IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,	Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.		Docket No. ARMY 20230265
Private (E-2) **TRENT M. MORLOCK,** United States Army,	Appellant	Tried at Fort Stewart, Georgia, on 13 September 2022, 6 April 2023, 8–11 May 2023 before a general court-martial convened by Commander, Headquarters, Fort Stewart Lieutenant Colonel Albert G. Courie and Colonel Stephan Nolten, military judges, presiding.

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

Assignment of Error I[1]

WHETHER DEFENSE COUNSEL WERE INEFFECTIVE BECAUSE THEY FAILED TO IMPEACH MRS. [redacted] WITH HER [ALLEGED DIAGNOSIS], FAILED TO CHALLENGE HER CLAIM OF SEROQUEL-INDUCED INCAPACITY AND FAILED TO OBJECT TO EXPERT TESTIMONY BY A LAY WITNESS.

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

Panel No 2

Assignment of Error II

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ADMITTED [redacted] UNRELIABLE HEARSAY STATEMENTS UNDER THE RESIDUAL HEARSAY EXCEPTION.

Assignment of Error III

WHETHER THE CHARGES ARE FACTUALLY INSUFFICIENT.

Assignment of Error IV

WHETHER APPELLANT'S CONVICTION FOR SEXUAL ASSAULT IS LEGALLY INSUFFICIENT BECAUSE MRS. [redacted] ALLEGED SLEEP, NOT NON-CONSENT AND BECAUSE THE MILITARY JUDGE ACQUITTED APPELLANT OF SEXUAL ASSAULT BY REASON OF SLEEP.

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Statement of the Case

On 11 May 2023, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault, and two specifications of domestic violence, in violation of Articles 120 and 128b, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 928b (2019) [UCMJ].[2] [3] (R. at 699–700). The military judge sentenced appellant to reduction to the grade of E-1, confinement for eight years and six months, forfeiture of all pay and allowances, and a dishonorable discharge. (R. at 794–95; Statement of Trial Results [STR]). The military judge credited appellant with 151 days of pretrial confinement credit. (R. at 795). The convening authority took no action on the adjudged sentence.[4] (Action). On 31 July 2023, the military judge entered judgment.[5] (Judgment).

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[2] The military judge acquitted appellant of four other specifications. (STR).
[3] All references to the UCMJ are to the 2019 edition of the Manual for Courts-Martial with 2020 and 2021 amendments.
[4] On 23 July 2023, the Convening Authority requested this court delay execution of appellant's adjudged punitive discharge resulting from a separate court-martial pending post-trial processing and appellate review in this instant case. ("Request to Delay/Defer COCAR and Punitive Discharge Pending Appellate Review of Second Court-Martial – PVT Trent M. Morlock," dated 21 July 2023).
[5] Although the "Date Judgement Entered" on the STR reflects 1 May 2023, the military judge's digital signature reflects the date of 31 July 2023. (STR).

Statement of Facts

Appellant and [redacted] met in March 2020 and married that July. (R. at 155–56, 162, 230). Appellant had already enlisted in the Army and [redacted] was supportive when he went to Basic Combat Training in Fall 2020. (R. at 162–63, 230). After graduating from Advanced Individual Training in February 2021, [redacted] and her son [redacted] joined appellant at Fort Stewart. (R. at 163, 230–31). [redacted] testified that when they first moved in together in 2020, the relationship quickly became tense because "[their] mental illnesses were butting heads." (R. at 156). In June 2021, appellant underwent back surgery, causing tremendous tension and stress in their household. (R. at 164–66, 168).

A. Between 1 June 2021 and 17 July 2021, appellant whipped [redacted] on the buttocks with an electric cord.

Sometime before appellant's back surgery, [redacted] was sitting in their living room when she heard appellant screaming at [redacted] crying and screaming, and then the crack of a cord hitting [redacted] leg. (R. at 166, 220). Appellant brought [redacted] out to her and told her he did not mean to hit him that hard. (R. at 166). [redacted] saw appellant holding a phone charger and a six-inch long welt from [redacted] buttocks to his knee. (R. at 166–67, 220–21, 231–32). [redacted] told him, moving forward, not to use corporal punishment on [redacted] (R. at 167, 232, 253).

At trial, five-year-old [redacted] testified that appellant hit him with a cord on his arm and on more than one occasion. (R. at 262, 289–91).

B. Between July 2021 and January 2022, appellant penetrated [redacted] vulva with his penis without her consent.

In July 2021, [redacted] began to take Seroquel and Trazodone as sleep medication. (R. at 168–69, 232–33, 251–52). She took Seroquel initially but switched to Trazodone at some unspecified time. (R. at 232). After taking those medications, she would be "out completely" and unable to move while she slept. (R. at 169). She and appellant discussed these effects. (R. at 169).

One morning, [redacted] woke up realizing someone had tried to sexually arouse her in her sleep. (R. at 170–72). Appellant asked her if she felt anything he did to her while she was sleeping. (R. at 170). By this time in their marriage, it was in no sense a romantic relationship and they had considered divorce. (R. at 172). She told him she did not want him to have sex with her while she slept. (R. at 171–72). She said, "You raped me. That's not okay. Don't do it again." (R. at 201). He merely replied, "You take it wrong." (R. at 174, 202, 218–19, 233–34). [redacted] did not report appellant. (R. at 234).

On 29 November 2021, appellant and [redacted] engaged in another verbal altercation, during which she told appellant that she was going to tell everyone he was raping her and had abused [redacted] (R. at 175, 238–39, 243). When police

responded to their house, initially, [redacted] did not tell them about the sexual assaults because she wanted to get quietly divorced. (R. at 176–77). But after law enforcement left, [redacted] decided to drive to their office to report the assaults after all. (R. at 177). Appellant's commander issued a military protective order (MPO) on 30 November 2021. (R. at 178; Pros. Ex. 17). His unit removed him from the apartment and took him to the barracks. (R. at 179).

Despite the MPO, [redacted] and appellant met for breakfast with [redacted] for his birthday. (R. at 179). [redacted] met with investigators later that day and told them she did not want to proceed with the investigations. (R. at 179). [redacted] believed appellant would remain out of the house for at least two weeks. (R. at 180). During this time, [redacted] and appellant continued to speak. (R. at 180). [redacted] believed there was a chance for them to be friends again, even becoming romantic. (R. at 180–81). Around 16 December 2021, his commander removed the November MPO and so appellant came home. (R. at 180–81; Def. Ex. X).

Before going to bed in the evening of 17 December 2021, [redacted] took her sleep medication. (R. at 184). Appellant, who had been asleep on the couch, briefly woke [redacted] when he crawled into bed around 0530. (R. at 184). [redacted] fell back asleep but woke again to find appellant on top of her with his penis inside her vagina. (R. at 184–85). [redacted] said, "Uh-uh," but appellant kept going. (R. at 185). [redacted] said she fell back asleep because the medication kept her from waking up right

away. (R. at 185). She next awoke to appellant penetrating her vulva with his fingers. (R. at 185). She said, "Uh-uh" again and then appellant climbed back on top of her and inserted his penis into her vagina. (R. at 185). [redacted] recalled going in and out of consciousness but saying, "Uh-uh" two or three times. (R. at 185). After the second or third time she said "Uh-uh" and fell back asleep, appellant bit her nipple; she woke up because she realized he was not going to leave her alone. (R. at 186).

C. On 18 December 2021, appellant struck [redacted] on the back of the head with his fist.

The next day, [redacted] told Private [PVT] AT, her friend at the time, about appellant sexually assaulting her. (R. at 186–87). As appellant and [redacted] headed to breakfast, another fight between them broke out. (R. at 181, 187–88). They were in the car with [redacted] and PVT AT. (R. at 187). Appellant and [redacted] both wanted to play music and fought over the AUX cord. (R. at 188). [redacted] held onto the cord while appellant repeatedly yanked it, accidentally causing her hand to connect with his shoulder, arm, or face. (R. at 188, 247, 264). Her purse and the AUX cord flew out of the car. (R. at 188–89, 247). Believing she had hit him on purpose, appellant punched the back of her head with his fist and said, "Equal rights, equal fights." (R. at 189).

[redacted] got out of the car and took [redacted] back into the apartment to his bedroom. (R. at 189). Appellant followed her into the house up the stairs. (R. at 190). [redacted] became afraid and so she grabbed her phone and ran out of the house. (R. at 190). When she got back in the car, appellant ran after her, threw himself on the hood of the car, and punched it and hit it with his crutch.[6] (R. at 198–99, 205; Pros. Ex. 19). As [redacted] tried to back up the car, appellant ran behind the car and tried to hold on. (R. at 199, 205–06). [redacted] screamed for help to her neighbors who came outside due to the commotion. (R. at 207, 387, 394–95).

One of those neighbors, Specialist [SPC] JB, stood on the sidewalk approximately twenty-five feet away when she saw appellant sprawled on the hood and windshield of the car and the car rolling forward. (R. at 388–89, 392, 395). When SPC JB asked if everything was okay, appellant replied calmly, "Just call the police." (R. at 389, 392, 397). Specialist JB observed [redacted] roll down the window; she appeared frantic, red in the face, and crying when she said words to the effect of, "He's trying to hurt me," or "He hurt me." (R. at 389–91, 397). SPC JB and her husband called police. (R. at 392).

Feeling safe with SPC JB and her husband present, [redacted] got out of the car and ran inside to check on [redacted] (R. at 208). Appellant parked the car in the

[6] Appellant was recovering from a broken ankle and wore a walking boot at the time. (R. at 206, 389, 396).

driveway. (R. at 393). When law enforcement responded, appellant told Sergeant [SGT] CC that they were in the car to get food, an argument happened, he did not want his wife to leave, so he placed a trashcan in the back and jumped on the hood of the car and struck the windshield, leaving a spiderweb crack on the driver's side of the windshield. (R. at 208, 247–48, 400; Pros. Ex. 19). When law enforcement spoke to [redacted] she reported that appellant had sexually assaulted her that morning. (R. at 404, 406–07, 414). Thereafter, appellant's commander put another MPO in place. (R. at 208, 247–48; Pros. Ex. 18).

Additional facts are incorporated below.

Assignment of Error I

WHETHER DEFENSE COUNSEL WERE INEFFECTIVE BECAUSE THEY FAILED TO IMPEACH MRS. [redacted] WITH HER [ALLEGED DIAGNOSIS], FAILED TO CHALLENGE HER CLAIM OF SEROQUEL-INDUCED INCAPACITY AND FAILED TO OBJECT TO EXPERT TESTIMONY BY A LAY WITNESS.

Additional Facts

A. Defense Theories.

At trial, defense's theme and theory of the case were: (i) to exact revenge against appellant, [redacted] and her boyfriend PVT AT falsely accused him and coached [redacted] to do the same (R. at 144, 145–48); (ii) after the altercation on 18 December 2021, [redacted] formed a motive to fabricate because appellant could support claims she

abused [redacted] (R. at 225–27, 249, 255, 265); (iii) [redacted] biological father abused him from February to March 2020, which was an alternate source of emotional and psychological trauma that caused [redacted] "behavior" (R. at 559–60, 564); and (iv) [redacted] merely parroted information he heard during [redacted] interview. (R. at 433–34).

B. [redacted] and PVT AT's Motives.

SGT CC testified about [redacted] and the apartment's apparent poor condition on 18 December 2021; namely, that it was dirty and there was the smell of urine in the apartment. (R. at 402, 407–09). SSG BJ and Special Agent (SA) JE observed the same plus additional apartment conditions, including feces in the residence. (R. at 439–40, 577–78, 581, 613–15; Def. Ex. S–W). Special Agent JE testified that when he returned a few weeks later, after appellant had left the apartment, conditions had improved. (R. at 615–16).

After appellant left, PVT AT lived in the apartment with [redacted] and [redacted] (R. at 310–11). PVT AT would spank [redacted] and made him bleed. (R. at 310–11). In January 2022, PVT AT was under investigation for allegedly abusing [redacted] (R. at 621–22).

C. Sleep Medication.

On cross-examination, [redacted] testified that she believed she was extremely sensitive to sleep medication. (R. at 233). But she admitted that this was not something her provider told her; she was uncomfortable taking the full 50 mg dose

with [redacted] alone in the house. (R. at 233). Dr. MS, the government expert in child forensic psychiatry, testified that taking a 50 mg dose of trazodone does not typically render the user of the drug totally unconscious. (R. at 531–32, 547). Defense did not ask any similar questions about Seroquel. (R. at 532).

D. Age-Appropriate Language and External Influences.

During the drive to the interview, [redacted] told [redacted] that appellant did bad things. (R. at 310). And while law enforcement interviewed [redacted] [redacted] was playing in the room next to her with the door open. (R. at 431, 621).

While laying the foundation for KS as an expert witness, trial counsel elicited testimony about her personal experiences with conducting child forensic interviewing. (R. at 317–24). When the government moved for the court to recognize KS as an expert witness in child forensic interviewing, defense objected arguing she should not be allowed to give expert testimony, including how child forensic interviews should be conducted, but clarified that they did not object to testimony about her background. (R. at 323–25, 328, 334). The government offered to use KS's testimony only as a fact witness. (R. at 326).

After publishing to the military judge the child forensic interviews KS conducted with [redacted] the following line of questioning ensued:

> Q. [KS], was [redacted] able to answer all the questions you asked him during the course of your interview?
> A. Yes.
> Q. And was [redacted] using age-appropriate language for his age?
> A. He was.
> Q. Was [appellant] in the interview room with [redacted] when [redacted] was telling you what [appellant] did to him?
> A. No.

(R. at 372–73; Pros. Ex. 23). Defense did not object. (R. at 373).

On cross examination and re-cross examination, defense elicited from KS that she was not initially concerned about coaching because she did not recall anyone telling her [redacted] was abused by [redacted] PVT AT, or his biological father. (R. at 376–78). But she still looked for signs of coaching as she conducted the interview. (R. at 382). On re-direct examination, she testified that she saw no such indications and repeated that [redacted] used developmentally appropriate language. (R. at 384). Defense did not object to this testimony but re-crossed her on signs of coaching. (R. at 373, 382).

The government expert in child forensic psychiatry, Dr. MS, testified about how to conduct child forensic interviews generally, the level of detail expected from a child's memory, the interviews that KS did of [redacted] and the absence of any signs of coaching. (R. at 509–14, 540). Dr. MS further testified that sitting in appellant's presence could have affected [redacted] testimony. (R. at 515–16). On cross-examination, defense elicited testimony implying [redacted] did not use age-

inappropriate language during his interview and external and other factors that could impact [redacted] memories, including hearing his mother talk about appellant's crimes. (R. at 521–31, 536, 538). Ultimately, there was no indicia that [redacted] memory had been improperly influenced during his forensic interviews, but there were indicia he relayed his actual experience. (R. at 540–46).

Standard of Review

Allegations of ineffective assistance of counsel are reviewed de novo. *United States v. Cueto*, 82 M.J. 323, 327 (C.A.A.F. 2022) (citations omitted).

Law

Military courts evaluate ineffective assistance claims using the Supreme Court's framework from *Strickland v. Washington*, 466 U.S. 668 (1984). *United States v. Furth*, 81 M.J. 114, 117 (C.A.A.F. 2021). "Under *Strickland*, an appellant bears the burden of demonstrating that (a) defense counsel's performance was deficient, and (b) this deficient performance was prejudicial." *Id*. (quoting *Strickland*, 466 U.S. at 687). Courts need not apply the *Strickland* test in any particular order; rather, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) (citing *Strickland*, 466 U.S. at 697); *United States v. Datavs*, 71 M.J. 420, 421 (C.A.A.F. 2012)).

In evaluating performance, courts "must indulge a strong presumption that

counsel's conduct falls within the wide range of reasonable professional assistance." *Captain*, 75 M.J. at 103 (quoting *Strickland*, 466 U.S. at 689, 694). This presumption can be rebutted by "showing specific errors [made by defense counsel] that were unreasonable under prevailing professional norms." *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001) (citations omitted). Appellant must show that "counsel's representation fell below an objective standard of reasonableness" to demonstrate deficiency. *Strickland*, 466 U.S. at 688. Further, a court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id*. at 690.

Even where counsel has committed an unreasonable error, it "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. Appellant must "affirmatively prove prejudice." *Id*. at 693. This means appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Captain*, 75 M.J. at 103. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. In other words, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). This requires consideration of "the totality of the

evidence before the judge or jury." *Strickland*, 466 U.S. at 695. In short, appellant must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

An appellate court can order a rehearing based on the accumulation of errors not reversible individually. *United States v. Castillo*, 74 M.J. 39, 43 (C.A.A.F. 2015) (quoting *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996) (considering the nature and number of errors, their interrelationship, and combined effect, how the trial court dealt with the errors as they arose, and strength of the government's case)) (quotation marks omitted).

Argument

In this case, appellant fails to demonstrate sufficient prejudice. *See Captain*, 75 M.J. at 103. First, [redacted] alleged only two instances of sexual assault: July 2021 and December 2021. Although defense counsel failed to challenge [redacted] claim of Seroquel-induced incapacity, the military judge acquitted him of Specification 2 of Charge II alleging sexual assault while [redacted] was asleep (i.e., the July 2021 incident). Thus, the sole instance at issue was December 2021 where [redacted] expressed non-consent when she repeatedly awoke to appellant sexually assaulting

her. (R. at 185). Additionally, in December 2021, [redacted] was taking Trazodone, not Seroquel, as sleep medication.[7]

Second, with respect to KS's lay person testimony regarding [redacted] age-appropriate language, the military judge acquitted appellant of the Specifications of Charge I. (R. at 699; STR). Further, Dr. MS provided expert testimony concluding the same. (R. at 508, 512, 541–46). The court can presume the military judge afforded their respective testimonies due weight. Not only did the trial court not recognize KS as an expert (R. at 324–26), but defense also subjected Dr. MS to a slashing cross. (R. at 521). *See* Additional Facts *supra* AE II. Thus, this court should find no material prejudice on either ground.

Furthermore, appellant claims on appeal that [redacted] has a mental health diagnosis and that he informed his trial defense counsel of the same. (Def. App. Ex. B). But any further investigation was unnecessary because even assuming [redacted] did have this diagnosis, the record contains no evidence she was experiencing any relevant symptoms when appellant told her he did not mean to whip [redacted] so hard some time before July 2021 or when she testified at trial. Contrary to appellant's assertion, a disorganized and unsanitary home is insufficient to show [redacted] was

[7] Appellant asks this court, in the alternative, to strike the language of "or more" from "on one or more occasion" from Specification 1 of Charge II. (Appellant's Br. 29–30). The government does not oppose, considers the variance minor, and respectfully submits no further relief is warranted.

symptomatic when appellant sexually assaulted her and punched her in the head in December 2021 (Appellant's Br. 12) because he and [redacted] both lived in the home at the time and conditions improved after he left. (R. at 265). Thus, her diagnosis had no bearing on her credibility and no relief is warranted.[8]

Assignment of Error II

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ADMITTED [redacted] UNRELIABLE HEARSAY STATEMENTS UNDER THE RESIDUAL HEARSAY EXCEPTION.

Additional Facts

Trial counsel sought to introduce [redacted] statement during a 29 March 2022 interview, "[Appellant] hit Mommy. He smacked her in the face," under Mil. R. Evid. 807 because [redacted] testified he did not remember, in relevant part, appellant hitting [redacted][9] (R. at 335–36, 340–41, 344; App. Ex. V). The military judge rendered an oral decision initially granting the government's motion limited to this portion of the recorded interview. (R. at 353–61). But upon defense's motion

[8] If this court "finds that allegations of ineffective assistance and the record contain evidence which, if unrebutted, would overcome the presumption of competence," the government requests this court order "a response from trial defense counsel in order to properly evaluate the allegations" in accordance with *United States v. Melson*, 66 M.J. 346, 350–51 (C.A.A.F. 2008).

[9] The government also sought to introduce other statements made in a 6 June 2022 interview under Mil. R. Evid. 807 because [redacted] did not remember a detail relevant to the Specifications of Charge I. (R. at 335–37, 340–41, 345–46, 370–71; Pros. Ex. 24; App. Ex. V; STR).

under Mil. R. Evid. 106 rule of completeness, the military judge admitted the entirety of the 29 March 2022 interview. (R. at 366–67; Pros. Ex. 23). Thereafter, the military judge admitted [redacted] child forensic interview without further objection. (R. at 369; Pros. Ex. 3, 23).

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).

"A military judge abuses his or her discretion when: (1) the military judge predicates a ruling on findings of fact that are not supported by the evidence of record; (2) the military judge uses incorrect legal principles; (3) the military judge applies correct legal principles to the facts in a way that is clearly unreasonable; or (4) the military judge fails to consider important facts. *United States v. Rudometkin*, 82 M.J. 396, 401 (C.A.A.F. 2022).

Law and Argument

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).

Although "'the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances' . . . 'one such exceptional circumstance generally exists when a child abuse victim relates to an adult the details of the abusive events.'" *Kelley*, 45 M.J. at 280 (citing *United States v. Shaw*, 824 F.2d 601, 609 (8th Cir. 1987)). "The more liberal approach in child abuse cases extends to the necessity requirement." *Id.* Even evidence that may be "somewhat cumulative" may be admitted as residual hearsay when it is "important in evaluating other evidence and arriving at the truth." *Id.* Thus, the "'more probative' requirement cannot be interpreted with cast iron rigidity." *Id.* (citation omitted). "The necessity prong 'essentially creates a 'best evidence' requirement.'" *Kelley*, 45 M.J. at 280 (citing *Larez v. City of Los Angeles*, 946 F.2d 630, 644 (9th Cir. 1991)). "This prong may be satisfied where a witness

cannot remember or refuses to testify about a material fact and there is no other more probative evidence of that fact." *Id.* (citations omitted).

For the reliability prong, "[i]n determining whether a statement is supported by circumstantial guarantees of trustworthiness, we look to a number of indicia of reliability. These may include, among other things: (1) the mental state of the declarant; (2) the spontaneity of the statement; (3) the use of suggestive questioning; and (4) whether the statement can be corroborated." *United States v. Donaldson*, 58 M.J. 477, 488 (C.A.A.F. 2003) (citing *United States v. Grant*, 42 M.J. 340, 343–44 (C.A.A.F. 1995); *Kelley*, 45 M.J. at 281; *United States v. Cox*, 45 M.J. 153, 157 (C.A.A.F. 1996)). "Other indicators of reliability may include the declarant's age or the circumstances under which the statement was made." *Id.* (citing *Kelley*, 45 M.J. at 281; *Cox*, 45 M.J. at 157). Ultimately, "[i]t requires an analysis of numerous factors indicating the time, place, and circumstances of the making of the statement to qualify it." *United States v. Giambra*, 33 M.J. 331, 334 (C.M.A. 1991) (citations omitted). A court's factual findings on the existence of circumstantial guarantees of trustworthiness are reviewed for clear error. *Id.* (citing *United States v. Workman*, 860 F.2d 140, 144 (4th Cir. 1988)).

Here, appellant contends the military judge abused his discretion when he ruled to admit [redacted] statement under Mil. R. Evid. 807. (Appellant Br. 16). However, the military judge rendered a thorough oral decision relying on the

correct legal principles and all relevant facts. (R. at 355).

A. The military judge considered correct legal principles and relevant facts.

The military judge reviewed [redacted] recorded child forensic interviews and KS's experience as a child forensic interviewer. (R. at 318–24, 350–53; App. Ex. III and IV). He first considered the text of Mil. R. Evid. 807, *Donaldson*, 58 M.J. 477, *United States v. Casteel*, 45 M.J. 379 (C.A.A.F. 1996), and *United States v. Czachorowski*, 66 M.J. 632 (C.A.A.F. 2008). (R. at 351). With respect to Sixth Amendment Confrontation Clause issues, the military judge considered *Crawford v. Washington*, 541 U.S. 36 (2004). (R. at 354). With respect to indicia of reliability, he considered *Giambra*, 33 M.J. 331, *United States v. McGrath*, 39 M.J. 158 (C.M.A. 1994); and *United States v. Pollard*, 38 M.J. 41 (C.M.A. 1993)).[10] (R. at 354–55).

B. The military judge correctly applied the legal principles to the facts.

Appellant asserts [redacted] statements were prior inconsistent statements. (Appellant's Br. 17). But his statements were not prior inconsistent statements. [redacted] testified that he did not remember. (R. at 289, 335–36, 340–41, 344).

[10] In his oral decision, the military judge appears to have miscited case law; he asserted *McGrath*, 39 M.J. 158 cited to *Pollard*, 38 M.J. 31, but it does not. (R. at 355). However, in both *McGrath* and *Pollard*, the Court of Appeals for the Armed Forces relied upon *Idaho v. Wright*, 497 U.S. 805 (1990) consistent with the military judge's proposition with respect to indicia of reliability. *See McGrath*, 39 M.J. at 164; *Pollard*, 38 M.J. at 49.

Accordingly, the military judge found no notice issue because [redacted] was available to testify and defense had an opportunity to cross-examine him. (R. at 354). He next found: (i) the parties agreed the statement offered was evidence of a material fact (R. at 354, 359); (ii) the statement is more probative for the point for which it is offered than any other evidence which the government can procure through reasonable efforts because [redacted] testified he did not remember the statement (R. at 354–55); and (iii) the general purpose of the rule and interests of justice will be best served by the admission of the statement into evidence because it goes to the central issue in the case (R. at 354–55, 359). In considering indicia of reliability, the military judge found that KS was very experienced and conducted the interview in accordance with protocol, that [redacted] was a child, and that the questioning was not suggestive. (R. at 356–59). He further found corroboration for the statement through [redacted] testimony. (R. at 358).

C. No Prejudice.

Even if this court finds error, there was no material prejudice. [redacted] credibly testified appellant punched her in the head. (R. at 189). Moreover, appellant benefitted from the military judge admitting [redacted] statement at issue because defense was able to move the entire interview into evidence under the rule of completeness. (R. at 362). These additional statements were related to the Specifications of Charge I, of which the military judge acquitted him.

Assignment of Error III

WHETHER THE CHARGES ARE FACTUALLY INSUFFICIENT.

Additional Facts

At the time of trial, [redacted] and [redacted] were twenty-one and five years old, respectively. (R. at 154). At trial, government counsel established [redacted] competency to testify on the record: trial counsel posed seven vignettes illustrating the difference between a truth and a lie (R. at 285–88); and [redacted] answered two incorrectly. (R. at 262, 291, 301–03).

In November 2021, police responded to appellant and [redacted] home for a report of possible suicide. (R. at 173). Appellant told [redacted] he wanted a divorce and would not talk to her, so to get his attention, she told him she was going to slit her wrists and take a whole bottle of sleeping pills though she had no intent to do so. (R. at 173–74).

Standard of Review

Questions of factual sufficiency are reviewed de novo. *United States v. Harvey*, 85 M.J. 127, 129 (C.A.A.F. 2024). Further, this Court's assessment of

factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

Law

A. Factual Sufficiency.

In any case in which every finding of guilty entered into the record is for an offense that occurred on or after 1 January 2021, the Court may consider whether the findings of guilty are correct in fact upon appellant's request if appellant makes a specific showing of a deficiency in proof. UCMJ art. 66(d)(1)(B) (2021); *Harvey*, 85 M.J. at 129–30; *see generally* Pub. L. No. 116-283, § 542(e)(2), 134 Stat. 3388, 3611–123.

After appellant has made such a showing, the Court may weigh the evidence and determine controverted questions of fact. UCMJ art. 66(d)(1)(B); *Harvey*, 85 M.J. at 130. In weighing the evidence, the Court affords "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence and findings of fact entered into the record by the military judge." UCMJ art. 66(d)(1)(B). "Appropriate deference" will depend on the nature of the evidence at issue. *Harvey*, 85 M.J. at 130. But it does not create a presumption that in reviewing a conviction, a court of criminal appeals presumes an appellant is in fact guilty. *Id*. at 132.

If the Court is clearly convinced that the finding of guilty was against the

weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding. UCMJ art. 66(d)(1)(B). This court must satisfy two requirements to be "clearly convinced" (i) that the evidence, as the court has weighed it, does not prove that the appellant is guilty beyond a reasonable doubt and (ii) of the correctness of this decision. *Harvey*, 85 M.J. at 132.

B. Sexual Assault.

It is an offense under Article 120(b), UCMJ to commit a sexual act upon another person without their consent. The term "sexual act" means the penetration, however slight, of the penis into the vulva with an intent to gratify the sexual desire of any person. UCMJ art. 120(g)(1)(C). The term "consent" means a freely given agreement to the conduct at issue by a competent person. UCMJ art. 120(g)(7)(A). A sleeping person cannot consent. UCMJ art. 120(g)(7)(B).

C. Domestic Violence.

It is an offense under Article 128b(1), UCMJ to commit a violent offense against a spouse or an immediate family member of that person. At the time appellant committed these offenses, the President had not promulgated definitions applicable to Article 128b(1), UCMJ.

Nevertheless, with respect to the term "violent offense," the Military Judge's Benchbook defined it as a violation of any offense that has as an element that includes the use, attempted use, or threatened use of physical force against the

person or property of another. *See* Benchbook, para. 3A-52B-1d (definitions); *see also* 18 U.S.C. § 16 (crime of violence). Thus, assault under Article 128, UCMJ, is a violent offense. *See United States v. Malone*, ARMY 20230151, 2025 CCA LEXIS 75, *19–20 (Army Ct. Crim. App. 25 Feb. 2025) (citing Exec. Order 14,062, 87 Fed. Reg. 4736 (Jan. 26, 2022)) ("The President has defined a "violent offense" as a violation of specific articles of the UCMJ, to include Article 128[.]")

Similarly, with respect to the phrase "immediate family member of that person," the UCMJ defines "immediate family" in other provisions as including a person to whom he stands in loco parentis and person living in his household and related to him by marriage. UCMJ art. 128, 130(b)(4)(A); *see also* MCM, pt. IV, ¶¶ 77.c.(4)(d), (5)(a)(vi).

Argument

A. Asserting that a witness is unreliable is not a specific showing of a deficiency in proof.

Appellant contends the charges are factually insufficient solely because the complaining witnesses were unreliable. (Appellant Br. 19). But this court no longer has a sua sponte duty to conduct a de novo review of the factual sufficiency of the evidence in every case. *Harvey*, 85 M.J. 130–31. Under the post-2021 Article 66, UCMJ, the court may only conduct this review "if [appellant] makes a specific showing of a deficiency in proof[.]" *Id.* at 131.

To make a "specific showing of a deficiency in proof," appellant must identify an affirmative defense raised at trial or evidence admitted at trial for the truth of the matter asserted that directly contradicts proof of one or more elements. *Cf. United States v. Valencia*, 85 M.J. 529 (N-M Ct. Crim. App. 2024) (requiring an appellant to explain why, on balance, the evidence (or lack thereof) contradicts a guilty finding), *rev. granted by United States v. Valencia*, 2025 CAAF LEXIS 202 (C.A.A.F. Mar. 14, 2025). Claiming that a witness is not credible is not sufficient because the question of weight is separate from the threshold question of specific deficiency. Nor can evidence that was never before the factfinder or raised at trial constitute a deficiency in proof.

Here, appellant's assertion that a witness is not credible does not constitute a "specific showing of a deficiency in proof." [redacted] "motive to fabricate," "history of histrionic displays," and "evidence engaging in witness tampering" suggesting she is not honest or reliable are impeachment evidence, not matters asserted at trial for the truth of the matter. (Appellant's Br. 20). Similarly, [redacted] alleged misattribution due to CID's investigative technique also does not contradict proof of one or more elements. (Appellant's Br. 21). The only assertion that meets the threshold question is self-defense with respect to Specification 3 of Charge III. (Appellant's Br. 22; R. at 675–76).

B. Having not personally observed the witnesses in this case, this court should afford great deference to the military judge's determination that [redacted] and [redacted] credible.

Even assuming arguendo appellant's grounds each demonstrated a specific showing of a deficiency in proof, this court should be clearly convinced that the evidence, as the court has weighed it, proves that the appellant is guilty beyond a reasonable doubt.

The military judge was best positioned to assess [redacted] and [redacted] sincerity and conduct in court because he saw and heard them. *See* UCMJ art. 66(d)(1). As the CAAF has said, "a CCA might determine that the appropriate deference required for a court-martial's assessment of the testimony of a fact witness, whose credibility was at issue, is high because the CCA judges could not see the witness testify." *Harvey*, 85 M.J. at 130. Moreover, this court can presume the military judge followed the law with respect to assessing witness credibility because there is no clear evidence to the contrary. *United States v. Leipart*, 85 M.J. 35, 40 (C.A.A.F. 2024). The arguments appellant raises on appeal are the same he made over the course of a four-day trial wherein defense counsel impressed upon the court that [redacted] was not credible. (R. at 490, 664, 667, 676, 689–90, 697). Thus, this court should afford great deference to the military judge's determination that the victims' accounts were believable.

C. In December 2021, appellant penetrated [redacted] vulva with his penis without her consent.

[redacted] testified that in December 2021, she awoke to appellant on top of her penetrating her vulva with his penis. (R. at 184). Twice she said, "Uh-uh" to indicate her lack of consent.[11] (R. at 184–85). Yet he persisted. (R. at 184–85). The "sexual act" in this case was penetration of [redacted] vulva with appellant's penis. There is no evidence [redacted] verbally or physically consented to appellant's sexual assault. Instead, evidence appellant committed this sexual act without her consent was [redacted] twice waking up and saying "Uh-uh" and their prior conversations when she told him she did not want him to have sex with her while she was asleep. (R. at 185–86). Thus, Specification 1 of Charge II is factually sufficient.

D. On 18 December 2021, appellant struck his wife on the back of the head with his fist.

[redacted] qualified as "immediate family" because she was appellant's spouse at the time. *See* UCMJ art. 128b(1), 130(b)(4)(A). The "violent offense" in this case was appellant striking her on the back of her head with his fist. *See* UCMJ art. 128, 128b(1). At trial, defense counsel raised self-defense. (R. at 675–76). But prefacing a fist punch to the victim's head with "equal rights, equal fights," demonstrates beyond a reasonable doubt that appellant had an offensive (perhaps

[11] *See* Open Session Audio: "Morlock(2)8May23(T)_20230508-1055_01d9819b9d7b5580" at 10:44:34 AM – 10:59:23 AM (on file with the court).

retaliatory) rather than defensive motive. Thus, Specification 1 of Charge III is factually sufficient.

E. Between 1 June 2021 and 17 July 2021, appellant whipped [redacted] on the buttocks with an electric cord.

[redacted] qualified as "immediate family" because he lived in appellant's household and was related to him by marriage. *See* UCMJ art. 128b(1), 130(b)(4)(A). At trial, defense counsel argued the government failed to disprove that this incident was merely parental discipline that was neither unreasonable nor excessive force or that it simply did not happen. (R. at 673–75, 690); *see United States v. Robinson*, ARMY 20220043, 2023 CCA LEXIS 235, *7–9 (Army Ct. Crim. App. 2 Jun. 2023) (sum disp.) (finding that appellant's whipping of her five-year-old child with a "cellphone charging cord" was legally and factually sufficient despite appellant's assertion of the parental discipline defense). But AS's testimony that she observed this injury and described it as a "pretty bad bruise" corroborated [redacted] and [redacted] account that it did happen and was excessive. (R. at 495, 166–67, 220–21, 231–32; Pros. Ex. 20); *Robinson*, ARMY 20220043, 2023 CCA LEXIS 235, at *8 (finding appellant's strikes with the cord and persistent injuries to the victim were sufficient evidence that the force was "excessive"). Even appellant knew the force used was disproportionate. (R. at 166). Thus, Specification 2 of Charge III is factually sufficient.

Assignment of Error IV

WHETHER APPELLANT'S CONVICTION FOR SEXUAL ASSAULT IS LEGALLY INSUFFICIENT BECAUSE MRS. [redacted] ALLEGED SLEEP, NOT NON-CONSENT AND BECAUSE THE MILITARY JUDGE ACQUITTED APPELLANT OF SEXUAL ASSAULT BY REASON OF SLEEP.

Standard of Review

Questions of legal sufficiency are reviewed de novo. *United States v. Washington,* 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

The standard for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 MJ 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *see United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). In resolving questions of legal sufficiency, the court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). During its legal sufficiency review, the court considers all available facts within the record and is "not limited to the appellant's narrow view of the record." *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996).

To the extent this court considers appellant's claim to allege an inconsistent verdict, that is not usually a cause for relief because the military judge may have merely shown appellant lenience. *United States v. Snipes*, 18 M.J. 172, 175 n.4 (C.M.A. 1984) (quotations omitted); *see United States v. Shelton*, 62 M.J. 1, 13 n.6 (C.A.A.F. 2005) (citing *United States v. Lyon*, 15 U.S.C.MA. 307, 313, 35 C.M.R. 279, 285 (1965)); *United States v. Watson*, 31 M.J. 49 (C.M.A. 1990) (citations omitted). Instead, military courts prefer to "look at the specification upon which a guilty finding has been made to determine whether it may legally stand." *See Snipes*, 18 M.J. at 175. This court employs a "case-by-case approach in which reversal would occur only if [this court] could discern no rational basis which might have led the judge to his verdict." *United States v. Perry*, 22 M.J. 669, 671 (A.C.M.R. 1986).

Argument

Here, appellant asserts he is not guilty of Specification 1 of Charge II (sexual assault without consent) because the military judge acquitted him of Specification 2 of Charge II (sexual assault while asleep). (Appellant's Br. 29). First, to the extent appellant is asserting the government cannot charge an accused in the alternative and present evidence supporting each theory, the CAAF, in *United States v. Mendoza*, said just the opposite: "Of course, nothing prevents the Government from charging a defendant with both offenses under inconsistent

factual theories and allowing the trier of fact to determine whether the victim was capable or incapable of consenting." __M.J.__, 2024 CAAF LEXIS 590, *18 (C.A.A.F. 7 Oct. 2024).

Second, the evidence demonstrates [redacted] was awake. [redacted] testified that she drifted in and out of sleep during the December 2021 sexual assault incident. (R. at 184–86). A reasonable inference from the fact that she drifted in and out of sleep was that she was awake during the assault. *See Barner*, 56 M.J. at 134. Even if this court views that evidence as merely circumstantial proof that [redacted] was awake, "The Government may meet its burden of proving an accused's guilt beyond a reasonable doubt with circumstantial evidence." *Mendoza*, 2024 CAAF LEXIS 590 at *10.

Further, [redacted] testified that she awoke to appellant still assaulting her after repeatedly verbalizing non-consent. The first time she awoke, she found him on top of her with his penis inside her vagina. (R. at 184–85). [redacted] verbalized non-consent, but he kept going. (R. at 185). The second time she awoke, he was penetrating her vulva with his fingers. (R. at 185). She verbalized non-consent again, but he climbed back on top of her and inserted his penis into her vagina. (R. at 185). Thus, there is direct evidence of [redacted] awake and verbalizing nonconsent while appellant sexually assaulted her. Accordingly, Specification 1 of Charge II is legally sufficient.

Conclusion

WHEREFORE, the government respectfully requests This Honorable Court affirm the findings and sentence.

[redacted]

VY T. NGUYEN
CPT, JA
Branch Chief, Government
Appellate Division

[redacted]

ANTHONY J. SCARPATI
CPT, JA
Branch Chief, Government
Appellate Division

[redacted]

COL, JA
Chief, Government Appellate
Division

CERTIFICATE OF SERVICE U.S. v. MORLOCK (20230265)

I certify that a copy of the foregoing was sent via electronic submission to Mr. Robert Feldmeier, civilian appellate defense counsel, at [redacted], and the Defense Appellate Division, at [redacted], on this 8th day of May, 2025.

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