IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,	Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.		Docket No. ARMY 20230655
Specialist (E-4) **MARIANO J. ROSENDO,** United States Army,	Appellant	Tried at Fort Carson, Colorado, on 21 February, 28 June, and 11–13 December 2023 before a general court-martial convened by Commander, Fort Carson, Colonel Jacqueline L. Emanuel and Colonel R. Bockin, Military Judges, presiding.

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

Assignment of Error I[1]

WHETHER APPELLANT'S CONVICTION IS FACTUALLY SUFFICIENT.

Assignment of Error II

WHETHER THE MILITARY JUDGE ERRED BY NOT AWARDING ADDITIONAL CONFINEMENT CREDIT.

[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. The government recognizes this court's authority to elevate *Grostefon* matters deserving of increased attention. 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. 4

Statement of the Case

On 12 December 2023, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920(b) (2019) [UCMJ].[2] (R. at 416). The military judge sentenced appellant to reduction to the grade of E-1, confinement for 12 months, and a dishonorable discharge. (R. at 469). The military judge issued appellant one day of *Allen* credit. (R. at 469). The convening authority took no action on the adjudged sentence and disapproved appellant's request for waiver of automatic forfeitures. (Action). On 4 May 2024, the military judge entered judgment. (Judgment).

Statement of Facts

A. Events Before the Sexual Assault

On 14 May 2021, [redacted] planned to meet SPC [redacted] at a bar. (R. at 192). [redacted] had met SPC [redacted] on Tinder approximately two months prior and they had seen each other a handful of times. (R. at 189). That evening, [redacted] with her friends, [redacted] and [redacted], and their boyfriends, went to the bar where SPC [redacted] had been

[2] Unless otherwise stated, all references to the UCMJ and Rules for Courts-Martial [R.C.M.] are to the versions in the Manual for Courts-Martial, United States ([2019] ed.) [*MCM*] [with the 2020 and 2021 National Defense Authorization Act Amendments].

socializing with his friends, including PFC [redacted] and appellant. (R. at 194). [redacted] arrived around 0200, when the bar was closing. (R. at 194).

[redacted] rode back to SPC [redacted] house with appellant and a woman appellant met at the bar. Appellant and [redacted] had only previously engaged in casual conversation and did not know each other well. (R. at 196–97). Nothing about their prior interactions involved group sex, nor would anything imply that she would consent to sex with appellant. (R. at 196–99). When they arrived at SPC [redacted] house, [redacted] went up to his bedroom, where she intended to have sexual interactions with SPC [redacted], and SPC [redacted] alone. (R. at 199). [redacted] and SPC [redacted] took their clothes off and started kissing consensually. (R. at 200).

B. Sexual Assault

[redacted] was lying on her back at the foot of SPC [redacted] bed. (R. at 200–01). SPC [redacted] got up from the bed, walked over to the door, and started talking to somebody. (R. at 204). He returned and asked if PFC [redacted] could join them. (R. at 204). [redacted] said no and resumed consensual kissing with SPC [redacted]. PFC [redacted] entered the room anyway. (R. at 205).

[redacted] told SPC [redacted] to tell PFC [redacted] to leave (R. at 206). SPC [redacted] told her "it will be okay." (R. at 206). PFC [redacted] did not leave. (R. at 206). He got on top of [redacted] and inserted his penis in her vagina without her consent. (R. at 206). [redacted] laid there, feeling scared, believing she couldn't leave. (R. at 207). She closed

her eyes, thinking if she didn't see it, it wasn't happening. (R. at 207). She did not participate. (R. at 208).

Appellant entered the bedroom next. (R. at 208). He neither said anything when he entered the room, nor did he ask if [redacted] consented to him being there. (R. at 208–09). He grabbed her neck and chin so he could put his penis in her mouth. (R. at 209). She did not participate. (R. at 209–10). [redacted] closed her eyes, wanting SPC [redacted], appellant, and PFC [redacted] to think that she was sleeping so that they could "hurry up and be done." (R. at 210). She testified that she was scared, that she didn't say anything because she felt like it was too late, that she didn't believe she'd be able to leave the room because the three of them wouldn't want to get in trouble if they discovered she was awake and could have reported the sexual assault. (R. at 210). On cross examination, she testified that appellant ejaculated on her face, and that she did not remember telling the trial team that he did not ejaculate in her mouth. (R. at 234–35). [redacted] was not aware of, and did not consent to, photos of the assault. (R. at 211).

After appellant and PFC [redacted] finished, they left the room, and SPC [redacted] put his penis in [redacted] vagina. (R. at 212). She did not participate. (R. at 212). SPC [redacted] fell asleep once he was finished, and [redacted] retrieved her clothes and went to the bathroom, where she called her friends to come get her. (R. at 213). She then rushed out of the house, not wanting SPC [redacted] and his friends to know she was

leaving. (R. at 214). Outside, she hid behind the neighbor's car and trash can because she didn't know if the three of them heard her leave and would try to look for her outside. (R. at 214–15).

C. Evidence Corroborating [redacted] Testimony about the Assault

Around 0330, [redacted] friend, [redacted], received multiple missed calls from [redacted]. (R. at 253). Around 0345–0400, [redacted] boyfriend, [redacted], too, was woken up with "multiple missed phone calls, and text messages from [redacted]." (R. at 241). Around 0400 (Central Time), [redacted] mother also received a call from her, testifying that [redacted] sounded "[s]cared. She was crying almost, I don't know, in shock. She was kind of hard to understand." (R. at 278–79). [redacted] friend, [redacted], testified that [redacted] called her multiple times after she had gone to sleep, and that when she called her back, she was upset and crying. (R. at 263).

When [redacted] called [redacted] back, she asked him to come get her. (R. at 241). He testified that she was crying, and she seemed scared. (R. at 242).

[redacted] testified that when she and [redacted] arrived at SPC [redacted] house, they found [redacted] hiding behind trash cans, distraught, scared, and crying. (R. at 254). When [redacted] and her boyfriend arrived at [redacted] house shortly thereafter, [redacted] was in her sister's ([redacted]) car, shaking and crying. (R. at 263).

[redacted] testified that the police later arrived at her house at 0600. (R. at 264). The responding deputy from El Paso County Sheriff's Office, [redacted], received notice

during his 0600 briefing that a call had come in with a sexual assault allegation. (R. at 282–83). On his way to the residence, he called to verify the address and spoke to the victim. (R. at 283). He testified that she sounded distressed and "something traumatic just happened." (R. at 284). At approximately 0815, the forensic nurse examiner conducted a SANE examination on [redacted]. (R. at 294–96).

D. The Investigation

During the CID investigation, Special Agent (SA) [redacted] from the Fort Carson CID office reviewed the forensic extraction from appellant's phone. (R. at 305). He found communications between appellant, SPC [redacted], and PFC [redacted] from 15 May, the day of the assault, onwards, (R. at 307), as well as "three photographs of what appeared to be three individuals; one female, two males engaged in a sexual act . . . in Specialist Rosendo's photos section of the digital examination." (R. at 308). He identified PFC [redacted], appellant, and [redacted] as the three individuals in the photos. (R. at 308); (App. Ex. II(E) (sealed)). [redacted] similarly identified the individuals in the photos. (R. at 221–22).

Detective [redacted] of the El Paso County Sheriff's Office interviewed [redacted], SPC [redacted], PFC [redacted], and appellant. (R. at 323). PFC [redacted] and appellant were simultaneously interviewed on 15 June. (R. at 324). The government admitted a recording of appellant's interview and played it for the panel. (R. at 326–39). During this interview:

(1) appellant initially tells the detective he believes he's at the sheriff's office to discuss a sexual assault case he had investigated with PFC [redacted] as a military policeman; then, when he realizes detectives aren't going to give him any information says "I know exactly what you're talking about now that I'm here, so I can clear that up," (Pros. Ex. 5);

(2) appellant admits [redacted] never said "she wanted to have sex with him or anything," (Pros. Ex. 5 26:46);

(3) appellant said he went into the bedroom, saw "[redacted] was getting fucked by PFC [redacted] already" and because SPC [redacted] had told him "PFC [redacted] already fucking her, do you want to join," he "thought about it and [was] like, alright, fuck it," (Pros. Ex. 5 27:14–29:05);

(4) when asked what made him think [redacted] was willing to participate, appellant again said "cuz she was having sex already with PFC [redacted] and she was having sex with SPC [redacted] . . . *you don't really have to ask if she's already doing it*," (Pros. Ex. 5 31:11 and 1:13:50) ("SPC [redacted] was like PFC [redacted] is having sex with her and I was like 'eh fuck it'") (emphasis added);

(5) appellant said unprompted throughout his interview that he "didn't grab [redacted] head or anything like that . . . at most I brushed her hair out of her face," (Pros. Ex. 5);

(6) when asked whether SPC [redacted] told him not to bring his phone, appellant claimed his phone was dying and that he left it in his barracks. (Pros. Ex. 5 1:36:52). Appellant also denied that anyone took photos of the sexual activity. (Pros. Ex. 5 1:37:50). Then, over the span of the next eight minutes, the detectives caught him in a lie—in fact, he did bring his phone, but he left it in his car. (Pros. Ex. 5).

Assignment of Error I

WHETHER APPELLANT'S CONVICTION IS FACTUALLY SUFFICIENT.

Standard of Review

"This court reviews questions of factual sufficiency de novo." *United States v. Penaloza*, ARMY 20230473, 2025 CCA LEXIS 76, at *4 (Army Ct. Crim. App. 28 Feb. 2025) (mem. op.) (citing *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)).

Law

A. Factual Sufficiency

Under Article 66(d)(1)(B), UCMJ, a criminal court of appeals can review a conviction for factual sufficiency only if two requirements are met: (1) appellant asserts an assignment of error; and (2) appellant makes a showing of a specific deficiency in proof. Once appellant has made such a showing, the court may weigh the evidence and determine controverted questions of fact, with appropriate deference to both the fact that the trial court saw and heard witnesses and other evidence, and findings of fact entered into the record by the military judge. Article 66(d)(1)(B). If the court is clearly convinced that the finding of guilty was against the weight of the evidence, it may dismiss, set aside, or modify the finding, or affirm a lesser finding. *Id.* Said another way, the court must first "decide that the evidence as the [c]ourt has weighed it does not prove that the appellant is guilty beyond a reasonable doubt [and] [s]econd, the court must be clearly convinced of the correctness of this decision." *United States v. Harvey*, 85 M.J. 127, 132 (C.A.A.F. 2024).

Article 66 "affords the CCA discretion to determine what level of deference is appropriate." *Id.* at 131.[3] That "degree of deference [when weighing the evidence and determining controverted questions of fact] . . . depend[s] on the nature of the evidence at issue." *Id*. at 130–31. For example, "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." *Id.* at 131. "In contrast, when the CCA can assess documents, videos, and other objective evidence just as well as the court-martial, the CCA might determine that the appropriate deference required is low." *Id.*

B. Article 120, Sexual Assault

The elements of sexual assault are: (1) the accused committed a sexual act upon another person; and (2) the accused did so without their consent. *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*], pt. IV, ¶ 60.b. "'Consent' means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent." *MCM*, pt. IV, ¶

[3] The amended factual sufficiency review under 10 U.S.C. § 866(d)(1) applies to courts-martial in which every finding of guilty in the entry of judgment is for an offense that occurred on or after 1 January 2021. William M. Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, §542, 134 Stat. 3388, 3611–12 (2021).

60.a.(g)(7). Mistake of fact as to consent has two requirements: (1) the ignorance or mistake must have existed in the mind of the accused; and (2) it must have been reasonable under all the circumstances. Rule for Courts-Martial [R.C.M.] 916(j)(1). "To be reasonable, the ignorance or belief must have been based on information, or lack of it, which would indicate to a reasonable person that [the other person consented]." Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 3A-44-2 (29 Feb. 2020) [Benchbook]. "[T]he ignorance or mistake cannot be based on a negligent failure to discover the true facts." *Id.* "'Negligence' is the absence of due care." "'Due care' is what a reasonably careful person would do under the same or similar circumstances." *Id.*

Argument

Appellant has not met the threshold requirement for this court to conduct a factual sufficiency review because he has not shown a specific deficiency in proof. Even if appellant has made such a showing, the government proved "without consent" beyond a reasonable doubt—appellant committed a sexual act without [redacted] consent and any mistake of fact that may have existed in his mind was not reasonable. Furthermore, the panel should be afforded high deference because witness credibility, which the members were best suited to assess, is a material issue in this case.

A. Appellant has not shown a specific deficiency in proof.

Merely emphasizing evidence that corroborates the accused's version of events is not enough to trigger a factual sufficiency review.

> [G]eneral disagreement with a verdict falls short of a specific showing of a deficiency in proof . . . [r]ather, appellant must identify a weakness in the evidence admitted at trial to support an element . . . and explain why, on balance, the evidence (or lack thereof) . . . contradicts a guilty finding.

United States v. Valencia, 85 MJ 529, 535 (N. M. Ct. Crim. App. 2024), appeal docketed, No. 25-0089/MC (C.A.A.F. 2025). The plain language of "specific showing of a deficiency in proof" requires appellant to allege that "due to a defect in the evidence, at least one required element of a charged offense was not proven beyond a reasonable doubt." Brief for Appellee at 14, *United States v. Valencia*, 85 MJ 529 (N. M. Ct. Crim. App. 2024) appeal docketed, No. 25-0089/MC (C.A.A.F. 2025). Here, too, appellant has neither identified a weakness in the evidence nor explained why, on balance, the evidence admitted at trial contradicts a guilty finding. Rather, he asks this court to assign more weight to one piece of evidence in isolation—the photographs—that the panel already considered and properly weighed at trial, while disregarding the corroborating evidence of "without consent" and the rest of the government's case.

An appellant has not met his burden of demonstrating a specific showing of a deficiency in proof as to that element where there is both ample direct and circumstantial evidence to meet an element of the crime. *United States v. Myers*,

ARMY 20230100, 2024 CCA LEXIS 535, at *17 (Army Ct. Crim. App. 16 Dec. 2024) (mem. op.). Here, there is overwhelming direct and circumstantial evidence to meet the "without consent" element of Article 120, and this court should similarly find that appellant has not met his burden.

First, the government offered direct evidence of "without consent" through [redacted] testimony. (R. at 209). [redacted] testified that appellant did not say anything when he entered the bedroom, did not ask if she consented to his presence, and grabbed her neck and chin so he could put his penis in her mouth. (R. at 208–10). She was not an active participant, (R. at 208–09), and laid there with her eyes closed because she wanted appellant, SPC [redacted], and PFC [redacted] to think that she was sleeping so that they could hurry up and be done. (R. at 210). She testified that she was scared, and didn't say anything because she felt like it was too late. (R. at 210). Defense attempted to impeach [redacted] with an inconsistent statement but did not establish materially inconsistent evidence or conflicting testimony rising to the level of reasonable doubt, (R. at 234–35), nor did it negate appellant's admission that he did not seek consent because "PFC [redacted] [was] having sex with her and I was like 'eh fuck it.'" (Pros. Ex. 5).

Second, [redacted] testimony about her lack of consent was corroborated by a litany of circumstantial evidence. All of the outcry witnesses—[redacted] and [redacted]—testified similarly at trial: [redacted] contacted them in distress, and when

[redacted] picked her up around 0400, she was hiding behind a trash can and crying in [redacted] car. (R. at 253–63).

Third, not only did the government corroborate [redacted] testimony about her lack of consent, but it also provided evidence that any mistake of fact from appellant was not reasonable. Specifically, appellant's own words to law enforcement demonstrate the unreasonableness of his mistake of fact: "[y]ou don't really have to ask if she's already doing it" and "SPC [redacted] was like PFC [redacted] is having sex with her and I was like 'eh fuck it.'" (Pros. Ex. 5). Appellant argues [redacted] was "an active and willing participant" (App. Br. 12)—an argument based on a theory that requires the fact finder to believe it was reasonable for appellant to expect sex from a woman he barely knew simply because someone else was already having sex with her.

There is ample direct and circumstantial evidence that appellant sexually assaulted [redacted], and this court should find that appellant has not met his burden. Appellant's interpretation of the photographs in question requires this court to ignore the rest of the evidence. If such a showing constitutes a deficiency, then the "specific deficiency in proof" language of Article 66 becomes meaningless. This court should find that appellant has failed to meet the threshold requirement of a "specific deficiency in proof" to trigger a factual sufficiency review.

B. Even if appellant has shown a specific deficiency in proof, the government proved "without consent" beyond a reasonable doubt.

"A reasonable doubt is not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 2-5-12 (29 Feb. 2020) [Benchbook]. Reasonable doubt "does not mean that the evidence must be free from conflict." *United States v. Cardenas*, ARMY 20180416, 2019 CCA LEXIS 479, at *7 (Army Ct. Crim. App. 27 Nov. 2019) (mem. op.) aff'd, 80 M.J. 420 (C.A.A.F. 2021). Here, the government proved beyond a reasonable doubt that (1) appellant put his penis in [redacted] mouth without her consent; and (2) any mistake of fact that may have existed in appellant's mind at the time of the assault was not reasonable.

1. Appellant put his penis in [redacted] mouth without her consent.

[redacted] testified at trial that she did not consent. *See supra* "Statement of Facts" Part B. Her testimony was not the only evidence introduced in the government's case-in-chief—although Ms. HT's friends did not see the sexual assault, the testimony of [redacted] corroborated her outcry. *See supra* "Statement of Facts" Part C. [redacted] demeanor after the incident was consistent with someone who had just experienced a traumatic event. *Id.* The SANE examination further corroborated [redacted] version of events, (R. at 294–96) and appellant admitted to putting his penis in the victim's mouth, (Pros. Ex. 5).

While appellant claimed [redacted] gave him indications she was participating, the government was able to show appellant was not credible. *See infra* "Witness Credibility" Part C.

The government proved beyond a reasonable doubt that appellant committed a sexual act without consent when he penetrated [redacted] mouth with his penis without her consent.

2. Appellant's mistake of fact was not reasonable.

Appellant alleged he thought he had consent for the following reasons: (1) his friend was already having sex with the victim; and (2) his other friend told him it was ok to have sex with the victim. (Pros. Ex. 5). He also claims his mistake of fact was reasonable because the victim did not protest or push him, and she was too casual in revoking consent. (Appellant's Br. 15–16). Appellant and [redacted] did not know each other well, (R. at 196–97), and nothing about their prior interactions involved group sex, nor would anything imply that she would consent to sex with appellant, (R. at 196–99).

First, it is not reasonable to assume one has consent to engage in a sexual act with a third party because one observes a friend engaging in a sexual act with the same individual. Walking in on group sex does not give one carte blanch to have sex with others in the group in a manner of one's choosing. A reasonable person, upon walking into a room where their friend is on top of a woman while another

stands there watching, would not assume that same woman also consented to having sex with them. *Cf.* (Pros. Ex. 5 27:14–29:05, 31:11, 1:13:50).

Second, it is also not reasonable to believe someone can give consent for a sexual act on a third party's behalf. Appellant claims it was reasonable to rely on SPC [redacted] to provide consent. (Pros. Ex. 5 27:14–29:05). The law has never found it permissible for a third party to give consent for a sexual act on someone else's behalf, nor should the court find this idea to apply today. Appellant failed to get consent from [redacted] herself and his reliance on SPC [redacted] was not reasonable.

Third, putting the onus on the victim to fight back and protest in lieu of seeking consent is not reasonable and is also not the law: "[l]ack of verbal or physical resistance does not constitute consent." *MCM*, pt. IV, ¶ 60.a.(g)(7). "The burden is on the actor to obtain consent, rather than the victim to manifest a lack of consent. Appellant's actions could only be considered innocent if he had formed a reasonable belief that he had obtained consent." *United States v. McDonald*, 78 MJ 376, 381 (C.A.A.F. 2019).

Appellant blasély decided to engage in group sex without obtaining consent from the person he was having sex with. The burden to obtain consent was his, and his alone. The reasons appellant provides in an attempt to bolster his alleged mistake of fact are not reasonable. The government proved "without consent" beyond a reasonable doubt.

C. This court should give high deference to the panel, who is best suited to assess witness credibility.

The material issue in this case is not whether a sexual act occurred, but whether there was consent. Here, the panel found [redacted] to be credible. Appellant was not. "[T]he degree to which [the court of criminal appeals] 'recognize[s]' or gives deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witness is at issue." *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015).

First, the panel found [redacted] to be credible. She testified that she did not consent, (R. at 209), and a substantial amount of corroborating evidence, including the SANE examiner, outcry witnesses, and even appellant's own statements to law enforcement, supported her testimony. Appellant offers the photographs as proof she participated in the sexual act. Not so. Appellant's argument overstates any alleged exculpatory nature of the evidence and offers an interpretation of the photos that is inconsistent with the testimony at trial. The photographs must be reviewed alongside all the evidence, not piecemeal and in isolation as appellant suggests. They depict [redacted] in a position consistent with someone passively lying down trying to cover their face, in keeping with her testimony that she "just laid there" during the sexual act. (R. at 207). Taken together with (1) [redacted] testimony; (2) the testimony of five outcry witnesses; (3) the patrol deputy who responded to the 911 call at 0600; and (4) the testimony of the forensic nurse

examiner who conducted [redacted] SANE exam the next day, the photographs corroborate [redacted] testimony that she did not consent to a sexual act with appellant.

Second, the panel determined appellant was not credible. In his interview, appellant is caught by detectives in a blatant lie about whether he brought his phone with him; his back and forth with the detectives stretches on for almost ten minutes. (Pros. Ex. 5 1:37:50). The recording of appellant's interview was played for the panel during trial. (R. at 326). Appellant, SPC [redacted], and PFC [redacted]—all military policemen themselves— had two months to come up with a story that matched, (R. at 307), though even then, their details of the events of that night were inconsistent, (Pros. Ex. 5 1:46:35). In reviewing this evidence, the panel properly considered whether appellant displayed consciousness of guilt. *See United States v. Quezada*, 82 M.J. 54, 50 (C.A.A.F. 2021) ("[A] false exculpatory statement also may provide relevant circumstantial evidence, namely, evidence of consciousness of guilt.").

Most critically, appellant's argument fails to address that CID found these three photographs on his phone in a forensic extraction pursuant to a search warrant—not offered as exculpatory evidence at appellant's behest. (R. at 305, 308). Appellant's argument fails to acknowledge that he was caught in the lies about his phone during his interview. (Pros. Ex. 5 1:36:52). If these photographs

were exculpatory, appellant had no reason to lie to detectives about their existence. The panel reviewed the photographs with the context of appellant's interview and was unpersuaded. This court should find the same.

Appellant cites *Young* for the proposition that this court should give less weight to [redacted] testimony because other evidence contradicts and undermines it. (Appellant's Br. 14). In *Young*, this court found that key facts given by a witness were directly contradicted by other fact witnesses. *United States v. Young*, ARMY 20230128, 2024 CCA LEXIS 383, at *9 (Army Ct. Crim. App. 13 Sep. 2024) (summ. disp.). In reviewing appellant's showing of a specific deficiency in proof for an Article 86 violation, the court found appellant sought out his chain of command to keep them updated on his whereabouts, and that there was contradicting evidence surrounding the unit's notification to appellant about his duty to attend the training session at issue. This case is distinguishable from *Young*. Here, there are no key facts that other evidence directly contradicts. Appellant merely asks this court to assign more weight to one specific piece of evidence in isolation—evidence that the panel already considered and properly weighed at trial in light of the ample evidence of "without consent." Taken together with all the other evidence, the photographs corroborate [redacted] testimony—and the panel members found her to be more credible than appellant. Appellant has not provided sufficient reasons for this court to second guess the panel's determinations.

While appellant may be dissatisfied with the outcome of his court martial, inconsistent verdicts are an insufficient basis on which to reverse a conviction. "[T]he fact that a co-accused facing similar charges at a separate court-martial may have been acquitted does not in and of itself provide a basis for challenging a conviction." *United States v. Temple*, ARMY 20090883, 2012 CCA LEXIS 248, at *10 (Army Ct. Crim. App. 13 Jul. 2012); *United States v. Garcia*, 16 M.J. 52 (C.M.A. 1983). Appellant failed to show a specific deficiency in proof. Even if he has made such a showing, the government proved "without consent" beyond a reasonable doubt—appellant committed a sexual act without [redacted] consent and any mistake of fact was not reasonable.

Assignment of Error II

WHETHER THE MILITARY JUDGE ERRED BY NOT AWARDING ADDITIONAL CONFINEMENT CREDIT.

Additional Facts

On 12 December 2023, the panel found appellant guilty of sexual assault in violation of Article 120, UCMJ. (R. at 416). The court recessed for the evening at 1723, after sentencing arguments concluded, but before the military judge issued a sentence. (R. at 448–49). Around 2000, appellant was handcuffed and escorted to the Provost Marshal's Office (PMO) in the back of a patrol car. (R. at 450–51). He was searched before he was put in the vehicle and again at PMO. (R. at 451). Once

at PMO, the military police officers (MPs) searched appellant again, confiscating his phone, vape, and Army Service Uniform (R. at 451). The next morning, defense filed a motion for both *Allen* and Article 13 sentencing credit. (R. at 449); (App. Ex. XXIX). Appellant and appellant's battalion commander testified during the motions hearing. (R. at 450 and 455).

The MPs told appellant he was placed in the detention cell overnight because he had to be watched. (R. at 451–52). The cell had a half wall, a metal sink and toilet, and a small twin-sized mattress attached to the wall. (R. at 452). Appellant was not able to shower, though the commander knew he had a personal bag with clothing and hygiene items. (R. at 458). Appellant was given an MRE for breakfast. (R. at 453).

Appellant's battalion commander testified he decided to put him in the detention cell overnight because he was concerned for his safety, and those escorting him, after the verdict was announced. (R. at 455–56). PFC [redacted] and SPC [redacted], who were awaiting court-martial for their involvement in the same misconduct, were also in the battalion. (R. at 457). Appellant also lived off-post. (R. at 456). The commander further expressed concerns related to an incident that had occurred elsewhere on the installation the year prior involving a different soldier. (R. at 456). Non-commissioned officers (NCOs) had escorted this soldier

to his off-post residence, at which point the soldier told the NCOs he needed to use the restroom and committed suicide while inside. (R. at 456).

Appellant's commander did consider whether he could place him in a barracks room overnight, but did not believe this course of action would adequately manage the safety concerns—the doors to the barracks room faced the outside, and there was no feasible way for an escort to maintain visibility over appellant while he was sleeping or using the latrine. (R. at 457–58).

After the verdict on 12 December, the commander contacted the chaplain and ensured he was available to speak with appellant, PFC [redacted], and SPC [redacted] on 13 December. (R. at 459).

The defense asked for one day of *Allen* credit and thirty days of Article 13 credit. (R. at 461–62). The government agreed that one day of *Allen* credit was appropriate, but also highlighted, among other things, that defense counsel was aware of appellant's whereabouts because they filed their motion for confinement credit at 0100 that morning and both cases were complete.[4] (R. at 464–66). The military judge ultimately credited appellant with one day of *Allen* credit and denied the remainder of the motion. (R. at 469).

[4] Appellant's access to his attorney and how the commander's intent was communicated down the chain of command is not definitively established by the record. *See* (R. at 459–60, 465–66).

Standard of Review

The question of whether an accused was subjected to unlawful pretrial punishment is a mixed question of fact and law. *United States v. Smith*, 53 M.J. 168 (C.A.A.F. 2000). The court reviews de novo the ultimate question of whether an appellant is entitled to credit for a violation of Article 13. *United States v. Mosby*, 56 M.J. 309, 311 (C.A.A.F. 2002).

Law and Argument

"[T]he mere fact of confinement is not tantamount to punishment . . ." *United States v. Palmiter*, 20 M.J. 90, 95 (C.M.A. 1985). Article 13 provides:

> [n]o person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

Article 13, UCMJ. In other words, "Article 13 prohibits two things (1) pretrial punishment; and (2) unduly rigorous circumstances during pretrial detention . . . ." *United States v. King*, 61 M.J. 225, 227–28 (C.A.A.F. 2005). In this case, appellant was neither subject to punishment in violation of Article 13 when he was placed in the detention cell after a finding of guilt but before sentencing, nor were the conditions of appellant's detention cell more rigorous than necessary.

A. Appellant was not subjected to pretrial punishment in violation of Article 13.

"The first prohibition of Article 13 involves a purpose or intent to punish, determined by examining the intent of detention officials or by examining the purposes served by the restriction or condition, and whether such purposes are 'reasonably related to a legitimate governmental objective.'" *Id.* "[I]n the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may on its face appear to be a punishment, is instead but an incident of a legitimate nonpunitive governmental objective." *United States v. Palmiter*, 20 M.J. 90, 95 (C.M.A. 1985) (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)).

Here, first, there is no evidence that the command intended to punish appellant. Second, holding appellant in the detention cell overnight was reasonably related to the legitimate government objective of ensuring appellant's safety and exercising command and control in the time between a finding of guilt but before sentencing.

1. There is no evidence the command intended to punish appellant.

In *United States v. Smith*, the CAAF analyzed four factors to determine whether the government intended to punish a soldier in confinement: (1) what similarities exist between those already sentenced and those awaiting disciplinary disposition; (2) if there are similarities, what relevance to customary command and

control measures can be established by the government for the same; (3) if there are similarities, do the requirements primarily (a) relate to command and control, or instead (b) reflect a purpose of stigmatization; and (4) if so, was there an "intent to punish or stigmatize a person [a]waiting disciplinary disposition." *See United States v. Smith*, 53 M.J. 168, 172 (C.A.A.F. 2000).

Here, appellant was subject to the same conditions as anyone who would be placed in the detention cell. Nonetheless, the standard operations of the cell are directly relevant to military command and control measures. Two of the three stated purposes of a detention cell are related to safety—ensuring the detained individual is safe, as well as other personnel. *See* Army Techniques Publication (ATP) 3-39.10, Police Operations, paras 3-28 through 3-33. Here, the record establishes that the decision to put appellant in the detention cell was the result of a deliberate decision-making process: to safely exercise command and control over appellant and the other soldiers within the battalion when there were few, if any, reasonable alternatives available and the command needed to exercise command and control over a soldier who had been found guilty but not yet sentenced. (R. at 455–58). The decision was neither arbitrary nor capricious. Finally, the standard operating procedures of the detention cell are entirely related to command and control; they do not reflect a purpose of stigmatizing persons awaiting disciplinary disposition. The fact that appellant was himself an MP and was detained by MPs is

not per se humiliating or stigmatizing. There is neither direct nor circumstantial evidence of intent to punish appellant here.

2. There was a reasonable and legitimate non-punitive government objective.

"[I]f a particular condition or restriction is reasonably related to a legitimate governmental objective, it does not without more, amount to punishment." *Bell v. Wolfish*, 441 U.S. 520, 538 (1979). While "one may infer circumstantially an intent to punish when the activity at issue serves no legitimate, non-punitive purpose," *United States v. Alston*, 75 M.J. 875 (Army Ct. Crim. App. 2016), here, there was a reasonable and legitimate non-punitive government objective—ensuring the safety of appellant, his escorts, and the other two soldiers with upcoming courts-martial for events stemming from the same criminal conduct.

Appellant's battalion commander testified he made the decision to place appellant in the cell for his safety: "[k]nowing that a verdict was reached yesterday afternoon, I wanted to ensure his safety, but also the safety of the people who would be escorting him around after learning that verdict." (R. at 455). "I was worried about the possibility of him being able to do something like that [suicide] and/or provide himself with the means to harm somebody else while entering his private residence." (R. at 458). This concern was reasonable given the previous suicide—the commander explicitly stated he did not want that to happen with his soldiers. (R. at 456). It was also reasonable for a commander to have command and

control concerns for a soldier who had been found guilty of an offense that carries a maximum possible sentence of 30 years confinement, total forfeiture, and a dishonorable discharge—but who had not yet been sentenced.

The record is clear—appellant's restriction and its surrounding circumstances are reasonably related to safety and exercising command and control over an individual who had been found guilty but not yet sentenced—legitimate governmental objectives that do not reflect an intent to punish. "Unless there is an intent to punish, Article 13, UCMJ, does not provide for judicial review of command personnel decisions; even in circumstances where appellant asserts the commander's decision was wrong, misguided, or negligent." *United States v. Alston,* 75 M.J. 875 (Army Ct. Crim. App. 2016).

3. Even if this court infers an intent to punish, appellant is not entitled to sentence credit because the impositions were *de minimis*.

Courts award Article 13 credit to ensure an accused is not doubly punished. *See United States v. James*, 28 M.J. 214, 216 (C.M.A. 1989). However, "the Government concededly . . . may subject [a person in pretrial detention] to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution." *Bell v. Wolfish*, 441 U.S. 520, 536–37 (1979). Moreover, even if these impositions are not reasonable, "'de minimis' impositions on a pretrial detainee" are not cognizable under Article 13, UCMJ. *See generally United States v. Fricke*, 53 M.J.

149, 155 (C.A.A.F. 2000) (discussing 'de minimis' impositions on a pretrial detainee do not require credit under Article 13, UCMJ but finding the impositions in the case were not de minimis, rather they were "genuine privations and hardship over an extended period of time," "which might raise serious questions under the Due Process clause as to whether those conditions amounted to punishment.").

Here, appellant was subject to administrative measures that were reasonably related to the effective management of the detention facility for less than twelve hours. He was not subject to genuine privations and hardship over an extended period—he was placed in the detention cell overnight. These administrative measures were *de minimis*.

B. The conditions imposed on appellant were not so egregious to give rise to an inference of punishment.

"The second prohibition of Article 13 prevents imposing unduly rigorous circumstances during pretrial detention. Conditions that are sufficiently egregious may give rise to a permissive inference than an accused is being punished, or the conditions may be so excessive as to constitute punishment." *United States v. King*, 61 M.J. 225, 227–28 (C.A.A.F. 2005) (citing *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997); *see also United States v. James*, 28 M.J. 214, 216 (C.M.A. 1989) (conditions that are "arbitrary or purposeless" can be considered to raise an inference of punishment).

The conditions imposed upon appellant were neither purposeless nor excessive—the military policemen who transported and placed appellant in the detention cell were following standard procedure outlined by regulation. ATP 3-39.10, Police Operations, para 3-32 provides:

> [a]n apprehended person must be thoroughly searched before being placed in the detention cell to ensure that the subject has no weapons . . . nor any other items that could be used for personal harm or harm to others . . . Some detained subjects may become distraught and attempt to inflict harm on themselves; therefore, any clothing items that could be used to inflict personal injury . . . should be removed to ensure that the subject is safe.

The confiscation of appellant's uniform, phone, and vape were in line with the standard operating procedure for detention cell operations. Further, the commander ensured that appellant had a bag with clothing and hygiene items. (R. at 453, 458). He was also given breakfast. (R. at 453).

For comparison, cases where courts have found the conditions to be sufficiently egregious to violate Article 13 include *King*, 61 M.J. at 228 (holding that classification as a maximum-security prisoner was not so egregious to give rise to an inference of punishment, but that he was entitled to 3-for-1 credit because he was isolated for a two-week period and the government offered no explanation as to whether it explored alternatives); *United States v. Gilchrist*, 61 M.J. 785, 797–98 (Army Ct. Crim. App. 2005) (finding where there were almost a handful of soldiers on duty ten to twenty feet from where appellant was shackled to a cot in a maintenance room, the shackling was more rigorous than necessary to

secure his presence at his Article 32 hearing the next day); *United States v. Reznick*, 2004 CCA LEXIS, ARMY 20010928 (Army Ct. Crim. App. 11 Feb. 2024) (mem. op.) (holding there is no legitimate governmental objective in keeping appellant in a military police detention cell and denying him the ability to shower, shave, and changes his clothes for a four-day period).

Here, the government *did* explore alternatives to confinement *and* provided sound reasons why appellant was subject to the conditions of confinement—the same conditions as anyone who would be placed in the detention cell. The decision to confine appellant was not arbitrary or purposeless; it was a product of deliberate decision-making intended to prioritize safety in the time after a finding of guilt but before sentencing. Appellant was neither subject to punishment in violation of Article 13, nor were the conditions of appellant's detention cell more rigorous than necessary.

Conclusion

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

[redacted]

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CERTIFICATE OF SERVICE, U.S. v. ROSENDO (20230655)

I certify that the foregoing was sent via electronic submission to the Defense Appellate Division, at [redacted] and on the 28th day of October 2025.

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