

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,	)	SUPPLEMENT TO
<i>Appellee,</i>	)	PETITION FOR GRANT
	)	OF REVIEW
v.	)	
	)	Crim. App. Dkt. No. ACM 40746
TYLIR D. CUNNINGHAM,	)	
Airman Basic (E-1),	)	USCA Dkt. No. 26-0220/AF
United States Air Force,	)	
<i>Appellant.</i>	)	July 8, 2026

**TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR
THE ARMED FORCES:**

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ISSUES PRESENTED

- I. Did the Air Force Court err in its application of the factual sufficiency standard by giving undue deference to the trial court's findings despite significant evidence that raised a reasonable doubt?**
- II. Did the special trial counsel commit prosecutorial misconduct during closing argument by arguing that it was "irrelevant" whether the complaining witness was awake or asleep, thereby conflating distinct theories of liability and eliminating a mistake-of-fact-as-to-consent defense?**

STATEMENT OF STATUTORY JURISDICTION

Airman Basic (AB) Tylir D. Cunningham's approved sentence includes a dishonorable discharge. Accordingly, the Air Force Court of Criminal Appeals (Air Force Court) had jurisdiction pursuant to Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3). AB Cunningham now invokes this Court's Article 67, UCMJ, jurisdiction.

STATEMENT OF THE CASE

A panel of members with enlisted representation sitting as a general court-martial convicted AB Tylir D. Cunningham, United States Air Force, pursuant to his pleas, of one specification of absenting himself from his place of duty without leave and one specification of dereliction of duty, in violation of Articles 86 and 92, UCMJ, 10 U.S.C. § 886, 892. Contrary to his plea, a panel of members with enlisted representation convicted AB Cunningham of one specification of sexual assault without consent, in violation of Article 120(b)(2)(A), UCMJ, 10 U.S.C.

§920(b)(2)(A). The military judge sentenced him to thirty months' confinement and a dishonorable discharge. The Convening Authority took no action on the findings or sentence.

On April 24, 2026, the lower court affirmed the findings and sentence. AB Cunningham timely petitioned this Court for review on June 18, 2026.

STATEMENT OF FACTS

A. Airman Basic Cunningham and AP met in technical school and began spending more time together.

When AB Cunningham met AP in early 2023, they were both in technical school and shared mutual friends. R. at 754-55. One friend they did not have in common was AP's boyfriend, ES. R. at 820-21. Despite AP's dating relationship with ES, AP and AB Cunningham soon began spending time together alone, getting fast food, and running errands as a pair. R. at 755-56.

One night, AP texted AB Cunningham around 2200 asking to get food together. R. at 759. She also asked if she could spend the night in his dorm room. R. at 760. AB Cunningham agreed to both requests. R. at 808-09. AB Cunningham then picked AP up from her friend's dorm room, and the two got fast food and chatted in the car. R. at 760-61.

During the conversation, AP initiated a discussion about sex. Specifically, without AB Cunningham having brought up the topic, AP said something like "sex isn't going to happen because I didn't shave." R. at 811. AB Cunningham was not

angry about this comment, nor did he try to persuade her otherwise. R. at 811-12.

They then went back to AB Cunningham's dorm room. R. at 760-62.

B. AP initiated consensual sex with AB Cunningham.

After eating their fast food in AB Cunningham's room, the two laid in AB Cunningham's twin bed, watched Netflix, and cuddled under the covers. R. at 762, 766. They began making out, eventually taking off their clothes and "touching each other." R. at 763-65.

AP got on top of him and began "grinding into him." R. at 815. At that point, they were both naked. R. at 764-65. AP initiated the transition to sex, asking AB Cunningham if he had a condom, which he retrieved and put on. R. at 765. In Court, AP laughed about the condom conversation. R. at 764. She said she was "adamant" about the condom, but then when asked to clarify what "adamant" meant, AP stated that she was not sure if she explicitly told AB Cunningham that he had to wear a condom, but that her "body language at least was kind of like you need a condom to sleep with me." R. at 764. Nonetheless, AP insisted that her "body language" made it clear to AB Cunningham that "there was no sex without a condom." R. at 764. AP stated that she "[a]bsolutely" would not have had sex with AB Cunningham without a condom. R. at 764-65.

AP was on top of AB Cunningham for “a large amount of the sex.” R. at 765. There was not much talking during the sex. R. at 817. AB Cunningham did not ejaculate. R. at 766.

After sex, AP put her underwear and shirt on, and they slept in AB Cunningham’s twin bed together. R. at 765-66. AP was on her side in bed, facing away from AB Cunningham and out into the room towards the desk and window. R. at 767. They were spooning with her back and buttocks up against AB Cunningham’s stomach and chest. *Id.*

C. AP testified that she pretended to be asleep during the morning sexual encounter.

AP testified that she woke up at some point that same morning to AB Cunningham beginning to have sex with her. R. at 768. Although she gave several versions of when she awoke, she testified that once she realized AB Cunningham was repositioning her to have sex, she closed her eyes and pretended to be asleep. R. at 828. She explained that she did not say anything because she “froze” and felt it would be easier if she just “let it happen.” R. at 774, 835.

AP testified that the sex lasted for ten to fifteen minutes, during which AB Cunningham was on his knees and she was on her side on the edge of the bed. R. at 769, 828-30. She stated that he was not wearing a condom and that he ejaculated on her leg. R. at 770. Despite testifying that her eyes were closed for the “majority of the time,” she was aware that AB Cunningham got off the bed, went to the

bathroom, returned with toilet paper, and cleaned her leg before resuming his position in the bed. R. at 771, 828.

D. AP's testimony was undermined by numerous inconsistencies and contradictory evidence.

AP's account of the morning was inconsistent. At trial, she testified that she woke up to the pain of AB Cunningham attempting to penetrate her. R. at 768. However, she also testified that she woke up before any penetration, when she felt AB Cunningham repositioning her. R. at 828. On cross-examination, when AP admitted that she had opened her eyes at some point that morning, had looked around the room, and then closed her eyes and pretended to be asleep when she felt AB Cunningham repositioning her prior to any penetration. R. at 828. Her eyes were "closed for a majority of the time" but she could not remember if they were closed "for the whole thing." R. at 828. Furthermore, she told her friend, Airman JC, a third version of events: that she woke up to AB Cunningham pulling down her underwear. R. at 908.

Objective evidence also contradicted AP's testimony. Although she claimed AB Cunningham ejaculated on her leg (R. at 770), a sexual assault forensic exam conducted that same day returned a negative result for his semen on her thigh. R. at 1020. That exam did, however, produce a positive test for the DNA of a different, unidentified male on her thigh and in her vagina. *Id.* AP gave no explanation for how she could tell AB Cunningham was not wearing a condom and could tell

where he ejaculated, while at the same time claiming at trial that her eyes were closed throughout the encounter.

E. AP and AB Cunningham “woke up together” and got breakfast together.

AP testified that she said nothing and then pretended to wake up about five to ten minutes later. R. at 773. They “woke up like normal,” and AB Cunningham asked AP how she slept, and AP told him she slept “[o]kay.” R. at 773. After about thirty minutes of laying in bed together and scrolling on their phones, they decided to get breakfast. R. at 775, 840. As they ate breakfast together, they had “casual chitchat,” and AB Cunningham brought AP back to her room. R. at 776, 844.

F. AP reported that she was sexually assaulted and had a sexual assault forensic exam, but told the nurse, her friends, and her boyfriend different versions of events.

When back at her room, AP texted AB Cunningham that she was going to sleep. R. at 779-80. She then took a shower and decided to call the “[Sexual Assault Prevention Response (SAPR)] hotline.” *Id.*

AP reported to SAPR that AB Cunningham had sexually assaulted her, but she did not tell them that they had consensual sex only a few hours before. R. at 782. She had a sexual assault forensic exam (SAFE) done at the hospital. R. at 919-21. She told the nurse that she had been sexually assaulted but did not tell the nurse that she had consensual sex with AB Cunningham hours before. R. at 819-20; Pros. Ex. 4 at 5. Instead, she told the nurse that AB Cunningham had “asked

her to stay in his dorm with him,” that they were watching a movie together when she fell asleep, and that she woke up and he was “having sex with her.” Pros. Ex. 4 at 5, R. at 961. She stated that the sex lasted ten to fifteen minutes, and then “he finished, got up, and went to the bathroom.” Pros. Ex. 4 at 5, R. at 961. She then “pretended to be asleep” and then “stretched and woke up.” Pros. Ex. 4 at 5, R. at 961. Lastly, AP told the nurse she left AB Cunningham’s room at about 1000 and went to her own room to shower. Pros. Ex. 4 at 5.

AP had two friends accompany her to SAPR and to the SAFE that day—Airman JC and Airman BJ. She told both that AB Cunningham had sexually assaulted her, but she did not tell them that they had spent the night prior together nor that they had consensual sex just hours before. R. at 819. She did not tell her friends that she and AB Cunningham had breakfast together the next morning. R. at 842. Instead, she told them that she had accidentally fallen asleep at AB Cunningham’s room. Though, at trial, AP had always planned to sleep in AB Cunningham’s room; it was not an accident. R. at 822. She then told her boyfriend, ES, that AB Cunningham had sexually assaulted her, but she did not tell ES about the consensual sex with AB Cunningham. R. at 820, 850-53; Def. Ex. A. ES found this out for the first time when the defense interviewed him just before trial. *Id.* During her interview with the Office of Special Investigations (OSI), AP did not tell investigators about ES. R. at 820.

After she made a report to OSI and prior to the trial, AP discussed her own future testimony and the testimony of at least four witnesses with those witnesses. R. at 859-63. She told her boyfriend not to speak to the defense, R. at 850-53; Def. Ex. A., made sure that her story was consistent with Airman JC's story, R. at 860, 910-11; and spoke with Airman JM about his interview with the defense. *Id.* She declined to interview with the defense before trial. R. at 848-49.

G. AP lied to AB Cunningham and told him she was asleep during the morning sex, and he apologized because he believed she was awake, which she was.

That night, AP and AB Cunningham were planning to see each other again, but AP told AB Cunningham she was too tired. R. at 847. The two talked about how the sex they had was awkward. *Id.* AP sent AB Cunningham a message telling him that she had been asleep when they had sex that morning. R. at 845. AB Cunningham told AP that he thought she was awake and that it was a big misunderstanding. Pros. Ex. 1; R. at 845-46. She did not tell him that she had been pretending to be asleep and was, in fact, awake. R. at 846.

At trial, the military judge gave the reasonable mistake of fact as to consent instruction. R. at 1104. Additional facts are incorporated in the argument below.

ARGUMENT

This Court should grant review because the Air Force Court committed two errors that undermined AB Cunningham's right to a fair trial and complete

appellate review. The lower court’s factual sufficiency review of AB Cunningham’s case also reveals its misunderstanding of the new Article 66, UCMJ, standard, which this Court should correct.

First, the Air Force Court erred by failing to conduct a proper, independent factual sufficiency review under Article 66, UCMJ. Rather than engaging in the “new weighing of the evidence” mandated by this Court in *United States v. Harvey*, 85 M.J. 127 (C.A.A.F. 2024), the lower court gave undue and absolute deference to the trial court’s findings. By ignoring the context of prior consensual sex just hours earlier, failing to scrutinize the complaining witness’s highly inconsistent testimony, and mischaracterizing AB Cunningham’s post-incident text messages as an admission of guilt, the court failed to properly evaluate the objective evidence supporting his honest and reasonable mistake of fact.

Second, the Air Force Court erred in finding no prejudicial prosecutorial misconduct regarding the special trial counsel’s (STC’s) closing argument. The STC explicitly misstated the law by telling the panel it was “irrelevant” whether the complaining witness was asleep or awake. This improper argument conflated distinct legal theories—sexual assault “without consent” and sexual assault of a “sleeping person”—in direct violation of *United States v. Mendoza*, 85 M.J. 213 (C.A.A.F. 2024). This misstatement impermissibly gutted AB Cunningham’s

mistake-of-fact defense and improperly relieved the Government of its burden of proof.

Because the lower court misapplied the factual sufficiency standard and excused constitutional-level prosecutorial misconduct, this Court should grant review to correct these errors and set aside the conviction.

I. The Air Force Court erred in its application of the factual sufficiency standard by giving undue deference to the trial court’s findings in light of significant evidence that should have raised a reasonable doubt.

The Air Force Court gave undue deference to the factfinder’s credibility determinations and failed to conduct a proper, independent review under Article 66, UCMJ. When weighing the objective evidence, including the prior sexual encounter just hours before, AP’s admitted silence, her inconsistent statements, and AB Cunningham’s post-incident conduct, a reasonable doubt remains as to whether AB Cunningham lacked an honest and reasonable belief that AP consented to sex just hours after consensual sex. By simply deferring its Article 66, UCMJ, duty to the factfinder, the Air Force Court shirked its responsibility to “conduct a new weighing of the evidence,” that this Court held in *Harvey* is mandated by Art. 66(B)(ii), UCMJ. 85 M.J. at 131 (analyzing Art. 66(B)(ii), UCMJ, 10 U.S.C. § 866(B)(ii)). This Court should grant review because the lower court’s misapplication of the factual sufficiency standard undermines AB Cunningham’s

statutory rights and sets a harmful precedent that effectively nullifies the mandate of Article 66(B)(ii), UCMJ, establishing a clear need for this Court's intervention.

A. Standards of Review.

The standard for granting review of an issue that an accused raises before this Court is good cause shown. Art. 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

This Court reviews a court of criminal appeals' (CCA's) factual sufficiency review for correct application of legal principles. *Harvey*, 85 M.J. at 129.

B. Article 66, UCMJ, mandates a new weighing of the evidence in cases where the Government's case was undermined by objective evidence and significant inconsistencies.

Under Article 66, UCMJ, CCAs are required to weigh the evidence anew, judge the credibility of witnesses, and determine controverted questions of fact. *See Harvey*, 85 M.J. at 131 (holding that Article 66(B)(ii), UCMJ, "directs the CCA to conduct a new weighing of the evidence, giving appropriate deference to the court-martial"). While the CCA must recognize that the trial court saw and heard the witnesses, this deference is not absolute. As this Court reasoned in *Harvey*, the Air Force Court must not simply default to the factfinder's conclusions when objective evidence and significant inconsistencies undermine the prosecution's case. *Id.* ("Subsection (B)(ii) [of Article 66, UCMJ] directs the [Court of Criminal Appeals] to conduct a new weighing of the evidence, giving appropriate deference to the court-martial.")

C. This Court should grant review to provide critical guidance to the CCAs on the limits of factual deference when the Government relies on an incredible, highly inconsistent witness to disprove a mistake-of-fact defense.

This Court should grant review of this case to clarify the boundaries of Article 66, UCMJ, deference and to provide necessary guidance to the CCAs. Currently, the lower courts require instruction on how to properly conduct a “new weighing of the evidence” when a conviction rests entirely on the credibility of a sole complaining witness whose testimony is riddled with inconsistencies. By affording absolute deference to the factfinder’s credibility determinations in such circumstances, the Air Force Court effectively rubber-stamped the conviction. This practice negates the independent review mandated by this Court in *Harvey* and lowers the Government’s burden of proof.

Once the defense raises a mistake of fact as to consent, the Government bears the heavy burden of disproving that defense beyond a reasonable doubt. R.C.M. 916(b)(1); *See, e.g., United States v. McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2019). To protect the integrity of this burden, this Court should establish a clear standard: when the Government’s ability to disprove a mistake of fact rests on a single witness who provides multiple conflicting versions of the underlying event, the CCA must apply heightened factual scrutiny. In these instances, Article 66, UCMJ, deference cannot be absolute. The CCA must independently verify that

the evidence is sufficient to overcome the defense, rather than defaulting to the trial court's baseline credibility findings.

Under this heightened scrutiny standard, AB Cunningham's conviction cannot stand. The Air Force Court failed to properly hold the Government to its burden because it gave blind deference to AP's constantly shifting narrative. As detailed below, AP provided at least three different versions of the morning in question and openly admitted to lying to both AB Cunningham and her friends. The Government simply cannot disprove an honest and reasonable mistake of fact beyond a reasonable doubt using an incredible witness whose testimony fundamentally contradicts the objective circumstances, including the prior consensual sex and the morning-after messages. Under a proper, independent weighing of the evidence, the Government failed to meet its burden, and the conviction must be set aside.

D. The Air Force Court failed to properly weigh the context of the prior consensual sex.

The Air Force Court abused its discretion when it failed to analyze this case as a "withdrawn consent" case. This Court should grant review to provide necessary guidance to the CCAs on how to properly analyze cases under different legal theories—specifically, the critical distinction in evaluating a mistake-of-fact defense when there is "withdrawn consent" versus when there is an initial lack of consent. Because the Air Force Court failed to apply the correct analytical

framework and failed to properly weigh the immediate context of the encounter, it abused its discretion. It is undisputed that AB Cunningham and AP engaged in consensual sex just hours before the alleged assault. R. at 763-65. This prior, proximate consensual interaction is critical objective evidence, which the Air Force Court ignored. It establishes a strong, reasonable foundation for AB Cunningham's honest belief that subsequent intimate contact later that same day was welcome and consensual. Rather than recognize how critical the initial sex act was to AB Cunningham's reasonable mistake of fact, the Air Force Court instead failed to weigh it at all. Appendix B at *7-10 (failing to discuss the timing of consensual sex in its "Analysis" section in relation to the alleged nonconsensual sex, except for as it concerns the use of a condom).

The morning sex was essentially a continuation of consensual sex that began just a few hours prior. Immediately following the first sex act, AB Cunningham and AP went to bed together in their underwear, spooning. R. at 767-69 (showing AP testified that the two fell asleep "spooning" after sex and were in the same position the next morning). Therefore, the Air Force Court should have analyzed AB Cunningham's case in the context of a withdrawn consent case, as it did in *United States v. Hunt*, No. ACM 40563, 2025 CCA LEXIS 215, at *20-21 (A.F. Ct. Crim. App. May 16, 2025), *certified for rev.*, 86 M.J. 324 (C.A.A.F. Sep. 2, 2025) (No. 25-0257).

In that case, the Air Force Court determined that the appellant held an honest and reasonable mistake of fact as to consent. It came to that conclusion by finding that “[s]ignificant inconsistencies in or patent refusals to clarify details on revocation or unwanted sexual acts seriously undercut the Government’s burden to prove this case beyond a reasonable doubt.” *Id.* at *14. The court emphasized that, particularly in withdrawn consent cases, there is a need “for clarity and precision.” *Id.* Yet, in AB Cunningham’s case, the Air Force Court ignored the close-in-time consensual sex, the circumstances of the two falling asleep in the same spooning position, and the complaining witness’s wildly inconsistent story. By failing to analyze this case through the lens of withdrawn consent, the Air Force Court ignored the heightened need for ‘clarity and precision’ regarding AP’s revocation, a standard the same court established in *Hunt*.

The court, instead, gave complete deference to AP’s statements that she “did not move” at all during the ten to fifteen minutes of sex, and therefore, it concluded that “a reasonable person in [AB Cunningham]’s position “would not have been able to discern if there was consent.” Appendix B at *14; R. at 829-30. In determining that AB Cunningham “did not have an honest belief that the sexual acts were consensual” the Air Force Court, gave complete deference to AP’s testimony that when AP *did wake up in the morning during the sex act* “it was *likely* [AB Cunningham] too could not see her face.” *Id.* at *8 (emphasis added).

The court relied heavily on its conclusion that “it was likely” AB Cunningham could not see AP’s face to find that AB Cunningham would not have known AP was awake. This makes little sense. AP, by her own testimony, was awake and could not remember if her eyes were constantly closed. R. at 828. The conclusion that the court made, that it was “likely” AB Cunningham could not see AP’s face when they both woke up that morning, is not nearly a high enough degree of certainty to sustain a conviction beyond a reasonable doubt under Article 66, UCMJ.

E. The Air Force Court erred by conflating a condition of consent with consent itself.

The Government’s case heavily relied on AP’s subjective state of mind, but the mistake-of-fact defense centers on *AB Cunningham’s* reasonable perception of the objective circumstances. *See, e.g., United States v. Rouse*, 78 M.J. 793, n.9 (A. Ct. Crim. App. 2019) (“Factors a court-martial may use to determine whether an accused had an honest and reasonable mistake of fact as to continued consent will vary based on the facts and circumstances of each case.”) The Air Force Court misapplied the mistake-of-fact analysis by concluding that the absence of a condom during the morning encounter automatically rendered AB Cunningham’s belief of consent unreasonable. Appendix B at *13-14. The court reasoned that because AP had required a condom for the first sexual act, AB Cunningham “was aware that the sexual acts without protection were not consensual.” *Id.* This was an

abuse of discretion because it improperly conflates a potential condition of consent (condom use) with consent to the sexual act itself, ignoring the totality of the circumstances that supported AB Cunningham's reasonable belief. Furthermore, AP's alleged insistence about condom use was not nearly as straightforward as the Air Force Court made it seem. In Court, AP laughed about the condom conversation. R. at 764. Initially, AP said she was "adamant" about the condom, but then when asked to clarify what "adamant" meant, AP stated that she was not sure if she explicitly told AB Cunningham that he had to wear a condom, but that her "body language at least was kind of like you need a condom to sleep with me." R. at 764. Nonetheless, AP insisted that AB Cunningham knew that "there was no sex without a condom" because her "body language," rather than her words, made it clear to him. R. at 764.

The central question in a mistake-of-fact defense is whether the accused reasonably believed the other person was consenting to the sexual contact at that moment. *See United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003) (focusing on the "totality of the circumstances at the time"). While AP's earlier insistence on a condom is one factor, it does not dispositively prove that AB Cunningham knew any future sexual act without one was nonconsensual, particularly when all other objective signals suggested continued consent. Just hours before, AP had initiated consensual sex. The two then fell asleep spooning and were in the same intimate

position in the morning. R. at 767-69. AP, by her own admission, was awake but remained silent and motionless as he initiated sex. R. at 769, 828-29. From AB Cunningham's perspective, every objective indicator—the prior intimacy, the shared bed, the spooning, and her lack of any verbal or physical resistance—pointed toward continued consent to the act of sex. The Air Force Court erred by isolating the condom issue and elevating it above all other objective evidence, effectively creating a strict liability standard where the absence of a previously-stated condition negates any possibility of a reasonable mistake. This misapplies the law and fails to properly weigh the totality of the circumstances.

F. The Air Force Court gave undue deference to AP, an incredible witness.

The Air Force Court afforded undue deference to AP's credibility, despite her admitted fabrications. AP told at least three different versions of the charged act. In one version, she testified that she woke up the next morning to AB Cunningham "trying to penetrate her." R. at 768. She opened her eyes when she woke up. R. at 828. AP testified that AB Cunningham also was able to see her face, but AP "[didn't] believe he saw" her eyes open. R. at 771. She testified at trial that her underwear was already down and pinpointed that the pain of AB Cunningham trying to put his penis into her vagina woke her up. R. at 768. In another version, AP told her friend, Airman JC, that she woke up to AB Cunningham pulling down her underwear. R. at 908. In a third version, AP testified on cross-examination that

she had opened her eyes at some point that morning, looked around the room, and closed her eyes and pretended to be asleep when she felt AB Cunningham repositioning her prior to any penetration. R. at 828. Her eyes were “closed for a majority of the time” but she could not remember if they were closed “for the whole thing” taking place. R. at 828. AP gave still another, alternate version at trial, when she testified that she did not say anything to AB Cunningham during the morning sex because she “[didn’t] think [she] really understood what was going on,” and she “froze.” R. at 774.

When a sole witness admits to lying about the incident to others and provides the trier of fact multiple versions of the same event, an appellate court conducting a factual sufficiency review must view the witness remaining testimony with intense scrutiny. This Court should grant review to remind the CCAs that Article 66, UCMJ, deference should be tailored to the facts of a case. And when, as here, the sole witness provides multiple versions of the same story, a CCA should not give deference to the court-martial.

Here, the Air Force Court minimized AP’s credibility issues and did not independently review the evidence for proof beyond a reasonable doubt. This requires review and reversal.

G. The Air Force Court mischaracterized AB Cunningham's messages as an admission of guilt.

Finally, the Air Force Court did not adequately consider AB Cunningham's actions immediately following the incident. The Air Force Court mischaracterized AB Cunningham's text messages, likening the messages to an admission that AB Cunningham "knew that he had acted without AP's consent" and that "the sexual acts without protection were not consensual." Appendix B at *8. In characterizing the messages as an admission of guilt, the court said it relied on "AP's claim." *Id.* The Air Force Court, rather than conducting a new weighing of evidence required under Article 66(B)(ii), UCMJ, fully adopted AP's version of events. It did this even though a plain reading of the messages contradicts such an interpretation.

While AP testified that she pretended to be asleep throughout the encounter, she told AB Cunningham a different story. R. at 768-69. She told AB Cunningham in the text messages that she was actually asleep during the sex and claimed, "[I] don't want this to be a big thing but [I] really did not like it especially without the use of protection as well." Pros. Ex. 1; R. at 833-34. AB Cunningham then responded, "I didn't think you were sleeping when I did it. So, yes, I understand I was dead wrong, especially since I didn't even use protection. I should have made sure you were up for one, and got consent before doing anything." *Id.* But AP never told him the truth—that she was actually awake. R. at 845-46. The apology from AB Cunningham was based on a lie, the same lie she repeated to friends and

her boyfriend. Much like the Government did at trial, the Air Force Court used this coerced apology to find that AB Cunningham admitted to assaulting her. R. at 1121. In reality, AB Cunningham's apology —after being told he had sex with someone who claimed to be asleep (but was, in fact, not) —is fundamentally irreconcilable with a sexual assailant. Rather, it is the exact behavior expected of a person who is operating under a genuine, reasonable belief that the preceding events were entirely consensual and then is genuinely apologetic when told otherwise. The Air Force Court abused its discretion by misapplying the standard of review mandated under Article 66, UCMJ, as described by this Court in *Harvey*, and failing to conduct a proper factual sufficiency review.

H. Conclusion.

The Air Force Court shirked its Article 66, UCMJ, duty by rubber-stamping the trial court's findings despite glaring deficiencies in the Government's case. The totality of the objective circumstances—prior consent, AP's silence, AP's admitted lies, and AB Cunningham's genuine apology in response to AP's lie—demands a finding of reasonable doubt based on mistake of fact. Because the Government failed to meet its burden to disprove this defense, the CAAF should grant review, correct the Air Force Court's misapplication of the factual sufficiency standard, and set aside the conviction.

II. The Air Force Court erred in finding no prejudicial prosecutorial misconduct when the special trial counsel conflated distinct legal theories during closing argument by stating it was “irrelevant” whether the complaining witness was asleep or awake, which eliminated the mistake of fact as to consent defense.

The special trial counsel committed prejudicial error by explicitly arguing to the panel that it was “irrelevant” whether AP was asleep or awake. This egregious misstatement of the law conflated the distinct legal theories of sexual assault “without consent” and sexual assault “of a sleeping person.” *See Mendoza*, 85 M.J. at 220 (“[W]e hold that [Article 120, UCMJ], subsection (b)(2)(A) and [Article 120, UCMJ], subsection (b)(3)(A) establish separate theories of liability.”; *United States v. Moore*, 86 M.J. 308 (C.A.A.F. 2026). Not only was this error, but it was also prejudicial because it gutted AB Cunningham’s mistake-of-fact defense. The Air Force Court erred in concluding this misconduct did not prejudice AB Cunningham.

A. Standards of Review.

The standard for granting review of an issue that an accused raises before this Court is good cause shown. Art. 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Whether a statement made during an argument on findings or sentencing is improper is a question of law that this Court reviews de novo. *United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014).

“Failure to object to improper argument before the military judge begins to instruct the members on findings shall constitute forfeiture of the objection.”

R.C.M. 919(c). When an objection is forfeited, this Court reviews the assertion of improper comment only for plain error. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019). Plain error has occurred when (1) there was an error, (2) the error was clear or obvious, and (3) the error caused material prejudice to a substantial right of the accused. *Id.* Under plain error review, the appellant generally has the burden of proving material prejudice. *Id.*

B. Sexual assault without consent and sexual assault on a sleeping person are two separate theories of liability, which both the Special Trial Counsel and the Air Force Court ignored.

Under the UCMJ, sexual assault committed “without consent” and sexual assault upon a person who is “asleep, unconscious, or otherwise unaware” are distinct legal theories with different elements, which implicate available defenses. *See Mendoza*, 85 M.J. at 220 (holding that the Government cannot “charge one offense under one factual theory and then argue a different offense and a different factual theory at trial” without violating an appellant’s constitutional rights, as “[d]oing so robs the defendant of his constitutional ‘right to know what offense and under what legal theory he will be tried and convicted.’” (quoting *United States v. Riggins*, 75 M.J. 78, 83 (C.A.A.F. 2016))). For a charge predicated on a lack of consent, the alleged victim must be capable of consenting (i.e., awake). *Mendoza*,

85 M.J. at 220. By blurring these two distinct theories, the Government lowered its burden of proof and sidestepped the specific elements required for the charged offense, a practice scrutinized anew by this Court in *United States v. Matti*. No. 25-0148, __M.J.__, 2026 CAAF LEXIS 189, at *30-31 (C.A.A.F. 2026) (re-explaining that “misstating the law” and “diverting members from the evidence” are forms of improper argument that “trial counsel must avoid, that defense counsel should consider objecting to, and that military judges ought to monitor”).

C. The special trial counsel misstated the law by telling members it was “irrelevant” whether the alleged victim was sleeping or awake, in violation of *Mendoza*.

“Misstating legal principles during argument is improper.” *Id.* at *30 (citing *United States v. Andrews*, No. NMCCA 201600208, 2017 CCA LEXIS 283, at *16 (N-M. Ct. Crim. App. Apr. 27, 2017)). During closing argument, the STC explicitly told the panel that it was “irrelevant” whether AP was asleep or awake during the encounter. R. at 1125. This is a direct and fatal misstatement of the law. *See Mendoza*, 85 M.J. 213. AP’s state of consciousness is the defining factual trigger for two entirely separate theories of liability. By instructing the panel to disregard whether AP was awake or not, the prosecutor actively invited the panel to convict AB Cunningham on an uncharged or conflated legal theory.

This Court held in *Mendoza* that the Government cannot charge an accused under one Article 120, UCMJ, theory and then argue a different one at trial. 85

M.J. at 220 (“But what the Government cannot do is charge one offense under one factual theory and then argue a different offense and a different factual theory at trial.”) The prosecution’s closing argument in this case did exactly what *Mendoza* and its progeny prohibit: it shifted the goalposts at the eleventh hour by misstating the law and removing a defense: mistake of fact as to consent. The Air Force Court’s conclusion that this did not constitute prejudicial error directly conflicts with this Court’s precedent and the text of Article 120, UCMJ. *See, e.g. Mendoza*, 85 M.J. 213; *Riggins*, 75 M.J. 78.

D. The special trial counsel’s comments prejudiced Airman Basic Cunningham by impermissibly removing the mistake-of-fact defense.

The STC’s conflation of theories was not a harmless slip of the tongue; it was a targeted strike against AB Cunningham’s strongest defense. At trial, AB Cunningham argued a reasonable mistake of fact as to consent, heavily relying on the premise that AP was awake and silent, citing the consensual sex just hours before, and using the text messages to show he reasonably believed AP was awake during the sex. *See* RCM 916(j)(1) (“[I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of an offense.”). Because a sleeping person cannot consent, telling the panel that AP’s sleep status was “irrelevant” effectively instructed the members to ignore the foundational premise of AB Cunningham’s

defense. It improperly relieved the Government of its burden to disprove the mistake of fact beyond a reasonable doubt, as the panel was led to believe they could convict regardless of the objective circumstances AB Cunningham perceived. *See McDonald*, 78 M.J. at 379 (holding that, once raised, the Government bears the burden to prove beyond a reasonable doubt that the defense does not exist.). As this Court recently re-explained in *Matti*, prosecutors “may not make comments during argument that have the effect of ‘switch[ing] the burden of proof’ from the government to the accused.” 2026 CAAF LEXIS 189, at *17 (citing *United States v. Vasquez*, 48 M.J. 426, 430 (C.A.A.F. 1998)). Such comments violate a prosecutor’s duty under the Due Process Clause of the Fifth Amendment to prove an accused’s guilt beyond a reasonable doubt. *Id.* (citing *United States v. Czekala*, 42 M.J. 168, 170 (C.A.A.F. 1995)).

Where an error is of a constitutional dimension, an appellate court may not affirm the result unless the error was “harmless beyond a reasonable doubt.” *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004) (citation omitted). This inquiry requires the Government to demonstrate that there was no reasonable possibility that the error might have contributed to the conviction. *United States v. Tovarchavez*, 78 M.J. 458, 462 n.5 (C.A.A.F. 2019) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). Despite this, the Air Force Court improperly found that

the STC's comments were not error, and that, even "if arguably erroneous" there was no prejudice to AB Cunningham. Slip Op. at *10.

The Air Force Court did not believe there was error because it misunderstood this Court's decision in *United States v. Casillas*, 86 M.J. 94 at 101 (C.A.A.F. 2025). To the Air Force Court, *Casillas* allows prosecutors to discuss an incapacity theory at trial, even when the evidence shows the complaining witness was never incapacitated. [Cite]. Based on this misunderstanding, the Air Force Court reasoned that because AP testified that "she was awake at some point during the non-consensual penetration" the STC was within the "parameters of proper argument" when he argued that her state of consciousness was "irrelevant." *Id.* at 10. This is wrong because AB Cunningham's case is not the same as *Casillas*. AP did not "wake up at some point" during the sexual act—she was awake the entire time. Therefore, the Air Force Court's reasoning, like the STC's, that AP's state of consciousness did not matter is fundamentally flawed and this Court should correct that misunderstanding.

CONCLUSION

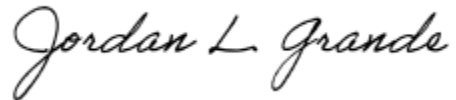
The proceedings below were marred by substantive errors that fundamentally deprived AB Cunningham of a fair trial and a proper appellate review.

First, the Air Force Court shirked its statutory duty under Article 66, UCMJ, by failing to conduct a truly independent factual sufficiency review. Instead of properly applying the new Article 66, UCMJ, standard (as analyzed by this Court in *Harvey*) the Air Force Court gave absolute deference to the factfinder. That amount of deference is inconsistent with Article 66, UCMJ's mandate in this case where there is glaring objective evidence that support's a reasonable mistake of fact as to consent—including a prior consensual encounter mere hours before, the complaining witness's admitted silence and changing narrative, and exculpatory post-incident conduct. The lower court allowed a conviction to stand where reasonable doubt exists regarding AB Cunningham's reasonable mistake of fact.

Compounding this failure to properly weigh the evidence, the Air Force Court sanctioned egregious prosecutorial misconduct. By permitting trial counsel to tell the panel that the complaining witness's state of consciousness was "irrelevant," the Government impermissibly conflated the distinct legal theories of "without consent" and "a sleeping person." This blatant misstatement of the law directly violates this Court's precedent in its *Mendoza* cases and improperly relieved the Government of its burden to disprove AB Cunningham's strongest defense.

AB Cunningham respectfully requests that this Honorable Court grant the petition for review, correct the Air Force Court's misapplication of the law, reverse the decision of the lower court, and set aside the findings and sentence.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Jordan L. Grande".

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APPENDIX A

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), AB Cunningham, through appellate defense counsel, personally requests that this Court consider the following matters.

ISSUE PRESENTED

Whether the military judge improperly denied AB Cunningham a new Rule for Courts-Martial 706 board.

ARGUMENT

A. Additional facts.

AB Cunningham's original defense counsel filed a motion requesting an inquiry into mental responsibility in accordance with RCM 706. Appellate Ex. III. The military judge granted that motion. Appellate Ex. IV. A sanity board evaluation was conducted and a report of the results was generated. Appellate Ex. V. AB Cunningham declined to participate in the RCM 706 inquiry, and so the board could not reach any conclusions or opinions to address the four questions required of the inquiry. R. at 26. Subsequently, AB Cunningham obtained new defense counsel—Major (Maj) ML and Captain (Capt) JL. R. at 22, 26. Maj ML and Capt JL, in response to the military judge's questions, stated that they had no concerns with AB Cunningham's "current competency or his ability to receive our legal advice or participate actively in his own defense." R. at 27. However, they declined to withdraw the previous defense team's request for a 706 inquiry. R. at

27. The Government believed that the RCM 706 inquiry was satisfied and requested that the defense waive the issue, since they were not requesting a second inquiry. R. at 29. Maj ML stated that he did not “believe that the mental incompetency of [AB] Cunningham at the time of the charge [sic] offenses is going to be at issue.” R. at 31. Maj ML expressed concern with articulating the issue with any more specificity without going into “areas of confidence.” R. at 31.

The Military Judge characterized the issue as “an unanswered question” but, ultimately, all parties concurred that Military Rule of Evidence [MRE] 302(d) authorized the military judge to prohibit the defense from presenting expert medical testimony, given AB Cunningham did not participate in the RCM 706 inquiry. R. at 33-34. AB Cunningham affirmed that he was not “currently suffering from any mental disease or defect,” that he was not “diagnosed with any condition that would affect [his] ability to understand [the] proceedings or cooperate with [his] defense counsel,” and that he “understood everything” that was discussed at the Article 39a, UCMJ, session. R. at 38. Ultimately, the proceedings continued and there was never a new RCM 706 inquiry. The defense never waived the issue of the original RCM 706 inquiry being satisfied.

B. The Military Judge’s order for an RCM 706 inquiry was never satisfied.

RCM 706 affords servicemembers facing court-martial important protections. *United States v. Best*, 61 M.J. 376, 382 (C.A.A.F. 2005). CAAF

recognized “the responsibility of the convening authority and the military judge to order a sanity board when required.” *Id.* Here, despite that the original military judge ordered an RCM 706 inquiry, that order was never satisfied. It remained an “unanswered question” during AB Cunningham’s trial. R. at 33. The Military Judge addressed the issue extensively with counsel for both sides, and expressed unease with proceeding to trial without the RCM 706 inquiry having been satisfied. While the Government requested several times that the defense agree to waive the issue before trial proceeded, the defense declined to do so.

Despite Maj ML and Capt JL affirming that they did not believe AB Cunningham was suffering from any mental disease or defect at the time of trial, that left open the question of whether he was suffering from any mental disease or defect at the time of the charged conduct. *See* RCM 706(c)(2)(A), UCMJ (“At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect?”) Even if the issue of whether AB Cunningham was suffering from a severe mental disease or defect *at the time of the proceedings* was satisfied by Maj ML and Capt JL’s affirmations, they did not waive nor satisfy the question posed by RCM 706(c)(2)(A), UCMJ. Therefore, the RCM 706 order was never satisfied, and AB Cunningham’s trial should not have proceeded.

AB Cunningham respectfully requests that this Honorable Court grant the petition for review, correct the Air Force Court's misapplication of the law, reverse the decision of the lower court, and set aside the findings and sentence.

APPENDIX B

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

No. ACM 40746

UNITED STATES

Appellee

v.

Tylir D. CUNNINGHAM

Airman Basic (E-1), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 24 April 2026

Military Judges: Julie L. Pitvorec (pre-trial motion); Matthew McCall (arraignment); Adam D. Bentz (trial).

Sentence: Sentence adjudged on 7 May 2024 by GCM convened at Goodfellow Air Force Base, Texas. Sentence entered by military judge on 20 January 2024: Dishonorable discharge and confinement for 30 months.

For Appellant: Major Jordan L. Grande, USAF.

For Appellee: Lieutenant Colonel Jenny A. Liabenow, USAF; Major Vanessa Bairos, USAF; Major Heather R. Bezold, USAF; Major Kate E. Lee, USAF; Major Jocelyn Q. Wright, USAF; Mary Ellen Payne, Esquire.

Before GRUEN, KEARLEY, and MORGAN, *Appellate Military Judges*.

Senior Judge GRUEN delivered the opinion of the court,¹ in which Judge KEARLEY and Judge MORGAN joined.

¹ Ms. Gabrielle Esquer, an extern assigned to the court under the Air Force Internship/Externship Program and supervised by an attorney admitted to practice before this court, participated in the preparation of this opinion with Senior Judge Gruen.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

GRUEN, Senior Judge:

A military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas, of one specification of absence without leave (Charge I), in violation of Article 86, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 886, and one specification of negligent dereliction of duty (Charge II), in violation of Article 92, UCMJ, 10 U.S.C. § 892.² The general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of sexual assault (Charge III), in violation of Article 120, UCMJ, 10 U.S.C. § 920. The members acquitted Appellant of one specification of assault (Charge IV), in violation of Article 128, UCMJ, 10 U.S.C. § 928. The military judge sentenced Appellant to confinement for 30 months and a dishonorable discharge. The convening authority took no action on the findings and the sentence.

Appellant raises two issues on appeal: (1) whether the evidence was factually insufficient for a finding of guilty of sexual assault; and (2) whether the special trial counsel committed prosecutorial misconduct during closing argument by conflating theories of liability, and thus eliminating a mistake of fact as to consent defense.

We affirm the findings and sentence and find no error that materially prejudiced Appellant's substantial rights.

I. BACKGROUND

The basis of the sexual assault charge starts with Appellant and AP, both in the same technical school at Goodfellow Air Force Base, Texas. They met through mutual friends and quickly became friendly and then intimate. AP and Appellant first hung out when Appellant picked up AP and they drove to get food in San Angelo, Texas sometime at the end of January or beginning of February 2023. The next time Appellant and AP hung out was at a club on 10 February 2023, where they talked and danced together. When they decided to

² Unless otherwise noted, all references in this opinion to the UCMJ and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

end the events for the night, Appellant asked AP to come home with him. AP declined to go home with Appellant.

The next night, 11 February 2023, AP texted Appellant asking him to hang out and get food. Appellant picked her up and they purchased food. While in the car, AP mentioned that they would not be having sex because she had not shaved. The two returned to Appellant's dorm room sometime around 0200. After they ate the food they had purchased, both Appellant and AP got into his bed and cuddled while watching television. Cuddling then escalated to kissing, which led to consensual sex. Before having consensual sex, AP and Appellant discussed use of a condom in that it was mandatory for AP to know a condom would be used before she would consent to sex. During direct examination of AP by the special trial counsel, the following colloquy took place:

[AP]. And we were like, taking our clothes off and stuff, and I didn't want to have — I didn't want to have sex without a condom.

[Special Trial Counsel (STC)]. Did ya'll discuss that?

[AP]. Yes. I asked him to if he had a condom . . . but he was kind of fighting me, asking for a condom. But I was really adamant on it because I— I didn't want to sleep with him without a condom. . . . [M]y body language at least was kind of like you need a condom to sleep with me, I'm not going to sleep with you without a condom.

[STC]. Did you make it clear to him that there was no sex without a condom?

[AP]. Yes, yes, he knew that.

[STC]. You would not have had sex with him without a condom?

[AP]. Absolutely not, no.

Appellant and AP proceeded to have consensual sex, and then after the sexual acts they redressed and went to bed. AP testified that it was weird that Appellant was really quiet during sex. AP testified that the next thing she remembered that it was at 0900 when she “woke up that mor — that next morning, um, and he was trying to penetrate me.” AP further testified that Appellant was

still behind me, but he's in a position where he's kind of like on his knees I — I never saw what position he was in, but I would assume he was like on his knees, and kind of like maneuvered himself in a way where I like wouldn't be aware that he was moving other than obviously the feeling of his stuff.

AP explained that she did not move and that she pretended to be asleep through the whole act, and she did not believe that Appellant ever saw her face. Appellant was not wearing a condom during the non-consensual sexual act and finished on AP's leg, meaning, he ejaculated and semen was deposited on her leg. After the sexual act, Appellant cleaned AP's leg and went back to sleep. AP stated that after 5 to 10 minutes, Appellant pretended to wake up for the first time while AP scrolled on her phone in the bed. Appellant scrolled on his phone after awaking with neither one saying a word about what happened. The direct examination of AP continued:

[STC]. So, throughout this entire period, up to the point that you woke up, after you went to sleep. You didn't say anything to him?

[AP]. No.

[STC]. Why?

[AP]. I think I was really scared. Do you mean like while it was going on?

[STC]. Right.

[AP]. I just — I don't — I don't think I really understood what was going on. And I think I just kind of froze. Like I don't know.

Later that morning, both Appellant and AP went to Dunkin' Donuts to have breakfast together. After breakfast, AP asked Appellant to drive her back to her dorm room. AP went back to her dorm room and showered. It was at that point that she decided to call the Sexual Assault Prevention Response (SAPR) hotline. The hotline representative told her to come to the office and AP called another Airman, BJ, to drive her there. While at the SAPR office, she filed a restricted report, but AP omitted the fact that she and Appellant had consensual sex the night before. AP then called JC another Airman from technical school who she considered to be a friend, to be with AP at the hospital for the Sexual Assault Forensic Examination (SAFE). At the hospital, AP again only talked about the assault. The SAFE nurse took swabs of the vulva, vagina, and on the leg for DNA analysis. Once AP got back to her dorm room, she did not leave for the rest of the day.

At some point after the incident, AP communicated with Appellant via text message, wherein they texted about what happened the morning of the sexual assault. Appellant admitted that, "[he understood] it was a big misunderstanding on [his] end," and "[he] didn't think AP was sleeping when [he] did it. So yes [he understood he] was dead wrong. Especially since [he] didn't even use protection." He then apologized "for not thinking straight and just doing it."

II. DISCUSSION

A. Factual Sufficiency

Appellant argues that the conviction for sexual assault is factually insufficient because the Government failed to disprove Appellant had a reasonable mistake of fact as to consent when he penetrated AP while she was sleeping.

1. Law

a. Standard of Review

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). “Our assessment of legal and factual sufficiency is limited to the evidence produced at trial.” *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citation omitted).

We are neither required nor empowered to review the factual sufficiency of the evidence unless an appellant both (1) asserts an assignment of error and (2) shows a specific deficiency in the proof. *United States v. Harvey*, 85 M.J. 127, 130 (C.A.A.F. 2024). The current version of Article 66(d)(1)(B), UCMJ, FACTUAL SUFFICIENCY REVIEW, states:

- (i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon a request of the accused if the accused makes a specific showing of a deficiency of proof.
- (ii) After an accused has made a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—
 - (I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
 - (II) appropriate deference to findings of fact entered into the record by the military judge.
- (iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

10 U.S.C. § 866(d)(1)(B), *Manual for Courts-Martial, United States* (2024 ed.) (2024 MCM).

“[T]he requirement of ‘appropriate deference’ when a [Court of Criminal Appeals (CCA)] ‘weigh[s] the evidence and determine[s] controverted questions of fact’ . . . depend[s] on the nature of the evidence at issue.” *Harvey*, 85 M.J.

at 130 (third and fourth alterations in original). It is within this court’s discretion to determine what level of deference is appropriate. *Id.* at 131.

“[T]he 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 accused guilty at trial.” *Id.* at 131 (internal quotation marks omitted). For this court “to be ‘clearly convinced that the finding of guilty was against the weight of the evidence,’ two requirements must be met.” *Id.* at 132. First, we must decide that evidence, as we weigh it, “does not prove that Appellant is guilty beyond a reasonable doubt.” *Id.* Second, we “must be clearly convinced of the correctness of this decision.” *Id.*

b. Article 120(b)(2)(A), UCMJ

In order to convict Appellant of sexual assault without consent in violation of Article 120(b)(2)(A), UCMJ, 10 U.S.C. § 920(b)(2)(A), the Government was required to prove: (1) that Appellant committed a sexual act upon AP by penetrating her vulva with his penis; and (2) that Appellant did so without the consent of AP. See *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 60.b.(2)(d).

A sexual act is “penetration, however slight, of the penis into the vulva or anus or mouth.” *MCM*, pt. IV, ¶ 60.a.(g)(1)(A).

c. Without Consent

Consent is defined as

a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. . . . A current or previous . . . sexual relationship by itself . . . does not constitute consent.

MCM, pt. IV, ¶ 60.a.(g)(7).

In *United States v. Mendoza*, our superior court established that the Government could not “charge one offense under one factual theory and then argue a different offense and a different factual theory at trial” without violating an appellant’s constitutional rights, as “[d]oing so robs the defendant of his constitutional ‘right to know what offense and under what legal theory he will be tried and convicted.’” 85 M.J. 213, 220 (C.A.A.F. 2024) (quoting *United States v. Riggins*, 75 M.J. 78, 83 (C.A.A.F. 2016)).

United States v. Casillas elaborated that if the victim wakes up during the sexual act, they are thus capable of consent, and the correct theory of liability would be without consent. 86 M.J. 94, 101 (C.A.A.F. 2025).

d. Mistake of Fact

“[I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense.” R.C.M. 916(j)(1). If the mistake goes to an element requiring general intent or knowledge, it “must have existed in the mind of the accused and must have been reasonable under all the circumstances.” *Id.* Therefore, an honest and reasonable mistake that the victim consented to the charged sexual contact is an affirmative defense to the charged offense. *See, e.g., United States v. McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2019) (considering the defense of mistake of fact to a charge of sexual assault). Once raised, the Government bears the burden to prove beyond a reasonable doubt that the defense does not exist. R.C.M. 916(b)(1); *see McDonald*, 78 M.J. at 379.

In considering whether the defense of mistake of fact as to consent was raised at trial, we “consider the totality of the circumstances at the time of the offense” and consider “whether the record contains some evidence of an honest and reasonable mistake to which the [factfinder] could have attached credit if they had so desired.” *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003) (citation omitted). While the quantity of evidence required is low, the record must contain evidence supporting both the subjective “honest” and the objective “reasonable” mistaken belief. *See United States v. Davis*, 76 M.J. 224, 228–30 (C.A.A.F. 2017) (citation omitted) (“[W]hile Appellant’s statement may constitute a scintilla of evidence about his ‘honest belief,’ . . . there is not an iota of evidence that such a belief was reasonable.”); *see also United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995) (citation omitted) (“The testimony relied on by appellant tended to show objective circumstances upon which a reasonable person might rely to infer consent. However, they provided no insight as to whether appellant actually or subjectively did infer consent based on these circumstances.”).

2. Analysis

Appellant claims that the Government (1) failed to prove the factual sufficiency of the sexual assault charge and (2) did not meet its burden to disprove that Appellant had a reasonable mistake of fact regarding consent. The Government counters that (1) Appellant failed to show a specific deficiency in proof and (2) that the Government proved that Appellant sexually assaulted AP without consent. We find Appellant indeed showed a specific deficiency in proof and thus we will analyze factual sufficiency.

Appellant admitted to the non-consensual sex act in Snapchat messages saying that he was “dead wrong” and it “was a big misunderstanding,” especially since the sex act occurred “without protection.” In admitting that the sex act, while AP was sleeping, was “without protection,” Appellant essentially

concedes that he knew that AP would not consent to sex without the use of a condom. AP and Appellant discussed the importance of using a condom before their first sexual encounter, the consensual sexual encounter which happened during this same night, wherein AP insisted on, and Appellant used, a condom. The fact that the second sexual act took place without the use of a condom supports AP's contention that she did not consent to Appellant penetrating her while she was sleeping or otherwise in a state of non-consent.

AP immediately reported the non-consensual sexual act that occurred on 13 February 2023. The fact that she had breakfast with Appellant does nothing to vitiate her report that Appellant sexually assaulted her. Despite the fact that, when she reported the assault, AP omitted the consensual sex act, her accounts were consistent throughout the reporting process. Minor discrepancies in AP's testimony are not enough to render AP someone without credibility, as Appellant now alleges.

For a mistake of fact defense to be valid, Appellant must have held both an honest and reasonable belief that the victim consented to the sexual act. AP and Appellant had a discussion the night before about how a condom was required before AP would engage in sexual acts. Because of her insistence, Appellant complied and wore a condom during their first sexual encounter that AP agrees was consensual. Despite knowing, and admitting to knowing, AP would not consent without the use of a condom, Appellant engaged in sexual acts with AP without a condom, not knowing if AP was sleeping or awake. The Snapchat messages that followed the non-consensual sexual acts support AP's claim that Appellant knew that he had acted without AP's consent and indicate that he was aware that the sexual acts without protection were not consensual. Simply put, Appellant did not have an honest belief that the sexual acts were consensual.

Appellant's claim of mistake of fact is not reasonable. AP testified that when she awoke during the non-consensual sexual act, she was unable to see Appellant's face, meaning it was likely he too could not see her face. Additionally, AP did not move during the non-consensual sexual acts and did not say anything to give Appellant any indication that she consented to the sexual act. A reasonable person in Appellant's position would not have been able to discern if there was consent given the totality of the circumstances, and could not have concluded that there was consent given for the sexual conduct.

B. Prosecutorial Misconduct

1. Additional Background

Appellant alleges misconduct regarding the following two sections of special trial counsel's closing statement, to which he provides emphasis:

[W]hen you go back there and look at this Article 120 offense, read closely through the messages, think about her testimony. And when you do and you make those comparisons, you're going to see that it's clear beyond reasonable doubt that he sexually assaulted her, and that she did not consent, and that he — he — or at least there was no reasonable mistake of fact to her consent. She is laying there asleep. She wakes up, he's starting to penetrate her, she just lays there. *And whether or not she's asleep or awake at this point, is irrelevant because he still doesn't have consent.*

Lying there without moving. She didn't resist. She didn't say anything. She didn't fight. She didn't fight back. And she didn't stop him. She just laid there. The law doesn't allow somebody to go, you didn't resist you just laid there. *Oh, you asleep, I didn't want to wake you up to ask for consent.*

There were no objections by trial defense counsel, nor were any sua sponte curative instructions given by the military judge.

2. Law

We review prosecutorial misconduct and improper argument de novo and where, as here, no objection is made, we review for plain error. *United States v. Matti*, CAAF LEXIS 189 (C.A.A.F. 2026). *See also United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018) (citations omitted). “The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused.” *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) (citations omitted).

The standard for determining prosecutorial misconduct was established in *Berger v. United States*, in which the Supreme Court stated that trial counsel “may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” 295 U.S. 78, 88 (1935). Trial counsel is entitled “to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence.” *Baer*, 53 M.J. at 237 (citation omitted). However, the Rules for Courts-Martial and existing case law both establish that it is error for trial counsel to make arguments that “unduly . . . inflame the passions or prejudices of the court members.” *United States v. Marsh*, 70 M.J. 101, 102 (C.A.A.F. 2011) (omission in original) (quoting *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007)); R.C.M. 919(b), Discussion.

“When a trial counsel makes an improper argument during findings, ‘reversal is warranted only when the trial counsel’s comments taken as a whole were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone.’” *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021) (quoting *Andrews*, 77 M.J. at 401–02). In general, appellate courts “weigh three factors to determine whether trial counsel’s improper arguments were prejudicial: ‘(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction.’” *Andrews*, 77 M.J. at 402 (quoting *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005)).

Where an error is of constitutional dimensions, an appellate court may not affirm the result unless the error was “harmless beyond a reasonable doubt.” *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004) (citation omitted). This inquiry requires the Government to demonstrate that there was no reasonable possibility that the error might have contributed to the conviction. *United States v. Tovarchavez*, 78 M.J. 458, 462 n.5 (C.A.A.F. 2019) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

3. Analysis

a. Section 1 of Special Trial Counsel’s Argument

The first contested section of special trial counsel’s argument regarding the relevance of “whether or not [JP] is asleep or awake at that point” was not erroneous because the Article 120, UCMJ, violation was charged as sexual assault without consent. In *Casillas*, it was established that if the victim awoke during the sexual act, a correct theory of liability could be without consent. *Casillas*, 86 M.J. at 101. The victim testified that she was awake at some point during the non-consensual penetration and so the special trial counsel was well within the parameters of proper argument when he argued that her state of awareness at the time of the non-consensual act does not change the fact that she was, at some point, awake and able to consent and Appellant did not have her consent.

b. Section 2 of Special Trial Counsel’s Argument

The second contested statement of special trial counsel’s closing argument, “[o]h, you asleep, I didn’t want to wake you up to ask for consent,” was also not error because in the context of counsel’s preceding sentence about the law, it explained the law regarding consent, which the members were instructed they had a duty to examine in their deliberations. Assuming without finding the statement could be error, the statement was not prejudicial because it was not severe, as it only happened once, and again since it was in closing argument, the military judge provided an instruction stating members were not to regard closing statements as evidence, which both cures any potential improper

argument and goes to show the lack of weight given to the statement. Considering the totality of the evidence provided during trial, this statement, if it was error, was harmless beyond a reasonable doubt.

c. Eliminating Mistake of Fact as a Defense

Appellant argues that the contested statements made by the special trial counsel effectively eliminated mistake of fact as a defense. Given we find both contested statements were proper and did not amount to error, we further find that if arguably erroneous, there was no prejudice to Appellant. There is no conflation of theories of liability, and there is a very low likelihood that given all the evidence the members heard at trial and the length of the Government's closing argument covering 18 pages of transcript, two statements in the closing argument did not prejudice Appellant and had no harmful effect on the conviction. Thus, we find no prosecutorial misconduct.

III. CONCLUSION

The findings are correct in law and fact. *See* Article 66(d), UCMJ, 10 U.S.C. § 866(d) (2024 *MCM*). In addition, the sentence as entered is correct in law and fact, and no error materially prejudicial to Appellant's substantial rights occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.



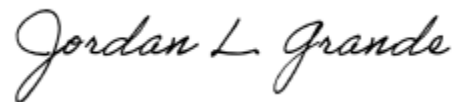
FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

Certificate of Compliance

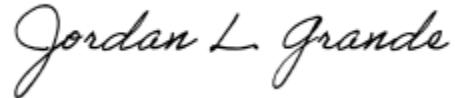
1. This brief complies with the type-volume limitation of Rule 21(b) because it contains 6,846 words excluding the index, table of cases, appendix, and certificates of counsel.
2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

A handwritten signature in cursive script that reads "Jordan L. Grande".

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Certificate of Filing and Service

I certify that the foregoing was electronically filed with the Court, and a copy served on the Air Force Government Trial & Appellate Operations Division at af.jajg.afloa.filng.workflow@us.af.mil on July 8, 2026.

A handwritten signature in black ink that reads "Jordan L. Grande". The signature is written in a cursive, flowing style.

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