT
Job Number: 224296737

Document (1)

1. *United States v. Scott, 2024 CCA LEXIS 126*
   Client/Matter: -None-

United States v. Scott

United States Army Court of Criminal Appeals

March 14, 2024, Decided

ARMY 20220450

Reporter
2024 CCA LEXIS 126 *; __ 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 P. Pond and Joseph T. Marcee, Military Judges, Colonel Runo C. Richardson, Staff Judge Advocate.

United States v. Scott, 83 M.J. 778, 2023 CCA LEXIS 456 (A.C.C.A., Oct. 27, 2023)

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

OPINION OF THE COURT ON REMAND[1] [2]

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.[3]

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 **[*2]** sentence.

There is little dispute about the incident that 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 1 '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

[1] Corrected

[2] On 1 February 2024, the Court of Appeals for the Armed Forces set aside our Opinion of the Court in this case, dated 27 October 2023, and remanded to this court for further review under *Article 66, UCMJ*. After further review, this new Opinion of the Court is issued.

[3] We have also given full and fair consideration to the matters personally raised by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, and find they warrant neither discussion nor relief.

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 **[*3]** contrary, appellant insisted they only ever described her as 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 **[*4]** 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*.

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 **[*5]** on notice that he needed to confirm her age. Because he negligently failed to 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. 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 **[*6]** continue to conduct a de novo standard of review.

CONCLUSION

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

Senior Judge PENLAND and Judge HAYES concur.

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User Name: Joseph Lam
Date and Time: Tuesday, May 14, 2024 8:09:00PM EDT
Job Number: 224296730

Document (1)

1. *United States v. Pruter, 2000 CCA LEXIS 310*
   Client/Matter: -None-

United States v. Pruter

United States Navy-Marine Corps Court of Criminal Appeals

May 16, 2000, Decided

NMCM 99 00748

Reporter
2000 CCA LEXIS 310 *; 2000 WL 33250664

UNITED STATES v. Christopher T. PRUTER, Hospitalman Third Class (E-4), U.S. Navy

Notice: [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Prior History: Sentence adjudged 25 August 1998. Military Judge: F.A. Delzompo. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 1st Combat Engineer Battalion, 1st Marine Division (Rein), Camp Pendleton, CA.

Disposition: Affirmed the findings and sentence, as approved on review below.

Counsel: LCDR ROBERT C. KLANT, JAGC, USN, Appellate Defense Counsel.

LT JAMES GRIMES, JAGC, USNR, Appellate Government Counsel.

Judges: BEFORE R.B. LEO, Senior Judge, D.A. ANDERSON, Judge, K.J. NAUGLE, Judge. Judge ANDERSON and Judge NAUGLE concur.

Opinion by: R.B. LEO

Opinion

LEO, Senior Judge:

In accordance with his conditional pleas, the appellant was convicted at a special court-martial before a military judge alone of assault consummated by a battery upon his spouse and drunk and disorderly conduct that was service discrediting, in violation of Articles 128 and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 928* and *934*. He was awarded a bad-conduct discharge, confinement for 150 days, and reduction to pay grade E-1. Pursuant to the pretrial agreement, the convening authority **[*2]** approved the sentence, but suspended the bad-conduct discharge for twelve months from the date of the action.

We have examined the record of trial, the assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the accused was committed. Arts. 59(a) and 66(c), UCMJ.

I. UNREASONABLE MULTIPLICATION OF CHARGES

The appellant contends that charging him with assault (Charge I) and drunk and disorderly conduct (Charge II) constitutes an unreasonable multiplication of charges. We disagree.

Even though the appellant did not raise this issue at trial, this Court has held that he is not barred from raising it for first time on appeal. *United States v. Quiroz, 53 M.J. 600 (N.M.Ct.Crim.App. 2000)*(*en banc*)(slip op. at 8). In reviewing such a claim for the first time, we look at whether the claim was raised at trial, whether the specifications are aimed at distinctly separate criminal acts, whether they misrepresent or exaggerate the appellant's criminality, whether they unfairly increase his exposure to punishment, and whether they **[*3]** suggest prosecutorial abuse of discretion in the drafting of the specifications. *Id*. at 10. Weighing all of these factors together, we are able to determine whether the charges in this case were *unreasonably* multiplied.

During the providence inquiry, the appellant acknowledged and described separate conduct for each offense, even though both offenses arose out of the same incident on the evening of 22 February 1998. The appellant had been drinking heavily that evening. He and his spouse got into an argument that escalated and eventually culminated in the assault. Following the assault, the argument continued in front of neighbors, who had come over to the appellant's house at the request of the appellant's spouse, Mrs. Pruter, to mediate. It ended when the appellant made an obscene hand gesture to his spouse as he left their residence, and she elected at that time to call Base Security for assistance. Based on this set of facts, we have no

difficulty determining that the offenses were separate and that they did not exaggerate the extent of his criminal behavior. We find no unreasonable multiplication of charges in this case.

II. RESIDUAL HEARSAY EXCEPTION

The appellant **[*4]** next contends that the military judge erred in granting the Government's motion to admit hearsay statements made by the appellant's wife. We disagree.

At trial, the Government moved *in limine* to admit the statements the appellant's wife made to the military police regarding the beating that the appellant delivered to her. Appellate Exhibit I. The Government sought to introduce the victim's verbal statements under the excited utterance exception and her written statement under the residual hearsay exception. Record at 38-39. After Cpl Wilson testified, the defense offered an affidavit of Mrs. Pruter. Record at 36; Appellate Exhibit IV. In her affidavit, Mrs. Pruter stated that she was calm on the night of the incident. *Id*. She also stated that all her statements were in response to questions and that "this line of questioning and the repeated attempts they made at telling me that my husband had done things to me **that I knew were not true** put alot [sic] of pressure on me to provide statements." *Id.* (emphasis added).

In ruling on the motion, the military judge held that all of the statements were admissible under the residual hearsay exception. Appellate Exhibit **[*5]** XII at 3. He found that the "statements [were] offered as evidence of a material fact," and that the "statements [were] more probative on the point for which they are offered than any other evidence the proponent can procure through reasonable efforts." Appellate Exhibit XII at 2. The military judge stated that this last finding was based on the assumption that Mrs. Pruter would recant (as she strongly suggested she would do in her affidavit). Appellate Exhibit XII at 3. The military judge then found that the "general purpose of the rules and the interests of justice would be served by admission of the statements." Appellate Exhibit XII at 3. Thereafter, the appellant, with the consent of the Government and the approval of the military judge, entered conditional pleas of guilty to the charges, subject to his right to appeal the military judge's preliminary ruling on the admissibility of Mrs. Pruter's statements and, if he prevailed, to withdraw his pleas. Appellate Exhibit IX at 2; R.C.M. 910(a)(2).

The decision of a military judge on the admissibility of evidence is reviewed for abuse of discretion. *United States v. Miller, 46 M.J. 63, 65 (1997)*. An abuse of **[*6]** discretion is action that is arbitrary, clearly unreasonable, or clearly erroneous. *United States v. Travers, 25 M.J. 61 (C.M.A. 1987)*.

The residual provision of Military Rule of Evidence 803, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), expressly provides for the admission of hearsay statements that do not fall under any of the other enumerated subsections of this rule if the military judge finds:

> (A) The statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

MIL. R. EVID. 803(24).

The requirements for the admissibility of hearsay statements under this rule have been summarily described as materiality, necessity, and reliability. *United States v. Haner, 49 M.J. 72, 77 (1998)*(citing *United States v. Kelley, 45 M.J. 275, 280 (1996))*. "The ruling of the military judge on admitting residual hearsay is entitled to *considerable* **[*7]** *deference*." *49 M.J. at 78* (emphasis added).

The materiality of Mrs. Pruter's statements is obvious. They provide the details of the appellant's assault, drunkenness, and disorderly conduct. As for the necessity of these statements in lieu of her in-court testimony, the military judge's ruling was conditional in nature. Based upon the affidavit from Mrs. Pruter, the trial counsel's representations about his attempts to interview her, and the defense counsel's uncertainty before the Court about whether she would testify in accordance with her previous statements, the military judge reasonably assumed in his ruling that she would be available as a witness, but would recant her previous statements if called. When the appellant decided to enter conditional guilty pleas to the charges, he essentially conceded for purposes of appellate review that his spouse would recant at trial, thus satisfying the requirement of necessity under Mil. R. Evid. 803(24). See *Haner, 49 M.J. at 75, 78*. Therefore, the only issue before us is the reliability or trustworthiness of the spouse's out-of-court statements.

To be reliable under the residual hearsay rule, the hearsay statements must **[*8]** have "'particularized

guarantees of trustworthiness' . . . [as] shown from the totality of the circumstances." *Id*. (quoting *Idaho v. Wright, 497 U.S. 805, 815, 111 L. Ed. 2d 638, 110 S. Ct. 3139 (1990))*. "Where the concerns of the *Confrontation Clause* have been satisfied [by the appearance of the recanting declarant as a witness], 'corroboration by other evidence is one of the means by which hearsay evidence can be tested for trustworthiness.'" *Id*. (quoting *United States v. McGrath, 39 M.J. 158, 166 (C.M.A. 1994))*. After reviewing the record, we find that the evidence in the case supports the military judge's essential findings and that he correctly applied the applicable law in arriving at his legal conclusions. [1] *United States v. Sullivan, 42 M.J. 360, 363 (1995)*. In short, there was a factual predicate on which one could reasonably conclude that the spouse's statements to the military police were sufficiently trustworthy and reliable to warrant their admission into evidence. Accordingly, the military judge did not abuse his discretion in ruling that this evidence could be admitted if the appellant's spouse recanted at trial.

[*9] III. DISPOSITION

We affirm the findings and sentence, as approved on review below.

Judge ANDERSON and Judge NAUGLE concur.

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[1] While the military judge did indicate that he considered only the circumstances surrounding the making of the statements and not the other corroborating evidence (e.g., scuff marks on the stairwell and red mark under spouse's eye), we find this election to be of no moment. He could have considered this evidence in determining the reliability of the hearsay statements, but he was not required to do so. *United States v. Kelley, 45 M.J. 275, 281 (1996)*. The outcome would have been the same in either case.

CERTIFICATE OF SERVICE, U.S. v. CAMPBELL (20230030)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at ***usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@mail.mil*** on the 15th day of May, 2024.

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