IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee,	)	BRIEF ON BEHALF OF
	)	THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 40386
	)	
Staff Sergeant (E-5)	)	USCA Dkt. No. 24-0175/AF
DANIEL R. CSITI	)	
United States Air Force	)	13 January 2025
Appellant.	)	

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUES PRESENTED

I.

WHETHER THE COURT OF APPEALS FOR THE ARMED FORCES HAS STATUTORY AUTHORITY TO DECIDE WHETHER A CONVICTION IS FACTUALLY SUFFICIENT.

II.

WHETHER APPELLANT'S CONVICTION FOR SEXUAL ASSAULT IS FACTUALLY AND LEGALLY INSUFFICIENT BECAUSE AH WAS CAPABLE OF CONSENTING – AND DID CONSENT – TO SEXUAL ACTIVITY WITH APPELLANT.

III.

WHETHER THE LOWER COURT ERRONEOUSLY INTERPRETED AND APPLIED THE AMENDED FACTUAL SUFFICIENCY STANDARD UNDER ARTICLE 66(d)(1)(B), UCMJ.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), UCMJ. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Contrary to Appellant's pleas, a military judge sitting alone as a general court-martial convicted Appellant of one charge and one specification of sexual assault in violation of Article 120(b)(3), UCMJ (sexual assault when the victim is incapable of consenting due to alcohol impairment). The military judge sentenced Appellant to a dishonorable discharge, two years of confinement, forfeiture of all pay and allowances, and reduction to E-1. AFCCA affirmed the findings and sentence in Appellant's case.

STATEMENT OF THE FACTS

Relevant facts are provided below with each issue.

SUMMARY OF THE ARGUMENT

Congress amended Article 67(c) and created a new, but limited, authority for the government to challenge a Court of Criminal Appeal's (CCA) decision to dismiss, set aside, or modify a finding or affirm a lesser finding based on factual insufficiency. 10 U.S.C. § 867(c)(1)(C). Importantly, however, Congress maintained the limitation that this Court shall only act on "matters of law."

10 U.S.C. § 867(c)(4). Thus, this Court now provides oversight if a CCA overturns an appellant's conviction – it may determine that the CCA abused its discretion as a matter of law when it did so. However, this Court is not authorized to conduct its own de novo factual sufficiency review when a CCA affirms a conviction as legally correct in fact, because such a review is not provided for by the plain language of Article 67(c)(1)(C) or Article 67(c)(4).

The amended Article 67(c) maintains this Court's previous authorities, so this Court may still perform a de novo legal sufficiency review. In this case, Appellant's conviction was legally sufficient because any rational factfinder could find each element of the offense was met beyond a reasonable doubt. Appellant admitted that he penetrated AH's vulva with his tongue. During the assault, AH lacked control of her physical and mental faculties and was incapable of consenting due to her alcohol consumption. She had consumed alcohol to excess and was unable to walk unassisted. And Appellant knew or reasonably should have known of her condition because he watched her consume enough alcohol that she was swaying, slurring, and unable to walk without the assistance of Appellant or AH's friend, NA, who drove her home from dinner.

In the event this Court finds that the government proved each element of the offense, Appellant claims that he had a viable mistake of fact as to consent defense. But the defense was refuted when the government proved that Appellant

knew or should have known of AH's impairment due to alcohol. If the government proves beyond a reasonable doubt that the accused knew or reasonably should have known the victim was incapable of consent, then it follows that the mistake of fact as to consent defense would be lost. If Appellant legally knew AH could not consent, then it is impossible that he reasonably believed she did consent.

Appellant challenges the lower court's interpretation of Article 66(d). But AFCCA properly interpreted Article 66(d) because the court's understanding aligned with this Court's decision in Harvey in four significant ways. First, AFCCA understood that it had the authority to defer to the court-martial because the military judge saw and heard the witnesses and other evidence – this Court agreed that the court-martial should receive such deference. Second, when AFCCA used lay definitions, not legal terms of art, to interpret "clearly convinced," its decision was the same as this Court's interpretation of the phrase. Third, like this Court, AFCCA decided that a finding is "against the weight of the evidence" when the evidence fails to establish guilt beyond a reasonable doubt. And fourth, AFCCA and this Court agree that to set aside a guilty finding, a CCA must be clearly convinced that the evidence does not support a conviction beyond a reasonable doubt. AFCCA properly interpreted and applied the amended factual sufficiency standard under Article 66(d)(1)(B).

This Court should affirm AFCCA's decision and deny Appellant relief.

ARGUMENT

I.

THIS COURT MAY REVIEW A CCA'S FACTUAL INSUFFICIENCY DETERMINATION, BUT ONLY FOR AN ABUSE OF DISCRETION.

Standard of Review

"This Court reviews matters of statutory interpretation de novo." United States v. Flores, 84 M.J. 277, 280 (citing United States v. Hiser, 82 M.J. 60, 64 (C.A.A.F. 2022).

Law

Military courts are Article I courts "of special jurisdiction and their authority is conferred by statute." United States v. Jacobsen, 77 M.J. 81, 84 (C.A.A.F. 2017) (citing Center for Constitutional Rights v. United States, 72 M.J. 126, 128 (C.A.A.F. 2013) ("[T]his Court. . .must exercise [its] jurisdiction in strict compliance with authorizing statutes."). "Assuming no constraints or limitations grounded in the Constitution are implicated, it is for Congress to determine the subject-matter jurisdiction of federal courts." United States v. Denedo, 556 U.S. 904, 912 (citing Bowles v. Russell, 551 U.S. 205, 212 (2007)). "This rule applies with added force to Article I tribunals, such as [CCAs] and CAAF, which owe their existence to Congress' authority to enact legislation pursuant to Article I, § 8 of the Constitution." Denedo, 556 U.S. at 912 (citing Clinton v. Goldsmith, 526

U.S. 529, 533-534 (1999)). Thus, this Court may not stretch its subject matter jurisdiction beyond the confines of the statute. Congress articulated this Court's limited jurisdiction to act under Article 67, UCMJ.

Analysis

Before 1 January 2021, Congress allowed this Court to act in limited circumstances:

> (1) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to
>
> > (A) the findings and sentence set forth in the entry of judgment, as affirmed or set aside as incorrect in law by the [CCA]; or
> >
> > (B) a decision, judgment, or order by a military judge, as affirmed or set aside as incorrect in law by the [CCA].
>
> . . .
>
> (4) The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

Article 67(c)(1)(2019). This Court has long recognized that Congress limited its jurisdiction to questions of law and not to questions of fact. United States v. Clark, 75 M.J. 298, 299-300 (C.A.A.F. 2016) (citing United States v. McCrary, 1951 CMA LEXIS 155, *2 (C.M.A. 1951)). "It is the cardinal rule of law that questions of fact are determined in forums of original jurisdiction or by those which are expressly granted the authority by constitution or statutes." McCrary, 1951 CMA

LEXIS 155, *2. In other words, this Court could not "reassess a lower court's fact-finding." United States v. Leak, 61 M.J. 234, 241 (C.A.A.F. 2005). This Court kept "the prerogative of determining on which side of the legal/mixed/factual divide an issue properly falls." Clark, 75 M.J. at 300. And this Court "retain[ed] the authority to review factual sufficiency determinations of the CCAs for the application of correct legal principles, but only as to matters of law." United States v. Mendoza, 2024 CAAF LEXIS 590, *21-22 (C.A.A.F. 2024) (internal citations omitted). If this Court identified a legal error in a CCA's factual sufficiency determination, then the Court typically remanded to the CCA to apply the correct legal principles to the CCA's factual sufficiency review. United States v. Thompson, 83 M.J. 1, 5 (C.A.A.F. 2022) (quoting United States v. Nerad, 69 M.J. 138, 147 (C.A.A.F. 2010)). This Court could not make its own findings of fact.

Effective 1 January 2021,[1] Congress amended this Court's authority under Article 67(c), UCMJ. The statute provides in relevant part:

> (1) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to-
>
> > (A) the findings and sentence set forth in the entry of judgment, as affirmed or set aside as incorrect in law by the [CCA]; or

[1] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(c), 134 Stat. 3388, 3612 (2021).

> (B) a decision, judgment, or order by a military judge, as affirmed or set aside as incorrect in law by the [CCA]; or
>
> **(C) the findings set forth in the entry of judgment, as affirmed, dismissed, set aside, or modfied [sic] by the [CCA] as incorrect in fact under section 866(d)(1)(B) of this title [].**
>
> . . .
>
> (4) The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

10 U.S.C. § 867(c)(1, 4) (emphasis added). Congress added Article 67(c)(1)(C), but the rest of the Court's authority to act remained the same.

Perplexingly, the added subsection provides for this Court to act upon the findings "as affirmed . . . as incorrect in fact," which seems contradictory. A CCA does not typically affirm findings "as incorrect in fact."

To interpret the amended Article 67, this Court employs the canons of statutory construction. United States v. Beauge, 82 M.J. 157, 162 (C.A.A.F. 2022) (citing United States v. Kohlbek, 78 M.J. 326, 330 (C.A.A.F. 2019). "As in all statutory construction cases, we begin with the language of the statute." United States v. McDonald, 78 M.J. 376, 379 (C.A.A.F. 2019) (citing Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002)). "[W]hether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case is the starting point for determining the meaning of the statute." Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997). "The plainness or ambiguity of statutory language

is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." Id. (internal citations omitted).

A. This Court has no statutory authority to review matters of fact or conduct a de novo review of a CCA's factual sufficiency determination.

In Article 67(c)(1), Congress provided this Court discretion to act on three categories of issues, and its action is limited to *only* those three categories. Congress used the phrase "may only act." 10 U.S.C. § 867(c)(1). May is a permissive term and "permissive words grant discretion." United States v. Atchak, 75 M.J. 193, 195 (C.A.A.F. 2016) (internal citations omitted); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 112 (Thomas/West 2012). This Court "may only act with respect to": (1) a CCA's decision to affirm the findings and sentence or set aside the findings or sentence because it was legally incorrect; (2) a CCA's decision to affirm a military judge's decision or set it aside because it was legally incorrect; or (3) a CCA's decision to affirm, dismiss, set aside, or modify those findings because they were incorrect in fact. 10 U.S.C. § 867(c). After reviewing these three categories of issues, the Court then has discretion to act.

If this Court decides to act, it "***shall*** take action only with respect to matters of law." 10 U.S.C. § 867(c)(4) (emphasis added). The "shall" should be read to mean that this Court can only act on legal errors, and it cannot decide matters of

fact. "[W]hen the word *shall* can reasonably be read as mandatory, it ought to be so read." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 114 (italics in the original). Here "shall" should be read as a mandatory requirement because that statement stands alone in its own subparagraph and no additional modifiers ambiguate the "shall." It can "reasonably be read as mandatory." Id. Thus, Congress maintains the limit on this Court's authority to act on only issues of law.

Appellant argues that Congress wanted this Court to perform its own de novo factual sufficiency review, but he never mentions the mandatory language of Article 67(c)(4). (App. Br. at 13). Appellant's interpretation of Article 67(c)(1)(C) conflicts with Article 67(c)(4). Article 67(c)(1)(C) appears to permit this Court to review a CCA's factual sufficiency determination, but this Court can only decide matters of law. This apparent conflict creates a tension within the statute that this Court should resolve by interpreting the statute in a way that "seeks to harmonize independent provisions of a statute." United States v. Kelly, 77 M.J. 404, 407 (C.A.A.F. 2018) (citation omitted). Reading Article 67(c)(1)(C) and Article 67(c)(4) together in harmony, this Court can only review a CCA's factual assessment of the finding for legal error, and it would not be allowed to conduct its own review of the facts – a de novo review.

This Court starts from the presumption that Congress knew the law and knew how to change it if it wanted to do so. United States v. Barry, 78 M.J. 70 (C.A.A.F. 2017). If Congress had meant to give this Court authority for a de novo review of the facts in a case, it would have explicitly permitted this Court to act on matters of fact. Congress would have laid out the factual sufficiency review requirements like it did for the CCAs in Article 66(d)(1)(B). But Congress did not lay out those explicit requirements, instead it created a very limited new authority for this Court to review a CCAs factual insufficiency determination.

Congress did not create a means for this Court to conduct its own de novo factual sufficiency review; such a reading of the statute ignores Congress' statutory language limiting this Court to act on "matters of law." 10 U.S.C. § 867(c)(4). If Congress wanted this Court to conduct factual sufficiency review of affirmed convictions, it would have expressly amended Article 67(c)(4)'s dictate to only act on matters of law and would have provided this Court authority to conduct factfinding. It would be a remarkable and –likely – unprecedented step to impliedly permit a supervisory court to have such jurisdiction. "It is the cardinal rule of law that questions of fact are determined in forums of original jurisdiction or by those which are ***expressly granted*** the authority by constitution or statutes." McCrary, 1951 CMA LEXIS 155, *2 (emphasis added). It seems unlikely that Congress would have taken such a remarkable step and departed from standard

American jurisprudence by ambiguous implication. Thus, this Court cannot review a CCA's factual sufficiency determination de novo.

B. Article 67(c)(1)(C) only allows this Court to review a CCA's determination of factual insufficiency; this Court cannot review a CCA's determination that the findings were factually sufficient.

With the understanding that this Court can only review a CCA's factual sufficiency determination for legal error, we encounter ambiguity when interpreting Article 67(c)(1)(C). "When faced with ambiguity regarding the meaning of discrete words or passages, our Court must examine the ambiguous phrase in its broader statutory context." United States v. Badders, 82 M.J. 299, 303 (C.A.A.F. 2022). Jurisdictional statutes "must be interpreted in light of the overall jurisdictional concept intended by the Congress, and not through the selective narrow reading of individual sentences within the" statute. Leak, 61 M.J. at 239.

In this case, the plain language of the statute is ambiguous because it could be interpreted in three different ways. Article 67(c)(1)(C) allows this Court to act on "the findings set forth in the entry of judgment, as affirmed, dismissed, set aside, or modfied [sic] by the [CCA] as incorrect in fact under [Article 66(d)(1)(B)]." As written, the phrase "as incorrect in fact" grammatically modifies the words "affirmed, dismissed, set aside, or modified." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 147 ("When there is a

straightforward, parallel construction that involves all [] verbs in a series, a [] postpositive modifier normally applies to the entire series."). As a result, the plain language of the statute allows this Court to review a CCA's decision to affirm as incorrect in fact, but logically, one does not think of a CCA affirming a finding that is incorrect in fact. Three conclusions could be drawn from this grammatical error: (1) Congress forgot to add the word "or" between "affirmed" and "dismissed," (2) Congress erroneously added the word "affirmed," or (3) Congress was referring to a "lesser finding" affirmed by the CCA under Article 66(d)(1)(B)(iii). The best reading is that Congress was referring to a "lesser finding" affirmed by the CCA.

1. Congress failed to add an "or" between affirmed and dismissed.

If Congress forgot to add "or" between affirmed and dismissed, then this Court would have an additional challenge to resolve. It would be forced to read in missing language to make sense of Article 67(c)(1)(C). If the statue is missing the word "or," then it should read: "the findings set forth in the entry of judgment, as affirmed or dismissed, set aside, or modfied (sic) by the [CCA] as incorrect in fact . . . ." But this reading of the statute would require this Court to add additional language to understand whether Congress meant "affirmed as correct in law" or "affirmed as correct in fact."

2. Congress erroneously added the word "affirmed."

Looking at Article 67(c)(1)'s subparagraphs, we see a pattern where Congress used "affirmed or set aside as incorrect in law" in both subparagraphs (A) and (B). These are interpreted to mean "affirmed as correct in law" and "set aside as incorrect in law" because Article 67(c)(4) permits this Court to only review matters of law. The construction of subparagraph (C) appears to follow the pattern in (A) and (B). If this Court follows that pattern for subparagraph (C) and reads in "affirmed as correct in law," then this portion of the statute is redundant to Article 67(c)(1)(A). This interpretation renders the word "affirmed" superfluous and violates the canon against surplusage which requires all portions of a statute to be given meaning. Yates v. United States, 135 S. Ct. 1074, 1085 (2015). On the other hand, if it is interpreted as "affirmed as correct in fact" that requires reading several more words into the statutes that simply are not there, and that Congress may not have intended to be in the statute. In sum, the word "affirmed" is either superfluous or it requires additional words Congress might not have wanted.

3. Congress was referring to a "lesser finding" affirmed by the CCA under Article 66(d)(1)(B)(iii).

Although this Court could presume that Congress accidentally included the word "affirmed" in Article 67(c)(1)(C), ignoring words tends to be a last resort for courts, when no other possible purpose for the word can be ascertained. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 235.

Instead, this Court should examine how a CCA might be able to "affirm" a finding "as incorrect in fact under" Article 66(d)(1)(B). Article 66(d)(1)(B) gives the CCA the ability to "affirm a lesser finding" if "the Court is clearly convinced that the finding of guilty was against the weight of the evidence." Thus, this must be the affirmance that Congress was referring to in Article 67(c)(1)(C). This Court may review the CCA's decision to affirm a lesser included offense when the CCA found the greater offense to be factually insufficient. It follows that Article 67(c)(1)(C) only allows this Court to review a CCA's finding of factual insufficiency – not factual sufficiency – since review of a factually sufficient finding is not provided for anywhere in that subsection.

The legislative history is enlightening in this case and supports the idea that Congress intended this Court only to be able to review cases where a CCA dismisses, sets aside, or modifies a finding, or affirms a lesser finding. This Court should use it in clarifying the statute's ambiguity. If a statute "creates some ambiguity, the context, structure, history, and purpose [may] resolve it." Abramski v. United States, 573 U.S. 169, 188 n.10 (2014). *See also* Wooden v. United States, 595 U.S. 360, 371 (2022) (five Justices in the majority using legislative history to interpret an ambiguous statute). Based on the legislative history of this amendment to Article 67, the House and the Senate wanted to make it more difficult for appellate courts to overturn convictions for factual reasons. Both the

House and the Senate put forth amendments creating oversight if a CCA overturned a conviction. The House's proposal required the CCA's to review en banc to overturn a court-martial conviction for factual sufficiency: "the provision would require the entire [CCA] review a determination by a panel of the Court that a finding of guilty was clearly against the weight of the evidence." H.R. Rep. No. 116-617, at 1605 (2020) (Conf. Rep.). The Senate disagreed with an en banc review requirement. The Senate:

> recede[d] with an amendment that would remove the requirement for the entire Court of Criminal Appeals to review a determination by a panel of the Court that a finding of guilty was clearly against the weight of the evidence and would amend Article 67 of the Uniform Code of Military Justice (10 U.S.C. 867) to authorize the United States Court of Appeals for the Armed Forces to review such a determination.

Id. The conference report shows that Congress was concerned with limiting the broad power of the CCA to overturn cases for factual insufficiency. It wanted to give this Court the ability to review a CCA's determination "that a finding of guilty was clearly against the weight of the evidence." But there is no indication that Congress wanted this Court to be able to do the reverse – review the CCA's determination that the findings were factually sufficient.

Factual sufficiency review is no longer mandatory, and it is within the CCA's discretion to decide whether to even conduct it. And Congress changed this Court's review authority so that oversight existed for a CCA's factual

insufficiency determination. Congress wanted to ensure convictions were more difficult to overturn, and it placed that responsibility with the entity designed to provide civilian oversight to the military justice system – this Court. In the end, the legislative history of the amendments to Article 67 supports that Congress only intended this Court to be able to review a CCA's determination of factual insufficiency. When considered in that light, the best interpretation of the amendments is that findings "affirmed . . . as incorrect in law," means instances where the CCA affirmed a lesser finding due to factual insufficiency.

C. This Court reviews a CCA's finding of factual insufficiency for an abuse of discretion.

Since Article 67(c)(1)(C) only allows for review of CCA's determination of factual insufficiency, the next question is how this Court conducts such a review. After all, per Article 67(c)(4), this Court is still only allowed to act with respect to matters of law. While prior to the amendments to Article 67(c), this Court could not "reassess a lower court's fact-finding," Leak, 61 M.J. at 241, the amendments themselves suggest that Congress intended to give this Court some greater power that it did not have before. The way to reconcile Article 67(c)(1)(C) and Article 67(c)(4) is to conclude that this Court may review the CCA's weighing of the evidence for an abuse of discretion. Reviewing for an abuse of discretion means that "when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the

court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." United States v. Houser, 36 M.J. 392, 397 (C.M.A. 1993)(citation omitted). This Court often reviews issues for an abuse of discretion, so doing so is acting with respect to a matter of law.

Using an abuse of discretion standard is appropriate because of the nature of Article 66 review. Article 66(d) now grants the CCAs more discretion to review factual sufficiency issues. Congress used the word "may" multiple times in Article 66(d)(1)(B). This use of permissive language throughout the factual sufficiency review process intentionally permits the CCAs to decide whether to review the issue, how to weigh the evidence, and whether to grant relief. Thus, the factual sufficiency review is discretionary.

Because a CCA's factual sufficiency decision is discretionary, this Court should use an abuse of discretion standard to review those discreet areas of discretion. This Court should ask if the CCA acted inappropriately in weighing the evidence, that is, was the weighing arbitrary, fanciful, clearly erroneous, or clearly unreasonable, as a matter of law. *See* Flores, 84 M.J. at 282. An abuse of discretion occurs when a CCA's findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the CCA's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law. *See* United States v. Behunin, 83 M.J. 158, 162

(C.A.A.F. 2023). Where a CCA's findings are neither clearly erroneous nor unsupported by the record, this Court should defer to those factual findings. United States v. Bess, 80 M.J. 1, 5 n.3 (C.A.A.F. 2020). Such a review still confines this Court to only acting with respect to matters of law. This Court cannot substitute its judgment for the CCA's. It can only rule that the CCA, as a matter of law, reached a conclusion that was completely untenable based upon the evidence in the record. *Cf.* United States v. Burris, 21 M.J., 140, 144 (C.M.A. 1985) ("When a court is limited to reviewing matters of law, the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record.") (internal quotations omitted).

In sum, Congress did not give this Court the authority to do a de novo factual sufficiency review of the findings of a court-martial. Article 67(c)(1)(C) only gives this Court the ability to review a CCA's finding of factual insufficiency. And when this Court review a factual insufficiency determination, it should only review the CCA's weighing of the evidence for an abuse of discretion.

II.

THE EVIDENCE WAS LEGALLY SUFFICIENT BECAUSE AH WAS INCAPABLE OF CONSENTING, AND APPELLANT SHOULD HAVE REASONABLY KNOWN OF HER CONDITION.

As a threshold matter, this Court cannot conduct its own factual sufficiency review of Appellant's conviction. It also cannot review the CCA's factual sufficiency finding, because the CCA found the evidence factually sufficient rather than factually insufficient. But this Court can review for legal sufficiency and should conclude that the findings were legally sufficient.

Additional Facts

Staff Sergeant AH (AH) moved to Malmstrom Air Force Base, Montana, in April 2017. (JA at 8-9). Her NCOIC introduced her to Appellant, and Appellant became her trainer for missile feeding – providing meals to those Airmen stationed at missile sites. (JA at 9). AH and Appellant became friends. (JA at 9). By late 2017, AH and Appellant hung out about once a week, and by the end of 2021 they hung out almost every weekend cooking, cleaning, going out to eat, and spending time with their other friends. (JA at 10).

AH became pregnant by her husband, and then they divorced. (JA at 11). After AH's divorce, Appellant provided emotional support to AH and her son, and he helped her buy things for her son. (JA at 11, 40). Five to seven months into her pregnancy, Appellant told AH that he had romantic feelings for her, and he wanted

"something more." (JA at 11). She rejected him saying nothing was going to happen between them. (JA at 11-12). Appellant stopped talking to AH for a few months after she rejected him, but eventually, the two became friends again. (JA at 12). Appellant expressed his romantic interest in AH approximately five different times during their friendship, and AH rejected him each time. (JA at 12).

On 21 May 2021, AH planned to go out to dinner with two other friends (NS and NA) and Appellant. (JA at 14). When her babysitter fell through, AH asked Appellant if he would babysit rather than attending dinner, and he agreed. (JA at 175). Appellant came over to AH's house on Malmstrom Air Force Base at approximately 1730 hours while she was getting ready for the evening out. (JA at 18). While AH was getting ready, she drank some of Appellant's homemade mead, but she did not have an entire glass. (JA at 18-19). AH then left Appellant with her son and drove to the restaurant. (JA at 19).

Once at the restaurant, AH ordered a glass of wine and a six-inch pizza. (JA at 19). After eating three-quarters of the pizza, AH threw it up, and once her stomach was empty, she drank two to three more glasses of wine. (JA at 20). By the end of dinner, she was too intoxicated to drive the ten to fifteen minutes home. (JA at 20). AH's friend, NA, drove her home. (JA at 20). AH did not remember getting out of NA's car. (JA at 21). The next thing she remembered she was in her kitchen talking with Appellant. (JA at 21). AH drank "a couple of Trulys,"

alcoholic seltzer waters. (JA at 21). She testified that she did not remember how much she drank, and Appellant told her that she had between three and five Trulys. (JA at 21). AH could not recall how intoxicated she was, but Appellant told her that she was "pretty intoxicated." (JA at 22).

The next morning, AH woke up completely naked on her bed. (JA at 22). Typically, she wore clothing to bed, and even on previous occasions when she was intoxicated, she wore clothes to bed. (JA at 22). Waking up naked, struck her as unusual. (JA at 22). She woke up, walked downstairs, and found Appellant was still at her house. (JA at 23). They spent the day together, but Appellant was quieter than usual. (JA at 23). During their day together, he never discussed having a sexual interaction with her the night before. (JA at 23).

AH invited Appellant over for dinner a week later, and only then did Appellant tell AH that he penetrated her vulva with his tongue. (JA at 23). AH was "shocked." (JA at 25). She was not attracted to Appellant, and she never expected him to perform oral sex on her. (JA at 25). AH and Appellant never kissed or had sex at any time during their friendship. (JA at 13). AH testified, "I am not attracted to him, I've told him that. And, I have told him nothing was ever -- nothing more would ever happened between us, besides our friendship." (JA at 25). They did not continue their friendship after Appellant told AH that he penetrated her vulva with his tongue. (JA at 38).

During the investigation of Appellant, law enforcement asked AH to make a recording with him on 29 May 2021. (JA at 35). In the recording, Appellant stated: When NA dropped off AH, he (Appellant) helped AH into the house, and then they sat on the floor between the kitchen and the laundry room talking. (Id., 183, 02:24-02:34, 02:36- 02:47). Then, Appellant helped AH to go upstairs. (Id., 03:12-03:14). AH came back downstairs and sat in a dining room chair while they talked more. (Id., 03:24-03:57). Then, AH leaned on the chair, and it tipped over, causing a dent in the wall, so he carried her elsewhere. (Id., 03:58-04:17).

Appellant said on the recording that AH was drunk and laughed. (Id., 04:18-04:22). He agreed that she was "fucked up." (Id., 04:23-04:33). AH said her body was not great, and Appellant said her body was perfect. (Id., 04:34-04:57). According to Appellant, AH said to Appellant, "Show me." (Id., 04:58-05:02). Then, AH took off her pants and her panties. (Id., 05:03-05:07). They kissed for a few moments and Appellant "went down orally" (performed oral sex on her) on the couch for about a minute. (Id., 05:18-05:34). AH pushed Appellant away. (Id., 05:37-05:45; 16:53-16:58). Appellant asked AH if she wanted to put her panties back on, and she nodded, so he helped her put her underwear back on. (Id., 5:47-05:55; 16:59-17:17). Then, AH laid down, and he put a blanket over her because she "knocked out quick." (Id., 05:46-06:13).

On the recording, AH said she needed to know if she needed "Plan B" and said she woke up sore. (Id., 06:36-07:14). He denied putting anything into her. (Id.). He said, "That's why I'm worried. I don't know what else I did. . . . . I never inserted. I never came." (Id., 07:15-07:49). When confronted about how Appellant could tell how "gone" drunk AH was, he said, "And that's where it was my fault for not telling myself, 'No.' And to just back away from it instead." (Id., 08:16-08:45). Then Appellant told AH she had three to five Truly's (alcoholic beverages) after she returned home on 21 May 2021. (Id., 08:46-08:59). Appellant apologized to AH. (Id., 12:34-14:32). During the apology, Appellant said, "However you deemed it to be. If you were to make a phone call or something, I did what I did." (Id., 13:58-14:09).

Appellant was charged and convicted of the following specification:

> In that [Appellant], did at or near Malmstrom Air Force Base, Montana, on or about 21 May 2021, commit a sexual act upon Staff Sergeant AH by causing contact between his mouth and her vulva, when Staff Sergeant AH was incapable of consenting to the sexual act due to impairment by alcohol, and that condition was known or reasonably should have been known by [Appellant].

(JA at 1, 3).

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) (citing United States v. Wilson, 76

M.J. 4, 6 (C.A.A.F. 2017)). And this Court reviews a CCA's factual sufficiency determination for an abuse of discretion. 10 U.S.C. § 867(c)(1)(C); 10 U.S.C. § 867(c)(4).

Law

The test for legal sufficiency is "whether, after viewing the evidence in the light most favorable of the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted). The test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but rather whether any rational factfinder could find that it did. United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001). Thus, legal sufficiency is a very low threshold. King, 78 M.J. at 221.

The standard for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011). "Further, in resolving questions of legal sufficiency, [this Court is] bound to draw every reasonable inference from the evidence of record in favor of the prosecution." Barner, 56 M.J. at 134.

Analysis

A. Appellant knew AH was falling over drunk and that she was incapable of consent, but he performed oral sex on her anyway.

The government proved AH consumed large amounts of alcohol and was unable to consent due to impairment. Appellant knew that she was falling over drunk and incapable of consenting to his sexual contact. For the court-martial to find Appellant guilty of sexual assault under Article 120(b)(3), UCMJ, the government needed to prove beyond a reasonable doubt that (1) Appellant committed a sexual act upon AH; (2) AH was incapable of consenting to the sexual act due to impairment by alcohol, and (3) Appellant reasonably should have known of that condition. Manual for Courts-Martial, United States, pt. IV, para. 60.b.(b)(2)(f) (2019 ed.). "Incapable of consenting" means the person is "incapable of appraising the nature of the conduct at issue" or "physically incapable of declining participation in, or communicating unwillingess [sic] to engage in, the sexual act at issue." 10 U.S.C. § 920(g)(8). The trial evidence was legally sufficient to establish AH was incapable of consenting and Appellant knew or reasonably should have known that AH was incapable of consenting.

1. Element 1: Appellant penetrated AH's vulva with his tongue.

The first element – whether the sexual act occurred – is not in dispute on appeal. (JA at 25; 185, 05:18-05:34; App. Br. at 18, 24). In the recording AH took of Appellant after the incident, Appellant admitted twice that he penetrated AH's

vulva with his tongue after her pants and underwear were removed. (JA at 185, 05:18-05:34). A rational finder of fact could reasonably interpret Appellant's statements to mean he placed his mouth on AH's vulva.

2. Element 2: AH was so impaired by alcohol that she was physically unable to walk unassisted and fell out of her seat, and she was mentally "gone" and "fucked up;" thus, she was incapable of consenting.

The government proved the second element that AH was "incapable of appraising the nature of the conduct at issue" and was "physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue." 10 U.S.C. § 920(g)(8). The government demonstrated the deterioration of AH's physical and mental capacity to consent by showing: AH drank a lot of alcohol on the evening of 21 May 2021; she needed assistance to move from place to place in her house; and Appellant described her as falling over drunk and "fucked up." (JA at 183, 04:23-04:33).

AH drank between six to nine drinks over the course of the evening beginning at 1730 hours on 21 May 2021. AH, a small individual weighing about 115 pounds, drank Appellant's strong homemade mead before she left the house. (JA at 18-19). She drank one glass of wine and ate a small pizza when she first arrived at the restaurant, and then she threw up the food. (JA at 20). After throwing up she drank two to three more glasses of wine but did not consume more food. (JA at 20). At this point, a rational factfinder could decide AH was

intoxicated because she was a small individual who had approximately four drinks and little to no food in her stomach.

A rational factfinder could decide AH was drunk just after dinner, and that her physical and mental faculties had already declined drastically. AH's inebriation just after dinner was corroborated by NA. NA observed AH's behavior and determined that she was too intoxicated to drive herself home. On the way to NA's car, the two walked arm in arm with AH swaying as she walked. (JA at 96). On the drive home, AH was slurring her words "here and there." (JA at 97). When AH arrived home, NA watched Appellant meet AH at the car and walk arm and arm with her into the house. (JA at 98). AH's swaying and slurring demonstrated that even before arriving home and drinking more alcohol, she was unsteady with hindered speech; thus, she was already losing her physical faculties.

Once in the house, AH and Appellant spoke in the kitchen while she drank three to five alcoholic drinks in quick succession. (JA at 21). These additional drinks would have increased AH's level of intoxication. She was already swaying and slurring after drinking mead and wine. The additional drinks would have further deteriorated her mental and physical faculties; thus, further hindering her capacity for consent.

AH did not have control of her physical faculties after drinking in her kitchen and she lost the mental capacity to consent to any sexual acts. AH needed

assistance to move about her house. Appellant told AH that he had to help her upstairs to her room. (JA at 183, 03:12-03:14). He said that she returned to the main floor of her own accord, but then she drunkenly tipped over in her dining room chair denting the wall. (Id.). The drunken chair tip was corroborated by a dent in the wall and paint transfer on the chair. (JA at 181-182). Because she was too drunk to sit in a dining room chair, Appellant said he carried her to a seat in the living room, likely because she could not walk by herself. (JA at 05:18-05:34). She was not in control of her physical faculties. Viewing all the evidence in the light most favorable to the prosecution, a rational factfinder could decide that if AH was so inebriated she could not sit in a chair and she had to be carried to the couch, then she was "physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act." 10 U.S.C. § 920(g)(8). A rational factfinder could decide that Appellant's description of AH as "fucked up" and "gone" indicated that she was so inebriated that she was not mentally present to appraise "the nature of the conduct at issue." Because a rational factfinder could decide AH was not in control of her physical or mental faculties at the time of the sexual act that she was incapable of consenting.

Appellant argues, "The possibility that AH may have been in a blackout does not mean she was incapable of consenting." (App. Br. at 20). It may be possible that someone who is blacked out *may* be able to consent to sexual activity.

But it is also possible that someone who is blacked out could be so intoxicated that they are incapable of consenting. And viewing the evidence in the light most favorable to the government, a rational factfinder could decide that AH was blacked out and too intoxicated to consent.

The present case is like United States v. Robinson, 77 M.J. 294, 298 (C.A.A.F. 2018). In Robinson, the victim blacked out after a night of drinking, and she did not recall most of the evening including the sexual assault. She was seen stumbling and slurring her words, almost hitting a stop sign with her car, and she had a trashcan and water bottle next to her bed indicating she was nauseous. The government charged appellant with sexual assault when the victim was incapable of consenting due to alcohol intoxication. This Court decided the conviction was legally sufficient. Robinson, 77 M.J. at 298. Like in Robinson, a rational factfinder in this case, viewing all the evidence in the light most favorable to the prosecution, could find that AH was both blacked out and incapable of consenting.

The government proved the second element of the offense. AH was so impaired by alcohol that she was physically unable to walk unassisted and fell out of her seat, and she was mentally "gone" and "fucked up;" thus, she was incapable of consenting.

3. Element 3: Appellant knew or reasonably should have known that AH was incapable of consenting because of her alcohol consumption.

The government proved the third element that Appellant knew or reasonably should have known that AH was significantly impaired by alcohol. As her best friend, Appellant drank with her on multiple occasions or was around her when she was drinking. (JA at 9, 40-43). He knew, just like AH's other friends, that she drank alcohol to intoxication multiple times a week. (JA at 43, 74). When she drank, AH would slur her words, sway when walking, change her demeanor, and black out. (JA at 44-45, 74, 77-78, 94, 97, 107).

Appellant observed AH's behavior when she returned from dinner, and after watching her drink more alcohol at home, he described her as falling over drunk, "gone," and "fucked up" on 21 May 2021. Thus, Appellant knew AH was extremely intoxicated and incapable of consenting, or he at least should have known of her condition because he saw her drink several alcoholic beverages and noticed her demeanor. He watched her drink his "strong" homemade mead before she left the house. (JA at 18). Then she drank enough while at dinner to inhibit her ability to drive home. (JA at 20). Appellant watched AH arrive to the house in NA's car and exit the vehicle. (JA at 20-21). At which point he helped AH get inside the house. (JA at 97). A rational factfinder could conclude that Appellant saw obvious signs that AH was very intoxicated the moment she arrived home.

Although AH was already swaying and slurring, she continued to drink once she was home. Appellant witnessed her drink approximately three to five alcoholic drinks in quick succession. (JA at 183, 08:46-08:59). He watched her intoxication level increase to the point that he needed to assist her upstairs because she was unable to do so of her own accord. (JA at 183, 03:12-03:14). Then, according to Appellant, AH came back down downstairs of her own, but he witnessed her fall out of her chair while sitting at the dining room table. (Id., 03:24-03:37). The falling chair dented the wall, this was corroborated when OSI agents found a dent in the wall and bits of paint on the edge of a chair. (Id., 03:58-04:17; JA at 180-182). And even though she could not walk to the seat herself because she did not have physical control of her own faculties, Appellant decided to perform oral sex on her. (Id., 05:18-05:34). Even if Appellant did not actually know that she was incapable of consenting, her inability to walk and sit in a chair should have indicated to a reasonable person that AH was extremely inhibited by alcohol and incapable of consenting.

Appellant's own words show that AH was "gone" and "fucked up" and his apology to her demonstrated his actual subjective understanding that AH was incapable of consenting. After seeing her demeanor, Appellant determined his own conduct was wrong. In their conversation, one week after the sexual act, Appellant said it was "my fault for not telling myself, 'No.' And to just back away

from it instead." (JA at 183, 08:16-08:45). Appellant also demonstrated his consciousness of guilt when he apologized and said he understood if AH would call law enforcement on him, "However you deemed it to be. If you were to make a phone call or something, I did what I did." (Id., 13:58-14:09). Appellant knew AH was too drunk to consent, and he knew he should not have committed a sexual act upon her.

Appellant argues that "if the military judge had, in fact, disbelieved [Appellant's] account of what occurred between him and AH, then there would be no evidence regarding the facts and circumstances leading up to the alleged offense at all." (App. Br. at 24). But a factfinder is not required to believe every statement a witness or accused makes, and in this case the military judge could have believed portions of Appellant's statements, especially those corroborated by other evidence, while finding other parts unpersuasive. United States v. Harris, 8 M.J. 52, 59 (C.M.A. 1979).

Portions of Appellant's account were corroborated by other evidence. NA witnessed Appellant help AH into the house. (JA at 96). This lines up with Appellant's account of AH's arrival home, and Appellant witnessing her already drunken state. AH testified that she remembered talking with Appellant in the kitchen while drinking Trulys, and this is consistent with Appellant's account that AH was drinking Trulys in the kitchen. (JA at 21). Appellant said AH fell over in

her dining room chair, and OSI corroborated this statement when they documented a dent in the wall and paint transfer on the chair. (JA at 180-182). This corroboration pointed to AH being extremely intoxicated. She drank enough at dinner to become drunk, she continued to drink, and then became so impaired she could not properly sit in a chair. The military judge could have decided this corroboration made Appellant's account of AH's inebriation believable. And the military judge could have found, like any rational trier of fact on appeal, that AH was incapable of consenting due to alcohol intoxication.

Meanwhile, the military judge could have believed everything Appellant stated in the recording, but disbelieved Appellant's self-serving statement that AH told him, "Show me," because AH testified that she would never have agreed to sexual activity with Appellant even if intoxicated. (JA at 26). Indeed, all other evidence in the case seemed to make Appellant's version implausible. AH had repeatedly and unwaveringly rejected every advance of Appellant. As this Court in United States v. Nicola pointed out, triers of fact are allowed to dissect an accused's statements into believable and unbelievable admissions, and "then use the accused's statements as substantive evidence of guilt . . . ." 78 M.J. 223, 227 (C.A.A.F. 2019) (citation omitted). "Under this principle, the court-martial" or any rational trier of fact could have decided Appellant was lying when he testified that

AH consented, "and then used his statements to find that the opposite was true" that AH did not consent. Id. at 227-228.

The military judge was able, during witness testimony, to view AH's facial expressions, posture, mannerisms, and hear vocal tones, volume, and cadence, and in his guilty verdict he found AH credible. She testified (1) she did not recall the "show me" conversation, (2) she would not say such a thing, and (3) it was not possible she would have taken off her pants and underwear for Appellant. (JA at 29-30, 80). Considering AH's past rejection of Appellant, and her actions after the sexual assault, the military judge reasonably believed AH's testimony and disbelieved Appellant's exculpatory statements.

Viewing the evidence in the light most favorable to the government, a rational factfinder could have reasonably found that Appellant knew or should have known that AH was incapable of consenting due to alcohol impairment.

B. Any mistake of fact defense was refuted when the government proved that Appellant knew or should have known of AH's impairment due to alcohol.

Appellant argues he had a reasonable mistake of fact as to consent because, as he claimed, AH told him to "show me" that her body was perfect thus indicating she wanted him to commit a sexual act on her. (App. Br. at 20). It is not only reasonable but probable that the fact finder determined AH never said, "show me." Rather, Appellant likely lied to provide himself a defense (a recognition of his own guilt). Regardless, assuming arguendo that the comment "show me" was made—

the Government still proved its case. Appellant's argument fails because if the government proves beyond a reasonable doubt that the accused knew or reasonably should have known the victim was incapable of consent, then it follows that the mistake of fact as to consent defense would be lost. If the factfinder determines beyond a reasonable doubt that the Appellant knew or reasonably should have known AH was not physically or mentally capable of consenting, then the factfinder cannot logically find Appellant reasonably believed that AH consented to the sexual act.

Consent is "a freely given agreement to the conduct at issue by a competent person." 10 U.S.C. § 920(g)(7)(A). A competent person is a one who possesses the physical and mental ability to consent. United States v. Pease, 75 M.J. 180, 185 (C.A.A.F. 2016). To be able to freely make an agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question and then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person. Id.

The elements for mistake of fact as to consent for a general intent crime are as follows: (1) the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances; (2) if the circumstances were as the accused believed them, the accused would not be guilty of the offense; (3) the ignorance or

mistake must have existed in the mind of the accused; and (4) the mistake must have been reasonable under all the circumstances. R.C.M. 916(j)(1).

The service courts have found and agree that "[i]f the government proves that an accused had actual knowledge that a victim was incapable of consenting, then, by definition, such an accused could not simultaneously honestly have believed that the victim consented." United States v. Teague, 75 M.J. 636, 638 (A. Ct. Crim. App. 2016) *rev. denied*, 75 M.J. 373 (C.A.A.F. 2016).[2] "Similarly, if the government proves that an accused should have reasonably known that a victim was incapable of consenting, the government has also proven any belief of the accused that the victim consented was unreasonable." Id. "Article 120(b)(3) already requires the government to disprove a mistake of fact defense, so a mistake of fact defense is 'baked in' to the elements of the offenses themselves." United States v. Bannister, No. 201600315, 2017 CCA LEXIS 361, at *10 (N-M Ct. Crim. App. May 31, 2017) (unpub. op.) (citations omitted); *See also* United States v. Rich, 79 M.J. 572, 587 (A.F. Ct. Crim. App. 2019) (en banc) ("[B]y proving the

[2] Article 120(b)(3) remained unchanged from the 2016 version of the statute to the 2019 version of the statute. *Compare* 10 U.S.C. § 920(b)(3) (2016) *with* 10 U.S.C. § 920(b)(3) (2019). The mistake of fact defense also remained unchanged between the 2016 and 2019 Rules for Courts-Martial. *Compare* R.C.M. 916(j)(1) (2016 MCM) *with* R.C.M. 916(j)(1) (2019 MCM).

elements of the charged offense, the Government necessarily disproved the existence of either asserted mistake of fact.").

Even if this Court disagrees with the service courts about the application of a mistake of fact defense as applied to incapacity cases under Article 120(b)(3), Appellant's mistake of fact defense was illogical and unreasonable.

Appellant asserted in his false, self-serving version of events that (1) AH invited him to have sexual contact by saying, "Show me," after he confirmed that she had a nice body; and (2) AH took off her pants and underwear to engage in sexual activity with Appellant. (App. Br. at 15). But AH explicitly stated to him that she was not interested in a sexual relationship with him. Rather than respect her explicit wishes that she explained to him when she was sober, he waited until she was falling over drunk to try to engage in a sexual relationship with her. Then he remained silent about the sexual encounter the next morning – an expression of a guilty mind. Had AH truly consented to a sexual encounter with him, would he not be excited to discuss the monumental change in their years' long friendship when she woke up the next morning? Instead, he waited one week to even broach the topic of oral sex with her, and when he did, she was "shocked." A trier of fact could reasonably interpret this evidence as indicating AH would not have consented or behaved in the manner, and the facts that raise the defense likely never happened.

AH testified that she would not have consented to any sexual interaction with Appellant had she been capable of doing so. This fact underscores that their relationship was platonic – not sexual. Over the course of years from 2018 until 2021, AH rebuffed Appellant and clearly stated she was not romantically interested in him. It was unreasonable for Appellant to think their relationship would suddenly turn sexual on 21 May 2021. AH admitted that she did not recall anything after talking with Appellant while sitting on the kitchen floor drinking. She agreed that she often blacked out when drinking. But she was steadfast that she would not have agreed to a sexual encounter with Appellant even when drinking. Appellant wanted a romantic relationship with AH, but she did not reciprocate those desires, repeatedly rejecting him. (JA at 11). She made it clear she just wanted to be friends. (Id). In fact, a few years prior to Appellant's crime, AH broke off the friendship with him for a couple of months when he expressed his romantic interest in her, and she told him it was "never going to happen." (JA at 11-12, 25, 42). A factfinder could reasonably interpret this evidence as indicating AH would not have consented or behaved in the manner thus making Appellant's defense unreasonable.

When assessing legal sufficiency, "[t]he evidence necessary to support a verdict 'need not conclusively exclude every other reasonable hypothesis and need not negate all possibilities except guilt.'" United States v. Wilson, 182 F.3d 737,

742 (10th Cir. 1999). However, a rational trier of fact could determine, viewing these facts in the light most favorable to the prosecution, that the government proved Appellant knew or reasonably should have known of AH's inability to consent and Appellant's mistaken belief as to consent was unreasonable. The conviction is legally sufficient, and this Court should affirm the decision of the lower court.

III.

THE LOWER COURT PROPERLY INTERPRETED AND APPLIED THE AMENDED FACTUAL SUFFICIENCY STANDARD UNDER ARTICLE 66(d)(1)(B), UCMJ.

Standard of Review

"This Court reviews de novo a CCA's interpretation of a statute." Harvey, 2024 CAAF LEXIS 502 at *3 (citing Kohlbek, 78 M.J. at 330-331).

Law and Analysis

Independent of its authority in Article 67(c)(1)(C), this Court still can review AFCCA's factually sufficiency review to ensure it was procedurally correct. 10 U.S.C. § 867(c)(1)(A). AFCCA properly interpreted its authority to conduct factual sufficiency review under Article 66(d) because it aligned with this Court's interpretation in Harvey. 2024 CAAF LEXIS 502, *12. This Court decided that to set aside a conviction, a "CCA must decide that the evidence, *as the CCA has weighed it*, does not prove that the appellant is guilty beyond a reasonable doubt."

Id. (emphasis in the original). When weighing the evidence, a CCA must give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence." 10 U.S.C. § 866(d)(1)(B)(ii)(I). Then a "CCA must be clearly convinced of the correctness of this decision." Harvey, 2024 CAAF LEXIS 502 at *12. If a CCA, "is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding." 10 U.S.C. § 866(d)(1)(B)(iii).

AFCCA's interpretation of Article 66(d) aligns with this Court's interpretation in Harvey in four significant ways. First, AFCCA understood that it had the authority to defer to the court-martial because the military judge saw and heard the witnesses and other evidence – this Court agreed that a CCA had such deference. Second, when AFCCA used lay definitions, not legal terms of art, to interpret "clearly convinced," its decision was the same as this Court's interpretation of the phrase. Third, like this Court, AFCCA decided that a finding is "against the weight of the evidence" when the evidence fails to establish guilt beyond a reasonable doubt. And fourth, AFCCA and this Court agree that to set aside a guilty finding, a CCA must be clearly convinced that the evidence does not support a conviction beyond a reasonable doubt. AFCCA properly interpreted and applied the amended factual sufficiency standard under Article 66(d)(1)(B).

A. AFCCA's interpretation of appropriate deference aligns with this Court's interpretation in Harvey.

AFCCA understood that it could choose the level of deference it gave to the court-martial under Article 66(d)(1)(B)(i) because the court-martial "saw and heard the witnesses and other evidence." (JA at 193). AFCCA cited the NMCCA's decision in United States v. Harvey, 83 M.J. 685 (N.M. Ct. Crim. 2023), noting, "Our Navy-Marine Corps counterparts concluded that 'appropriate deference' is a more deferential standard than 'recognizing,' but not one which deprives the CCA of the power to determine the credibility of witnesses." Then AFCCA immediately stated, "We broadly agree, with the additional observation that the significance of the credibility of particular witnesses or testimony will vary depending on the circumstances of the case." (JA at 193-194).

Appellant argues that "AFCCA erroneously interpreted the language 'appropriate deference' in Article 66(d)(1)(B), UCMJ, to be a 'more deferential standard' in comparison to the old factual sufficiency standard under the previous Article 66, UCMJ." (App. Br. at 27). AFCCA did not wholesale adopt the NMCCA's decision that "'appropriate deference' is a more deferential standard than 'recognizing,' but not one which deprives the CCA of the power to determine the credibility of witnesses." (JA at 194). Instead, AFCCA adopted only part of NMCCA's statement. AFCCA said they "broadly agreed[ed] with the additional observation that the significance of the credibility of particular witnesses or

testimony will vary depending on the circumstances of the case." (JA at 193-194). Had they agreed with the "more deferential standard" then they would have agreed with the statement in its entirety rather than "broadly."

Even if AFCCA's decision is read to say that the new Article 66(d) review is more deferential to the trial court, that interpretation is still accurate and does not conflict with this Court's precedent. This Court, in Harvey, never said the new standard was more or less deferential to the court-martial. Instead, this Court decided "that the degree of deference will depend on the nature of the evidence at issue" and any deference the CCA gave to the trial court would be reviewed by this Court for an abuse of discretion. Harvey, 2024 CAAF LEXIS 502 at *7-8. This Court followed with examples to illustrate this idea, but at no point did this Court dictate that a court-martial must be given deference for having heard witness testimony, while documentary evidence must receive less deference. The Court used the term "might" to indicate that the "appropriate deference" is a case-by-case endeavor.

Appellant states that "AFCCA believes it is not completely deprived of 'the power to determine the credibility of witnesses,' but it is silent as to whether it can determine the credibility of 'other evidence' offered at trial." (App. Br. at 27). But AFCCA was not silent on the other evidence presented at trial, and the court made a credibility determination about other evidence. AFCCA reviewed "other

evidence" that was not witness testimony – Appellant's recorded statements. Appellant did not testify; thus, he was not a witness. AFCCA stated the recordings were available to them "in the same form" that was provided to the court-martial, meaning they did not need to defer to the court-martial's interpretation of the evidence. Then AFCCA identified the recordings as the "critical evidence" in this case. (JA at 194). AFCCA made a credibility determination about the recordings by assigning them value. Thus, the court understood and acted upon its ability to make credibility determinations about "other evidence."

Appellant claims that AFCCA was unclear on whether they would have given the military judge less deference if they believed they could do so. (App. Br. at 28). By AFCCA making their own credibility determination on Appellant's recorded statements and labelling them "vital," the lower court demonstrated that they need not defer to the court-martial when reviewing other evidence. AFCCA made a point of explaining the recordings were provided to them in the same form as the court-martial. Thus, the court understood they could make an independent assessment of the evidence, and it was not beholden to the court-martial's decision. AFCCA was more deferential to the court-martial for AH's testimony. But even this Court in Harvey stated such deference was appropriate considering the appellate court would not be able to see the witness' demeanor during testimony. Harvey, 2024 CAAF LEXIS 502 at*8. AFCCA understood they could give the

court-martial varying levels of deference – more and less deference than the previous Article 66(d) standard – and the court exercised that authority. AFCCA's interpretation of appropriate deference aligns with this Court's interpretation in Harvey; thus, AFCCA properly interpreted its authority under Article 66(d)(1)(B)(ii).

B. AFCCA used lay definitions, not legal terms of art, to interpret "clearly convinced," thus aligning with this Court's interpretation of the phrase.

AFCCA reiterated the new legal standard for factual sufficiency review: "Having weighed the evidence, the ultimate statutory test for factual insufficiency is whether we are 'clearly convinced that the finding of guilty was against the weight of the evidence.'" (JA at 194) (citing 10 U.S.C. § 866(d)(1)(B)(iii)) (2024 MCM)). AFCCA stated, "We agree with our CCA counterparts to the extent that Congress intended this new statutory standard to 'make[ ] it more difficult for [an appellant] to prevail on appeal.'" (JA at 194) (citing United States v. Scott, 83 M.J. 780 (A. Ct. Crim. App. 2023); *see also* Harvey, 83 M.J. at 693 ("[T]his [c]ourt will weigh the evidence in a deferential manner to the result at trial.")).

AFCCA interpreted "clearly convinced" in the same way as this Court, even though they did not use the exact same terms. AFCCA interpreted "clearly convinced" using the plain language of the words, and specifically stated they were not using a legal term of art. (JA at 194); Robinson, 519 U.S. at 340 (The plain language controls when the statutory scheme is coherent and consistent.).

Although AFCCA did not lay out their analysis, this Court can use the plain language definitions from a lay dictionary to understand the plain meaning in this case. "Clearly" means "in a clear manner," and "clear" means "free from obscurity or ambiguity, easily understood." Clear, MERRIAM WEBSTERS DICTIONARY (2024 online ed.); Clearly, MERRIAM WEBSTERS DICTIONARY (2024 online ed.). "Convinced," as the past tense of convince, means to have been brought "(as by argument) to belief, consent, or a course of action." Convince, MERRIAM WEBSTERS DICTIONARY (2024 online ed.). Putting the definitions together, "clearly convinced" means being brought to a belief in a manner free from obscurity or ambiguity.

This Court decided that "clearly convinced" meant the CCA needed to be in a "state of confidence." Harvey, 2024 CAAF LEXIS 502 at *11. The relevant lay definition of "state" means "mode or condition of being" and "confidence" means "the quality or state of being certain." State, MERRIAM WEBSTERS DICTIONARY (2024 online ed.); Confidence, MERRIAM WEBSTERS DICTIONARY (2024 online ed.). Putting the two definitions together, "state of confidence" means a mode of being certain. Essentially both courts interpreted "clearly convinced" to mean that a CCA must be certain "that the finding of guilty was against the weight of the evidence." 10 U.S.C. § 866(d)(1)(B)(iii). This Court should find that AFCCA did not misinterpret the phrase "clearly convinced" to mean something more than a

"state of confidence." This Court should find the two interpretations are synonymous. AFCCA's interpretation of "clearly convinced" was correct and aligned with this Court's precedent in Harvey.

C. Like this Court, AFCCA decided that a finding is "against the weight of the evidence" when the evidence fails to establish guilt beyond a reasonable doubt.

AFCCA interpreted "against the weight of the evidence" as this Court did in Harvey. AFCCA decided that "a finding of guilty would be against the weight of the evidence if the legal and competent evidence admitted at trial failed to establish the accused's guilt beyond a reasonable doubt." (JA at 195). AFCCA determined that Congress was not overlaying a clear and convincing standard on top of the plain language of the statute and a beyond a reasonable doubt standard needed to be used on appeal. (JA at 194). This understanding aligns with this Court's decision in Harvey, that the "quantum of proof" required was not changed from beyond a reasonable doubt to a "clear and convincing evidence" standard. Harvey, 2024 CAAF LEXIS 502 at *11-12. Both courts agree that Congress intended for a beyond a reasonable doubt standard to be used as the appropriate quantum of proof for factual sufficiency review on appeal. This Court should find that AFCCA's interpretation of "against the weight of the evidence" was correct and aligned with this Court's precedent in Harvey.

D. AFCCA and this Court agree that to set aside a guilty finding, a CCA must be clearly convinced that the evidence does not support a conviction beyond a reasonable doubt.

AFCCA and this Court interpreted the new factual sufficiency standard in the same way. "This Court decided that for a CCA to be 'clearly convinced that the finding of guilty was against the weight of the evidence,' two requirements must be met." Harvey, 2024 CAAF LEXIS 502, *12. "First, the CCA must decide that the evidence, as the CCA has weighed it, does not prove that the appellant is guilty beyond a reasonable doubt." Id. "Second, the CCA must be clearly convinced of the correctness of this decision." Id. AFCCA also decided two criteria must be met. First, "the weight of the evidence does not support the conviction beyond a reasonable doubt", and second that the court "must be clearly convinced this is the case." (JA at 195). Because AFCCA interpreted the statute like this Court did, its interpretation was not erroneous.

E. Even assuming this Court can review AFCCA's substantive factual sufficiency review for an abuse of discretion, AFCCA did not abuse its discretion.

Even if this Court could act on a CCA's determination of factual *sufficiency*, AFCCA did not abuse its discretion when applying the new factual sufficiency review. The record supports AFCCA's findings of fact; the court was not influenced by an erroneous view of the law; and AFCCA's decision to find

Appellant's conviction factually sufficient was within the range of choices reasonably arising from the applicable facts and the law.

After addressing AFCCA's statutory interpretation of Article 66(d), Appellant turns to the substance of the lower court's decision and requests a de novo review. (App. Br. at 29). But assuming this Court can review the substance of AFCCA's factual sufficiency decision, it should be reviewed for an abuse of discretion, not de novo. 10 U.S.C. § 866(d)(1)(C); 10 U.S.C. § 867(c)(4). CCAs have been given "broad discretion" in conducting their Article 66 reviews, and those determinations are generally reviewed for an abuse of discretion. United States v. Guinn, 81 M.J. 195, 199 (C.A.A.F. 2021) (discussing a CCA's discretionary review authority under Article 66(c) – now Article 66(d)). This Court does not review Article 66 determinations de novo because to do so this Court would need to make decisions as a matter of fact. Thus, this Court would be operating outside the scope of Article 67(c)(4) that only allows this Court to act as a matter of law. Using the abuse of discretion standard, to overturn AFCCA's substantive factual sufficiency decision, this Court would need to find that AFCCA's findings of fact were clearly erroneous, the court's decision was influenced by an erroneous view of the law, or the CCA's decision on the issue at hand was outside the range of choices reasonably arising from the applicable facts and the law. *See* Behunin, 83 M.J. at 162.

Appellant claims, "The lower court's opinion brushed over the fact that AH lied on the stand during the trial." (App. Br. at 29). The court did not. AFCCA reiterated the correct legal standard under Article 66(d)(1)(B)(ii)(I) for reviewing witness credibility: "[W]e have given appropriate deference to the fact that the military judge saw and heard the witness testimony and other evidence." (JA at 194). Then they noted the credibility issue with AH's testimony in a lengthy footnote. (JA at 194). The court explained AH's testimony was "less vital" because she did not remember the sexual assault and her testimony was not "in substantial conflict with other evidence." (JA at 194). AFCCA's credibility determination was not arbitrary, capricious, or unreasonable and it was within the range of possibilities available to them. AFCCA noted the credibility issue, but ultimately explained the "critical proof" in this case was Appellant's recorded statements. (JA at 194). This was within the realm of choices arising from the facts, and AFCCA did not abuse its discretion.

Next Appellant claims the court "erred because it did not explain" the deference it gave to the trial court, the conclusions it drew, or its own independent review of the evidence. (App. Br. at 29). But silence or lack of explanation by a CCA does not constitute error or an abuse of discretion warranting the vacation of a CCA's decision. This Court starts with the presumption that the "CCAs are presumed to know the law and follow it." United States v. Chin, 75 M.J. 220, 223

(C.A.A.F. 2016). Thus, CCAs need not address each issue raised by an appellant and are not required to state their reasoning for their decisions. United States v. Reed, 54 M.J. 37, 42 (C.A.A.F. 2000). This Court decided in 1987 that CCAs are not required to explain their decisions at length, in fact CCAs need only note that they considered the assignments of error and found them to be without merit. United States v. Matias, 25 M.J. 356, 361 (CMA 1987), *cert. denied*, 485 U.S. 968 (1988). How much to write in an opinion is left to the judges and their court rules. United States v. Clifton, 35 M.J. 79, 82 (C.M.A. 1992). *See also* Flores, 84 M.J. at 282 ("This Court's precedents do not require a CCA to explain its reasoning when assessing the reasonableness of a sentence."); United States v. Winckelmann, 73 M.J. 11, 16 (C.A.A.F. 2013) ("The [CCA] did not detail its analysis in this case; nor was it obligated to do so."). Although Appellant would prefer a longer opinion, AFCCA was within its discretion to write the opinion in the manner it chose. Silence or lack of explanation by a lower court does not constitute error or an abuse of discretion, and this Court should decline to overturn AFCCA's decision on these grounds.

AFCCA properly interpreted its authority to conduct factual sufficiency review under Article 66(d) because it aligned with this Court's interpretation in Harvey. 2024 CAAF LEXIS 502 at *12. AFCCA understood that it had the authority to decide the appropriate deference to give to a court-martial, and

AFCCA understood that to set aside a guilty finding, a CCA must be clearly convinced that the evidence does not support a conviction beyond a reasonable doubt. Thus, this Court should find that AFCCA properly interpreted and applied the amended factual sufficiency standard under Article 66(d)(1)(B), UCMJ.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and transmitted by electronic means with the consent of the counsel being served via email to megan.crouch.1@us.af.mil on 13 January 2025.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 12,523 words. And this brief complies with the typeface and type style requirements of Rule 37.

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