

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF  
APPELLANT**

v.

Docket No. ARMY 20250081

Specialist (E-4)

**GERARDO S. FERRUFINO,**  
United States Army,

Appellant

Tried at Joint Base Lewis-McChord,  
Washington on 9 November 2023, 18  
March 2024, and 24-27  
February 2025, before a general court  
martial appointed by Commander, I  
Corps, Lieutenant Colonel Robert  
Murdough and Lieutenant Colonel  
Anne Hsieh, 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 KIDNAPPING  
BY INVEIGLEMENT WAS FACTUALLY INSUFFICIENT.**

**Statement of the Case**

On 27 February 2025, a panel consisting of officers and enlisted members sitting as a general court-martial convicted appellant, Specialist Gerardo S. Ferrufino, contrary to his pleas, of one specification of kidnapping, in violation of Art. 125, Uniform Code Mil. Justice, 10 U.S.C. § 925, Manual for Courts-Martial.<sup>1</sup>

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<sup>1</sup> The Appellant was acquitted of one specification of sexual assault, in violation of Article 120, UCMJ.

(R. at 639, 647; Charge Sheet). On 27 February 2025, the members sentenced appellant to be reduced to the grade of E-1; confined for 1 year; and to be discharged from the service with a dishonorable discharge. (R. at 774).

On 25 March 2025, the convening authority took no action on the findings and adjudged sentence. (Convening Authority Action). On 30 April 2025, the military judge entered Judgment. (Judgment of the Court). This court docketed appellant's case on 11 July 2025. (Referral and Designation of Counsel).

### **Statement of Facts**

In late 2020, appellant and [REDACTED] both E-4s stationed in Germany, began a flirtatious texting relationship where [REDACTED] expressed a specific interest in “consensual non-consent” (CNC) sex. (R. at 286, 289). Appellant and [REDACTED] talked about how appellant liked things like “degrading and forceful use and such.” (R. at 291). They specifically discussed Bondage, Discipline, and Sadomasochism (BDSM), however [REDACTED] definition of BDSM *at the time* (before the sexual assault) was radically different than what the actual definition of BDSM is. (R. at 85, 290). Prior to the alleged sexual assault, [REDACTED] believed BDSM was “I give you permission, like, to do whatever you want to me...to include more of the degrading as well as like slapping, hair pulling, and light choking.” (R. at 290). However, she understood *at the time of trial* that “...it's pretty extreme. There's a lot goes into it like bondage.” (R. at 290).

In early May 2021, the two had a consensual sexual encounter. (R. at 369). During this encounter, appellant slapped █████ pulled her hair, and called her names such as “slut.” (R. at 362). Following this encounter, █████ communicated to appellant her disappointment that he had not been aggressive enough and had failed to fulfill her stated desire for a more dominant partner within a CNC/BDSM dynamic. (R. at 363). █████ described the sexual encounter as “very average sex” for not going rough enough. (R. at 295). However, she still had hopes that the relationship could continue. (R. at 364).

After the sexual encounter appellant was concerned █████ had given him a sexually transmitted disease. (R. at 298). The appellant then discussed with █████ best friend, █████, that █████ was “stinky” and had a sexually transmitted disease. (R. at 365). Appellant later hit on █████ in front of █████ (R. at 367).

█████ blocked appellant from contacting her about two weeks after the May 1st sexual encounter. (R. at 369). She reinitiated contact with appellant in July 2021. (R. at 300). On 17 July 2021, within a few days of unblocking him, █████ asked appellant if he wanted to get food at Benji’s. (R. at 371, 303). Appellant responded with “flirty emojis.” (R. at 371, 303).

The appellant picked up █████ and they began driving to Benji’s Burrito Bistro, a local restaurant in Kaiserslautern, Germany. (R. at 305). Instead of

driving directly to the restaurant, appellant drove to an empty field, which surprised [REDACTED] (R. at 311). Once in the field, appellant and [REDACTED] had sexual intercourse.<sup>2</sup> (R. at 334).

After the encounter, appellant asked, “Do you still want to go to Benji’s?” (R. at 336). [REDACTED] told appellant to drive her home. (R. at 336). On the drive home, [REDACTED] told appellant she had not wanted to have sex. (R. at 336). The appellant replied, “I’m sorry, I thought you wanted it.” (R. at 336). [REDACTED] testified appellant looked like he was about to cry. (R. at 398).

After the sexual encounter [REDACTED] contacted her future romantic partner, [REDACTED], who drove her to the hospital forty minutes after she was dropped off by the appellant. (R. at 406, 375). It was noted in the medical documentation that [REDACTED] had alcohol in her system. (R. a 423). When cross-examined about this fact, [REDACTED] had no explanation but denied drinking alcohol that day. (R. at 423,432, 433).

During cross examination it became apparent [REDACTED] recollection of this event was less than credible. [REDACTED] stated that she was wearing boots but equivocated and stated she may have been wearing sandals. (R. at 378). She testified she was wearing a romper. (R. at 385, 419). A romper is essentially shorts sewn into a dress

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<sup>2</sup> This sexual intercourse formed the basis of Charge I, of which appellant was found not guilty. (R. at 639; Statement of Trial Results).

top. (R. at 419). However, she later admitted she was in fact not wearing a romper, which would have required appellant to pull it down her body. (R. at 420, 421). Instead, what she was wearing that day could have easily slid up her body to her head. (R. at 420-423).

### **Standard of Review**

This court reviews questions of factual sufficiency de novo. *United States v. Penaloza*, ARMY 20230473, 2025 CCA LEXIS 76, at \*6 (Army Ct. Crim. App. 28 Feb. 2025) (mem. op.) (citing *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2022)).

Pursuant to the amended Article 66, UCMJ, this court may consider whether a finding is correct in fact “upon request of the appellant if the appellant makes a specific showing of a deficiency in proof.” UCMJ art. 66(d)(1)(B)(i). Once triggered, this court conducts a review of the controverted questions of fact, giving appropriate deference “to the nature of the evidence at issue.” *United States v. Harvey*, 85 M.J. 127, 130 (C.A.A.F. 2024). This court “does not have to give complete deference to the court-martial,” because this court “might weigh the evidence different from how the court-martial weighed the evidence.” *Id.* at 131.

In conducting its review, this court must decide two things: whether the evidence, “as the CCA has weighed it, does not prove the appellant is guilty

beyond a reasonable doubt. Second, the CCA must be clearly convinced of the correctness of this decision.” *Penaloza*, 2025 CCA LEXIS 76, at \*7-8. (quoting *Harvey*, 85 M.J. at 132) (*emphasis in original*). “Clearly convinced” refers to a “state of confidence” in the “correctness of the decision” as to the finding of guilty. *Harvey*, 85 M.J. at 132.

The “quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is ‘proof beyond a reasonable doubt,’ the same as the quantum of proof necessary to find an appellant guilty at trial.” *Harvey*, 85 M.J. at 131-32. After review, if this 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.” UCMJ art. 66(d)(1)(B)(iii).

### **Law**

The elements of the offense of kidnapping as charged in this case are: (1) appellant inveigled ■■■ (2) appellant then held ■■■ against her will; and (3) appellant did so wrongfully. (Art. 125, UCMJ; App. Ex. XXVIII p. 4).

As to the first element of kidnapping, “[i]nveigle’ means to lure, lead astray, or entice by false representations or other deceitful means. For example, a person who entices another to ride in a car with a false promise to take the person to a certain destination has inveigled the passenger into the car.” (App. Ex. XVIII). This representation need not be entirely false to constitute inveiglement. A

statement that is a partial truth can be deemed deceitful if it is used as a pretext to conceal a contemporaneous criminal intent. *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991).

In *Blocker*, the appellant lured his victim, a stranger he met at a bar, to a secluded area under the pretext of needing to urinate. The Court held even if the appellant did urinate, his representation was “so incomplete or false in implication as to be deceitful” because it concealed his true, criminal purpose. *Blocker*, 32 M.J. 281, 285. The Court found it was reasonable to infer this hidden criminal intent based on a specific confluence of facts. *Id.* at 286. In particular, the appellant’s romantic overtures toward the victim had been “rebuffed” earlier that evening, the pretextual act (pulling over) moved the victim to a dense forest which “facilitated or permitted him to engage in sex with her despite her protests”, and the appellant, immediately upon completing his pretextual act, “proceeded to rape the victim three times.” *Id.* at 286. Based on these facts, the court inferred the appellant harbored a hidden criminal intent to commit rape, rendering his stated reason for stopping the car a deceitful inveiglement. *Id.* at 286.

### **Argument**

The Government alleged “that Specialist (E-4) Gerardo S. Ferrufino, U.S. Army, did, at or near Baumholder Germany, on or about 17 July 2021, wrongfully

inveigle and hold █████ a person not a minor, against her will.” (Charge Sheet).

The appellant’s kidnapping conviction is factually insufficient because the evidence fails to establish the required criminal intent. The government did not prove a false representation was made to inveigle █████ and the appellant's actions were consistent with a reasonable, if mistaken, belief that he was engaging in a consensual encounter. █████ unreliable testimony and motive to fabricate magnify this reasonable doubt, which the fact-finder’s own verdict ultimately confirms.

**a. Intent**

The Government did not prove appellant intended to inveigle the victim. This case is fundamentally different from *Blocker*. Unlike in *Blocker*, appellant and █████ had a prior sexual relationship defined by conversations about CNC and BDSM, to include █████ prior explicit disappointment that appellant was not “rough enough.” (R. at 363). After an encounter involving slapping and hair-pulling, she instructed him she wanted to be dominated more forcefully. (R. at 362-63). Furthermore, unlike in *Blocker*, █████ had expressed interest in BDSM. (R. at 290).

█████ through her own testimony, admitted her version of BDSM was not as extreme as the actual definition of BDSM. (R. at 290). The acronym BDSM means a relationship based on Bondage, Discipline, and Sadomasochism. In

*Blocker*, criminal intent was inferred from the Victim's earlier rejection, her uneasiness in accepting his offer of a ride, and finally, and most importantly, when the accused raped the victim. *Blocker*, 32 M.J. 281, 285. In this case [REDACTED] was the one who asked to go to Benji's. (R. at 303). The appellant did not stalk or lure [REDACTED] to get her into his car, she got in willingly. (R. at 303). Furthermore, the appellant, had a prior sexual relationship with [REDACTED] was the one who initiated contact with the appellant, and the appellant, unlike in *Blocker*, was acquitted of rape. (R. at 286, 300, 289, 639).

Context matters. Appellant's specific intent was not to commit a non-consensual crime; it was to engage in what he honestly and reasonably believed was a consensual, BDSM/CNC sexual encounter. Taking [REDACTED] to a different location by surprise is entirely consistent with an attempt to fulfill her stated interest in a BDSM/CNC scenario. (R. at 361). Throughout their relationship they each had expressed an interest in BDSM, CNC, or "domination type sex." (R. at 360). Even at the time of trial, [REDACTED] stated that "At the time, I believed BDSM was, like, just being lower than, like, submitting to somebody. Giving yourself, like, "Hey, I want you." Like "I give you permission, like, to do whatever you want to me." I was willing to do anything he wanted. (R. at 360). This potential mistake of fact creates reasonable doubt.

**b. False Representation**

The appellant did not give a false representation. The Government's entire theory rests on the assumption that the Appellant never intended to take ■■■ to Benji's. (R. at 623). However, ■■■ own testimony refutes this. ■■■ was the one who asked to go to the Benji's. (R. at 371, 303). Furthermore, after the sexual encounter, appellant asked, "You still want to get Benji's?" (R. at 336). This statement proves his intent to go to the restaurant was genuine all along; it was a destination, not a deception. The appellant and ■■■ had discussed CNC and similarly situated domination and submission "kinks" throughout their relationship. (R. at 290). ■■■ had already teased the appellant and described the sexual encounter as "very average sex" for not going rough enough in their first sexual encounter, after he pulled her hair, spanked her, called her a slut, and slapped her. (R. at 295). This was a consensual encounter reasonably derived from the actions of ■■■ and the appellant. Given the facts it is readily apparent that the intent to go to Benji's never wavered. There was no false representation.

**c. Credibility of ■■■**

Reasonable doubt is bolstered by the testimony of the complaining witness, ■■■ which is fraught with inconsistencies and inaccuracies. Her recollection of the events has been demonstrably unreliable. (R. at 378). On key facts her statements have been proven incorrect, such as the type of shoes and clothes she

was wearing, as well as whether she had been drinking. (R. at 378, 419-421; Prosecution Exhibit 14).

Furthermore, her actions following the alleged incident defy credulity. After being driven home by the appellant, she met with a future romantic partner and delayed seeking medical attention for forty minutes. (R. 375, 447). Upon her arrival at the hospital, medical notes indicated the presence of alcohol in her system, a fact ■■■ she denied and was unable to explain why the documentation suggested that she had been drinking. (R. at 375, 423). This pattern of inconsistent statements and questionable behavior undermines the credibility of her entire testimony.

Beyond a faulty memory, ■■■ possessed a compelling motive to fabricate the allegations. The appellant had made several deeply insulting and humiliating remarks to her, stating she had a sexually transmitted disease and smelled unpleasant, and had also made advances on her best friend. (R. at 365, 367). These personal attacks provide a clear and understandable motive for retaliation, casting further doubt on the truthfulness of her accusations.

#### **d. No Wrongful Intent**

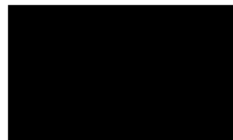
Finally, the panel rendered a not guilty verdict for the Article 120 charge derived from their sexual encounter, which was the culminating event of the kidnapping. (R. at 639). The panel believed there was reasonable doubt as to

appellant's criminal intent during the sexual encounter itself, the very event the alleged kidnapping was meant to facilitate. It is factually incongruous to find appellant lacked the wrongful intent for the primary act (sex) but somehow possessed it for the ancillary act (the drive to the field). The same reasonable mistake of fact which negates a finding of guilt for sexual assault must also apply to the kidnapping.

Appellant had no intention of inveigling or kidnapping ■■■ whatsoever; he was under the mistaken belief he was engaging in a mutual BDSM/CNC fantasy with ■■■. He had an honest and reasonable belief the entire course of events was part of a consensual BDSM/CNC encounter. (R. at 290). The facts above, from their prior conversations regarding BDSM (and erroneous definitions) to their first sexual encounter, to her reaching out after cutting him off lead to the conclusion the appellant had a reasonable mistake of fact, and the finding of guilt is factually insufficient.

## Conclusion

Appellant respectfully asks this honorable court to set aside the finding and sentence.



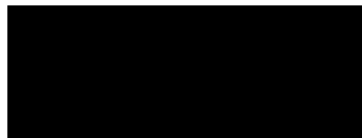
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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was electronically filed with the Army Court and Government Appellate Division on March 27, 2026.



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