IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20250050
Staff Sergeant (E-6) **MASON L. WOLLERSHEIM,** United States Army, Appellant	Tried at Fort Carson, Colorado, on 21 March, 23 April, and 12 November 2024, and 27–31 January 2025, before a general court-martial appointed by the Commander, 4th Infantry Division and Fort Carson, Colonel Jacqueline Emanuel and Colonel Alexander N. Pickands, military judges, presiding.

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

Assignment of Error

WHETHER APPELLANT'S CONVICTION FOR SPECIFICATION 2 OF CHARGE I IS LEGALLY AND FACTUALLY SUFFICIENT.

Statement of the Case

On 31 January 2025, an enlisted panel sitting as a general court-martial convicted appellant, Staff Sergeant Mason L. Wollersheim, contrary to his pleas, of one charge and one specification of indecent broadcasting; one charge and three specifications of attempt to steal money; one charge and one specification of wire fraud, and one charge and one specification of larceny; in violation of Articles 120c, 80, 134 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 920c, 880,

934, and 921 (2018) [UCMJ].[1] (R. at 924; Charge Sheet). That same day, the military judge sentenced appellant to a reduction to the grade of E-4, confinement for 28 months, and a bad conduct discharge.[2] (R. at 1017–18, Statement of Trial Results [STR]). The military judge credited appellant with 5 days of confinement credit. (R. at 1018; STR).

On 3 April 2025, the convening authority took no action on the findings and adjudged sentence. (Action). On 8 April 2025, the military judge entered Judgment. (Judgment). This court docketed appellant's case on 23 July 2025. (Referral and Designation of Counsel).

[1] Appellant was acquitted of one specification of indecent recording; one charge and one specification of extortion; one charge and one specification of assault consummated by a battery. (R. at 924; STR). Pursuant to Rule for Court-Martial 917, the military judge entered a finding of "not guilty" for Charge VII and its specification concerning false official statement. (R. at 934; STR).

[2] The military judge sentenced appellant as follows:

Charge I, Specification 2	6 months
Charge IV, Specification 1	12 months
Charge IV, Specification 2	12 months
Charge IV, Specification 3	2 months
Charge V, The Specification	20 days
Charge VI, The Specification	2 months

The military judge ordered the sentences to confinement for Charges IV and V to run concurrently; and for Charges IV and V to run consecutively with Charges I and IV. (R. at 1017–18; STR).

Statement of Facts

A. Appellant discovered a stranger in bed with his wife at his home, recorded the encounter, and distributed the recording.

Around 0800 on 30 January 2021, appellant arrived at the home he shared with his then-wife, from whom he had recently separated, and with whom he was not living at the time.[3] (R. at 252–55, 311). While videorecording on his phone from a first-person perspective, he entered their darkened master bedroom where he discovered [redacted] a stranger to him—in bed with his wife under the bedclothes. (R. at 256, 311, 320–21; Pros. Ex. 1).

The 52-second video recording he made of the encounter, later admitted as Prosecution Exhibit 1 at appellant's court-martial, shows the following sequence of events:

(1) appellant approaches the closed bedroom door, where a pair of men's shoes are visible, and enters the bedroom;

(2) appellant accuses his wife of adultery and tells [redacted] to "get out of my house, right now;"

[3] Appellant's wife testified appellant "had a no-contact order" at the time. (R. at 253-55). The government did not introduce an order but provided notice of the order in its Military Rule of Evidence (Mil. R. Evid.) 404b notice. (App. Ex. III-F, p. 2).

(3) appellant repeatedly asks [redacted] for his rank while searching [redacted] pants beside the bed and retrieving his military identification card;

(4) as appellant films himself looking for [redacted] card, in the background a clearly startled and an apparently nude [redacted] begins to uncover himself and get out of the bed;

(5) appellant continues filming as he removes [redacted] card from the wallet and steps into the entryway, where better lighting allows him to record the card's identifying details;

(6) appellant reads [redacted] full name and rank out loud and says "your career is done, boy;"

(7) appellant continues to insult both his wife and [redacted] and returns to the bedroom where he can be heard telling [redacted] (who is off-camera) "do not come back to this house again." (Pros. Ex. 1).

Although the roughly six seconds of footage in which [redacted] is visible reflect he is not wearing either a shirt or pants, the recording does not depict his naked or underwear-clad genitalia, anus, or buttocks.[4] (Pros. Ex. 1).

[4] At 00:19 on the video, although [redacted] exposed right thigh continues to shield his private area from view, the camera briefly captures his bare right hip, indicating that he is not wearing underwear. (Pros. Ex. 1 at 00:19).

Later that day, appellant sent the video to four individuals ([redacted] and [redacted]) through the Facebook Messenger application. (R. at 277, 294–95, 331–34, 337; Pros. Ex. 19, p. 1; Pros. Exs. 53, 54, 56).[5]

B. At trial, the recipients testified they did not see [redacted] private area in the recording.

The government charged appellant with two specifications related to this recording:

> SPECIFICATION 1: In that [appellant] … without legal justification or authorization knowingly make a recording of the private area of [redacted] without [redacted]s consent, and under circumstances in which [redacted] had a reasonable expectation of privacy.
>
> SPECIFICATION 2: In that [appellant] … without legal justification or authorization knowingly broadcast a recording of the private area of [redacted] when [appellant] knew or reasonably should have known that the said recording was made without the consent of [redacted] and under circumstances in which [redacted] had a reasonable expectation of privacy.

(Charge Sheet).[6]

At trial, appellant's wife testified she viewed the video during trial preparation. (R. at 257). Although she said she did not look closely at the video,

---

[5] The military judge admitted Prosecution Exhibits 53, 54, and 56, but the exhibits were not marked as admitted and were not provided to the panel during deliberations. They are included in the Record of Trial in the section for "Exhibits Marked But Not Offered And/Or Admitted Into Evidence." (R. at 296, 823–26).

[6] These were the sole specifications under Charge I. (Charge Sheet).

she could not confirm she was able to see [redacted] private area in the recording. (R. at 316). When asked whether the people in the video were clothed or naked, another recipient of the video, [redacted], testified only that she "remember[ed] the guy had no shirt on[.]" (R. at 334). In a stipulation of expected testimony, [redacted] stated that he "did not see any genitalia or explicit images in the video." (R. at 337).[7]

C. The military judge disallowed the government from introducing an enhanced version of the recording.

Several days into appellant's court-martial, the government attempted to introduce a digitally enhanced version of the video. (R. at 544–54, 666–69). The government called a digital evidence examiner from the U.S. Army Criminal Investigation Laboratory to testify (in an Article 39(a) session outside of the presence of the members) about digital enhancement of videos generally, as well as the specific enhancements she performed on the video in appellant's case. (R. at 666–92). The examiner testified that the government had specifically asked her to "enhance the genitalia" on the video. (R. at 676). The examiner explained that the enhanced video concentrated only on the six seconds of footage in which [redacted] was

[7] Although he testified as a sentencing rather than a merits witness, when asked if he understood that appellant had been convicted of indecent broadcast [redacted] stated: "That is shocking because I've seen a lot worse in the media and on social media than what that video contained." (R. at 980). The fourth recipient of the video, [redacted], did not testify.

visible. (R. at 691). The enhanced version focused exclusively on the brief portion of the recording in which [redacted] was visible and altered the playback speed and the brightness of the footage. (R. at 691).

The military judge did not permit the government to introduce the exhibit. (R. at 698–99). He explained that the panel's assessment of whether appellant knowingly recorded [redacted] private area could be "unfairly impacted by watching a different experience that [appellant] experienced as he was in the room making the recording." (R. at 698). Additionally, the military judge found the enhanced video was "likely to cause a confusion of the issues…between the knowledge element and the one for which it [had] more probative value, which is whether the recording was itself indecent, under the definition of the element." (R. at 699).

D. The panel acquitted appellant of unlawful recording but convicted him of unlawful broadcasting.

The military judge instructed the panel members on the elements of Specifications 1 and 2 of Charge I. (R. at 830–32). In his instructions, he correctly defined "private area" as "the naked or underwear clad genitalia, anus, buttocks, or female areola or nipple." (R. at 830).

In closing argument concerning the Article 120c specifications, the trial counsel focused primarily on the government's burden in establishing appellant's mens rea, arguing that appellant must have known there was a man in the bedroom

with his wife before he started recording, and that appellant "continued recording as [redacted] got up from the bed and [his] genitals were visible in that video." (R. at 858–59).

Trial counsel also directly addressed the "private area" issue:

> Now, some of you may be thinking, I'm not 100% sure I saw genitals. It was fast, it was a little dark. If you can be asking yourself that question, what it does prove beyond a reasonable doubt is that the private area was visible. The government did not charge that he recorded the genitals of [redacted] rather, the private area which was just defined by the judge.

(R. at 859).

The panel ultimately returned a verdict acquitting appellant of the recording offense and convicting him of the broadcasting offense. (R. at 924). Consequently, the military judge raised his concern that "it's kind of internally inconsistent whether you can find one without the other." (R. at 926). The parties argued, and the military judge ultimately resolved the apparent contradiction:

> So I see two possibilities here. Either in the heat of the moment and the poor lighting conditions in the room and the just the rapidity and emotionally laden circumstances under which the video is recorded, it is entirely conceivable to me that the panel was not confident that, at the time he made the recording, he was knowingly making a recording. But, perhaps the proof failed on that he knowingly recorded what the law defines as the private area of [redacted]

> It's also possible that he knew those—he had that knowledge but concluded […] that [redacted] had no reasonable expectation of privacy. And then upon reviewing the video either now sees that he did end up recording this video of the private area of [redacted] or upon reflection still broadcast the video; that could explain their rationale.
>
> The other thing that I think we need to consider is—the panel members, there's nothing in the law that prevents them from seeing those two offenses and concluding the one harm, the moral harm, for Specification 2 is greater than Specification 1. But they didn't think specification—he should be found guilty of two offenses when it was such a closely related offense. Essentially, they may have been doing a layperson's version of merging the offenses. I don't see any legal prohibition to doing that and there being at least some logical way that they could have concluded that he was guilty of broadcasting a video; that he then knew showed the private area of [redacted] when he did not in Specification 1.
>
> I'm not inclined to change the panel's verdict with respect to that.

(R. at 937–38).

ASSIGNMENT OF ERROR

WHETHER APPELLANT'S CONVICTION FOR SPECIFICATION 2 OF CHARGE I IS LEGALLY AND FACTUALLY SUFFICIENT.

Summary of Argument

Appellant's conviction rests on a video that does not depict a private area as defined by Article 120c. The recording shows a brief confrontation in appellant's bedroom after he discovered a stranger in bed with his wife. For only a few seconds is the putative victim visible, and during that time his private area remains obscured. Because the recording itself does not satisfy the statutory element, the evidence is legally and factually insufficient to sustain appellant's conviction for indecent broadcasting.

Standard of Review

This court reviews questions of legal sufficiency de novo. *United States v. Robinson*, 77 M.J. 294, 297 (C.A.A.F. 2018).

For factual sufficiency, this court may weigh the evidence and determine controverted questions of fact once appellant identifies a deficiency in proof. Article 66(d)(1)(B), UCMJ; *United States v. Harvey*, 85 M.J. 127, 130 (2024). Depending on the type of evidence presented at trial, the court may owe little or no

deference to the factfinder. *United States v. Downum*, 86 M.J. 200 at *13, n. 4 (C.A.A.F. 2025).

Law

A. Legal Sufficiency.

"'The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Robinson*, 77 M.J. at 297–98 (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). "This legal sufficiency assessment draws every reasonable inference from the evidence of record in favor of the prosecution." *Id.* at 298.

B. 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 only if appellant makes a specific showing of a deficiency of proof. Article 66(d)(1)(B), UCMJ; *United States v. Harvey*, 85 M.J. 127, 130 (C.A.A.F. 2024). Once shown, the court may weigh the evidence and determine controverted questions of fact. *Id.* at 130.

C. Article 120c, UCMJ (Indecent Broadcasting).

1. Elements

a. That the accused, without legal justification or lawful authorization, knowingly broadcast a certain recording of another person's private area;

b. That said recording was made without the other person's consent;

c. That the accused knew or reasonably should have known that the recording was made without the other person's consent;

d. That said recording was made under circumstances in which the other person had a reasonable expectation of privacy; and

e. That the accused knew or reasonably should have known that said recording was made under circumstances in which the other person had a reasonable expectation of privacy.

2. Definitions

a. Private Area—The term "private area" means the naked or underwear clad genitalia, anus, buttocks, or female areola or nipple. 10 U.S.C. § 920c(d)(2).

b. Reasonable expectation of privacy—The term "under circumstances in which that other person has a reasonable expectation of privacy" means … circumstances in which a reasonable person would believe that he … could disrobe in privacy, without being concerned that an image of a private area of the person was being captured[.] 10 U.S.C. § 920c(d)(3)(A).

Argument

A. The evidence is legally and factually insufficient to establish that the recording depicted a "private area."

1. The video itself does not clearly depict a statutory "private area."

This appeal turns on a straightforward question this court can answer by viewing Prosecution Exhibit 1: whether the recording depicts the victim's genitalia, anus, buttocks, or other statutory "private area." It does not.

Article 120c criminalizes broadcasting "a recording of the private area of another person." That statutory language requires that the private area must actually be depicted in the recording itself, not merely that a private area might have been visible in reality.

In *United States v. Perez*, this court rejected a sufficiency challenge to an indecent recording conviction premised on the blurriness of the image, explaining that the offense does not turn on the "visual quality of the resultant recording." ARMY 20240076, 2025 CCA LEXIS 516, at *2 (Army Ct. Crim. App. 16 Oct. 2025) (summ. disp.). But *Perez* involved a recording that captured the victim's private area; the dispute concerned only how clearly it appeared. This case presents the antecedent question: whether the recording depicts a private area at all.

In the video, [redacted] is only visible for roughly six seconds. For most of those few seconds, [redacted] is largely covered by the bedding; any potential exposure occurs

only during a fleeting moment as he is guardedly rising from the bed. Indeed, as he does so, he is apparently conscious of his nudity and intentionally orients himself to protect his modesty. At most, the recording shows ambiguous nudity—not the statutorily-defined anatomical genitalia.

2. The government's theory relied on speculation about ambiguous imagery.

The government's implicit theory at trial was that [redacted] was nude, and therefore a private area must have been momentarily visible. Trial counsel's assertion in closing argument that "the government did not charge that he recorded the genitals … but rather, the private area" reflects a confusion of the law and a misstatement of the government's burden. (R. at 859). Unable to elicit testimony that the recipients actually saw [redacted] genitals in the video, and given its inability to clearly point to the content of the video itself, the government instead was compelled to rely upon the obvious but legally insufficient fact of [redacted] nudity.

The government must prove the actual elements of the offense, and not assumptions derived from surrounding facts. Proof that a person was nude does not establish that a statutory private area was visible in the recording.

3. The panel's acquittal on the indecent recording charge underscores the ambiguity of the video.

The same recording was the basis of both the indecent recording and indecent broadcasting specifications, and the mixed verdicts illustrate the ambiguity of the recording itself. Given that the panel had doubt about the recording, this court should carefully scrutinize whether the evidence truly proves the elements of indecent broadcasting beyond a reasonable doubt.

While appellant acknowledges and agrees with the military judge's post-verdict finding that the verdicts are not inconsistent as a matter of law, the panel's acquittal on the indecent recording specification reflects the uncertainty surrounding what the recording actually depicts. As the military judge explained, it is possible the panel found appellant may not have intended or even known he was recording a private area, but after having reviewed the video realized he had in fact made an indecent recording and then knowingly broadcast it. (R. at 937–38).

Nevertheless, the very fact the military judge felt compelled to address the issue highlights the doubts surrounding, among other things, what the video showed in fact.

4. The court is in the same position as the factfinder and owes no deference in assessing the video.

As the recording itself is part of the record, this court is in the same position as the panel to evaluate what it depicts. After independently reviewing the video, the court should conclude that the government failed to prove beyond a reasonable

doubt that it depicts a statutory private area. Because this court can view the video directly, without reliance upon credibility of witnesses or competing testimony, the panel's finding of fact on this point deserves no deference. *See Downum*, 86 M.J. 200 at *13, n. 4 (C.A.A.F. 2025) ("To be clear, neither *Harvey* nor the text of Article 66(d), UCMJ, forecloses the possibility that—based on the type of evidence presented at trial—a service court might owe little to *no* deference to the trial court in performing its factual sufficiency review.") (emphasis added); *see also United States v. Smith*, 2025 CCA LEXIS 608 at *12 (mem. op.) (30 Dec. 2025) (Army Ct. Crim. App. 2025) ("[W]hen 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 is low.").

However, although deference to the factfinder's ability to judge the credibility of witnesses is not determinative here, the testimony of the witnesses who received the video is nevertheless instructive, as these witnesses uniformly denied that they observed a private area. The military judge himself expressed strong doubt that the video contained a recording of a private area, though he correctly identified the issue as a matter left to the determination of the factfinder:

> I was taking notes at the time, I found the —video to be of—of fairly low quality. It may be that the private area of [redacted] was captured in that video, but that wasn't

> necessarily apparent to me as I watched it as it was published.
>
> [T]he court is reluctant to make that determination for the panel. They have the video […] [S]o they can observe it.
>
> Because if the video isn't itself indecent, Specification 2 doesn't […] the panel can't reasonably find that, right? Because if the video is not indecent, broadcasting that video that was broadcasted, is not a crime.

(R. at 660–62).[8]

Moreover, the government's attempt to introduce an enhanced version of the recording further illustrates the ambiguity of the imagery contained in the original video. (R. at 650–99).

Although the panel reached a contrary conclusion, this court owes no deference to that determination and should independently assess the video evidence. The video does not depict a private area, and appellant's conviction cannot sustain this court's legal sufficiency scrutiny.

B. Even if the recording arguably depicts a private area, the evidence is insufficient to establish that appellant knowingly broadcast an indecent recording.

[8] This posture also informed the defense counsel's express decision to forego a motion for a directed verdict under R.C.M. 917, as he acknowledged that there was "some evidence" suitable for the panel's determination. (R. at 972).

The government's theory of appellant's liability depended on a fleeting and ambiguous frame in which a private area might appear. A conviction cannot rest on speculation that a private area was momentarily visible.

The government must prove appellant knowingly broadcast the recording, but produced no evidence appellant perceived the recording as indecent before broadcasting it. While the statute does not explicitly require knowledge of indecency, the government's theory of guilt necessarily assumed appellant recognized the nature of what he was distributing.[9]

Here, appellant made a spontaneous, extremely brief recording during an unexpected confrontation. The potentially relevant imagery occurs only during a fleeting moment. There is no evidence appellant reviewed the video, paused it, zoomed in, or otherwise recognized a private area in the recording.

The government's theory requires speculation that appellant recognized indecent content in an extremely brief and ambiguous recording—a recording in

[9] The military judge correctly observed during the litigation of the enhanced video that there was evidence of "deliberately recording being undertaken, but it would require an inference to conclude that what the accused was doing was knowingly recording the private area versus knowingly recording [redacted] in his bedroom, [redacted] being nude, right? He would have to know that [redacted] is nude, to be knowingly making a recording of—of the private area." (R. at 665). Similarly, appellant would have to have known the recording was indecent when he subsequently broadcast it.

which none of the witnesses who viewed the video themselves recognized that it was indecent. That speculation cannot sustain proof beyond a reasonable doubt that appellant knowingly broadcast an indecent recording of [redacted] private area.

The same ambiguity that prevents a finding that the recording clearly depicted a private area also undermines the government's theory that appellant recognized such imagery when broadcasting the video. If the military judge (or trained appellate judges) struggle to see the element, it becomes difficult to conclude appellant clearly perceived it before broadcasting it.

C. The government failed to prove the privacy elements of Article 120c.

1. [redacted] did not possess a reasonable expectation of privacy against appellant in appellant's own bedroom.

Article 120c protects individuals from voyeuristic invasions of privacy—not from being observed or documented by the homeowner who unexpectedly enters his own bedroom. Here, appellant openly entered his own bedroom in the home he shared with his wife.[10] Although appellant and his wife were separated at the time,

[10] The government emphasized at trial that appellant had previously received a no-contact order. (R. at 856–58). But the order itself was never admitted into evidence, and the record does not establish its terms or whether it prohibited appellant from entering the home that morning. In any event, even assuming appellant's presence was improper, that fact does not relieve the government of its burden to prove that the recording depicted a private area and that the victim possessed a reasonable expectation of privacy against appellant under Article 120c.

and notwithstanding the possibility his wife may have reasonably expected privacy under the circumstances, a reasonable factfinder could not conclude [redacted] expectation was objectively reasonable against appellant. Whatever privacy interest [redacted] possessed against the outside world, it could not reasonably extend to a homeowner unexpectedly entering his own bedroom.

2. At minimum, the government failed to prove appellant knew or reasonably should have known of such an expectation.

Even if the court believes [redacted] may have had some expectation of privacy, the question remains whether the government proved the element beyond a reasonable doubt. Given the unusual circumstances—the location within appellant's home, the unexpected nature of the encounter, the context in which [redacted] found himself naked in appellant's bed with appellant's wife—there is reasonable doubt as to whether [redacted] expectation of privacy was objectively reasonable against appellant.

Article 120c requires proof of appellant's knowledge or constructive knowledge of the victim's privacy expectation. Here, the recording occurred during a rapid, emotionally charged confrontation. Appellant discovered

unfamiliar shoes outside his bedroom and immediately began recording.[11] This sequence strongly suggests reactive conduct in the moment, not a considered invasion of privacy. The government presented no evidence appellant paused to consider whether [redacted] possessed a legally cognizable expectation of privacy before recording the encounter, and the evidence before the factfinder does not support an inference that he did.

If the video itself does not clearly depict a private area—and the putative victim appears only very briefly—then the premise that appellant recognized a privacy violation becomes even weaker. Stated differently, this court cannot conclude appellant recognized a violation of sexual privacy in imagery that is itself ambiguous.

In short, a person documenting an unexpected encounter in his own bedroom would not necessarily recognize the other individual possessed a legally protected expectation of privacy against him. On this record, sustaining the conviction would require the court to infer that appellant recognized a violation of sexual privacy during a sudden confrontation and from imagery that is itself ambiguous. Such stacked inferences cannot support a finding beyond a reasonable doubt that

[11] Although appellant did not testify, both trial and defense counsel alluded to his discovery of [redacted] shoes outside the bedroom as the triggering event to begin recording. (R. at 244, 858).

appellant knew or reasonably should have known the victim possessed a reasonable expectation of privacy.

3. The unusual circumstances of this encounter place this case far outside the paradigmatic applications of Article 120c.

Article 120c was "'intended to criminalize non-consensual *sexual* misconduct that ordinarily subjects an accused to sex offender registration.'" *Quick*, 74 M.J. at 522 (quoting *Manual for Courts-Martial, United States* (2012 ed.), App. 23 at A23-16) (emphasis added). Indeed, the punitive article is titled "Other *sexual* misconduct." (emphasis added).

Here, appellant's recording documented an unexpected encounter rather than a covert invasion of privacy. Appellant entered the home openly; he did not secretly observe an unwitting victim, he did not plant a recording device, he did not surreptitiously film through a window. Although the suspected adultery formed the background to appellant's decision to film the encounter, any sexual dimension of his conduct is too attenuated to bring it within the type of sexual misconduct Article 120c was enacted to address.

The video clearly shows that appellant intended to identify the unknown individual in bed with his wife and document the encounter. Appellant's focus throughout the brief video is in obtaining [redacted] military ID card and filming the information it contained. His tone suggests he intended to document the encounter

for potential use as evidence of adultery, either against his wife, [redacted] or both. In any event, his actions were consistent with gathering evidence, not with recognizing that he was violating someone's sexual privacy.[12]

Nothing in the video suggests appellant recorded or distributed the video for sexual gratification or exploitation. The recording occurred during an unexpected discovery of adultery, in appellant's own bedroom, while he attempted to identify the other individual. Appellant's focus, as reflected in the video, is in accusing his wife of adultery, telling [redacted] to leave, and locating [redacted] military ID card to document his identity. These facts strongly suggest the recording was evidentiary in nature, not exploitative.

[12] In the government's opening, trial counsel argued: "Based on [appellant's] comments [in the video], he seems intent on ascertaining the man's rank, and little else is of concern to him." (R. at 236).

While Article 120c does not by its own terms address itself or require an exploitative purpose to sustain a conviction, appellant's conduct here was plainly not the type of behavior towards which this Article is directed.[13]

[13] *Cf. United States v. Mays*, 83 M.J. 277 (C.A.A.F. 2023) (attempted surreptitious viewing of victim in shower); *United States v. Simpson*, 81 M.J. 33 (C.A.A.F. 2021) (recording and broadcasting for purposes of sexual gratification); *United States v. Zhong*, ACM 40441, 2024 CCA LEXIS 344* (A.F. Ct. Crim. App. 21 Aug. 2024) (unpub.) (surreptitious recording during sexual encounter); *United States v. Davis*, ARMY 20160069, 2018 CCA LEXIS 417 (Army Ct. Crim. App. 16 Aug. 2018) (mem. op.), aff'd, 79 M.J. 329 (C.A.A.F. 2020) (surreptitious recording during sexual encounter); *United States v. Bunch*, ARMY 20160197, 2017 CCA LEXIS 471 (Army Ct. Crim. App. 13 Jul. 2017) (mem. op.), pet. denied, 77 M.J. 101 (C.A.A.F. 2017) (surreptitious recording of sleeping 7-year-old stepdaughter for sexual gratification); *United States v. Quick*, 74 M.J. 517 (N.M. Ct. Crim. App. 2014), aff'd, 74 M.J. 332 (C.A.A.F. 2015) (surreptitious recording during sexual encounter).

Conclusion

The government's theory requires stacking inferences that cannot satisfy proof beyond a reasonable doubt: first, that the recording contains a private area; second, that appellant noticed that private area when reviewing the video; and finally, that appellant nonetheless chose to broadcast it. The record shows none of these things directly. The conviction rests on a chain of speculation rather than proof. Because the recording itself does not depict a statutory private area—and because the remaining elements were not proven beyond a reasonable doubt—appellant's conviction for Specification 2 of Charge I must be dismissed.

Accordingly, this court should dismiss appellant's conviction for Specification 2 of Charge I.

[redacted]

Andrew M. Hopkins
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division

[redacted]

Beau O. Watkins
Major, Judge Advocate
Branch Chief
Defense Appellate Division

[redacted]

Kyle C. Sprague
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division

[redacted]

Frank E. Kostik Jr.
Colonel, Judge Advocate
Chief
Defense Appellate Division

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically filed with the Army Court and Government Appellate Division on March 19, 2026.

[redacted]
MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division