

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

No. ACM 40823

UNITED STATES

Appellee

v.

Brandon S. JASTAL

Major (O-4), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 25 September 2026

Military Judge: Jennifer E. Powell (arraignment and motions); Christopher D. James (trial).

Sentence: Sentence adjudged 17 January 2025 by GCM convened at Joint Base Pearl Harbor-Hickam, HI. Sentence entered by military judge on 8 March 2025: Dismissal, confinement for 30 days, and a reprimand.

For Appellant: Major Jordan L. Grande, USAF; Dwight H. Sullivan, Esquire.

For Appellee: Colonel Matthew D. Talcott, USAF; Major Vanessa Bairos, USAF; Major Morgan R. Christie, USAF; Mary Ellen Payne, Esquire.

Before DOUGLAS, MCCALL, and KUBLER, *Appellate Military Judges*.

Judge KUBLER delivered the opinion of the court, in which Senior Judge DOUGLAS and Judge MCCALL joined.

**This is an unpublished opinion and, as such, does not serve as
precedent under AFCCA Rule of Practice and Procedure 30.3.**

KUBLER, Judge:

A panel of officer members at a general court-martial convicted Appellant of two specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928b; and one specification of drunk and disorderly conduct in violation of Article 134, UCMJ, 10 U.S.C. § 934.^{1,2} The panel sentenced Appellant to a dismissal, confinement for 30 days, and a reprimand. The convening authority took no action on the findings or the sentence and waived automatic forfeitures for a period of one month to be paid to his spouse, HC, for her benefit and the benefit of his dependent children.

Appellant raises four issues on appeal, which we have rephrased: (1) whether the trial counsel committed prosecutorial misconduct by vouching for a witness during closing argument; (2) whether Specification 1 of Charge II is factually sufficient; (3) whether the military judge committed plain error by admitting the victim impact statement into evidence; and (4) whether Appellant's constitutional rights were violated when he was convicted without a unanimous verdict.

We carefully considered issue (4) and find it warrants neither discussion nor relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987); *see also United States v. Anderson*, 83 M.J. 291, 293, 302 (C.A.A.F. 2023) (holding courts-martial defendants do not have a right to a unanimous guilty verdict).

As to the remaining issues, we find no error that materially prejudiced Appellant's substantial rights, and we affirm the findings and sentence.

I. BACKGROUND

On 11 February 2023, Appellant attended a gathering with his wife HC at a firepit in front of the home of Mrs. KK and her husband, Major (Maj) JK, neighbors on Joint Base Pearl Harbor-Hickam, Hawaii. Mrs. JC and her husband, Lieutenant Commander (LCDR) JC, Commander (CDR) DD, Mrs. KF, along with several others, and some with their children, also attended. Appellant had been drinking and went into the house to get more whiskey with LCDR JC. When he returned with his drink, Appellant noticed someone changed the music that he had been playing. Mrs. JC described how, “[w]hen he came back to the firepit, he was stumbling when he was trying to figure out

¹ Unless otherwise indicated, all references to the UCMJ and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

² The court-martial found Appellant not guilty of two specifications of assault consummated by a battery under Article 128, UCMJ, 10 U.S.C. § 928; and one specification of domestic violence under Article 128b, UCMJ.

what happened with the Bluetooth. He was having a hard time even holding his phone. Just stumbling in and out of the chair. Slurring words.”

Appellant then unleashed a tirade of profanity on his wife, HC, in front of everyone. Mrs. JC said Appellant was “[c]ursing aggressively. At first, I thought it was a joke. But then realize[d] it wasn’t. He was very loud and upset and cursing about the music change.” Then Appellant pointed at the officers and spouses around the firepit and cursed at them one by one. CDR DD attempted to defuse the situation with Appellant and asked, “Do you need to take a walk?” Though Mrs. JC had seen Appellant intoxicated on other occasions, “[this] was the worst time.” Mrs. KK described Appellant as “intense and scary and very . . . intimidating, like, he just was ready to fight and wanted someone to start with him, as if he was just on, like, I don’t know, just could burst at any moment type of feeling.” “Once we realized it wasn’t a joke,” Mrs. JC said, “things became uncomfortable. And one by one everyone just started to leave.”

Later that evening, HC returned home, locked Appellant out of the house, and texted him: “Find somewhere else to sleep,” “You said f[***] you to all our neighbors. Doors are being locked.” Shortly thereafter, Appellant texted, “You locked me out b[****]. Why did you lock me out?” First, HC heard banging on windows and doors. Then Appellant kicked in the back door and entered the house. Appellant then entered the bedroom and began yelling profanities at HC. The baby monitor recorded the audio of the commotion as it ensued. HC testified, while trial counsel played the audio of the baby monitor, and explained what was happening during the audio, to include when Appellant spit on her and when he slapped her. HC got up and followed him into the hallway because she wanted to ensure he did not wake up CJ, their two-year-old son. HC, seven months pregnant at the time, was in the hallway and Appellant, still screaming at HC, grabbed her, spit on her and slapped her. HC then texted Mrs. KK that Appellant broke in the door.

Mrs. KK received the text from HC that Appellant broke in the door, and went with her husband, Maj JK, to check on HC. “[S]he was crying hysterically,” Mrs. KK said, “holding her face.” Mrs. KK testified HC told her that Appellant “had slapped her and was spitting at her and he was screaming at her.” HC “was very emotional and holding her face.” Mrs. KK also testified that she did not see bruises on HC’s face but her face “was all red from being so upset and she was holding it.” Maj JK arrived at the house, found the back door broken in and Appellant in the hallway. “He was very upset. Lots of curse words. Very upset.” Maj JK took Appellant back to his house and told him he would stay at their house that night. This incident formed the basis for Specification 1 of Charge II in which Appellant was convicted of committing a violent offense against his wife, HC, by unlawfully slapping her face with his hand and unlawfully spitting on her, in violation of Article 128b, UCMJ.

On another occasion, HC, Appellant, and their son CJ, still a toddler, visited Mrs. KF and her husband LCDR JF at their home. While there, CJ bent over to pick up a toy, at the same time Appellant bent over to pick something up and both of their heads collided. Appellant said “Oh, [CJ]. That hurt. That really hurt” in an aggressive way, grabbed CJ by the shoulders and pushed him down. Mrs. KF said, “[H]e pushed him kind of like you would push an adult that made you angry I was kind of shocked at how much force he used with a toddler. And then [CJ] . . . landed on the floor with the back of his head.” Mrs. KF noted Appellant kept saying “That really hurt, [CJ]” and kept talking about how he was hurting and did not comfort his son CJ. HC picked up her son, comforted him, and told Appellant to calm down. “So it looked like what I would expect to see if two grown men were getting in a fight,” LCDR JF said, “and one was pushing the other one away. . . . But it was a baby – or a toddler, so about that amount of force.” This incident formed the basis for Specification 2 of Charge II in which Appellant was convicted of committing a violent offense upon CJ, an immediate family member under the age of 16 years, by shoving CJ with his hand, in violation of Article 128b, UCMJ.

II. DISCUSSION

A. Prosecutorial Misconduct: Vouching

It is improper for trial counsel to express their personal belief as to the truth of a witness’s testimony.³ It is equally true when trial defense counsel affirmatively decline to object to either argument or evidence that constitutes waiver. Waiver, in contrast to forfeiture, leaves nothing to correct on appeal.⁴ Trial defense counsel said they had no objection to the trial counsel’s closing argument slides which included a statement, in 60-point font size, “[HC] is telling the truth.” Trial defense counsel later answered, “No sir,” when asked if they objected to trial counsel’s closing argument, which included two oral remarks— “[HC] is telling the truth here . . .” and “[t]he truth of the matter is that she isn’t lying. She’s telling the truth.” The question is whether we can hear Appellant’s claim that he suffered prejudice from the slides presented and the remarks made, even though trial defense counsel told the military judge they did not object to either. We conclude Appellant waived objection to the slide and the remarks made, foreclosing the issue on appeal. Had we reached the merits, we would have found no material prejudice to Appellant.

³ *United States v Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)

⁴ *United States v. Cunningham*, 83 M.J. 367, 374 (C.A.A.F. 2023)

1. Additional Background

Trial counsel and trial defense counsel prepared slides for closing argument and showed these slides to opposing counsel before delivering their summations. The military judge asked if there were any objections to the slides. Trial defense counsel replied, “No, Sir.” These slides are attached to the record as appellate exhibits.

The Government projected their slides—Appellate Exhibit XXIX—on a large monitor during their argument. Remarks made during the presentation of Slides No. 4 and 5 are shown side by side below.

Slide No.	Argument	Slide Text
4	So members, let’s start with the first. [HC] is telling the truth here, and there’s a couple ways that you can be sure of that, beyond a reasonable doubt. And it has to do with one of your most important jobs this week.	[HC] is telling the truth. ^[5] But you don’t have to believe only her word, there is corroborating evidence.
5	This is an instruction that you received from the military judge about determining the credibility of witnesses. Because members, that duty is important. It’s something that each of you individually has to assess. You have to think back to the testimony of each person who came before you. There’s a lot of factors to consider in the instruction	Credibility of Witnesses Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with either side; and how each witness might be affected by the verdict. In weighing a discrepancies between witnesses, you should consider whether they resulted from an innocent mistake or a deliberate lie.

Later, in a separate segment of trial counsel’s closing argument, specifically addressing Specification 1 of Charge 1 (unlawfully putting his arm around the neck of HC), trial counsel told the members, “The truth of the matter is that

⁵ This sentence appeared in 60-point font size.

she isn't lying. She's telling the truth.”⁶ These two sentences did not correspond to any of the Government's closing argument slides.

Before the members began deliberations, the military judge asked, “Do counsel object to the instructions given, opposing counsel's argument, or request additional instructions?” Senior defense counsel replied, “No, sir.” The members returned a not guilty verdict for Specification 1 of Charge I.

2. Law

“Whether a statement made during an argument on findings or sentencing is improper is a question of law that this [c]ourt reviews de novo.” *United States v. Matti*, 86 M.J. 384, No. 25-0148, 2026 CAAF LEXIS 189, at *9 (C.A.A.F. 17 Feb. 2026) (citing *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. *Matti*, 2026 CAAF LEXIS 189, at *9 (citing *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019)). “Plain error occurs 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 this review, “[an] appellant generally has the burden of proving material prejudice.” *Id.* (citing *Voorhees*, 79 M.J. at 9).

It is improper for a trial counsel to interject herself into the proceedings by expressing a “personal belief or opinion as to the truth or falsity of any testimony or evidence.” *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (citation omitted). Trial counsel may not place “the prestige of the [G]overnment behind a witness through personal assurances of a witness's veracity.” *Matti*, 2026 CAAF LEXIS 189, at *10 (citation omitted).

In *Matti*, the court held the following statements “were not fair commentary but instead were instances of improper vouching:”

“[Y]ou have a credible witness. You have the victim, [CC], who came up here and took the stand and she was credible.”

⁶ During argument, trial counsel asserted the lack of corroboration would be inconsistent with HC fabricating Specification 1 of Charge 1: “If she was going to fabricate something, don't you think she would have done it better? The truth of the matter is that she isn't lying. She's telling the truth. This is the first thing that happened to her.”

“[Y]ou have not been provided with any real reason to doubt the credibility of this witness. She’s telling the truth. What does she have to gain by not telling the truth?”

“You know she's telling the truth.”

“Trial counsel did not limit himself to commenting on the evidence relevant to issues of credibility. On the contrary, trial counsel directly told members that a witness was credible. The quoted comments [*CAAF held*] were clear and obvious errors under *Voorhees*.” *Id.* at 12 (emphasis added).

Whether an appellant has waived an issue is a legal question that this court reviews de novo. *United States v. Cunningham*, 83 M.J. 367, 374 (C.A.A.F. 2023) (citing *United States v. Davis*, 79 M.J. 329, 332 (C.A.A.F. 2020)).

“In determining whether a particular circumstance constitutes a waiver or a forfeiture, we consider whether the failure to raise the objection at the trial level constituted an intentional relinquishment of a known right.” *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (citation omitted).

We review forfeited issues for plain error while “a valid waiver leaves no error for us to correct on appeal.” *Id.* (citations omitted).

“[A]s a general proposition of law, ‘no objection’ constitutes an affirmative waiver of the right or admission at issue.” *United States v. Swift*, 76 M.J. 210, 217 (C.A.A.F. 2017) (citing *Campos*, 67 M.J. at 332–33).

In *Cunningham*, “[a]t the conclusion of . . . sentencing arguments, the military judge asked if either party had any objections. Government trial counsel and trial defense counsel answered in the negative.” 83 M.J. at 374. The United States Court of Appeals for the Armed Forces (CAAF) held, “In this case, trial defense counsel ‘did not just fail to object,’ but ‘affirmatively declined to object’ when answering ‘no’ to the military judge’s question. We hold that this response constitutes an express waiver, obviating the need to address the issue of improper sentencing argument.” *Id.* (citation omitted).

3. Analysis

We find Appellant waived any objection to the slides the Government used in its closing argument, including Slide No. 4, reading in 60-point font size, “[HC] is telling the truth.” In this case, trial defense counsel reviewed the slides in advance, knew the content, and knew the slides’ stated purpose. Yet, when asked if the Defense had any objection, counsel stated “No, Sir.” The 60-point font size on the fourth slide could not escape notice, yet Appellant stated they had no objection. Applying the “general proposition of law, that ‘no objection’ constitutes an affirmative waiver of the right or admission at issue,” we find Appellant waived any objection to the slide and its content. *See Swift*, 76 M.J. at 217 (citing *Campos*, 67 M.J. at 332–33). Here, as in *Cunningham*, “trial

defense counsel ‘did not just fail to object,’ but ‘affirmatively declined to object’ when answering ‘no sir’ to the military judge’s question,” *Cunningham*, 83 M.J. kat 374, *i.e.*, “Any objection to each other’s slides?”

We must now determine if waiving objection to the slide displaying the statement “[HC] is telling the truth” also waived claims against trial counsel’s oral statement made while presenting that slide: “[HC] is telling the truth here.” Having found Appellant waived any objection to the Government slides and its content, we hold the oral statement made in conjunction with the slide where counsel orally states what is on the slide is also waived.

We also hold that Appellant waived objection to both statements, “[HC] is telling the truth” and trial counsel’s later statement that “[t]he truth of the matter is that she isn’t lying. She’s telling the truth,” at the close of argument. As explained above, before the members began their deliberations, the military judge asked if counsel objected “to the instructions given, *opposing counsel’s argument*, or request additional instructions.” (Emphasis added). Senior defense counsel replied, “No, sir.” This response constitutes an express waiver. *See Cunningham*, 83 M.J. at 374.

Even if the answer to the military judge’s question did not constitute waiver for the second statement—“The truth of the matter is that she isn’t lying. She’s telling the truth.”—Appellant suffered no prejudice. That statement was made in direct support of Specification 1 of Charge I, which members found Appellant not guilty of committing. Under plain error, without showing prejudice, Appellant is not entitled to relief. *See Matti*, 2026 CAAF LEXIS 189, at *9.

Having found Appellant waived the issue of vouching, we need not review it on appeal. Appellant’s improper argument claim warrants no relief.

B. Factual Sufficiency

Specification 1 of Charge II alleged that on or about 11 February 2023, Appellant committed a violent offense against his wife HC by slapping HC’s face with his hand and spitting on her. Appellant raises the issue of whether Specification 1 of Charge II is factually sufficient.

We understand Appellant’s brief and reply brief together to say his specific showings of a deficiencies of proof are based on three assertions: (1) when confronted, Appellant immediately and adamantly denied committing the acts for which he was charged; (2) the alleged vouching by trial counsel tainted HC’s testimony; and (3) HC was an unreliable witness.⁷ The Government avers

⁷ Appellant’s initial assignment of error claimed the specific deficiencies of proof were the absence of any physical evidence corroborating the allegation; [Appellant]’s

Appellant has failed to make a specific showing of a deficiency of proof which would empower us to conduct our review. As we explain in section II.B.2.b.iii below, we disagree. In our application of the *Threshold for Review*,⁸ the third assertion qualifies as a specific showing of a deficiency of proof such that we may conduct our review. However, as we explain in section II.B.3, as part of our *Weight of the Evidence Review* below, we determine the finding of guilty is not against the weight of the evidence, is factually sufficient, and therefore warrants no relief.

1. Law and Analysis

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 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

immediate, adamant denial of having committed the offense; and his explanation that the alleged victim advanced the allegation in an effort to “gaslight” him. We do not separately address the allegation of psychological manipulation (referred to by Appellant as gaslighting) as it was part of his immediate adamant denial and did not warrant being addressed separately from the denial assertion. The lack of physical corroboration also did not warrant separate consideration as a specific showing of a deficiency of proof. Rather, we address that claim as a factor during our weight of the evidence review. We address the specific showings of deficiencies of proof we understand Appellant to be asserting in his original brief and reply brief read together.

⁸ *United States v. Harvey*, 85 M.J. 127, 130 (C.A.A.F. 2024), referred to this two-part prerequisite to conducting a full factual sufficiency review as a trigger. However, in *Hunt*, a more recent opinion, the CAAF referred to this two-part requirement for review as a “threshold to review.” *United States v. Hunt*, __ M.J. __, No. 25-0257, 2026 CAAF LEXIS 661, at *7 (C.A.A.F. 6 Aug. 2026). Here, we will refer to the two-step requirement for review as a threshold vice trigger going forward.

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*).

There is “nothing in [the] amended Article 66, UCMJ, [that] either requires or allows a [Court of Criminal Appeals (CCA)] to review the factual sufficiency of the evidence,” unless “two express [threshold] conditions” are met: “appellant (1) asserting an assignment of error, and (2) showing a specific deficiency of proof.” *United States v. Harvey*, 85 M.J. 127, 130 (C.A.A.F. 2024) (citations omitted). The first requirement, asserting an assignment of error, is straightforward and easily measured. The second requirement, showing a specific deficiency of proof, less so. Not defined in Article 66, UCMJ, it has been discussed but not yet defined in our case law.

There remain open questions as to what is required for a specific showing of a deficiency of proof. The CAAF began to set limits on this second requirement in *United States v. Hunt*, stating to invoke a factual sufficiency review the specific showing of a deficiency of proof must be “a specific, reasonable, nonfrivolous statement of error as to a particular finding.” __ M.J. __, No. 25-0257, 2026 CAAF LEXIS 661, at *7 (C.A.A.F. 6 Aug. 2026). The dissent in *Hunt* agreed with this point, making clear, that “the new requirement of a specific showing ‘avoids allowing the defense to obtain factual sufficiency review by making a mere boilerplate allegation of factual insufficiency in every case with a contested finding of guilty.’” *Id.* at *18 (Maggs, C.J., dissenting). Chief Judge Maggs’ dissent acknowledges the “Court has not yet had occasion to define exactly what is needed to satisfy this requirement . . . , “[b]ut the requirement of the ‘specific showing’ appears to rest on a principle of judicial efficiency.” *Id.* The dissent further alludes to the fact that CCAs should not “use their limited resources conducting a factual sufficiency review unless such a review is likely to matter.” *Id.* What threshold demarcates a deficiency of proof (that matters)? How weighty must the deficiency be to qualify for review?

We make a qualitative assessment informed by our discretionary authority, our judicial experience, an appellant’s assertion, and the record of trial to determine whether an appellant has demonstrated a “specific showing of a deficiency of proof” under Article 66(d)(1)(B)(i), UCMJ. When an appellant (1) requests a factual sufficiency review and (2) asserts a specific showing of a deficiency of proof, we must assess whether the claim constitutes a specific showing of a deficiency of proof. Our review must ensure the claimed specific showing of a deficiency of proof is “a specific, reasonable, nonfrivolous statement of error as to a particular finding,” as required by *Hunt*, 2026 CAAF LEXIS 661, at *7. We need to qualitatively assess the deficiency of proof to ensure the specific showing of a deficiency of proof meets these limits set in *Hunt*. We do not

articulate an agreed upon algorithm—or test within a test—for determining when these requirements are met. Instead, our court relies upon the judicial discretion of the judges of the court weighing the stated deficiency with the specific facts in the record against the plain meaning of the terms “specific” and “non-frivolous statement of error as to a particular finding,” and “reasonable” in each individual case.

Once satisfied the stated deficiency constitutes a specific showing of a deficiency of proof, we are empowered to conduct a full weight of the evidence review. Conversely, when we determine through our qualitative assessment an appellant has failed to make a specific showing of a deficiency of proof, we lack the statutory authority to proceed further and our analysis ends. *Harvey*, 85 M.J. at 130. Our qualitative assessment of an appellant’s threshold showing is a mixed question of law and fact. This qualitative assessment, akin to fact finding, is in our view amenable to review by our superior court for an abuse of discretion, while our application of the law is subject to a de novo review. See *United States v. Csiti*, 85 M.J. 414, 419 (C.A.A.F. 2025).⁹

When we are authorized to conduct a full factual sufficiency review, the statutory requirement to apply “appropriate deference” depends “on the nature of the evidence at issue.” *Harvey*, 85 M.J. at 130. It remains within this court’s discretion to determine what level of deference is appropriate under the circumstances. *Id.* at 131. The ultimate substantive burden remains clear: “the quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is proof beyond a reasonable doubt, the same as the quantum of proof necessary to find an 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 the appellant is guilty beyond a reasonable doubt.” *Id.* Second, we “must be clearly convinced of the correctness of this decision.” *Id.*

In this case, to convict Appellant of domestic violence as alleged in Specification I of Charge II, the Government was required to prove Appellant: (1) committed a violent offense, to wit: unlawfully slapping HC’s face with his hand and unlawfully spitting on her; and (2) HC was, at the time of the offense, the spouse of Appellant. See *Manual for Courts-Martial, United States* (2019

⁹ In *Csiti*, the CAAF explained they “review [our court’s] interpretation of Article 66(d)(1)(B), UCMJ, de novo because that is a question of law [, and] review [our court’s] application of Article 66(d)(1)(B), UCMJ, for abuse of discretion.” 85 M.J. at 419 (emphasis and citations omitted).

ed.) (*MCM*), App. 2, at A2-45–46; Exec. Order. No. 14,062, 87 Fed Reg. 4763, 4778 (31 Jan. 2022).

A violent offense under domestic violence includes assault consummated by a battery under Article 128, UCMJ, 10 U.S.C. § 928, which occurs when a person (1) unlawfully and with force or violence (2) does bodily harm to another person. Bodily harm means an offensive touching of another, however slight. *See* 87 Fed. Reg. at 4780.

2. Applying the Threshold for Review Under Article 66(d)(1)(B)(i), UCMJ—Has Appellant (1) Requested Review and (2) Made a Specific Showing of a Deficiency of Proof?

a. Appellant Requested Review

Pursuant to Article 66(d)(1)(B)(i), UCMJ, Appellant requested a factual sufficiency review in his assignments of error brief, thereby satisfying step one of the two-step requirement for this court to be empowered to conduct a factual sufficiency review. *See Harvey*, 85 M.J. at 129.

b. Appellant’s Three Assertions of Specific Showings of Deficiencies of Proof, Which we Analyze in Turn

i. Initial denial

Appellant’s first assertion of a “specific showing of a deficiency of proof” is that, when initially confronted, he immediately and adamantly denied having committed the charged acts. In our view, an out-of-court denial does not constitute a “specific deficiency of proof.” A person denying an assault when confronted does not render the evidence for any element related to the assault deficient. Though an admission may have strengthened the evidence, a denial in this context does not constitute “a weakness in the evidence admitted at trial to support an element [that] on balance . . . contradicts a guilty finding.” *See United States v. Valencia*, 85 M.J. 529, 534 (N.M. Ct. Crim. App. 2024). As we weigh the first assertion, which fails to identify a sufficient statement of error as to a particular finding or a weakness in the Government’s proof, it falls short of a “specific showing of a deficiency of proof.” Accordingly, our statutory analysis as to this assertion is concluded, and we decline to initiate a full weight-of-the-evidence review on this basis.

ii. Vouching

Appellant next asserts the alleged vouching by trial counsel that we addressed above in section II.A is a “specific showing of a deficiency of proof.” Specifically, Appellant argues the vouching tainted the members’ consideration of the victim HC’s testimony. This assertion presents a novel threshold question: whether an issue that has been waived and leaves no error to correct on appeal can nevertheless serve as a specific deficiency of proof solely for the

purpose of meeting the threshold for a factual sufficiency review under Article 66, UCMJ. We conclude that it can. A waived issue could be considered independently at this initial threshold requirement stage as a specific showing of a deficiency of proof. The relief, which could ultimately be granted, would be based upon any subsequent weight of the evidence review and not upon the waived issue, which merely served to empower our review. Applying that principle here, however, Appellant's assertion falls short. During closing argument, trial counsel introduced the instruction on credibility of the witnesses with a slide saying "[HC] is telling the truth. But you don't have to believe only her word, there is corroborating evidence," and at the same time, stated, "[HC] is telling the truth here, and there's a couple ways that you can be sure of that, beyond a reasonable doubt. . . . This is an instruction that you received from the military judge about determining the credibility of witnesses." We find these statements, even if considered a flawed way to preface a discussion on a judicial instruction on witness credibility, are so inconsequential when viewed in context as to make it unreasonable to think this made a difference at trial or amounts to an issue likely to matter. Therefore, although we considered the waived issue as a potential threshold for review, it fails to establish "a specific showing of a deficiency of proof" for us to conduct a full weight of the evidence review. Thus, our analysis of this assertion is concluded, and we decline to initiate a full weight-of-the-evidence review on the basis of the alleged vouching.

iii. Appellant's assertion that HC is unreliable

Finally, Appellant asserts "HC's unreliability as a witness" constitutes a specific showing of a deficiency of proof. In our view, an assertion that a witness is unreliable may in some cases constitute a "specific deficiency of proof." Conducting an initial qualitative review, we note the record contains a number of attacks on the credibility of HC. The Defense's theory from the beginning was that HC fabricated the allegations. Trial defense counsel established that HC made these allegations only after Appellant informed her that he was seeking a divorce. The Defense further averred that HC fabricated the assault to gain leverage in an upcoming child custody hearing. Appellant slapped and spit on HC in their home on the evening of 11 February 2023 with no other witnesses present. We conduct our review of the claimed "specific deficiency of proof" with these facts in mind and find this constitutes a specific showing of a deficiency of proof which empowers us to conduct a weight of the evidence review.

3. Conducting a Weight of the Evidence Review under Article 66(D)(1)(B)(iii), UCMJ

Appellant's claim that HC's unreliability leaves a real possibility Appellant did not slap or spit on HC as alleged, but rather HC made it up, does not persuade us. After reviewing the entire record of trial, we are convinced beyond a reasonable doubt Appellant did slap and spit on HC as alleged in Specification

1 of Charge II. Appellant correctly points out that a person cannot hear the slap or the spitting in the audio recording of the baby monitor admitted at trial. A person can, however, hear Appellant violently enter the home, which is further supported by the photographic evidence of a broken door. Then, after a period of profanity-filled accusations and questions by Appellant, HC can be heard crying loudly. During her testimony, HC explained at what point in time Appellant spit on her and then slapped her. HC texted her neighbor and told her Appellant broke in the door. The neighbors, Mrs. KK and her husband Maj JK, arrived shortly thereafter to find the door broken in as HC had described. Mrs. KK found HC crying hysterically holding her face, and while still under the stress of the event, HC told Mrs. KK Appellant slapped her and spit on her. Mrs. KK did not see bruises but did see HC holding her face and crying hysterically. The lack of a bruise does not indicate she was not slapped. The audio recording, photographs, text messages and testimony of neighbors corroborate HC's description of what occurred. This assault constitutes a violent offense, and Appellant does not dispute being married to HC at the time. After weighing the evidence and giving appropriate deference to the fact that the trial court saw and heard the witnesses, we determine the finding of guilty is not against the weight of the evidence, the evidence proved his guilt beyond a reasonable doubt, and is correct in fact. Accordingly, we affirm.

C. Victim Impact Statement

Appellant for the first time on appeal asserts the unsworn victim impact statement by HC contained improper portions that substantially influenced his sentence. First, Appellant asserts the statement below amounted to a request for a specific sentence, a dismissal.

I married Brandon when he was a Captain in the United States Air Force in 2019. I was 24 years old. Both of my parents served in the U.S. Army and I grew up thinking that a member of our United States Armed Forces meant that they were disciplined, honorable, and understood how to treat those they cared about. I still believe that. And that is why Brandon should not be an Airman.

Second, Appellant claims the abuse mentioned in the paragraphs below are discussions of uncharged misconduct.

I want to move on from him and provide a happy and healthy upbringing for my sons. I don't want them to be exposed to the same shame and abuse that I endured throughout the course of our marriage. Part of moving on is a fair and just sentence for what he did.

When Brandon and I started dating he was outgoing, fun to be around, and made me feel the center of his world. Looking back on it, I now see that this was the beginning of his abuse.

Third, Appellant asserts the mention of “consequences—severe ones” was an improper request for a specific sentence.

Please take into consideration the struggles and trauma I have endured as a result of his actions. Please give him a sentence that might actually get through to him and show that there are consequences—severe ones—for committing violence against his family.

The Government argues Appellant waived any objection to the unsworn victim impact statement and that even if waiver did not apply, we should find no plain error. We agree with the Government that Appellant waived his objections to the unsworn victim impact statement, and that even if waiver did not apply, we find no plain error.

1. Additional Background

Trial defense counsel told the military judge they reviewed the one-page unsworn victim impact statement and that they had no objection to it.

[Military Judge (MJ)]: [] Defense Counsel, have you seen a copy of the victim impact statement?

[Defense Counsel (DC)]: Yes, Your Honor.

MJ: Any objections to it?

DC: No, Your Honor.

Then, outside the presence of the members, the victim’s counsel, the military judge, and the parties discussed providing a written copy of the victim impact statement to the members. The Defense and the military judge agreed that “[t]he unsworn statement may be oral, written, or both,” meant that the members could be provided with the written unsworn victim impact statement. See R.C.M. 1001(c)(5)(A). Before the members received the written victim impact statement, the following discussion ensued:

MJ: . . . Trial and Defense Counsel, did you have a chance to review [the victim impact statement copies] that will go to the members?

[Special Trial Counsel (STC)]: Yes, Your Honor.

MJ: Any objections?

STC: No, Your Honor.

MJ: Defense Counsel?

[Senior Defense Counsel]: It's been reviewed by the Defense, sir. No objections.

MJ: All right. Thank you. So I will call them back in. I will state that you can provide it to them, that it's already been reviewed by the trial and defense counsel. You'll do that and then we'll move on to the defense sentencing case.

The Government did not refer to the victim impact statement during the sentencing argument.

2. Law

This court “reviews a military judge's ruling on an objection to a victim's unsworn statement for abuse of discretion.” *United States v. Campos*, 85 M.J. 310, 314 (C.A.A.F. 2025) (citing *United States v. Hamilton*, 78 M.J. 335, 340 (C.A.A.F. 2019)).

“When an appellant merely fails to object to the admission of evidence at trial, the issue is forfeited; but when an appellant affirmatively states he has no objection to the admission of evidence, the issue is waived and his right to complain on appeal is extinguished.” *Andersen*, 82 M.J. at 546–47 (first citing *Davis*, 79 M.J. at 331; then citing *United States v. Ahern*, 76 M.J. 194, 198 (C.A.A.F. 2017)); *see also Campos*, 67 M.J. at 332–33; *Swift*, 76 M.J. at 217.

Rule for Courts-Martial 1001(c) (2019 ed.) governs the victim's unsworn statement in this case. Three clauses of this rule are pertinent. R.C.M. 1001(c)(5)(A) provides: “The crime victim may make an unsworn statement and may not be cross-examined by trial counsel or defense counsel, or examined upon it by the court-martial.” R.C.M. 1001(c)(3) further provides: “The content of statements made under paragraph[] . . . (5) may only include victim impact and matters in mitigation.” And R.C.M. 1001(c)(2)(B) states: “For purposes of this subsection, victim impact includes any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty.”

Campos, 85 M.J. at 314.

“[T]he Court will grant relief only if the Court is persuaded that the improper portion of the victim impact statement ‘substantially influenced the adjudged sentence.’” *Id.* (citing *Hamilton*, 78 M.J. at 342–43). To determine whether “evidence substantially influenced a sentence, this court considers four factors: ‘(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question.’” *Id.* (citing *Hamilton*, 78 M.J. at 343).

3. Analysis

Waiver applies to the victim impact statement, which trial defense counsel stated they had reviewed and had no objections to; therefore, “the issue is waived and [Appellant’s] right to complain on appeal is extinguished.” *Ander- sen*, 82 M.J. at 547.

Even if we were to conclude Appellant forfeited rather than waived the issue, we still would not find plain error. The unsworn statement approached the line as a potential request for a dismissal, *i.e.*, a specific sentence, where HC stated, “I grew up thinking that a member of our United States Armed Forces meant that they were disciplined, honorable, and understood how to treat those they cared about. I still believe that. And that is why [Appellant] should not be an Airman.” In context, however, the fleeting comment within HC’s description of growing up in a military family was close to the line and not over it. The other two statements are not error in our view and, if errors at all, not severe. During sentencing argument, trial counsel did not refer to the victim impact statement and the mixed findings showed members independently assessed the allegations and were not convinced where the testimony of HC was not strongly corroborated. We are convinced the impact statement did not “substantially influence[] the adjudged sentence.” *Campos*, 85 M.J. at 314. Trial defense counsel offered members two options for what Defense believed was a fair sentence, a set menu of sorts, with Appellant’s preferred choice of more confinement and no dismissal and a less preferred choice of a dismissal and no confinement. Members made a slight variation from Defense’s second choice and adjudged a dismissal with 30 days confinement. Putting the second option on the menu of fair sentences likely influenced members more than the one-page unsworn statement that no one referred to during argument. Nor do we find the one-page document being provided to the members after it was read to them prejudicial. Even if there was error, there was no prejudice. Accordingly, Appellant is entitled to no relief on this issue.

III. CONCLUSION

The findings as entered are correct in law and fact. 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