

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES’ MOTION FOR
<i>Appellee,</i>	)	RECONSIDERATION AND
	)	RECONSIDERATION EN BANC
v.)	
	)	Before Panel No. 3
Airman First Class (E-3))	
WON KIM	)	No. ACM 24007
United States Air Force)	
<i>Appellant.</i>	)	15 September 2025

**TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

Pursuant to Rule 31.2 of this Court’s Rules of Practice and Procedure, the United States respectfully moves this Honorable Court to reconsider and reconsider en banc its 15 September 2025 opinion finding: (a) that Appellant’s conviction for abusive sexual contact for touching EW’s breast without her consent was factually insufficient; and (b) that his conviction for abusive sexual contact for unlawfully touching EW’s vulva with his thigh was factually insufficient. United States v. Kim, 2025 CCA LEXIS 386 (A.F. Ct. Crim. App. Aug. 15, 2025).

As of September, this Court has already overturned convictions in 16 cases this year (11 for factual insufficiency), as opposed to convictions in 9 cases in all of last year (6 for factual insufficiency). While it is possible that this reflects a trend of poorer decision-making by the trier of fact at the trial level, it could also be an indicator that this Court is sometimes reviewing factual sufficiency and plea inquiries under an inappropriately elevated standard that is not supported by the law. This Court’s opinion shows that it applied such an inappropriately elevated standard here. This Court identified several unlikely interpretations of the evidence that will be described in more detail below (e.g. that Appellant might have reasonably and mistakenly believed he could touch EW’s breast again after she had just removed his hand and told him she

was not comfortable with it; that EW might not have known what vulva meant; and that even though Appellant's body was directly on top of EW's, that it might have been some other part of his leg – rather than his thigh – that was touching her vulva) and then used those unlikely interpretations to find that it was “*clearly convinced*” that that findings were against the weight of the evidence. Reconsideration en banc is warranted to ensure that the Court is uniformly and correctly applying the standard of review for factual sufficiency.

Reconsideration is also appropriate under Rule 31.2(b)(1) because “[a] material legal or factual matter was overlooked or misapplied in the decision.” A.F. CT. CRIM. APP. R.

31.2(b)(1). Specifically, this Court:

1. Misapplied the definition of consent and unreasonably considered that EW was not wearing a bra, despite her manner of dress being irrelevant to consent.
2. Misapplied the definition of consent and unreasonably assumed that EW existed in a state of consent and had some burden to manifest nonconsent, rather than evaluating whether she ever made a freely given agreement to the conduct.
3. Misapplied the definition of consent, which makes clear that lack of verbal and physical resistance does not constitute consent. This Court gave undue weight to EW's testimony that, after her previous rejection of Appellant's touch of her breast, EW “just let” the second touch happen because she had already told him no, and he did not listen to her.
4. Overlooked the Court's own case law that recognizes that a reasonable mistake cannot be based on a negligent failure by Appellant to discover the true facts; after EW rejected Appellant's first breast touch, it was at the very least negligent for Appellant to touch her breast again without confirming she was okay with it.
5. Overlooked EW's testimony to unreasonably assume – without any evidence in the record – that EW might not know what vulva meant.
6. Overlooked logical inferences from EW's in-depth testimony about how EW and Appellant's bodies were physically aligned to conclude that there was no evidence that Appellant's thigh touched EW's vulva.
7. Overlooked Appellant's attempts to kiss EW with his tongue and later admissions that he was trying to recreate “intimate” moments with her when concluding that the Government did not prove beyond a reasonable doubt that Appellant touched EW's vulva with his thigh to gratify his sexual desire.

Reconsideration en banc is “necessary to secure or maintain uniformity of the Court’s decisions” and because “the proceeding involves a question of exceptional importance.” A.F. CT. CRIM. APP. R. 27(a). First, the Court’s application of the law conflicts with the opinion in United States v. Soloshenko, 2025 CCA LEXIS 358, at *18 (A.F. Ct. Crim. App. July 31, 2025). In Soloshenko, this Court applied the principle that an appellant’s mistake of fact cannot be based on a negligent failure to discover the truth. Id. This Court abandoned that principle here by never considering whether Appellant negligently failed to discover the truth about whether EW was consenting to the touching of her breast. Second, and discussed in more detail below, this Court similarly deviated from United States v. Rodela, 82 M.J. 521 (A.F. Ct. Crim. App. 2021) (rejecting argument that “consent to arguably nonsexual contact must be extended to sexual contact when the victim fails to manifest a lack of consent to progressive touching”) and United States v. Plourde, 2019 CCA LEXIS 488 (A.F. Ct. Crim. App. Dec. 6, 2019) (unpub. op), *pet. denied*, 80 M.J. 73 (C.A.A.F. 2020) (rejecting premise that after a victim expresses lack of consent to sexual conduct, she is legally obligated to repeatedly assert lack of consent throughout an assault). In spite of Rodela and Plourde, this Court appears (1) to have interpreted EW’s consent to nonsexual conduct as evidence that Appellant has a valid mistake of fact as to her consent to later sexual conduct and (2) to have required EW to continue to manifest nonconsent to the breast touching after expressing nonconsent once. This Court should reconsider en banc to reconcile this case with its prior opinions.

This case also involves questions of exceptional importance. Not only did this Court improperly consider the victim’s manner of dress (not wearing a bra) in determining whether she consented or Appellant could have mistakenly believed she did, but it found that Appellant could have had a reasonable mistake of fact as to consent for touching the victim’s breast, even though

the victim told him she did not want him to do so immediately before he did it again. Left as is, this Court's decision would set a concerning precedent regarding whether an accused is expected to honor a victim's lack of consent and the extent to which a mistake of fact as to consent will be considered "reasonable" even after a victim has manifested nonconsent to a particular sexual act. United States v. Davis, 76 M.J. 224, 230 (C.A.A.F. 2017). For these reasons, this Court should reconsider its decision and do so en banc.

ISSUES FOR RECONSIDERATION

I.

WHETHER THIS COURT SHOULD RECONSIDER ITS CONCLUSION THAT APPELLANT'S CONVICTION FOR TOUCHING EW'S BREAST WAS FACTUALLY INSUFFICIENT BECAUSE THE GOVERNMENT DID NOT PROVE LACK OF CONSENT OR THAT APPELLANT HAD A REASONABLE MISTAKE OF FACT AS TO CONSENT TO TOUCH EW'S BREAST.

II.

WHETHER THIS COURT SHOULD RECONSIDER ITS CONCLUSION THAT APPELLANT'S CONVICTION FOR ABUSIVE SEXUAL CONTACT BY TOUCHING HIS THIGH TO EW'S VULVA IS NOT FACTUALLY INSUFFICIENT.

JURISDICTION

In accordance with Rules 15 and 31(b)-(c), this Court has jurisdiction to consider this motion because neither the Court of Appeals for the Armed Forces nor any other court has acquired jurisdiction over this case.

STATEMENT OF THE CASE

A special court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one charge and two specifications of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ); and one charge and one specification

of assault consummated by battery in violation of Article 128, UCMJ. (*Entry of Judgment*, dated 19 October 2023 (EOJ), Record of Trial (ROT), Vol. 1). The members sentenced Appellant to a reprimand, forfeiture of \$500 pay per month for four months, hard labor without confinement for 30 days, and restriction to the limits of Osan for 30 days. (*Id.*). The convening authority reduced Appellant’s forfeitures from four months to two months. (*Convening Authority Decision on Action*, dated 6 October 2023 (CADAM), ROT, Vol. 1).

On appeal, Appellant raised four assignments of error before this Court. (*See App. Br.*) On 15 August 2025, this Court found in favor of Appellant on his first and second assignment of errors, concluding that his convictions for touching EW’s breast with his hand and her vulva with his thigh were factually insufficient. Kim, 2025 CCA LEXIS 386. This Court set aside the findings of guilty with respect to those two specifications, dismissed both specifications with prejudice, and returned the case to the Judge Advocate General for further processing, including= authorizing a rehearing on the sentence. Id. at *43.

The United States received the Court’s opinion on 15 August 2025 and timely filed a motion for reconsideration within 30 days.

STATEMENT OF FACTS¹

EW met Appellant through work and they started getting to know each other, though she “wanted to be friends first before [they] moved on” to a relationship.” (R. at 193-195). EW and Appellant talked about topics such as marriage, religion, “what [they] wanted out of life,” and how many kids each wanted so EW could better determine if she wanted a relationship with Appellant. (R. at 195-196). EW was 21 years old at the time of the offenses. (R. at 266-267).

¹ The United States adopts the statement of facts from its original Answer to Assignments of Error; however, for this Court’s convenience, the most pertinent facts are recited again here.

While watching movies in EW's room, EW and Appellant were often "cuddling" by either sitting up or lying down on her bed. (R. at 198). Occasionally while doing this, Appellant and EW would "make out," which EW described as "multiple kisses" that "would include tongue." (Id.). EW agreed that there were also occasions where Appellant would lie on top of EW with his leg between her thighs while they "made out" and Appellant's legs and hips would sometimes be moving on these occasions. (R. at 231). During one occasion when they were kissing, Appellant "playfully" put EW's "hands behind [her] back." (R. at 212).

For the first two occasions where Appellant touched EW's breast without her consent, she and Appellant were in EW's room sitting up watching a movie and "cuddling" as they had in the past. (R. at 198). Appellant's arm started around EW's shoulder, moved to her waist, and then Appellant slid his hand under her shirt; this made EW uncomfortable, but she did not initially react. (R. at 198-199). Appellant then shoved his hand upward to cup EW's breast, which was bare beneath EW's shirt because she was not wearing a bra. (Id.). EW moved his hand away from her breast and told him she "wasn't comfortable with that." (R. at 199). EW told Appellant that she "just wanted to get to know him" and that he was "pushing it too far into the line of dating and intimacy." (Id.). Appellant told EW that he knew she wore a "chastity ring" and "didn't want to have sex before marriage." (Id.). To EW, "chastity" meant she didn't "want anything sexual about touching like [her] vulva or any area like that." (R. at 200). However, Appellant informed EW that he "wasn't going to make [her] take [her] ring off, but as a man he needed certain things." (R. at 199). Appellant's comments made EW feel like "he didn't really respect [her] and what [she] wanted." (Id.). Appellant then moved his hand back to EW's breast, and EW "let it go" because he did not listen the first time and she "didn't really

know what to do.” (Id.) EW “didn’t think [Appellant] would listen a second time,” because he had not “listen[ed] the first time.” (R. at 200).

Between these touches to her breast and before 11 May 2022, EW told Appellant that she did not have “any interest in dating him anymore, that [she] just wanted to be friends but nothing else,” and that she wanted to be with her friend JK. (R. at 202, 220). After this conversation, Appellant was “still very relentless” and “wouldn’t accept it.” (R. at 205).

On 11 May 2022, EW was studying for a test at JK’s house. (R. at 221). When EW returned to her dormitory, Appellant knocked, typed in her code, and came into her room without permission. (R. at 203). Appellant asked EW where she had been, and EW told Appellant she had been at JK’s house. (R. at 204). Appellant did not react well to this and talked to EW about why she wanted to be with JK and not him. (Id.) EW got up from her low chair and moved to sit on her bed to be at a better physical “talking level” with Appellant. (Id.)

EW testified that Appellant grabbed her wrists and pushed her down onto the bed. (R. at 203). Appellant held one of EW’s hands in each of his and their forearms were aligned. (R. at 205). Appellant’s chest was against EW’s chest and his leg was between her legs. (R. at 203). Appellant “had his leg between [her] legs touching [her] vulva.” (Id.) Appellant was very close to EW’s face and had “his nose on [her] cheek.” (Id.). EW turned her head to the right so he could not touch her lips. (Id.) Appellant did not move his thigh between EW’s legs or rub against her. (R. at 232). EW laid there for about a minute because she realized how angry Appellant was. (R. at 205). EW then tried to push Appellant off, but Appellant pushed back. (Id.) EW told Appellant to get off her, but Appellant “just kept talking” about EW and JK’s incompatibility. (R. at 205, 238). EW tried to push him off with her own arm strength but was unable to do so. (R. at 206). EW “aggressive[ly]” told Appellant to get off her at least ten times.

(R. at 207). After about five minutes, Appellant moved his head to her lips and tried to kiss her.

(R. at 203). Appellant tried to stick his tongue in EW's mouth. (Id.) EW kept her lips pressed tightly together to prevent him from sticking his tongue in her mouth, and she felt Appellant's "wet" "tongue all over [her] lips." (R. at 207-208). This went on for about ten seconds until EW started crying. (R. at 208). EW testified that Appellant noticed she was crying, got up, and walking out the door. (Id.)

ARGUMENT

I.

THIS COURT SHOULD RECONSIDER ITS CONCLUSION THAT APPELLANT'S CONVICTION FOR ABUSIVE SEXUAL CONTACT FOR TOUCHING EW'S BREAST WAS FACTUALLY INSUFFICIENT.

Law and Analysis

A. EW's manner of dress is not evidence of her consent nor a basis for mistake of fact as to consent.

A "current or previous dating or social or sexual relationship by itself or *the manner of dress* of the person involved with the accused in the conduct at issue does not constitute consent." MCM part IV, ¶ 60.a.(g)(7)(A) (emphasis added). A victim's manner of dress has not been relevant to consent in sexual offenses since 2007. *See* Exec. Order 13,447, 72 Fed. Reg. 190 (28 Sep. 2007); *see also* Manual for Courts-Martial, United States part IV, ¶ 45.a.(t)(14) (2008 ed.) (2008 MCM). It "is now generally accepted that there is little, if any, relationship between a complainant's dress and whether or not she was" the victim of a sexual offense. Paul DerOhannesian II, Matthew Bender, *Sexual Assault Trials*, Ch. 5, § 5.49 (5th ed. 2025).

Yet five times, this Court referred to the fact that EW was not wearing a bra at the time of the abusive sexual contact and regarded it as evidence that EW either consented or as evidence

that Appellant had a reasonable mistake of fact as to consent. Kim, 2025 CCA LEXIS 386, at *6, 26, 27, 29, 32. Contrary to these assertions, the only significance EW's absent bra had was that it meant Appellant touched her bare breast as opposed to touching her over her clothes. (R. at 198). A victim's manner of dress is not an invitation to touch them, and neither was EW's decision to wear a shirt without a bra.

This Court's borderline censure of a 21-year-old woman's decision not to wear a bra in what should have been the comfort of her own home is deeply concerning and a misapplication of the definition of consent provided in the Manual. A victim's manner of dress has not been relevant to consent in military prosecutions of sexual offenses since 2007. *See* Exec. Order 13,447, 72 Fed. Reg. 190 (28 Sep. 2007); *see also* 2008 MCM pt. IV, ¶ 45.a.(t)(14). To demonstrate this illogicality, consider instead if EW had not been wearing underwear (and had not previously discussed with Appellant not to touch her genitals). If Appellant then stuck his hand down her pants to touch her bare buttock or her genitals, EW's absent underwear would not have been considered an indication that she consented to that sexual contact, or that Appellant had a reasonable mistake of fact as to consent to touch her buttocks or genitals because she was not wearing underwear. The same must be true for a victim who chose not to wear a bra.

By considering EW's lack of a bra relevant regarding whether she consented to sexual contact or Appellant's mistake of fact as to consent to sexual contact, this Court applied outdated standards excluded from military sexual assault prosecutions for nearly twenty years. Therefore, this Court should not have been clearly convinced that this evidence rendered the finding of guilty against the weight of the evidence.

B. The Court unreasonably assumed that EW existed in a state of consent and had some burden to manifest non-consent rather than evaluating whether she ever made a freely given agreement to the conduct.

Whether consent existed is determined by “*all the surrounding circumstances.*” MCM, pt. IV, ¶ 60.a.(g)(7)(C) (emphasis added). The law is clear that people do not exist in a perpetual state of consent, since consent must be “*given.*” MCM, pt. IV, ¶ 60.a.(g)(7)(A) (emphasis added). The opposite is true - a person exists in a state of nonconsent until consent is “freely given.”

Earlier in their relationship, EW had expressed to Appellant she did not want to have sex or for him to touch her vulva. (R. at 200). She and Appellant had discussed her “chastity ring.” (Id.) EW testified that to her, “chastity” meant she did not “want anything sexual about touching like [her] vulva *or any area like that,*” and Appellant understood this. (Id.) (emphasis added). It is not a leap to understand that EW would consider her breasts, a body part widely regarded as sexual, in this personal definition. Breasts are specifically included in the definition of “sexual contact” under Article 120 for this reason, while the “waist” is not. MCM, pt. IV, ¶ 60.a.(g)(2).

Furthermore, EW’s consent to “make out” with Appellant and let him touch her waist beneath her shirt was not evidence that she would consent to more “progressive touching.” (R. at 198-199); Rodela, 82 M.J. at 527. In Rodela, this Court disagreed with the premise that “consent to arguably nonsexual contact must be extended to sexual contact when the victim fails to manifest a lack of consent to progressive touching.” 82 M.J. at 527.² Consent must still be determined by *all* the surrounding circumstances, which in this case included conversations about EW’s boundaries and sexual touching. (R. at 199). As in Rodela, there is no evidence that

² The accused and victim in Rodela were friends but not in a romantic relationship. The accused rubbed the victim’s back to comfort her while she vomited into a toilet. Id. at 523. The accused argued that because the victim did not react to him rubbing her back, he had a reasonable mistake of fact to touch her breast and vulva. Id. at 527. This Court rejected that argument.

EW “consented to Appellant touching her breast or vulva. Therefore she could not have ‘withdrawn’ consent that had not been given.” 82 M.J. at 527. Since “[l]ack of verbal or physical resistance does not constitute consent,” MCM, pt. IV, ¶ 60.a.(g)(7)(A), neither does “a victim's lack of verbal or physical resistance, without more,” become “some evidence of a reasonable belief that consent has been obtained (or given).” Rodela, 82 M.J. at 529.

EW did not exist in a state of consent whereby Appellant was free to touch her unless she expressly told him not to, even if EW had specifically told Appellant he could not touch her vulva. Consent is not *presumed*; it must be *freely given*. MCM, pt. IV, ¶ 60.a.(g)(7)(A). But instead of determining if a freely given agreement existed for Appellant to touch EW’s breast, this Court adopted an inversion of that definition; it assumed that because EW said Appellant understood he could not touch her vulva or have sex with her, that she was consenting to touches everywhere else. Kim, 2025 CCA LEXIS 386 at *26; R. at 199. This was a misapplication of the law and warrants reconsideration.

C. Appellant did not have a reasonable mistake of fact to the first breast touch.

EW did not consent to have her breast touched, and this Court misapplied material facts and law in concluding that Appellant had a reasonable mistake of fact as to consent. Kim, 2025 CCA LEXIS 386 at *27.

Appellant knew that EW was not willing to have sex or have him touch her vulva. (R. at 199). He also knew that she wore a “chastity ring.” (Id.) Knowing these facts about EW, it was on *Appellant* to ensure she would be okay with him touching her breast, not on *EW* to specifically list each place on her body that Appellant was not free to touch. By holding otherwise and calling this a reasonable mistake of fact as to consent, this Court failed to recognize that a reasonable mistake cannot be based on a negligent failure by Appellant to

discover the true facts. Soloshenko, 2025 CCA LEXIS 358, at *18 (citing United States v. Lee, 2020 CCA LEXIS 61, at *22 (A.F. Ct. Crim. App. 26 Feb. 2020) (unpub. op.) (“[I]n this case, as in [United States v. McDonald, 78 M.J. 376, 379 (C.A.A.F. 2019)], the military judge properly instructed the members that any mistake of fact as to [the victim's] consent must have been non-negligent.”).” Consent to touching in one location does not create a reasonable belief that Appellant “had consent to any progressive touching—and had a corresponding reasonable mistake of fact as to consent to progressive touching—unless and until [EW] outwardly manifested revocation of consent.” Rodela, 82 M.J. at 527 (internal quotations omitted).

Appellant did not clarify with EW what touches she was comfortable with. Instead, he put his hand under her shirt in a non-sexual place and then progressed to her breast without EW’s consent. That EW testified she was “okay” with Appellant touching her waist beneath her shirt, still a non-sexual location, does *not* translate to consent or a reasonable mistake as to consent to touch her breast, a sexual location. (R. at 198-199). Based on this, this Court should not have been clearly convinced that this finding was against the weight of the evidence.

While this Court acknowledged that an accused cannot have a reasonable mistake of fact due to negligence, Kim, 2025 CCA LEXIS 386 *23, it failed to hold Appellant to that standard when weighing the evidence. Instead, this Court placed the blame on EW for not being more specific with Appellant in prior discussions of her boundaries. Id. at *26. The Court overlooked this material provision in the law as well as the facts of EW’s testimony and warrants reconsideration.

D. EW expressly did not consent to the second breast touch.

Even if this Court still finds that Appellant had a reasonable mistake of fact as to the first breast touch, EW expressly did not consent to the second. EW testified that she told Appellant

she “wasn’t comfortable” with his hand on her breast. (R. at 199). She also explained to Appellant that he was “pushing it too far into the line of dating and intimacy.” (Id.) According to EW, Appellant acknowledged her statement by telling her that he knew she wore a chastity ring and would not make her take it off, but “he needed certain things” as a man. (Id.) He then touched EW’s breast again. (Id.) Based on EW’s summary of this interaction, her testimony suggested that the length of time between the first breast touch, EW’s moving his hand from her breast and explaining that she was not comfortable, Appellant stating he “needed certain things,” and “after that [statement Appellant] moved his hand back onto [her] breast” was brief. (Id.)

With these facts, this Court should not be clearly convinced that the conviction was against the weight of the evidence because EW’s “explicit expression of lack of consent—acknowledged by Appellant—serves as a clear demarcation as to what specific conduct [EW] did not consent to, to wit, the exact conduct Appellant proceeded to engage in.” Plourde, 2019 CCA LEXIS 488, at *20-21. EW told Appellant she was not comfortable with him touching her breast. (R. at 199). She even explained *why* she was uncomfortable, which was that Appellant was pushing things too far into “dating and intimacy.” (Id.) That was an “explicit expression of lack of consent” that Appellant “acknowledged.” Plourde, 2019 CCA LEXIS 488, at *20. Appellant’s decision to touch EW again at that point disrespected her expressed lack of consent and placed his “need” as a “man” over what EW had already told him. (R. at 199).

This Court should not be “convinced that [EW's] later acquiescence” or, better stated, submission, “to an ongoing, legally completed [abusive] sexual [contact] is evidence of her consenting to Appellant's initial [sexual contact] under the particular circumstances of this case.” Plourde, 2019 CCA LEXIS 488, at *21. This Court has previously concluded that “[o]nce a person makes their lack of consent to a sexual [contact] known, we know of no legal obligation

for that person to repeatedly and continuously assert a lack of consent throughout an assault, and we decline to create such a requirement here.” Id.

While EW acknowledged that permitted touches had become “blurred” in the past, EW did not *accuse* Appellant of touching her without consent during those other occasions. (R. at 231). Furthermore, there was no ambiguity about whether EW was willing to let lines “blur” when Appellant touched her breast: EW *said* she was uncomfortable with Appellant touching her breast and *moved* Appellant’s hand away from her breast. (R. at 199). EW *explained* to Appellant that he was moving too far into “dating and intimacy.” (Id.) There was no freely given agreement for Appellant to touch EW’s breast a second time. The moment Appellant did so anyway, essentially right after she told him it made her uncomfortable, he completed the crime of abusive sexual contact. (Id.) EW was not required to “continuously assert a lack of consent,” and that should be especially true in this case where EW specifically testified that she “let him do it” because she had no reason to think he would listen a second time when he did not listen “the first time.” (R. at 199-200). To hold otherwise is to negate the concept of consent as defined by the Manual and common sense.

Based on EW’s testimony, this Court should not have been clearly convinced that the conviction was against the weight of the evidence. This Court misapplied material facts from EW’s testimony and the law regarding what constitutes consent, and both issues warrant reconsideration.

E. Appellant had no honest or reasonable mistake of fact as to second breast touch.

Appellant did not have an honest belief that he had EW’s consent to touch her breast a second time, and even if he did, such a belief was objectively unreasonably given her rejection moments before. R.C.M. 916(j)(1); *see DiPaola*, 67 M.J. at 102; *see also Prather*, 69 M.J. at

346-47. This Court should not have been clearly convinced that the conviction was against the weight of the evidence based on this affirmative defense.

To conclude that Appellant had a reasonable mistake of fact as to consent, this Court placed emphasis on the “blurred” lines in EW and Appellant’s relationship with respect to where EW did and did not consent to be touched. Kim, 2025 CCA LEXIS 386 at *29-31. This Court also focused on the “break” between the first and second breast touches during which EW and Appellant “discussed boundaries and each other’s needs and thoughts about going further given the nature of their relationship.” Id. at *29. This is an erroneous view of the evidence and directly contrary to EW’s testimony.

Taking up the second point first, the “break” between the first and second touches to EW’s breasts was brief. While EW did not provide a length of time from start to finish, she said that once Appellant put his hand on her breast, she moved his hand away. (R. at 199). She then summarized her part in the conversation as (1) telling him she was not comfortable with the breast touch, (2) that she “just wanted to get to know him,” and (3) that he was “pushing it too far into the line of dating and intimacy.” (Id.) EW testified that Appellant then told her he knew she wore a chastity ring and would not make her take it off, “but as a man he needed certain things.” (Id.) EW testified that it was “after that [statement, Appellant] moved his hand back onto [her] breast.” (Id.) Taken together, those actions and that conversation would take a minute to conclude in their entirety. This Court assumed that this conversation constituted some sort of “break” in which time EW and Appellant had a deeper conversation about EW’s boundaries and the nature of their relationship, but all EW testified to is captured in those few sentences above. That was not enough time for Appellant to honestly and reasonably believe time had passed and perhaps EW had changed her mind regarding a touch to her breast.

Turning back to the first point, EW did testify that she and Appellant later had greater discussions about EW's feelings for JK and "what was okay like in [EW and Appellant's] friendship because the line was kind of blurred like was friends and what was dating." (R. at 202). However, that conversation happened between the second breast touch and a third breast touch on a completely different day. (R. at 200, 202). In that different conversation, EW told Appellant that she "was fine cuddling or making out, but [she] didn't want to do anything else. . . . Like touching [her] breast, touching [her] anywhere else." (R. at 202). As such, this Court should not have considered this second conversation about boundaries when considering whether Appellant had an honest and reasonable mistake of fact as to consent with respect to the second breast touch, because it happened afterward. (Id.)

Appellant's own statements showed that he did not have a mistake of fact. Between the first and second breast touches, EW told Appellant that she was not comfortable with the breast touching. (R. at 199.) Appellant said he would not make EW take off her chastity ring, but "as a man he needed certain things." (Id.) After saying that, Appellant touched EW's breast again. The evidence reflected that, after being rejected, Appellant disregarded EW's statement and prioritized his "need[s]" as a man and so touched her breast again. (Id.); Moore, 2018 CCA LEXIS 560, at *24 (appellant "was dismissive of [the victim's] rebukes delivered immediately after he committed the offense"). Appellant did not have an honest mistake of fact as to EW consent – in fact he manifested his intent to disregard what he knew to be her lack of consent.

That Appellant was trying to "advance their relationship," as this Court described it, is immaterial– what Appellant wanted did not create an honest mistake as to consent. His desire did not override EW's expressly withheld consent. If anything, it makes it more likely that

Appellant was disregarding EW's expressed lack of consent because it did *not* align with what he wanted, to wit: a dating relationship with EW that included intimacy. (R. at 201).

This Court expressed that "Appellant may have believed that in their discussion after the first breast touch incident he had negotiated a new line in their relationship." Kim, 2025 CCA LEXIS 386 at *30-31. Such a belief would not have been reasonable. To say that Appellant could have "negotiated a new line of intimacy" with EW mischaracterizes their conversation. To "negotiate" is "to confer with another so as to arrive at the settlement of some matter."³ But there was no "negotiation" between EW and Appellant according to her testimony. EW told Appellant she was uncomfortable, and Appellant replied that "as a man he needed" things." (R. at 199). Appellant then put his hand on her breast again without *ever* confirming or clarifying with her that EW was now okay with it. (Id.) This Court did not properly consider that a reasonable mistake cannot be based on a negligent failure by Appellant to discover the true facts. Soloshenko, 2025 CCA LEXIS 358, at *18. Appellant "further lost the ability to claim he honestly believed she consented when he acknowledged her lack of consent" by telling EW he would not make her take off her chastity ring but that "as a man he needed certain things" before again touching her breast. Plourde, 2019 CCA LEXIS 488 at *23; (R. at 199). After EW rejected him the first time, it was at the very least negligent for Appellant to touch her breasts without confirming she was okay with it.

This Court also overlooked EW's express lack of consent in concluding Appellant mistake of fact as to consent was also reasonable. This Court placed too much focus on

³ *Negotiate*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/negotiate> (last visited 10 Sep. 2025).

Appellant's previous consensual interactions with EW to create a pseudo "mixed-messages" scenario that is not application to the present case. *See DiPaola*, 67 M.J. at 102.

EW did admit that the lines sometimes became "blurred" regarding what touches she was okay with. (R. at 231). However, there was nothing "blurred" about the incident in question: EW took Appellant's hand off her breast and told him she was not comfortable with him touching her like that. (R. at 199). She specifically told him it was because he was moving too far into "dating and intimacy." (Id.) At that moment, any "blurred" line in their relationship was non-existent. EW drew a plain, easily understandable line in the sand for Appellant, and he stepped over it moments later because "as a man he needed certain things." (Id.) He did not then clarify with EW if it was okay for him to touch her breast again; he simply did it. (Id.) Appellant "lost his ability to rely on a reasonable belief as to [EW]'s consent when she told him" that she was not comfortable with him touching her breast after he did so the first time. *Plourde*, 2019 CCA LEXIS 488 at *23 (Accused did not have reasonable mistake of fact to vaginally penetrate victim with his penis after she told him "don't go in me" while he was rubbing his penis between her legs). EW told Appellant that his touch to her breast made her uncomfortable because he was pushing their relationship too far, and "evidence that the victim manifested a lack of consent strengthened—but was not a prerequisite to—the conclusion that the appellant lacked an honest and reasonable mistake of fact as to consent." *Rodella*, 82 M.J. at 529 (internal citations omitted).

Finally, previous discussions about intimate topics such as "marriage, children, religion, and abortion," *Kim*, 2025 CCA LEXIS 386 at *32, do not create a corresponding reasonable belief that Appellant was free to touch EW's breast after she already told him no and moved his hand away. (R. at 199). It *would* be unreasonable for Appellant to think that, even though EW

has *just* told him she was not comfortable with him touching her breast, somehow he “had negotiated a new level of physical intimacy that would still respect her limits on sexual intercourse and lower body touches, but which allowed other intimate touches—to include her breasts.” Kim, 2025 CCA LEXIS 386 at *32.

F. EW’s actions after Appellant touched her breast a second time could not have informed Appellant’s mistake of fact as to consent because the crime was completed upon his touch to her breast.

This Court placed too much weight on EW’s actions following the second breast because those actions could not have affected Appellant’s mistake of fact. This Court should again consider Plourde, in which it found unconvincing the premise that:

[The victim]’s later acquiescence to an ongoing, legally completed sexual assault is evidence of her consenting to [appellant]’s initial penetration under the particular circumstances of this case. Once a person makes their lack of consent to a sexual act known, we know of no legal obligation for that person to repeatedly and continuously assert a lack of consent throughout an assault, and we decline to create such a requirement here.

2019 CCA LEXIS 488, at *21.

This Court then went on to say that:

Even if we were to conclude [the victim] consented to later sexual conduct with [appellant], this later-given consent has no bearing on whether he was honestly and reasonably mistaken at some earlier point in time when he was unaware of what—if any—future consent would be given. In sum, [appellant] had no valid mistake of fact claim with regard to the offense he was convicted of.

Id. at *23-24

Following this logic, this Court misapplied the fact that EW did not move Appellant’s hand from her breast or tell him she was uncomfortable a second time without considering the qualifying language that EW “didn’t think [Appellant] would listen a second time,” because he had not “listen[ed] the first time.” (R. at 200). While “[l]ack of verbal or physical resistance

does not constitute consent,” MCM, pt. IV, ¶ 60.a.(g)(7)(A), EW verbally *and* physically resisted Appellant by moving his hand and telling him she was uncomfortable. (R. at 199). EW was not under a “legal obligation . . . to repeatedly and continuously assert a lack of consent.” Plourde, 2019 CCA LEXIS 488, at *21.

And even if this Court still wished to consider EW’s post-contact actions as evidence of Appellant’s reasonable mistake of fact as to consent, it should give them very little weight because the crime had already been committed. As soon as Appellant put his hand back on her breast after she told him it made her uncomfortable, Appellant had already committed an abusive sexual contact. Plourde, 2019 CCA LEXIS 488 at *21. Any inference that EW consented because she did not push Appellant away a second time is unpersuasive because she had *just* moved his hand away and told Appellant that his touch to her breast made her uncomfortable and he put his hand on her again anyway. Id. at *22. EW’s post-contact actions did not create a deficiency in proof that could have clearly convinced this Court that Appellant’s conviction was against the weight of the evidence.

In addition and as discussed above, EW’s decision not to put a bra on after the second unconsented to touch had no bearing on her consent or Appellant’s mistake of fact. Kim, 2025 CCA LEXIS 386 at *29. A victim’s manner of dress does not constitute consent *before* a sexual offense occurs, so it cannot be relevant to consider what a victim was wearing after the abusive sexual contact had occurred. EW’s decision not to wear a bra was not relevant to whether she consented or Appellant had a mistake of fact *before* touching EW’s breast. Therefore, her *post-hoc* decision to remain without one had absolutely no bearing on Appellant’s reasonable mistake of fact after he had already put his hand on her breast for a second time. (R. at 199).

This Court overlooked material facts regarding EW’s testimony about her relationship with Appellant and misapplied other facts to find either that she consented to the abusive sexual contact or Appellant had a reasonable mistake of fact to her consent. Likewise, this Court overlooked and misapplied the law in concluding that consent existed or Appellant had a reasonable mistake of fact as to consent. If left as is, this Court’s opinion will set a concerning precedent for future sexual assault cases in the Air Force. The opinion stands for the proposition that a victim’s physical and verbal manifestations of nonconsent to a particular sexual act or contact may no longer be deemed sufficient to meet the element of “without consent” and may not be enough to prevent the accused from claiming that he had a reasonable mistake of fact. It is disconcerting for this Court to strip victims’ of their agency in this manner. Unnervingly, a victim’s “no” may not be sufficient for her perpetrator’s unwanted sexual conduct to be within the bounds of criminality. This Court should reconsider its opinion and should not be clearly convinced that the conviction was against the weight of the evidence.

II.

THIS COURT SHOULD RECONSIDER ITS CONCLUSION THAT APPELLANT’S CONVICTION FOR ABUSIVE SEXUAL CONTACT BY TOUCHING EW’S VULVA WITH HIS THIGH WAS FACTUALLY INSUFFICIENT.

Additional Facts

On 13 May 2022, Appellant “very quiet[ly]” came to EW’s room without permission again. (R. at 235, 249, 250). Over the next five minutes, EW told Appellant “to get out and that [she] didn’t want him in there.” (R. at 250). EW told Appellant to leave about ten times and Appellant did not respond or acknowledge her words. (Id.). Eventually, they discussed the incident on 11 May 2022. (R. at 236).

On 14 May 2022, Appellant texted EW “I’m so sorry I didn’t know you felt that way.” (R. at 237, Pros. Ex. 1). Appellant was “shocked” that EW said he had sexually assaulted her. (R. at 237-238, Pros. Ex. 1). After Appellant took time to “digest” what EW said to him, he texted her again on 15 May 2022. (Pros. Ex. 1). Appellant said he had “tried to kiss [her] in hopes of starting another intimate moment like [they] had before” and Appellant had wanted EW to “give in to [her] feelings.” (Id.). Appellant then said he “thought lightly about what [he’d] done because [they had] had intimate moments before” and it “never crossed [Appellant’s] mind that [he] was sexually assaulting [EW].” (Id.)

On 16 May 2022, Appellant texted EW and EW texted Appellant to “stop messaging [her].” (Id.). Appellant said “okay,” but texted EW again on 22 May 2022 to ask to speak with her again. (Id.). On 23 May 2022, Appellant texted EW that he liked her and that he had a “different read” than her on what happened the night of 11 May 2022. (R. at 239, Pros. Ex. 1). Appellant said he “just meant to kiss [her] like we did before and [he] didn’t catch on that [she was] really uncomfortable with what [Appellant] was doing.” (Pros. Ex. 1). Appellant compared the night of 11 May 2022 to the previous occasion when he pinned EW down consensually and said he was “just trying to do that again.” (R. at 241).

On 25 May 2022, Appellant accused EW of having a “different reason” for ignoring him. (Pros. Ex. 1). Appellant said “[a]ll [Appellant] was trying to do was try to make out with [her] like before. [Appellant] was really surprised when [EW] started crying too.” (Id.). On 26 May 2022, Appellant said that he had tried to kiss her because they “did the same thing and more a week prior so [he] was just trying to do that again.” (Id.)

The military judge correctly defined “vulva” as “the external genital organs of the female, including the entrance of the vagina and the labia majora or labia minora. ‘Labia’ is the Latin and

medically correct term for lips.” (R. at 330). The military also instructed the members that evidence may be applicable to more than one offense. (R. at 337).

Law & Analysis

A. EW testified that Appellant touched her vulva, and there is nothing in the record to indicate she did not understand the meaning of the word.

This Court contrasted EW’s testimony that Appellant previously consensually grinded on her “pelvic area⁴” and nonconsensually put his leg against her “vulva.” Kim, 2025 CCA LEXIS 386, at *39. This Court then pointed out that EW never “provided information” that she knew “the difference between the pelvic region and vulva.” Aside from being overly paternalistic, this Court created a burden on the Government greater than the law requires to prove an accused guilty beyond a reasonable doubt, and this finding should be reconsidered. Id.

The Government is not required to have witnesses, particularly grown adults, define anatomical parts when describing where an accused touched them without consent. It is not standard nor required practice for a victim to define “penis,” “vagina,” or “buttocks” in sexual offense cases; the victim simply says that word and the factfinder can reasonably conclude they are referring to the so-named body part. It is conceivable that more detailed testimony might be necessary when dealing with child victims, since it could be unexpected for a child of tender years to know the names of such body parts. But that is not the case here: EW was a 21-year-old woman and a Staff Sergeant at the time of trial. (R. at 190, 266-267). She did not hesitate to state that Appellant touched her vulva, and neither did she give any indication that she did not

⁴ “Pelvic” means “of, relating to, or located in or near the pelvis.” *Pelvic*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/pelvic> (last visited 12 Sep. 2025); “Pelvis” means “a basin-shaped structure in the skeleton of many vertebrates that is formed by the pelvic girdle and adjoining bones of the spine.” *Pelvis*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/pelvis> (last visited 12 Sep. 2025).

understand *what* her vulva was.⁵ (R. at 200, 203). The factfinder is meant to use their common sense and knowledge about the ways of the world when determining whether the Government has proven an accused's guilt beyond a reasonable doubt. The most reasonable conclusion to draw from EW's use of the word "vulva" is that EW knew what a vulva was. It is likewise reasonable to conclude that when EW agreed Appellant would move his legs and hips against EW's on previous occasions, she was referring to contact between a larger surface area on their bodies than just her vulva. Finally, while this Court used the phrase "pelvic area," neither that phrase nor "pelvis" are reflected in EW's testimony. (R. at 231). It was illogical of this Court to then expect EW to explain the difference between "pelvic area" and her "vulva" when EW agreed to "legs" and "hips." Legs and hips are plain words without complicated meanings, and neither EW nor the Government should have been expected to flesh them out for the record.

The military judge also correctly defined "vulva" to the panel, so there was little to no risk that the panel misunderstood which part of EW's body they would need to conclude Appellant touched to convict him. (R. at 330).

Furthermore, if Appellant's thigh was between EW's legs and pressed against her "pelvic area," as this Court calls it, it would be virtually impossible for him *not* to touch her vulva through her clothes. As defined by the military judge, the vulva is the "external genitals organs on a female," including the "labia majora." If Appellant's thigh was between EW's legs, and he was pressed against her "pelvic area" while lying down on top of her, then his thigh was touching *at a minimum* her labia majora through her clothes. This charge was not of a

⁵ Consider, in contrast, that EW testified that Appellant was lying on top of her and holding her down with his chest on her chest. Earlier, EW had testified that Appellant touched her "breast" without her consent. Despite this difference, this Court did not speculate that EW did not know what her "breast" was, even though she used that term first and Appellant must have also been touching EW's breasts with his chest on 11 May 2022.

penetrative offense – there was no requirement that the Government prove penetration, however slight, of EW’s vulva. Rather, the Government had to prove that Appellant touched EW’s vulva with his thigh. It accomplished this through EW’s testimony, which gave explicit details on how Appellant was lying atop her and pressed against her vulva, and Appellant’s own text message where he admitted to having his “leg between [her] legs.” (Pros. Ex. 1). It is illogical to find there was no evidence that Appellant touched EW’s vulva because he referred to her “leg” in his text message. (Id.) Ordinary people do not typically use terms like “vulva” when texting each other, even in conversations regarding sexual assault between each other.

On appeal, Appellant never raised the possibility that EW did not know what her vulva was. Absent this “specific showing” by Appellant, this Court should not have considered an “alternative basis” of a deficiency of proof to conclude that the conviction was against the weight of the evidence. United States v. Slayton, 2025 CCA LEXIS 427, at *37-38 (A.F. Ct. Crim. App. Sep. 8, 2025) (Johnson, J., dissenting in part). Mere speculation without any basis in the record that EW did not know what a vulva was is not the type of deficiency in proof that should clearly convince the Court that the findings were against the weight of the evidence. This Court should reconsider its opinion.

B. EW’s physical description of the abusive sexual contact made it clear that the part of Appellant’s leg that touched her vulva was his thigh.

This Court incorrectly disregarded the logical conclusion that if Appellant was on top of EW in the way that she described, the part of the leg aligning with her vulva would have to be his thigh. This Court could not have been “clearly convinced” that a finding that his thigh touched her vulva was against the weight of the evidence. As Judge Johnson stated in his dissent, the thigh “refers to ‘the proximal segment of the vertebrate hind or lower limb extending

from the hip to the knee.’’⁶ Kim, 2025 CCA LEXIS 386, at *57. This meant that every part of Appellant’s leg from above his knee to his hips should have been considered his “thigh.”

EW testified that Appellant grabbed her wrists, pushed her down onto her bed, and held EW down with his hands on hers and their forearms aligned. (R. at 203). Appellant’s face was up against EW with his nose on her cheek, and he was so close to EW that she could feel his mouth moving on her skin while he talked to her about her. (Id.) Their chests were pressed together and Appellant’s leg between EW’s legs “touching her vulva.” (R. at 205).

There is no physical configuration that matches each of those four factors that could put a different part of Appellant’s leg between EW’s legs against her vulva. If Appellant brought up his knee to place it against EW’s vulva, it would have raised his chest away from hers and repositioned their forearms so that they were no longer aligned. It would also likely have lifted Appellant’s face away from EW’s face, which was not his goal as he was speaking into her skin about why she should not be with JK romantically. (R. at 203). The *only* way the layout of their bodies makes sense is if it was Appellant’s thigh, perhaps even his upper thigh, between EW’s legs. This Court could not have been clearly convinced that this finding was against the weight of the evidence and should reconsider its opinion.

C. Appellant touched EW’s vulva with his thigh to gratify his sexual desire and admitted as much in his text messages to EW after the incident.

This Court unreasonably disregarded (1) Appellant’s attempts to kiss EW while holding her down with his thigh against her vulva and (2) the text messages from Appellant wherein he admitted to wanting to recreate prior moments of physical intimacy. The extremely remote possibility that Appellant might not have been acting to gratify his own sexual desires in this

⁶ *Thigh*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/thigh> (last visited 12 Sep. 2025).

encounter is not the type of deficiency that should make this Court clearly convinced that the conviction was against the weight of the evidence.

To defend himself against EW's accusation that he sexually assaulted her, Appellant repeatedly compared the "sexual assault" on 11 May 2022 to previous occasions when he and EW had been intimate. (Pros. Ex. 1). In so doing, Appellant's text messages were themselves evidence that Appellant was trying to gratify his sexual desire by touching EW's vulva with his thigh the same as when he had kissed and done "more" with her the week prior. (Id.)

On 15 May 22, Appellant said he "tried to kiss [her] in hopes of *starting another intimate moment* like [they] had before." (Id.) (emphasis added). Appellant clarified that he "thought lightly about what [he'd] done because [they had] *had intimate moments before.*" (Id.) (emphasis added). On 23 May 2022, Appellant said he "just meant to kiss [her] like we did before and [he] didn't catch on that [she was] really uncomfortable with what [Appellant] was doing." (Id.) Appellant compared the night of 11 May 2022 to the previous occasion when he pinned EW down consensually and said he was "just trying to do that again." (Id.)

On 25 May 2022, Appellant said "[a]ll [Appellant] was trying to do was try to make out with [her] *like before.*" (Id.) (emphasis added). On 26 May 2022, Appellant said that he had tried to kiss her because they "did the same thing and more a week prior so [he] was just trying to do that again." (Id.).

When reading these text messages, this Court should remember Appellant's statement to EW when he touched her breasts for the first time: that "as a man, [Appellant] needed certain things." (R. at 199); *see United States v. Alston*, 75 M.J. 875, 886 (A. Ct. Crim. App. 2016) ("surrounding circumstances may establish the necessary intent."). Appellant's "need" referred to his sexual needs, which he was attempting to gratify during the occasions he would "make

out” with EW. (R. at 198). On previous occasions, Appellant rubbed his legs and hips against EW’s while they were making out. (R. at 232). In these text messages, Appellant is the one saying that he was trying to recreate previous intimate encounters with EW, and it is unreasonable to conclude that Appellant was *only* engaging in make-out and cuddling sessions with EW to arouse or gratify *her* sexual desires and not his own as well.

In addition, this Court should not have concluded that because the kissing allegation made up a separate offense it was not relevant to Appellant’ intent when he put his thigh against EW’s vulva.⁷ When Appellant attempted to kiss EW, his thigh was still between her legs against her vulva. The attempted kisses were part of the same course of conduct, to wit: make EW “give in to [her] feelings” for Appellant and share another “intimate” moment with him. (Pros. Ex. 1).

The facts of the kiss itself also bolster the Government’s theory that Appellant was trying to gratify his sexual desire, since EW testified that Appellant ran his tongue over her lips. (R. at 205, 207-208). There is no reasonable argument that Appellant was licking and trying to force his tongue into EW’s mouth other than with an intent to gratify his sexual desire, except possibly to arouse EW’s at the same time. These two intents were not mutually exclusive. In addition, that Appellant finally stopped pinning EW to the bed and trying to forcibly kiss her once she started crying is not evidence that he did not have the intent to gratify his sexual desire. Appellant texted EW that he was “surprised” she started crying, and that was because he was completely focused on *his* intent to create an intimate moment with EW to gratify his sexual desire. (Pros. Ex. 1).

⁷ When evidence is offered at trial to support two different offenses, this Court is not necessarily precluded from considering the evidence that was introduced in support of the charge for which the appellant was acquitted. United States v. Rosario, 76 M.J. 114, 117 (C.A.A.F. 2017).

This Court overlooked and misapplied the statements made by Appellant in his text messages to EW after the abusive sexual contact and disregarded the surrounding circumstances in holding the Government did not prove Appellant's intent. This Court's unsupported conjecture that Appellant *might* not have acted to gratify his own sexual desires is not a *reasonable* doubt. It was not reasonable to conclude from the evidence presented that Appellant might have been pinning EW down with his thigh against her vulva merely to get her to talk to him. Kim, 2025 CCA LEXIS 386, at *40. It is not the type of discrepancy that should leave this Court clearly convinced Appellant's conviction was against the weight of the evidence and should reconsider its opinion.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court to reconsider and reconsider en banc its 15 August 2025 decision.

[REDACTED]

REGINA HENENLOTTER, Maj, USAF
Appellate Government Counsel,

[REDACTED]

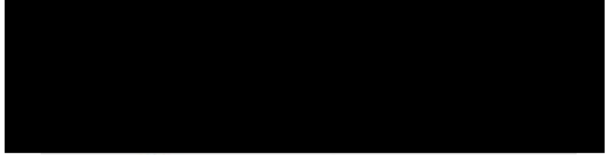
[REDACTED]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 15 September 2025.



REGINA HENENLOTTER, Maj, USAF
Appellate Government Counsel



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	APPELLANT’S REPLY TO
<i>Appellee,</i>	)	UNITED STATES’ MOTION FOR
	)	RECONSIDERATION AND
	)	RECONSIDERATION EN BANC
v.)	
)	
	)	Before Special Panel
Airman First Class (E-3))	
WON KIM,	)	No. ACM 24007
United States Air Force,)	
<i>Appellant.</i>	)	22 September 2025

**TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

Pursuant to Rule 31(c) of this Court’s Rules of Practice and Procedure, Appellant, Airman First Class (A1C) Won Kim, responds to the United States’ Motion for Reconsideration and Reconsideration En Banc, dated 15 September 2025 [hereinafter U.S. Motion for Recons.]. A1C Kim opposes this motion and requests this Court deny it because the Government has not met this Court’s standards for reconsideration.

In finding A1C Kim’s two abusive sexual contact convictions factually insufficient, this Court has already determined something very critical: the Court is “*clearly convinced* of the correctness of this decision,” i.e., that the *Government failed* to prove these offenses beyond a reasonable doubt. *United States v. Won Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *43 (A.F. Ct. Crim. App. Aug. 15, 2025) (emphasis added). Whatever blame the Government appears to cast upon this Court in its motion operates as a poor mask for the Government’s own failings at trial, of which, in this case, there are plenty:

1. “But EW provided no additional information regarding the touches and *the trial counsel did not ask* for additional information to develop the context of those incidents.” *Id.* at *7 (emphasis added).

2. “*There was no evidence* that EW objected to the subsequent breast touches” *Id.* (emphasis added).
3. “Given the *lack of any additional evidence* as to the third and fourth touching, we will focus our analysis on the first and second [breast touching].” *Id.* at *25 (emphasis added).
4. “[*T*]here is no evidence that before this first breast touch, she told him she did not want him to touch her breasts.” *Id.* at *26 (emphasis added).
5. “The *Government* had the burden to disprove lack of consent beyond a reasonable doubt and *it failed to do so.*” *Id.* at *29 (emphasis added).
6. “The *Government’s argument is primarily flawed* in that EW did not testify that Appellant put his ‘thigh’ between her legs so that it was against her vulva. . . .” *Id.* at *36 (emphasis added).
7. “*Trial counsel similarly argued* that Appellant ‘shoved his knee between her legs, touching her vulva with his leg,’ *but that was not the testimony provided* by EW, nor was it charged by the Government.” *Id.* (emphasis added).
8. “*Trial counsel also failed to elicit any additional details* about the alleged leg-vulva touch beyond this singular sterile statement to clarify what part of EW’s body Appellant had allegedly touched.” *Id.* (emphasis added).
9. “Both EW’s testimony and *trial counsel’s interpretations of her testimony* were insufficient to prove the sexual contact as charged beyond a reasonable doubt.” *Id.* at *37 (emphasis added).
10. “Our decision rests on two significant *shortcomings* with the *Government’s evidence*” *Id.* (emphasis added).
11. “[EW] *provided no information* to determine if she knew the difference between the pelvic region and vulva or how his ‘leg’ was able to position itself on her vulva. She in fact *never testified* that it was his thigh that touched her vulva.” *Id.* at *39 (emphasis added).
12. “*There was no evidence* that during this time he was trying to be sexual or was pressing his leg or groin area into her with an intent to satisfy his sexual desires.” *Id.* at *40 (emphasis added).
13. “[This Court] h[as] limited context to understand this text message since *the court received limited details about the conversation* EW and Appellant had preceding this message.” *Id.* at *41 (emphasis added).
14. “*Based on the evidence produced at trial*, we do not find the *Government* proved that Appellant specifically intended to place his leg sexually on EW during this interaction or with the intent to gratify his sexual desire.” *Id.* at *42 (emphasis added).

15. “Given that we do not find *the Government* proved what they charged—that Appellant touched EW’s vulva with his thigh with the specific intent to satisfy his sexual desires—we find insufficient evidence to support a conviction for abusive sexual contact.” *Id.* (emphasis added).

As these fifteen observations reveal, the responsibility to prove a case beyond a reasonable doubt rests with the Government and that does not change on appeal during factual sufficiency review. *See United States v. Harvey*, 85 M.J. 127, 131 (C.A.A.F. 2024) (“[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 . . . to find an accused guilty at trial.”). Yet, instead of opening its motion with a discussion of the merits, the Government laments that “eleven cases” failed to meet that standard this year and leaps to the binary conclusion that this could only be because (a) something is suddenly broken with factfinders, or (b) this Court’s application has employed an “inappropriately elevated standard.” U.S. Motion for Recons. at 1.

With this argument, the Government ignores or dismisses basic principles. Never mind, goes the Government’s argument, that this Court’s factual sufficiency review was recently twice affirmed by the Court of Appeals for the Armed Forces (CAAF). *United States v. Patterson*, No. 25-0073/AF, 2025 CAAF LEXIS 548, at *12 (C.A.A.F. July 14, 2025); *United States v. Csiti*, 85 M.J. 414 (C.A.A.F. 2025). Never mind that this Court has an independent obligation, 10 U.S.C. § 837(a)(1), to apply “correct legal principles” when conducting its factual sufficiency review. *United States v. Leak*, 61 M.J. 234, 241 (C.A.A.F. 2005). Never mind that many of the recent overturned convictions were insufficient due to post-trial changes in the law or resolution of nuanced legal questions.¹ And never mind that the Government controls the charge sheet, *United*

¹ *E.g.*, *United States v. Slayton*, No. ACM 40583, 2025 CCA LEXIS 427 (A.F. Ct. Crim. App. Sep. 8, 2025); *United States v. Hunt*, No. ACM 40563, 2025 CCA LEXIS 215 (A.F. Ct. Crim. App. May 16, 2025), *cert. filed*, 2025 CAAF LEXIS 734 (C.A.A.F. Sep. 2, 2025); *United States*

States v. Reese, 76 M.J. 297, 301 (C.A.A.F. 2017), its own presentation of evidence, and its own arguments at trial and on appeal. The Government’s suggestion that this Court has exceeded some kind of unwritten quota for finding factual insufficiency ignores an obvious third reason reflecting back: Eleven convictions being overturned is a comment on the *Government’s* inability to prove a case beyond a reasonable doubt on a fundamental level. *See Patterson*, No. 25-0073/AF, 2025 CAAF LEXIS 548, at *12-13 (noting the problems on appeal could have been easily resolved with trial level strategies by the Government).

This Court did not overlook or misapply the law or facts in finding A1C Kim’s abusive sexual contact convictions were factually insufficient. This Court’s opinion is consistent with *United States v. Soloshenko*, 2025 CCA LEXIS 358 (A.F. Ct. Crim. App. July 31, 2025), *United States v. Rodela*, 82 M.J. 521 (A.F. Ct. Crim. App. 2021), and *United States v. Plourde*, 2019 CCA LEXIS 488 (A.F. Ct. Crim. App. Dec. 6, 2019), *pet. denied*, 80 M.J. 73 (C.A.A.F. 2020), cases that the Government misinterprets, misapplies, and extends beyond their factual underpinnings. Here, based on the paucity of evidence, the lack of developed trial testimony, and the elicited evidence about the “blurred lines” in the relationship, this Court was well within in its statutory discretion under Article 66(d)(1)(B), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d)(1)(B), to find the evidence in this case was factually insufficient for the two abusive sexual contact specifications.

v. Kershaw, No. ACM 40455 (f rev), 2025 CCA LEXIS 205 (A.F. Ct. Crim. App. Mar. 27, 2025), *cert. filed*, 2025 CAAF LEXIS 408 (C.A.A.F. May 27, 2025); *United States v. Caswell*, No. ACM 23035, 2025 CCA LEXIS 98 (A.F. Ct. Crim. App. Mar. 17, 2025); *United States v. Rocha*, No. ACM 40134 (rem), 2025 CCA LEXIS 10 (A.F. Ct. Crim. App. Jan. 15, 2025), *cert. filed*, 2025 CAAF LEXIS 352 (C.A.A.F. May 5, 2025).

ARGUMENT

I.

Reconsideration, let alone reconsideration en banc, is inappropriate where no material legal or factual matter was overlooked or misapplied when this Court was clearly convicted A1C Kim’s conviction for touching EW’s breast was against the weight of the evidence.

This Court applied the correct law to the facts of this case, neither overlooking nor misapplying anything. The Court cited the complete definition of consent, to include “an expression of lack of consent through words or conduct means there is no consent” and “the manner of dress of the person involved with the accused . . . does not constitute consent.” *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *21. As this Court also noted, “All the surrounding circumstances are to be considered in determining whether [EW] gave consent.” *Id.* The Court looked at all the surrounding circumstances for whether EW consented and then also analyzed mistake of fact as to consent on A1C Kim’s part. *Id.* at *24-34. This Court conducted a thorough factual and legal analysis and concluded that “the finding of guilty was against the weight of the evidence because [the evidence] ‘does not prove that the appellant is guilty beyond a reasonable doubt’ and [the Court was] ‘clearly convinced of the correctness of this decision.’” *Id.* at *34 (quoting Article 66(d)(1)(B), UCMJ); *see also Harvey*, 85 M.J. at 132 (“[T]he evidence, as the [lower court] has weighed it, does not prove that the appellant is guilty beyond a reasonable doubt.”). A disagreement over a reasonable and supported factual interpretation of the record is insufficient to trigger reconsideration.

1. The Government attempts to heighten the legal standard and demand a different interpretation of the facts.

This Court’s decision about three of the four alleged breast touches is unanimous. Three judges were clearly convinced that the Government failed to prove the first, third, and fourth

allegation of abusive sexual contact beyond a reasonable doubt. *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *25; *id.* at *53-56 (Johnson, C.J., dissenting). The Government appears to recognize the third and fourth breast touches that EW broadly alleged cannot substantiate this conviction since the Government does not discuss them at all. But the conviction capturing the first touch was unanimously decided to be *against* the weight of the evidence. The crux of the Government’s argument on the first touch relies on a fundamental misunderstanding of the law: the military justice system is not an affirmative consent jurisdiction.

Contrary to the Government’s proposition, the law does not presume that EW lives in a state of non-consent or that such a state persists in perpetuity. U.S. Motion for Recons. at 10-11, 12-14. Congress did not intend to mandate a verbal “yes” for every intimate act, nor to criminalize silence or passivity. Instead, the statute requires an objective manifestation of non-consent—words or conduct that would alert a reasonable person that the conduct is unwelcome—while clarifying that *mere absence* of resistance does not establish consent. 10 U.S.C. § 920(g)(7). This balance reflects deliberate legislative judgment and the realities of human interaction, which is reflected in many other jurisdictions. Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441, 448 (2016). As Professor Tuerkheimer observed, “In [many] states, without consent means without an expression of non-consent; absent such an indication, an alleged victim—even one who has remained inert throughout the encounter—is deemed to have consented. Affirmative consent definitions, by way of contrast, transform the legal meaning of passivity. Absent some indication of consent, an alleged victim is deemed not to have consented.” *Id.*

The Government appears to disagree on this point by asserting this Court had to determine whether “a freely given agreement existed for Appellant to touch EW’s breast,” and couches that in a discussion about how EW needed to strictly “give” consent. U.S. Motion for Recons. at 10-

11. Consent can be “freely given” without the artificial strictures the Government urges this Court to put on day-to-day sexual conduct. While the Government repeatedly harps on the boundaries EW did set, attempting to extend them to all unmentioned places (breasts), it ignores EW’s repeated acknowledgement that the lines were blurred about what was and was not ok in the relationship. *See Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *26-27 (showing this Court did not ignore the “verbally drawn . . . line of contact at her vulva before the first breast touch”). This Court did not selectively focus on Government-friendly facts and instead, considered the entire record independently and wholistically to conclude “the Government’s burden to prove lack of consent before the first touch is high and they did not meet it.” *Id.* at *27.

Furthermore, to find for the Government on this argument would require this Court to upend military justice practice and find that “sex must proceed in an artificial, overly cautious manner” that diverges from reality—requiring something like a “script.” Aya Gruber, *Not Affirmative Consent*, 47 U. PAC. L. REV. 683, 683 (2017). That is not the law. Instead, the definition of consent requires the factfinder, and this Court, to consider at “all the surrounding circumstances.” 10 U.S.C. § 920(g)(7). Agreements to sexual activity need not be expressed, but can be implied, or tacit—even through silence—as shown in this very case. EW did not allow touching of her vulva but allowed A1C Kim to grind his pelvic region on her pelvic region when they made out on the bed. *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *31-32. EW allowed kissing and cuddling in her bed. *Id.* This case was about “blurred lines,” something the Government completely ignores other than to disagree with this Court’s conclusion to believe EW’s own admission. U.S. Motion for Recons. at 14, 15, 18. The Court never places blame on EW in this analysis. Rather, any notions of “blame” are on the Government for not eliciting the correct or

sufficient evidence. *See, e.g., Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *7 (highlighting how trial counsel failed to ask for additional information to develop context).

The law does not require A1C Kim to constantly “clarify”² with EW what touches she was comfortable with when she already told him: “No sex. I don’t want anything sexual about touching like my vulva or any area like that.” R. at 200. The Government, notably, takes the latter part of this sentence out of context to argue that touching “any area like that” included touching her breasts. U.S. Motion for Recons. at 10. But EW was clarifying “no sex,” an activity that would inherently require “touching like [her] vulva or any area like [her vulva].” R. at 200. The progressive touching—“having his hand on her shoulder, to her waist, and then inside her shirt before touching her breast”—was lawful under the circumstances, and it was a valid consideration for reasonable mistake of fact as to consent in this case, as the dissent even noted. *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *53-54 (Johnson, C.J., dissenting).

Furthermore, A1C Kim was not “negligent,”³ a concept built into the reasonable person standard for mistake of fact as to consent. *United States v. McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2019). This Court thoroughly analyzed all the reasons why A1C Kim had an honest and reasonable mistake of fact as to consent and correctly cited the law in doing so. All three judges on the panel agreed there was an honest and reasonable mistake of fact as to consent as to the first breast touch. *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *33-34; *id.* at *53-54 (Johnson, C.J., dissenting). Even the dissent recognized the reasonable mistake of fact as to consent that resulted from the progressive touching: “[G]iven that EW did not object as Appellant progressed from having his hand on her shoulder, to her waist, and then inside her shirt before touching her breast, I do not

² U.S. Motion for Recons. at 12.

³ U.S. Motion for Recons. at 12, 17.

find the Government disproved beyond a reasonable doubt that Appellant had an honest and reasonable mistake of fact that EW would consent to the touching.” *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *53-54 (Johnson, C.J., dissenting). The Government’s arguments about “negligence” and rhetoric rising to the level of requiring affirmative consent are not valid legal issues in this case, nor do they highlight any inconsistency with previous decisions.

The Government’s reliance on *Rodela* shows how untethered from the law the Government’s position is. In *Rodela*, the named victim was throwing up in a toilet and had no prior sexual relationship with the appellant. *Rodela*, 82 M.J. at 523. The named victim displayed no outward reaction when the appellant touched her, first by rubbing her back—which “was okay”—but then sexually while her “head was still in the toilet bowl . . . [her] arm was on the toilet bowl . . . as a headrest and [she] was just kind of lying there.” *Rodela*, 82 M.J. at 524. In *Rodela*, this Court merely “declined to adopt [Rodela’s] interpretation of consent to progressive touching *in this case* for several reasons.” *Rodela*, 82 M.J. 528 (emphasis added). This alone demonstrates that *Rodela* is not as sweeping or unequivocal as the Government contends. U.S. Motion for Recons. at 10-12.

On top of overstating the law, the Government likewise ignores the factual distinctions between A1C Kim’s case and *Rodela*, which are extensive. The relationship is different (testing out dating versus being close friends); the sobriety and mental capacities are different (sober versus not sober); and the discussions about touching were different (EW set some boundaries and there were “blurred lines” versus there was apparently no discussion or sexual relationship in *Rodela*). Compare *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *3-17 (reciting the facts), with *Rodela*, 82 M.J. at 523-25 (reciting the facts). The Government’s reliance on *Rodela* “fails to recognize that *the specific facts of each case* drive the analysis.” *Rodela*, 82 M.J. at 527 (emphasis added). Progressive touching can be an appropriate consideration in the right case. This is such a case.

Rodela was confined to its facts and, here, the Court did not overlook or misapply this distinguishable case.

2. The Government overstates the facts in its disagreement with this Court’s analysis of the second breast touch.

At trial, the Government failed to elicit enough evidence about the second breast touch for this conviction to stand. This Court recognized that and reviewed the evidence in total to find the Government (1) did not prove EW did not consent *and* (2) did not disprove that A1C Kim had a reasonable mistake of fact as to consent. The Government’s arguments about the second breast touch contain similar legal flaws as discussed above with the first breast touch, including overtones of an affirmative consent standard and a concern about A1C Kim being negligent. For all the reasons articulated above, those concerns remain inapplicable to the second breast touch as well. But on top of what has already been said, the unique facts of this case make it clear this Court did not overlook a material point of law or fact in finding the second breast touch also did not constitute abusive sexual contact.

After the first breast touch, which the Court unanimously agreed was factually insufficient, A1C Kim and EW talked. Unlike in *Plourde*, the case the Government relies on, EW did not “explicitly” say, “Do not touch my breasts.” *See Plourde*, No. ACM 39478, 2019 CCA LEXIS 488, at *20-21 (finding an “explicit expression of lack of consent in the phrase “don’t go in me” immediately prior to unconsensual penile penetration). EW said she was uncomfortable and said A1C Kim was “pushing it too far into the line of . . . dating and intimacy.” *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *6. But that was not the end of their discussion. A1C Kim responded, explaining how he respected her boundary about sex, but in the relationship, he needed things. *Id.* As this Court pointed out, there was no evidence how long this conversation was. *Id.* at *28. The only other fact the Government elicited from EW was that “after” their conversation, A1C Kim

put his hand back on her breast, and EW “just let him do it.” *Id.* The Government infers this was “immediately” or a “brief” time after. U.S. Motion for Recons. at 4, 13. There is no evidence of that, as this Court explained. *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *28-29.

Rather than looking at the evidence through the pinhole the Government presents, this Court looked at all the surrounding circumstances to determine whether EW consented or A1C Kim had a reasonable mistake of fact as to consent. In determining this controverted question of fact, this Court highlighted how EW did not confront A1C Kim about *any breast touching* or report the breast touch until after she reported other events, raising questions about her consent at the time. *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *29-30. This Court also placed significance on the conversation between the first and second touch, along with the relationship’s “blurred lines,” while the Government’s sterile rendition of the facts ignores human nature. *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *30-34. Although the Government argues that A1C Kim could not have reasonably thought EW consented because the “crime had already been committed,” this argument relies on the first touch being unconsensual and ignores the context of the relationship, the conversation, and what amounted to a negotiation. U.S. Motion for Recons. at 19-20. But the post-touch events are relevant to what A1C Kim reasonably and honestly thought at time. It was appropriate to weigh the evidence and consider all the surrounding circumstances in evaluating consent.

In criticizing this Court’s independent weighing of the evidence, the Government argues there was no “negotiation” after the first breast touch. U.S. Motion for Recons. at 17. But the Government’s cited definition does not accurately capture this Court’s meaning when discussing the facts. *Id.* “Negotiation” also means “to deal with” or “to arrange for or bring about through conference, discussion, and compromise.” *Negotiate*, Merriam-Webster, <https://www.merriam->

webster.com/dictionary/negotiate (last visited Sep. 17, 2025). These other definitions capture this Court’s meaning best when discussing A1C Kim’s honest belief based on the facts. *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *31-32. He was trying to offer his perspective to create compromise. A1C Kim believed he had received consent based on talking with EW about how he respected her choice about sex but still needed things in the relationship too. Consistent with *Soloshenko*, his response worked to discover the boundaries of the relationship and consent; he was not negligent, but did exactly what the law required him to do in the context of this specific relationship. *Soloshenko*, 2025 CCA LEXIS 358, at *18.

Without other evidence, the Government failed to prove EW “did not consent” or disprove that A1C Kim did not have an honest and reasonable mistake of fact as to consent. *See United States v. Mendoza*, 85 M.J. 213, 220 (C.A.A.F. 2024) (requiring proof that the named victim is “capable of consenting but does not consent”). The assumptions and inferences made by the Government do not overcome the fact the Government left a hole in the evidence after this conversation that raised reasonable doubt. In weighing the evidence to determine a controverted question of fact, this Court simply came to a different conclusion over the significance of this conversation in the context of all of EW’s actions. This is clear from the Court noting EW and A1C Kim “discussed boundaries and each other’s needs and thoughts about going further” in the context of a relationship where “EW was fine with ‘cuddling or making out’ and creating lines that were ‘blurred sometimes on what was okay and what was not.’” *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *29. The Court emphasized that “under the *unique* circumstances of this case,” there was no “firm line . . . drawn between the two touchings — especially since [A1C Kim] recognized the boundary of her ring, expressed his desire and tried again only to have her in her own words ‘let him do it.’” *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *29. Notably, the

“firm line” point the Court makes is what distinguishes this case from *Plourde*. Telling someone “don’t go in me” and setting a clear boundary, like in *Plourde*, is different from having an unclear conversation about boundaries in a relationship that already had “blurred lines.” *Plourde*, No. ACM 39478, 2019 CCA LEXIS 488, at *20-21.

Just because the Government disagrees with this Court’s finding does not mean this Court’s interpretation and subsequent weighing of the evidence is “erroneous.” *United States v. McAllister*, 55 M.J. 270, 277 (C.A.A.F. 2001) (quoting *United States v. Tollinchi*, 54 M.J. 80, 82 (C.A.A.F. 2000)) (dictating a finding of fact will not be overturned by the CAAF unless clearly erroneous or unsupported by the record). Rather, this Court simply views the evidence more holistically than the Government. This Court said it best: “under the *unique circumstances of this case*” the Government failed to prove the offense beyond a reasonable doubt. *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *29.

3. The Government distorts this Court’s use of the fact EW not wearing a bra into something it is not.

This Court never asserts that *because* EW did not wear a bra that she consented. Rather, this Court explains the facts leading up to the breast touch, which included that A1C Kim had his hand on her bare skin right before he slid his hand up to her bare breast. *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *25-26; *see id.* at *53-54 (Johnson, C.J., dissenting) (discussing the progressive touching to include going “inside her shirt”). The fact EW was not wearing a bra is simply *res gestae*. The Court’s holding on factual sufficiency looks at the whole context of the relationship and sums it up in one sentence:

Given that EW’s own testimony describes that she was “fine with cuddling or making out” and admitted that “the line was blurred sometimes on what was okay and what was not,” and had only verbally drawn the line of contact at her vulva before the first breast touch, the Government’s burden to prove lack of consent before the first touch is high and they did not meet it.

Kim, No. ACM 24007, 2025 CCA LEXIS 386, at *26-27. There is no mention of EW’s bra or lack thereof in this conclusion. Whether EW wore a bra or not is irrelevant to this Court’s factual sufficiency determination on the issue of consent.

Mistake of fact as to consent is an affirmative defense to abusive sexual contact, meaning that any time mistake of fact is discussed, the factfinder has already determined that the named victim *did not consent*. See *United States v. Mader*, 81 M.J. 105, 108 (C.A.A.F. 2021) (explaining in the context of assault, that “even if an alleged victim did not consent to being touched,” a conviction cannot occur if a valid mistake of fact as to consent defense existed). This Court also analyzed mistake of fact as to consent and concluded that A1C Kim had an honest and reasonable mistake of fact as to consent about touching EW’s breasts. *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *27-28. In this phase of the analysis, the Court assumed EW did not consent. *Id.* at *27. Therefore, the fact EW was braless was *still* not being used to show she consented, contrary to the Government’s argument.

Furthermore, this Court factually found, without reference to EW’s clothing, that there were no boundaries set up around breast touching. *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *27. The Court’s analysis focused on context to assess whether A1C Kim had an honest and reasonable mistake of fact as to consent. Contrary to the Government’s position, the context about whether EW wore a bra at the time of the offense *is* relevant to mistake of fact as to consent. See, e.g., *United States v. Brown*, No. 201700003, 2018 CCA LEXIS 316, at *25-29 (N-M. Ct. Crim. App. July 2, 2018) (overturning a sexual assault conviction for reasonable mistake of fact as to consent, which included details about the named victim’s lack of bra, and the acknowledgment that “it would be artificial to divorce” a short mistake of fact scenario from the full context of the relationship). Based on EW’s previously communicated explicit boundary line and the complete

context of the relationship, to include her level of comfort around A1C Kim in her bed, A1C Kim had an honest and reasonable mistake of fact in thinking EW did consent. *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *27-28. Even the dissent agreed on this point for this first touch. *Id.* at *53-54 (Johnson, C.J., dissenting). When this Court concluded that A1C Kim’s belief was honest and reasonable, it had nothing to do with EW’s clothing but rather everything that happened before, during, and after the breast touch.

The Government twists the Court’s analysis, asserting with outrage that this Court improperly focused on EW’s lack of a bra. U.S. Motion for Recons. at 3, 8-9. This Court did nothing of the sort nor does this Court need to be concerned that discussing the context of this touch will create some sort of legal confusion about consent or “strip victims’ [sic] of their agency.” U.S. Motion for Recons. at 21. Rather, this Court has, once again, reinforced that the Government bears the burden at trial. This was a fact-specific analysis, and *the Government* failed to prove that the minimal evidence it elicited from EW constituted a crime. This Court analyzed all the facts in the case and is authorized to weigh the evidence differently than the court-martial—and whatever the Government urges on appeal. *Harvey*, 85 M.J. at 131-32. In weighing the evidence in this case, this Court was clearly convinced that the finding of guilty was against the weight of the evidence. That level of confidence need not be reassessed or second-guessed based on the Government’s parade of horrors.

II.

This Court applied the correct law to facts supported by the record in holding that the Government failed to prove the crime it charged—that A1C Kim touched EW’s “vulva” with his “thigh” to “gratify his sexual desire”—obviating any basis for reconsideration.

The Government calls this Court “overly paternalistic” when its own failures at trial are the problem. U.S. Motion for Recons. at 23. The Government must prove what it charged; it is as

simple as that. *See Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *39-40 (“The specifics of a charged offense matter and the evidence elicited at trial must match the alleged criminal conduct.”). The *Government* failed to elicit context and the words from EW necessary to prove the crime it alleged beyond a reasonable doubt. *Id.* at *37-43. This Court maintains the ability to determine “controverted questions of fact.” Article 66(d)(1)(B)(ii), UCMJ. Here, the facts show the Government made inferences and conflated terms rather than securing the required evidence. This Court was clearly convinced the Government failed to prove the charged offense for a myriad of reasons, none of which indicate this Court overlooked or misapplied a point of law or fact.

1. The Government failed to prove the specific body parts it charged were involved.

A1C Kim identified two deficiencies of proof on the “leg-to-vulva” offense that explain the Court’s analysis. The first deficiency is relevant here: “the Government failed to prove A1C Kim touched EW’s vulva with anything more specific than just his ‘leg.’ This means the Government failed to prove he used his *thigh*, as charged.” Reply Br. on Behalf of Appellant at 4. In analyzing this specific showing of a deficiency in proof, the Court did exactly what the statute authorized: once A1C Kim made a “specific showing of a deficiency in proof,” this Court “may weigh the evidence and determine controverted questions of fact.” Article 66(d)(1)(B)(ii), UCMJ. Nothing in the statute limits this Court’s analysis to the specific deficiency of proof. *Id.* Raising a specific deficiency is simply the key to open the door to factual sufficiency. A1C Kim opened that door, and the Court proceeded to analyze whether A1C Kim’s “thigh” *did* touch EW’s “vulva.” The Court identified the lack of evidence surrounding this offense and concluded that EW “never testified that it was his thigh that touched her vulva,” while also raising concerns that due to the prior conduct in the relationship, it was unclear whether EW’s repetition of the word “vulva” actually meant his “thigh” touched this very specific body part. This review of the “evidence” to

“determine controverted questions of fact” is authorized under the plain text of the statute. Article 66(d)(1)(B)(ii), UCMJ; *see Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (“It is well established that, when the statutory language is plain, we must enforce it according to its terms.”).

Moreover, the Court did not rest its entire conclusion on the word “vulva,” as the Government’s motion appears to contend. U.S. Motion at 23-25. Rather, there were a number of reasons why the Court was clearly convinced the conviction was against the weight of the evidence. One of those included EW’s explanation of what happened and the lack of clarity it created. While standing, A1C Kim was “in front of or over” EW, who was sitting on the bed. *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *9. At no point did the Government elicit “thigh” from EW, nor did it distinguish between a previous consensual encounter EW testified about to create clarity. *Id.* at *36, *39. EW’s unclarified testimony created confusion because EW said this type of “pinning down” happened before and when it did, A1C Kim moved his leg or his hips to “grind[]” on her. *Id.* at *39, *41. If this is the same conduct, as this Court found, then not only is A1C Kim’s “thigh” not necessarily involved, EW’s “vulva” is not either. *Id.*

The lack of clarity for a crime that required very specific body parts to be proven beyond a reasonable doubt is the problem. The Government even recognized this in its answer and its motion, and used assumptions to explain why it was A1C Kim’s thigh, despite no evidence being presented that it was. U.S. Motion for Recons. at 25-26.⁴ Contrary to the Government’s assertions, prosecutors *are* required to have “grown adults” explain what specific body parts are at issue. U.S. Motion for Recons. at 23. As the Court noted, “might,” “maybe,” and “assum[ing]” is not sufficient

⁴ This sort of in-the-ballpark argument has been tried before by the Government to fix its proof problems, and the result was a self-admitted “mess” that frustrated appellate review. *United States v. Honea*, 77 M.J. 181, 184 (C.A.A.F. 2018) (quoting appellate government counsel’s acknowledgment at oral argument).

for the specificity this charging scheme required and for proof beyond a reasonable doubt. *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *37-40.

It is not clearly erroneous or unsupported by the record to find that “thigh-to-vulva” contact did not occur beyond a beyond a reasonable doubt based on the evidence presented. That lack of proof is not EW’s fault; it’s not the Court’s fault; it’s the Government’s. As this Court emphasized, “The specifics of a charged offense matter and the evidence elicited at trial must match the alleged criminal conduct.” *Id.* at *39-40. Here, the evidence did not.

2. The Court’s analysis did not just rest on the Government failing to prove beyond a reasonable doubt the body parts at issue, but it also extended to the fact the Government failed to prove intent.

The unclear nature of the touching is just one reason this Court found the conviction was against the weight of the evidence. *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *37. The other reason was that the Government failed to prove the charged intent.⁵ *Id.*

Assuming A1C Kim’s “thigh” touched EW’s “vulva,” the Court highlighted the differences between when there was consensual grinding and the charged encounter where no sexual intent was expressed. *Id.* at *40-41. The Court acknowledged that A1C Kim attempted to kiss EW but considered this evidence in the context that it occurred after five minutes of talking and trying to convince EW to “give into [her] feelings.” *Id.* at *41-42. These findings of fact are not clearly erroneous, they are supported by the record, and there is no misapplication of the law in this pure factual analysis. This Court’s fact-based analysis on this element alone eliminates the need for reconsideration because even if the correct body parts had been proven, the conviction would still be against the weight of the evidence on the element of intent.

⁵ This happened to be the second deficiency in proof A1C Kim raised. Reply Br. on Behalf of Appellant at 4.

The Government raises the same arguments presented in its original briefing: that A1C Kim could have had two intents, which is a position the dissent also adopts. *Compare Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *58-59 (Johnson, C.J., dissenting), with U.S. Motion for Recons. at 28. This argument was clearly considered by this Court, and thus was not overlooked. *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *58-59 (Johnson, C.J., dissenting). Nevertheless, the Government persists, highlighting a number of text messages from A1C Kim about creating another intimate moment. U.S. Motion for Recons. at 27-28. But, as this Court noted, there was “limited context to understand this text message since the court received limited details about the conversation EW and Appellant had preceding this message.” *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *41. While the Court was specifically talking about one text message, this observation is true for the entire text conversation. R. at 210-13, 236-41. Again, this is a failure on the Government’s part at trial.

The evidence the Government did present convinced the Court that A1C Kim did not “specifically intend[] to place his leg sexually on EW during this interaction or with the intent to gratify his sexual desire.” *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *42. As this Court pointed out, A1C Kim was not grinding on EW like he did in a previous encounter. *Id.* at *40. This incident was factually distinct and while a non-consensual kiss occurred, that kiss was not in a vacuum. The Government tries to argue the kiss revealed that he had an intent to gratify his sexual desire when his leg was between her legs. U.S. Motion to Recons. at 28. But this assumption is not supported by EW’s testimony, the text messages, or subsequent events. The Court weighed all this evidence and determined, “There was no evidence that during this time [A1C Kim] was trying to be sexual or was pressing his leg or groin area into her with an intent to satisfy his sexual desires.” *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *40 (emphasis added). The

Government failed to prove the offense it charged, and this Court did not overlook or misapply a fact or point of law in finding so.

CONCLUSION

The Government's rendition of the facts is incomplete and the caselaw it cites to is both inapplicable and overstated. Rather than siding with either party's presentation of the facts, this Court made a pointed effort to cover all the factual circumstances surrounding the relationship between A1C Kim and EW for the purpose of evaluating consent, mistake of fact as to consent, intent, and whether the Government proved the crime it charged. Frankly, this Court recited more facts, in more detail, than either party in any filing. The detailed factual background significantly reduces the possibility that a factual matter was overlooked or misapplied to the correctly stated applicable law.

The standards for reconsideration have not been met. Furthermore, en banc reconsideration is inappropriate when the four circumstances outlined in A.F. Ct. Crim. App. Rule 27(a) are absent from this case. This Court properly stated the law, weighed the evidence, determined controverted questions of fact, and ultimately concluded it was clearly convinced that the evidence, as weighed, did not prove that A1C Kim was guilty beyond a reasonable doubt. *Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *43. The Government's disagreement with this Court's findings of fact is not sufficient to justify reconsideration.

WHEREFORE, A1C Kim requests that this Court deny the Government’s motion for reconsideration and for reconsideration en banc.

Respectfully submitted,



SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel

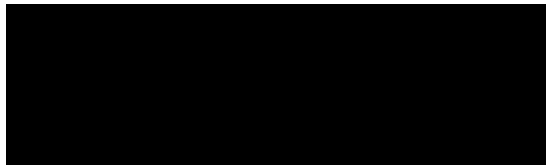


Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 22 September 2025.

Respectfully submitted,



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Appellate Defense Counsel



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

UNITED STATES	)	No. ACM 24007
<i>Appellee</i>)	
)	
v.)	
	)	ORDER
Won KIM)	
Airman First Class (E-3))	
U.S. Air Force)	
<i>Appellant</i>	)	Special Panel

On 15 September 2025, Appellee moved for this court to reconsider its decision in *United States v. Kim*, No. ACM 24007, 2025 CCA LEXIS 386 (A.F. Ct. Crim. App. 5 Aug. 2025) (unpub. op.), and further requested reconsideration *en banc*. Appellant opposed the motion.

In accordance with Rule 27(c) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, Appellee’s motion was transmitted to each judge of the court who was in regular active service and not disqualified, in which a vote was requested to determine whether the court should reconsider the opinion *en banc*. JT. CT. CRIM. APP. R. 27(c). The court voted 7–1 against reconsideration *en banc*.

The panel of Chief Judge Johnson, Senior Judge Gruen, and Judge Kearley voted 2–1 against panel reconsideration.

Accordingly, it is by the court on this 7th day of October, 2025,

ORDERED:

Appellee’s Motion for Reconsideration and Reconsideration En Banc are **DENIED**.

FOR THE COURT



CAROL K. JOYCE
Clerk of the Court

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

UNITED STATES	)	No. ACM 24007 (f rev)
<i>Appellee</i>)	
)	
v.)	
	)	NOTICE OF
Won KIM	)	DOCKETING
Airman First Class (E-3))	
U.S. Air Force)	
<i>Appellant</i>)	

The record of trial in the above-styled case was returned to this court by the Military Appellate Records Branch (JAJM).

Accordingly, it is by the court on this 20th day of May, 2026,

ORDERED:

The record of trial in the above-styled matter is referred to a Special Panel. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
GRUEN, PATRICIA A., Colonel, Senior Appellate Military Judge
KEARLEY, CYNTHIA T., Colonel, Appellate Military Judge

No briefs will be filed unless ordered by the court.



FOR THE COURT



TANICA S. BAGMON
Appellate Court Paralegal