IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,	Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.		Docket No. ARMY 20230457
Warrant Officer One (WO1) **JOHN R. FREESTONE,** United States Army,	Appellant	Tried at Camp Humphreys, Republic of Korea, on 26 April 2022, 12 July 2023, 21-25 August 2023, before a general court-martial appointed by the Commander, 8th Army, Colonels Larry Babin and Matthew Fitzgerald, military judges, presiding.

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

Assignment of Error I[1]

SPECIFICATION 10 OF THE CHARGE WAS FACTUALLY INSUFFICIENT AS APPELLANT DID NOT DAMAGE ES' LAPTOP WITH THE INTENT TO THREATEN OR INTIMIDATE HER.

Assignment of Error II

THE MILITARY JUDGE WRONGLY MARKED BLOCK 32 OF THE STATEMENT OF TRIAL RESULTS AS "YES."

[1] 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, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

Panel No. 4

Statement of the Case

On 25 August 2023, an officer 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 (2021) [UCMJ]. (R. at 1035). The military judge sentenced appellant to a reprimand and forfeiture of $325 per month for four months. (R. at 1071). The convening authority took no action on the adjudged sentence. (Action). On 26 September 2023, the military judge entered judgment. (Judgment).

Statement of Facts

The government's case included eleven specifications of domestic violence against appellant's spouse, Mrs. ES. (STR). The panel acquitted appellant of ten specifications but convicted him of Specification 10 for destroying Mrs. ES's laptop with his hand, with the intent to intimidate or threaten her. (Charge Sheet). This occurred during a visit to appellant's family in San Antonio, Texas, between 28 October 2021 and 4 November 2021. (R. at 567; Charge Sheet). The two had been arguing throughout the trip and were staying in a hotel room. (R. at 567). Appellant became excessively angry and shouted at Mrs. ES, smashed her laptop, and screamed at her. (R. at 569–72).

This incident was recorded. (R. at 570). In the recording, appellant confronted Mrs. ES, asking her "[i]s it turned on? I'm going to fucking break it."

(Pros. Ex. 15 at 00:15–24). Mrs. ES replied something indecipherable before appellant interrupted her, shouting "[s]hut the fuck up. If you don't shut the fuck up, I swear to . . . fuck. . ." (Pros. Ex. 15 at 00:24–32). Mrs. ES tried to respond, but again appellant interrupted, "shut the fuck up, shut the fuck up!" (Pros. Ex. 15 at 00:33–36). A loud sound of something being struck follows. (Pros. Ex. 15 at 00:40–42). Mrs. ES exclaims "God," and appellant responds "fuck you, really!" (Pros. Ex. 15 at 00:42–46). After the smashing ceased, appellant screams gutturally, unintelligibly in rage. (Pros. Ex. 15 at 00:50–55).

At trial, Mrs. ES testified that appellant was referring to her laptop when he said, "[i]s it turned on? I'm going to fucking break it." (R. at 571; Pros. Ex. 15 at 00:15–24). The laptop belonged to Mrs. ES, and she was using it for a school assignment. (R. at 571). Mrs. ES explained that appellant then approached her laptop, which was on a desk, and made a motion with both hands, threatening to smash it. (R. at 571–72). He then grabbed it off the desk. (R. at 572). Mrs. ES begged him not to break the laptop, but appellant proceeded to break it. (R. at 572). This was consistent with the audio recording. (R. at 571-72; Pros. Ex. 15 at 00:30 to 1:00).

The recording continues for another nine minutes, during which appellant is crying as he mutters, "shut the fuck up." (Pros. Ex. 15 at 1:20–23). After a period of silence, Mrs. ES replies, her voice wavering, "I just want you to be happy."

(Pros. Ex. 15 at 1:41–45). She goes on, "For your next marriage, please don't bring any garbage, or anything out of the past." (Pros. Ex. 15 at 01:46–59). She begins sobbing and tells appellant, "I just want you to be happy." (Pros. Ex. 15 at 2:14–17).

Mrs. ES also confronts appellant on the recording, "where are you filing the divorce? Then why should I be afraid of anything? Darling wouldn't have broken the laptop and spitted on me several times. . . now I can't even [unintelligible]." (Pros. Ex. 15 at 04:15–34). Throughout the remainder of the recording, appellant can be heard shouting "shut the fuck up," as Mrs. ES tries to calmly speak with him about their relationship. (Pros. Ex. 15 at 03:50–04:00; 06:11–16).

The recording ends with appellant shouting, "Fuck, fuck, fuck you!" (Pros. Ex. 15 at 09:45–50). Mrs. ES is crying out fearfully as appellant screams, "get the fuck out of here! Get the fuck away from you fuckin bitch! What the fuck is wrong with you? Get the fuck don't fuckin [glass shatters, Mrs. ES screams].[2] Really! Stop fuckin doing shit really you fuck." (Pros. Ex. 15 at 09:50–10:02).

Mrs. ES testified that at the end of the recording, appellant threw a glass of ginger ale at her, hitting her, and soaking her with the ginger ale. (R. at 577–78). Mrs. ES went to the front desk of the hotel to ask for help and contacted a friend on

[2] Mrs. ES testified that the sound of glass shattering was her breaking a liquor bottle. (R. at 575).

her phone about the situation. (R. at 578–79). She spent that night in a shelter after reporting appellant for domestic violence to the San Antonio Police. (R. at 573–74, 585–86). There, she took a photo of her destroyed laptop, which the prosecution admitted as evidence. (R. at 573–74; Pros. Ex. 16).

Further, Mrs. ES recorded a telephone conversation after the laptop incident. During this phone call appellant stated, "ok, you want me to be honest, everything that happened in the hotel, you know, is true, ok." (R. at 592; Pros. Ex. 23, at 07:02–12). Further, appellant wrote Mrs. ES a letter apologizing for all the mistakes he made during their marriage. (R. at 596; Pros. Ex. 22). He also made a lengthy social media post describing himself as a "toxic man" and lamenting "having to replay and relive all the mistakes I've made," which he described as a "nightmare." (R. at 771; Pros. Ex. 30).

Assignment of Error I

SPECIFICATION 10 OF THE CHARGE WAS FACTUALLY INSUFFICIENT AS APPELLANT DID NOT DAMAGE ES' LAPTOP WITH THE INTENT TO THREATEN OR INTIMIDATE HER.

Standard of Review

"This court 'may consider whether the finding[s] [are] correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.'" *United States v. Myers*, Army 20230100 __ LEXIS __, *6 (Army Ct.

Crim. App. 16 December 2024)(mem. op.). Questions of legal and factual sufficiency are reviewed de novo. *United States v. Walters*, 58, M.J. 391, 395 (C.A.A.F. 2003); *United States v. Craion*, 64 M.J. 531, 534 (Army Ct. Crim. App. 2006).

Law and Argument

a. Appellant has failed to establish a deficiency in proof.

Congress amended Article 66(d), UCMJ, in 2021, which "applies to offenses that occurred on or after January 1, 2021." *United States v. Mendoza*, __ M.J. __ (C.A.A.F. October 7, 2024)(FN6). Though most of the specifications in this case involved misconduct from 2019, the sole specification to which the panel convicted appellant occurred after January 1, 2021. (Charge Sheet). Therefore, the 2021 version of Article 66 applies. Under this updated version of Article 66, Congress eliminated the CCA's "duty and power, to review a conviction for factual sufficiency *absen*t an appellant (1) asserting an assignment of error, and (2) showing a specific deficiency of proof." *United States v. Harvey*, __ M.J. __, 2024 CAAF LEXIS 502, *5 (C.A.A.F. 2024)(emphasis in original). Therefore, in order to prevail, appellant must show a deficiency in proof. *Myers*, __ LEXIS at *6.

Domestic violence against property consists of two elements: (1) accused intends to threaten or intimidate spouse; (2) accused commits an offense under this

chapter against any property.[3] Art. 128b(a)(2)(B). Appellant does not dispute element two, he only disputes that he destroyed his wife's laptop with an intent to threaten or intimidate her. (Appellant's Br. p. 7–8).

Regarding the first element, witness testimony and audio recordings portrayed appellant intentionally destroying Mrs. ES's laptop after repeatedly telling her to "shut the fuck up." (R. at 571–72; Pros. Ex. 15). Immediately before destroying Mrs. ES's laptop, appellant said, "if you don't shut the fuck up, I swear to __ I will." (Pros. Ex. 15, at 00:25–00:40). By any measure, this was a threat.

Appellant's repeated use of abusive language towards Mrs. ES, his guttural screaming immediately after destroying her laptop all support a finding that he intended to intimidate or threaten Mrs. ES. They support a finding that he intended to do so while destroying her laptop. Appellant has not met his burden of demonstrating a specific showing of a deficiency in proof as to this element. *Myer*, __ LEXIS at *8. A failure to establish a specific showing of a deficiency in proof "forestalls any further analysis," of factual sufficiency. *Id*. (FN6). However, even if the court determines appellant met this threshold burden, it should still affirm his conviction.

[3] For the purposes of element two, the charge sheet reflects the elements of Art. 109(b)(3), UCMJ.

b. This court should find Appellant's conviction for destroying Mrs. ES's laptop with intent to threaten or intimidate her factually sufficient due to the overwhelming evidence.

Unlike the other specifications of domestic violence, the destruction of Mrs. ES's laptop involved the most corroboration. (R. at 571–72; Pros. Ex. 15; Pros. Ex. 16). The prosecution introduced the recording of appellant shouting "shut the fuck up," at Mrs. ES as he destroyed her laptop. In combination with Ms. ES's compelling testimony, the recording proved this specification beyond a reasonable doubt. Moreover, there is no other reasonable explanation to undermine the verdict. (Pros. Ex. 15).

Assuming appellant meets the initial burden to establish a deficiency of proof, this court must "weigh the evidence and determine controverted questions of fact." Article 66(d)(1)(B)(ii). Moreover, the court is required to give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence." Article 66(d)(1)(B)(ii)(I); *Harvey*, __ M.J. __, at *7. If the conviction is "against the weight of the evidence," then the court may "dismiss, set aside, or modify the finding." Article 66(d)(1)(B)(iii). The Court of Appeals for the Armed Forces (CAAF) has interpreted this last section as requiring "proof beyond a reasonable doubt. *Harvey*, __ M.J. __, at *10. "Reasonable doubt, however, does not mean the evidence must be free from conflict." *United States v. Rankin*, 63 M.J. 552, 557 (N.M. Ct. Crim. App. 2006). "The degree to which [this court will]

'recognize' or give deference to the trial court's ability to see and hear witnesses will often depend on the degree to which the credibility of the witness is at issue." *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015).

The court-martial properly convicted appellant of domestic violence, and the officer panel gave appropriate weight to the testimony and evidence presented at trial. Following its review of the record, affording appropriate deference to the officer panel's observation of witnesses, this court should not be clearly convinced appellant's convictions are against the weight of the evidence.

1. This court should give high deference to the officer panel.

The testimony of Mrs. ES and the audio recording of appellant and Mrs. ES arguing in their San Antonio hotel room largely informed the officer panel's guilty finding for Specification 10. (R. at 567–72).

The panel observed Mrs. ES testify over the course of two days. (R. at 448, 754). She began her direct examination around noon on 23 August, concluding at 1732 the same day. (R. at 598). The following morning defense began their cross-examination, and the parties did not complete their two rounds of redirect and recross until the afternoon. (R. at 599, 804). Appellant argues that this court is "equally capable as the panel to determine the sufficiency of the evidence based on [Mrs. ES's] testimony and Prosecution Exhibit 15" and should therefore give the

factfinder low deference. (Appellant's Br. at p. 7). The facts of this case and the case law regarding factual sufficiency do not support this argument.

The facts in this case are highly dependent on the credibility of Mrs. ES, something this court cannot glean from a dry record. This is particularly important regarding appellant's intent to intimidate or threaten Mrs. ES. The officer panel observed the witnesses and was best situated to determine their credibility. They sat in the courtroom during the two days Mrs. ES testified, they observed the tone of her voice, pauses, body language and gestures, and facial expressions. This court is deprived of those nonverbal, albeit important cues, as they cannot be transcribed into the record of trial.

If this court were solely considering the audio recording and accompanying photos of the destroyed laptop, this court "might determine that the appropriate deference required is low." *Harvey*, __ M.J. __, at *8. However, that is not the case. The findings required the panel to consider the credibility of testimony in conjunction with the corroborating evidence, and this is the type of case where this court should give great deference to the panel's findings. *United States v. Ryan*, 21

M.J. 627, 632 (A.C.M.R. 1985) (holding that a victim's testimony alone, when credible, can be sufficient to sustain a conviction beyond reasonable doubt).[4]

2. Controverted testimony only affected the other specifications.

A defense witness, MSG KB testified that Mrs. ES "told me that she made up the allegations of domestic violence to hurt Mr. Freestone because he wanted a divorce - to be divorced." (R. at 915). During cross, MSG KB elaborated that Mrs. ES expressed concerns about ending appellant's military career. "On December 25, she texted me and asked me if she discharged the allegations, would his career survive and that she didn't want to have revenge on him, for asking for a divorce, sir." (R. at 917).

This testimony undermined the specifications involving physical violence against Mrs. ES and provided reasonable doubt for the other specifications.

---

[4] *See also United States v. Coovert*, No. ACM 39848, 2021 CCA LEXIS 355, at *38 (A.F. Ct. Crim. App. 21 Jul. 2021) (mem. op.) ("At trial, [the victim's] testimony alone was sufficient to establish proof of the two elements necessary for the charge."); *United States v. Leach*, No. ACM 39563, 2020 CCA LEXIS 230, at *74 (A.F. Ct. Crim. App. 8 Jul. 2020) (mem. op.) ("[Trial counsel] further correctly argued [the victim's] testimony alone could be sufficient to convict Appellant if the members found her credible."); *United States v. Long*, ARMY 20150160, 2018 CCA LEXIS 512, at *19 (Army Ct. Crim. App. 26 Oct. 2018) (*rev'd on other grounds*) (mem. op.) ("The strength of one witness's testimony may, in some cases, be sufficient to sustain a conviction.").

However, the absence of any contradicting evidence regarding Specification 10 reinforces that the panel correctly weighed the testimony of all the witnesses.

Even if the testimony of MSG KB could be interpreted to contradict Specification 10, it would not render the finding of guilt factually insufficient. "It is axiomatic in the context of factual sufficiency, that the evidence need not be free of conflict or that every minor conflict in the evidence be resolved." *United States v. Whigham*, 72 M.J. 653, 662 (Army Ct. Crim. App. 2013) (citing *United States v. Teeter*, 12 M.J. 716, 722 (A.C.M.R. 1981)). Importantly, the panel heard these inconsistencies and still believed Mrs. ES's version of the events when it came to Specification 10. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

3. Specification 10 had the most corroboration and the finding of guilt was not against the weight of the evidence.

Mrs. ES documented appellant's destruction of her laptop. (R. at 570–72). She began an audio recording before appellant flew into a fit of rage in their San Antonio hotel room, capturing the moment appellant destroyed her laptop. (Pros. Ex. 15). She also photographed the damage he wrought on her laptop the same night it occurred. (Pros. Ex. 16). Finally, Mrs. ES testified consistently with the audio recording and the photograph documenting the destruction. (R. at 571–72; Pros. Ex. 15; Pros. Ex. 16).

Further, appellant's rage induced rant accompanying the destruction of her laptop lacked an innocent explanation. He is heard telling Mrs. ES to "shut the fuck up" repeatedly before smashing her laptop. (Pros. Ex. 15, at 00:38–46). After he destroys her laptop, he screams at the top of his lungs. (Pros. Ex. 15, at 00:50–55). The factfinder could easily determine that he destroyed the laptop with the intent to intimidate or threaten her. This court should find the same.

Though on appeal appellant claims that these acts were "merely to express his frustration," he admits this frustration was directed towards Mrs. ES for talking to him about subjects he did not wish to discuss. In appellant's own representation, "[h]e did not want to have such a conversation, he wanted to retreat to a quiet space." (Appellant's Br., p. 8).

This is textbook intimidation. After deciding he did not wish to speak to Mrs. ES, and telling her to "shut the fuck up," he resorted to more dramatic tactics. (Pros. Ex. 15). He grabbed her laptop, something he knew she valued, and threatened to destroy it if she kept talking. (Pros. Ex. 15; R. at 571–72). He then destroyed her laptop to intimidate her, so she would "shut the fuck up." (Pros. Ex. 15). He didn't merely express his frustration, he channeled his rage in an intimidating and threatening manner to get Mrs. ES to behave the way he wished. (Pros. Ex. 15).

The panel clearly considered all the evidence at appellant's trial. They clearly were aware of the high burden of proof required for a verdict of guilty, as they acquitted appellant of all but one specification of domestic violence. Therefore, the finding of guilt for Specification 10 was not against the weight of the evidence.

Assignment of Error II

THE MILITARY JUDGE WRONGLY MARKED BLOCK 32 OF THE STATEMENT OF TRIAL RESULTS AS "YES."

Concession

The Government concedes that the military judge erred in marking block 32 of the STR as "yes." Consistent with *Williams*, we agree that the appropriate remedy is to remand for appropriate corrective action. *Williams*, 2024 CAAF LEXIS 501, *13 (C.A.A.F. 5 Sep. 2024).

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]

MARC B. SAWYER
MAJ, JA
Branch Chief, Government
Appellate Division

[redacted]

RICHARD E. GORINI
COL, JA
Chief, Government Appellate
Division

CERTIFICATE OF SERVICE U.S. v. FREESTONE (20230457)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division, at [redacted], on this 18th day of December 2024.

[redacted]

DANIEL L. MANN
Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
[redacted]