

**IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

UNITED STATES,  
Appellee

**BRIEF ON BEHALF OF  
APPELLEE**

v.

Docket No. ARMY 20230029

Sergeant (E-5)  
**MICHAEL V. SMITH,**  
United States Army,  
Appellant

Tried at Fort Huachuca, Arizona, on  
30 March 2022, 25 May 2022, and  
17–20 January 2023 before a general  
court-martial convened by the  
Commander, U.S. Army Intelligence  
Center of Excellence and Fort  
Huachuca, Lieutenant Colonel  
Michael E. Korte, Military Judge,  
presiding.

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

**Assignment of Error<sup>1</sup>**

**WHETHER THE CONVICTION FOR  
SPECIFICATION 1 OF CHARGE I IS LEGALLY  
SUFFICIENT.**

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<sup>1</sup> The government has reviewed appellant’s *Grostefon* matters and respectfully submits that they lack merit. The government recognizes this court’s authority to elevate *Grostefon* matters deserving of increased attention. *United States v. Grostefon*, 12 M.J. 431, 437 (C.M.A. 1982). Should this court exercise such authority, finding any of appellant’s *Grostefon* matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

### **Statement of the Case**

On 19 January 2023, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification each of sexual assault, abusive sexual contact, assault consummated by a battery, and extramarital sexual conduct in violation of Articles 120, 128, and 134, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 920, 928, and 934.<sup>2</sup> (Statement of Trial Results [STR]; R. at 628). The military judge sentenced appellant to a reduction to the grade of E-1, confinement for a total of forty months and fifteen days, and a dishonorable discharge.<sup>3</sup> (STR; R. at 683). On 31 March 2023, the convening authority took no action on the findings or sentence. (Action). The military judge entered judgment on 3 April 2023. (Judgment).

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<sup>2</sup> The military judge also convicted appellant of two specifications of Article 128, UCMJ (Specifications 1 and 2, respectively, of The Additional Charge) to be conditionally dismissed upon successful completion of appellate review of Specifications 1 and 2 of Charge I. (STR; R. at 628). Appellant was acquitted of one specification of abusive sexual contact. (STR; R. at 628).

<sup>3</sup> The military judge segmented appellant's sentence to confinement as follows:

<b>Charge / Specification</b>	<b>Confinement</b>	<b>Consecutive with...</b>
Charge I, Specification 1	30 months	Charge I, Specification 2 and The Additional Charge, Specification 3
Charge I, Specification 2	10 months	Charge I, Specification 1 and The Additional Charge, Specification 3
Charge II, The Specification	No confinement	N/A
The Additional Charge, Specification 3	15 days	Charge I, Specification 1 and Charge I, Specification 2

(STR; R. at 683). The military judge also awarded appellant with 21 days of confinement credit. (STR; R. at 683).

## Statement of Facts

### **1. Sergeant [REDACTED] drank to the point of being “very intoxicated.”**

On the night of 9 April 2021 Sergeant (SGT) [REDACTED] consumed alcoholic drinks with a group of soldiers at the smoke pit, near his barracks on Fort Huachuca, Arizona. (R. at 287). Appellant was also present, offering SGT [REDACTED] Jack Daniel’s whiskey and encouraging him, and others, to drink directly out of the bottle. (R. at 120, 169, 290). Sergeant [REDACTED] was the only soldier who accepted appellant’s offer of Jack Daniel’s. (R. at 120–21, 169–70, 215, 290–91). Over the course of the night, SGT [REDACTED] drank to the point of being “very intoxicated,” drinking the Jack Daniel’s, mixed drinks, seltzers, beer, and rum. (R. at 169–70, 200, 291–92).<sup>4</sup> By all accounts, appellant was present at the outdoor gathering of approximately twenty people throughout the night. (R. at 109–10, 113, 167–68, 173, 213–14, 219, 287–90).

At the end of the night, SGT [REDACTED] went back to his barracks room to retrieve

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<sup>4</sup> Though SGT [REDACTED]’s testimony at trial provided most of the details regarding his state of intoxication, his testimony was consistent with Specialist (SPC) SB, Corporal (CPL) JG and CPL DGH. Specialist SB testified that SGT [REDACTED] was “pretty drunk” and “drunk, but . . . coherent.” (R. at 125). Corporal JG testified that SGT [REDACTED] was “intoxicated,” “pretty drunk,” and that he had to talk to SGT [REDACTED], “to make sure he didn’t do anything stupid and to calm him down.” (R. at 170). Corporal DGH testified that SGT [REDACTED] was “intoxicated.” (R. at 200). Appellant, through his own testimony, downplayed SGT [REDACTED]’s level of intoxication. (R. at 466–67, 469). However, he later admitted on cross-examination to telling Army Criminal Investigation Division (CID) that SGT [REDACTED] “couldn’t handle his alcohol.” (R. at 486–88).

a pitcher of water. (R. at 292). He shared the water with others, bringing the pitcher outside where he filled cups for them. (R. at 292). When he returned to the barracks, he was accompanied by SPC SB, CPL DGH, and appellant. (R. at 130, 192, and 469). Staff Sergeant (SSG) CC came out of his room and asked the soldiers to be quiet, which provoked SGT [REDACTED] to argue heatedly with him. (R. at 131). Trying to deescalate the argument, SPC SB asked SSG CC to not take SGT [REDACTED] seriously, as he was drunk. (R. 131).<sup>5</sup>

Eventually, the soldiers dispersed to their respective rooms. (R. at 192). Sergeant [REDACTED] returned to his room, which he had left propped open by the deadbolt. (R. at 292). Inside, he found appellant waiting for him. (R. at 293, 496). Sergeant [REDACTED] asked appellant what he was doing in his room, as he had not invited him there, nor had he ever invited appellant to his room in the past. (R. at 293, 496, 498). Appellant told SGT [REDACTED] that he was, “just there to chill,” and offered SGT [REDACTED] more whiskey from his bottle of Jack Daniel’s. (R. at 293–94, 475, 499). Sergeant [REDACTED] sat on his bed and obliged, drinking again directly from the bottle. (R. at 294, 475). After taking that drink, SGT [REDACTED] testified, “from there my memory stops.” (R. at 294).

## **2. Appellant sexually assaulted SGT [REDACTED] while SGT [REDACTED] was incapable of consenting.**

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<sup>5</sup> Appellant testified to being present for this heated exchange (R. at 472), though no other soldier testified to appellant being there to witness it.

Sergeant [REDACTED]'s next memory was of waking up, lying in his bed with his pants pulled down: "I remember I regained consciousness while the incident was happening. I – for like a split second I remember [appellant] was – my pants were down and [appellant] was perform[ing] fellatio on me. And then I immediately blacked out again[.]" (R. at 297–98; Pros. Ex. 4). Sergeant [REDACTED] felt as if he could not move and was unable to talk. (R. at 299). He felt that his "brain couldn't register what was going on," but he recalled appellant telling him, "you won't report this." (R. at 299). The next conscious memory SGT [REDACTED] could recall was of waking up alone in his room, with his pants pulled back up. (R. at 298). Sergeant [REDACTED] noticed vomit and his broken chain necklace on the floor. (R. at 301). Sergeant [REDACTED]'s hoodie was also present in the room, covered in vomit. (R. at 302). Though SGT [REDACTED] did not recall vomiting, he noticed that the vomit contents resembled the food he had consumed the day prior. (R. at 302). Sergeant [REDACTED] felt angry, confused and upset. (R. at 302).

The only additional evidence of what occurred in SGT [REDACTED]'s room came from appellant. (R. at 476–78). Appellant described SGT [REDACTED] as being conscious and participating by moving from a chair to the bed, and by pulling his own pants down. (R. at 477). Appellant stated that he leaned over the bed and performed oral sex on SGT [REDACTED], but the sexual encounter ended after SGT [REDACTED] told

appellant, “I need to pee.” (R. at 478).<sup>6</sup>

### **3. Appellant appeared severely intoxicated after the sexual assault.**

On 10 April 2021, Mrs. [REDACTED] awoke to a frantic phone call from her husband, SGT [REDACTED]. (R. at 358). It was very early in the morning, around 0500 Eastern Standard Time, or 0300 Mountain Time at Fort Huachuca. (R. at 358). Her husband was breathing heavily and mumbling to himself. (R. at 358). She had known her husband since high school, and she could tell that he sounded scared and anxious. (R. at 358, 360). He told her, “I think I was raped, there was someone in my room.” (R. at 299, 358). Mrs. [REDACTED] was in shock and told SGT [REDACTED] to find help. (R. at 303, 358). Sergeant [REDACTED] hung up the phone and sought assistance nearby. (R. at 303).

Sergeant SB awoke in the early hours of 10 April 2021 to SGT [REDACTED] knocking on his door. (R. at 363). Sergeant SB could hear SGT [REDACTED] repeating to himself, “I don’t feel safe, I need you to come with me.” (R. at 363). Sergeant [REDACTED] continued to repeat the phrase, “I don’t feel safe,” as he was shaking, and rubbing his head. (R. at 363). Sergeant SB could tell that SGT [REDACTED] was distraught, so he accompanied him to his room. (R. at 363). There, SGT SB found a mess, chairs in disarray, vomit, and SGT [REDACTED]’s broken chain on the floor. (R. at

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<sup>6</sup> Appellant’s testimony is the only evidence in the record describing how the sexual assault concluded; appellant claims, for the first time on appeal, SGT [REDACTED] “realized he could not ejaculate.” (Appellant’s Br. 6).

363–64). Sergeant [REDACTED] continued to repeat himself, ranting “I don’t feel safe,” “how could this happen to me,” and “someone was in my room.” (R. at 365).

Eventually, SGT [REDACTED] explained that he had woken up to appellant on top of him, performing oral sex on him, and “that he felt, like, paralyzed while he was doing it.” (R. at 365–66). He told SGT SB that after blacking out again, he woke up to appellant telling him, “you’re not going to report this because I know you like it, and no one’s going to believe you.” (R. at 366).

#### **4. Appellant claims prior sexual contact with SGT [REDACTED].**

According to appellant, he had performed oral sex on SGT [REDACTED] prior to 9 April 2021. (R. at 460–61). Sometime in March 2021, appellant, SGT [REDACTED], and several other soldiers drove to Bisbee, Arizona for a night of drinking and hookah. (R. at 452–54, 534). While at a bar, SGT [REDACTED] consumed alcohol to the point of belligerence, becoming combative and starting arguments with those around him. (R. at 455, 522, 534, 584). The group then went to a hookah bar. (R. at 455). There, SGT [REDACTED] was observed to be so intoxicated that he could not walk, and he could barely talk. (R. at 584). Sergeant [REDACTED] became disrespectful to the women who were present, calling them “bitches.” (R. at 537, 584). One woman jumped out of her chair to confront SGT [REDACTED] for his disrespectful behavior, and SGT [REDACTED] “jump[ed] up to fight her.” (R. at 537). This led to SGT [REDACTED] getting kicked out of the hookah bar, but he was so intoxicated that he had to be carried out by

two soldiers. (R. 537–38, 584–85).

Appellant was one of those two soldiers who carried SGT [REDACTED] out of the hookah bar, and to the truck they had driven to Bisbee in. (R. at 538). Appellant volunteered to keep SGT [REDACTED] company so others could enjoy the remainder of the night. (R. at 538–39). Appellant joined SGT [REDACTED] in the back seat of the vehicle, the two sitting on opposite ends of the cabin. (R. at 538).

The owner of the truck, SGT AS, testified that he checked on the two in the vehicle every 15 minutes. (R. at 539). During one of those welfare visits, he heard SGT [REDACTED] complain that he needed to throw up. (R. at 539). SGT [REDACTED] then got out of the vehicle and threw up. (R. at 539).

According to appellant, while he and SGT [REDACTED] sat in the truck, they had conversation and physical contact which escalated to oral sex.<sup>7</sup> (R. at 458–60). Appellant testified that while they were sitting in the back of the truck, he told SGT [REDACTED] that he was married to a man. (R. at 458). After disclosing that, SGT [REDACTED] tried to get out of the truck and go back into the hookah bar. (R. at 459). After being told to get back in the truck by another soldier, SGT [REDACTED] returned and remained with appellant. (R. at 459–60). According to appellant, it was at this time that SGT [REDACTED]'s leg met his, and he put his hand on SGT [REDACTED]'s knee. (R. at

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<sup>7</sup> Sergeant [REDACTED] denied that any sexual contact occurred with appellant in Bisbee, or any time prior to 9 April 2021. (R. 334–35).



460). After doing so, SGT [REDACTED] moved appellant's hand to his crotch, and appellant began performing oral sex on SGT [REDACTED]. (R. at 460–61, 493). Appellant provided contradictory statements on whether he obtained verbal consent from SGT [REDACTED]. (*Compare* R. at 461 *with* R. at 493).<sup>8</sup>

Sergeant [REDACTED] disputed that any sexual contact occurred that night between himself and appellant. (R. at 334–35).

## **5. The Forensic Psychologist's Testimony on Blackouts.**

Dr. DM, qualified as an expert in forensic psychology, explained how alcohol can prevent short-term memories from becoming long-term memories. (R. at 560, 562). This phenomenon is called a blackout, and there are two types of blackouts: en bloc and fragmentary. (R. at 563). En bloc blackouts involve total memory loss, during which the subject will usually fall asleep. (R. at 563). Fragmentary blackouts can create gaps in memory, and it's possible that someone can appear awake while experiencing a fragmentary blackout. (R. at 564). Further, during a fragmentary blackout, "they can appear sort of more put together

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<sup>8</sup> Appellant stated the following on direct regarding SGT [REDACTED] consenting to the oral sex in the back of the truck: "He said – I don't remember, but I remember I got verbal consent." (R. at 461). However, on cross-examination, the following exchange occurred: "Q. Okay. And he takes your hand and moves it to his crotch and then you perform oral sex on him? A. Yes, sir. Q. Again, this is a Soldier that you just met that day? A. Correct. Q. And this is performed without a single word being spoken between the two of you? A. [The accused nodded indicating an affirmative response.]" (R. at 493).

than they are.” (R. at 566).

Dr. DM testified that it was possible that SGT [REDACTED] was experiencing an en bloc blackout during the incident in Bisbee and a fragmentary blackout on the night of 9 April 2021. (R. at 571, 579). Further, Dr. DM testified that those who have experienced alcohol-induced blackouts in the past are more likely to experience them again in the future. (R. at 566). Dr. DM also testified that it was possible that SGT [REDACTED] fell asleep intermittently during the sexual acts that appellant performed on him. (R. at 575).

### **Summary of Argument**

Compelling testimony provided by appellant and other witnesses informed the military judge’s finding that a reasonable person should have known that SGT [REDACTED] was unable to consent due to his intoxication.

### **Standard of Review**

Questions of legal sufficiency are reviewed de novo. *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019).

### **Law**

Findings of guilty are legally sufficient when “any rational fact-finder could have found all essential elements of the offense beyond a reasonable doubt.”

*United States v. Nicola*, 78 M.J. 223, 226 (C.A.A.F. 2019) (citations omitted).

When this court conducts a legal sufficiency review, it is obligated to draw “every

reasonable inference from the evidence of record in favor of the prosecution.”

*United States v. Robinson*, 77 M.J. 294, 298 (C.A.A.F. 2018) (citations omitted).

“As such, the standard for legal sufficiency involves a very low threshold to sustain a conviction.” *King*, 78 M.J. at 221 (cleaned up). Reasonable doubt “does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented.” *King*, 78 M.J. at 221. In analyzing both legal and factual sufficiency, this court’s superior court “has long recognized that the government is free to meet its burden of proof with circumstantial evidence,” and “recognize[s] that the ability to rely on circumstantial evidence is especially important in cases . . . where the offense is normally committed in private.” *Id.*

“False testimony, knowingly and purposely invoked by [the] defendant, [may] be used against him.” *Nicola*, 78 M.J. at 227 (quoting *Allen v. United States*, 164 U.S. 492, 500 (1896)). An immediate report may be considered as evidence weighing in favor of guilt. *United States v. Jimenez-Victoria*, 75 M.J. 768, 771 (Army. Ct. Crim. App. 2016).

To convict appellant of sexual assault of SGT [REDACTED] while SGT [REDACTED] was incapable of consenting due to impairment by alcohol, as alleged in Specification 1 of Charge I, the government was required to prove that: (1) appellant committed a

sexual act<sup>9</sup> upon SGT [REDACTED]; (2) he did so when SGT [REDACTED] was incapable of consenting because he was impaired by alcohol, and (3) appellant reasonably should have known about that condition. *Manual for Courts-Martial, United States* (2019 ed.) [MCM], pt. IV, ¶ 60.b.(2)(f); Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 3A-44-2 (29 Feb. 2020).

The term “incapable of consenting” is defined as “incapable of appraising the nature of the conduct at issue; or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue.” UCMJ art. 120(g)(8).

### Argument

The record provided a sound basis for the military judge's finding of guilt for Specification 1 of Charge I. Appellant, by his own admission, committed a sexual act when he placed SGT [REDACTED]'s penis in his mouth. (R. at 477). Further, the government introduced voluminous evidence, from many different sources, to support that appellant should have known that SGT [REDACTED] was incapable of consenting due to his intoxication. (R. at 486–88).

No testifying witness disputed that SGT [REDACTED] drank heavily on the night of 9 April 2021. Appellant saw SGT [REDACTED] drink through the night and watched as

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<sup>9</sup> “Sexual act” means, in relevant part, “contact between the mouth and the penis.” UCMJ art. 120(g)(1)(B), UCMJ. The first element was not at issue during trial or on appeal.

appellant drank directly from appellant's whiskey bottle. (R. at 465). Appellant knew that "SGT [REDACTED] couldn't handle his alcohol" and was intoxicated. (R. at 486–88, 499). Several soldiers, including appellant, witnessed SGT [REDACTED] belligerently arguing with SSG CC, a superior noncommissioned officer (NCO), in the barracks hallway. (R. at 131, 472). This occurred shortly before appellant performed the unwanted sexual act on SGT [REDACTED]. (R. at 474–76). One of the soldiers even tried to deescalate the argument by asking SSG CC not to take SGT [REDACTED] seriously because he was drunk. (R. at 131).

Appellant went uninvited to SGT [REDACTED]'s barracks room, let himself in through the door SGT [REDACTED] had propped open with the deadbolt, waited for him to return, and immediately plied him with more whiskey. (R. at 293, 475). After drinking from appellant's whiskey bottle SGT [REDACTED]'s next memory was with his pants down and appellant performing oral sex on him. (R. at 294, 296–97). Sergeant [REDACTED] testified that he was laying down on his bed, parallel with the mattress, and felt that he could not move or speak. (R. at 297, 299). Thereafter, the next memory SGT [REDACTED] had was of appellant telling him, "you're not going to report this because I know you like it, and no one's going to believe you." (R. at 300, 366). Sergeant [REDACTED] remembered waking up in his bed with his pants back up, finding his hoodie covered in vomit, and his broken chain necklace and vomit on the floor. (R. at 301–02). All of this testimony regarding the sexual assault,

when viewed in a light most favorable to the prosecution, provided an ample basis for a finding of guilt for Specification 1 of Charge I.

The defense's expert witness testimony, when considered as a whole and viewed in a light most favorable to the prosecution, also supports the conviction of Specification 1 of Charge I. Dr. DM opined that it was possible that SGT [REDACTED] fell asleep before he was sexually assaulted by appellant. (R. at 575).<sup>10</sup>

Though Dr. DM opined on what was possible, those eyewitnesses who were present provided direct insight into SGT [REDACTED]'s condition on the night of 9 April 2021. Sergeant [REDACTED] appeared intoxicated to those around him. (R. at 131, 170, 200). He acted belligerently through the night, requiring others to calm him down when he got worked up. (R. at 170). He argued with a superior NCO. (R. at 131). All of this was consistent with how SGT [REDACTED] acted in Bisbee, a night when he became so intoxicated he was thrown out of a bar—which appellant had also been

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<sup>10</sup> Sergeant [REDACTED] testified about his spotty memory of the night, clearly fitting Dr. DM's description of a fragmentary blackout. (*See generally* R. at 291–303). Appellant equates these partial memories with consent: “[SGT [REDACTED]] was clear that he did have some memories. . . . Because he recalled appellant performing oral sex, and understood it to be oral sex, it is clear he was able [sic] of appraising the nature of the sexual conduct as defined in Article [120(g)(8)(A)], UCMJ.” (Appellant's Br. 11). By appellant's logic, the mere ability to understand one is being sexually assaulted is sufficient for them to have the capacity to consent to it. Just as confusing is appellant's suggestion that SGT [REDACTED]'s ability to draw a rough sketch of the layout of his room on 9 April 2021 four days later while at CID undermines his claim of fragmentary blackouts (Appellant's Br. 4, 10)—as if it is commonplace for one to get drunk and rearrange their furniture.

present for, and thus had experience in seeing SGT [REDACTED] drunk. (R. at 584).

Appellant relies heavily on *United States v. Smith*, 83 M.J. 350 (C.A.A.F. 2023) and *United States v. Robinson*, 77 M.J. 294 (C.A.A.F. 2018) to argue for an elevated standard of how intoxicated the victim must be before an accused should reasonably know the victim is too intoxicated to consent. (Appellant’s Br. 8). The victim in *Smith*, for example, was “literally falling over” and had urinated in two different beds. *Smith*, 83 M.J. at 360. Certainly this is sufficient evidence that would lead a reasonable person to conclude the victim in question is incapable of consenting, but at no point has this court nor its superior court ever held that such an extreme manifestation of intoxication is necessary to meet the final element of Article 120(b)(3)(A). By asking this court to apply precedent such as *Robinson* and *Smith*, appellant equates “too incapacitated to consent” with the elevated standard of “too incapacitated to walk, talk, or control one’s bladder.”

In the same vein, appellant argues that SGT [REDACTED] “was not ‘the most intoxicated’ anyone had ever seen.” (Appellant’s Br. 9 (quoting *Smith*, 83 M.J. at 360)). Appellant completely ignores relevant context, namely the fact that he, his victim, and the eyewitnesses to the barracks party on 9 April 2021 were at Fort Huachuca in a temporary duty status (TDY) for a military occupational specialty – transition (MOS-T) course of roughly six months. (R. at 100–01, 164, 189, 212, 229–30, 287, 451). Each of the witnesses testified, in one form or another, that

they barely knew SGT [REDACTED] on the day appellant sexually assaulted him. (R. at 111, 164, 189, 287, 451).<sup>11</sup> Of course no one described SGT [REDACTED] as “the most intoxicated” they had ever seen; none of them had the sample size to make such a judgment. What they *did* testify to, however, was that appellant was encouraging others, and especially SGT [REDACTED], to drink directly from his Jack Daniel’s bottle (R. at 112, 168, 191, 214–15, 220); SGT [REDACTED] drank directly from that bottle (R. at 120, 169, 227, 475); and that SGT [REDACTED] was drunk (R. at 125, 170, 200). For appellant to now claim that the government “*never* put on *any* evidence which showed by inference or otherwise that a reasonable person would believe SGT [REDACTED] was too drunk to be able to appreciate or communicate a decision about engaging in the sexual activity” ignores the bulk of eyewitness testimony from anyone not named SGT Smith. (Appellant’s Br. 9) (emphasis added).

Appellant, minimizing this court’s mandate to draw “every reasonable inference from the evidence in favor of the prosecution,” *Robinson*, 77 M.J. at 298, argues on appeal the same version of events he presented on the witness stand.

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<sup>11</sup> Sergeant [REDACTED] testified that he had only been at Fort Huachuca for “about a month” when appellant assaulted him on 9 April 2021. (R. at 287). Corporal DGH also arrived TDY to Fort Huachuca roughly a month earlier, on 12 March 2021. (R. at 189). Specialist SB testified that he had known SGT [REDACTED] “for maybe three, four days.” (R. at 111). Corporal JG testified that he arrived at Fort Huachuca for his TDY on 9 April 2021, the date of the assault. (R. at 164). Appellant testified that he arrived to Fort Huachuca “October, November 2020” and finished his course “April 2021.” (R. at 451).



(Appellant's Br. 10). Though appellant denied that SGT [REDACTED] appeared to be intoxicated at the time of the sexual act, his statement is self-serving and contrary to the accounts of multiple witnesses who observed appellant before and after the sexual assault. (R. at 131, 170, 200, 358–59, 363–66). Ultimately, the military judge heard, considered, and rejected appellant's version of events alleging SGT [REDACTED] was capable of consenting, and did consent, to the sexual acts. *See Nicola*, 78 M.J. at 227. As any rational factfinder could have found all elements of Charge I, Specification 1 beyond a reasonable doubt, appellant's conviction is legally sufficient and should be affirmed. *See id.* at 226.

### **Conclusion**

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

[REDACTED]  
ALEX J. BERKUN  
CPT, JA  
Appellate Attorney, Government  
Appellate Division

[REDACTED]  
PATRICK S. BARR  
CPT, JA  
Appellate Attorney, Government  
Appellate Division

[REDACTED]  
KALIN P. SCHLUETER  
LTC, JA  
Branch Chief, Government  
Appellate Division

[REDACTED]  
CHRISTOPHER B. BURGESS  
COL, JA  
Chief, Government Appellate  
Division

**CERTIFICATE OF FILING AND SERVICE,**

I certify that a copy of the foregoing was sent via electronic submission to the  
Defense Appellate Division at [REDACTED]  
[REDACTED] on this 3<sup>rd</sup> day of May 2024.

[REDACTED]  
K  
Paralegal Specialist  
Government Appellate Division