IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Private First Class (E-3) **PHILIP D. SOLA** United States Army, Appellant	**BRIEF ON BEHALF OF APPELLEE** Docket No. ARMY 20210322 Tried at Fort Drum, New York, on 25 September 2020 and 8–9 April 2021 before a general court-martial convened by Commander, Fort Drum, Colonel James A. Barkei and Lieutenant Colonel Troy A. Smith, Military Judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignment of Error I[1]

WHETHER THE MILITARY JUDGE ERRED IN DENYING DEFENSE COUNSEL'S MISTRIAL MOTION.

Assignment of Error II

WHETHER THE MILITARY JUDGE ERRED IN FINDING PAGES 25 THROUGH 28 OF PROSECUTION EXHIBIT 6 WERE NONTESTIMONIAL.

[1] The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits they lack merit. The government respectfully requests notice and opportunity to supplement its brief should this court consider any of those matters meritorious.

PANEL NO. 4

Assignment of Error III

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING THE DOCTOR'S STATEMENTS IN PAGES 25 THROUGH 28 OF PROSECUTION EXHIBIT 6 PURSUANT TO MILITARY RULE OF EVIDENCE 803(4).

Statement of the Case

On 9 April 2021, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault, in violation of Articles 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2016) [UCMJ].[2] (R. at 301; Statement of Trial Results). The military judge sentenced appellant to be reduced to the grade of E-1, confinement for twelve months, and a dishonorable discharge. (R. at 327; Statement of Trial Results). On 15 June 2021, the convening authority approved the adjudged sentence and the military judge entered judgment on 22 June 2021. (Action; Judgment).

Statement of Facts

A. [redacted] felt a burning, ripping pain in her anus as appellant sexually assaulted her.

Appellant's roommate, CM, invited a few fellow soldiers, including [redacted] to a party at his off-post home.[3] (R. at 29). [redacted] consumed multiple shots of tequila upon her arrival at the party and thereafter danced with and kissed appellant in the living room. (R. at 31–32). [redacted] accompanied appellant upstairs to his bedroom, with the mutual understanding that, "we were going to have sex." (R. at 36). Kissing quickly led to [redacted] and appellant removing their pants, after which

[2] The first page of the record of trial is mistakenly entitled, "PROCEEDINGS OF A SPECIAL COURT-MARTIAL." (R. at 1).

[3] [redacted] was a soldier at the time of the sexual assault but was medically discharged from the Army prior to trial. (R. at 27–28, 66).

appellant "immediately tried to do like vaginal insertion." (R. at 37). Although [redacted] wanted to have vaginal sex with appellant, she could not because she was menstruating and had a tampon in her vagina. (R. at 37). She repeatedly attempted to excuse herself to the bathroom, but appellant was unrelenting, so [redacted] removed her tampon in appellant's bedroom and threw the used tampon into his trash can. (R. at 38; Pros. Ex. 3). [redacted] laid back down on her back and resumed consensual, vaginal sex. (R. at 39).

Appellant, despite the lack of consent or lubrication, inserted his penis into [redacted] anus. (R. at 40). [redacted] repeatedly told appellant, "no," and tried to redirect his penis back to her vagina. (R. at 40). However, appellant became even more persistent, and tried to verbally coax [redacted] into anal sex. (R. at 40). Appellant then began "full thrusting" his penis into [redacted] anus despite her continued verbal protest. (R. at 41). [redacted] felt "burning and ripping pain" in her anus as appellant thrust his penis "all the way in." (R. at 41). The "burning and ripping" eventually gave way to numbness as appellant continued to penetrate [redacted] anus in various sexual positions—all while she kept saying "no." (R. at 42–44).

During the sexual assault, appellant struck [redacted] face so forcefully that he nearly knocked her glasses off. (R. at 44–45). [redacted] maintained her composure long enough to remove her glasses and then "everything went black." (R. at 45). She awoke to appellant thrusting his penis into her anus and he only stopped after [redacted]

repeatedly asked to go to the bathroom. (R. at 46). [redacted] did not consent to anal sex and she denied ever telling appellant to "go up [her] butt," or "put it in my butt." (R. at 40–41, 44, 46–47).

[redacted] eventually retrieved her clothing, dressed, and went to the downstairs bathroom. (R. at 47–49). While there, she sent a text message to her friend, JW, asking him to "get me out if [sic] here" and "I dont [sic] want to be here anymorw [sic]", "I really need to get out of here." (Pros. Ex. 2). CM noticed that [redacted] was upset and asked "[w]hat's wrong?" (R. at 50). [redacted] kept saying "He hit me. He took it too far. He hit me." (R. at 50). When JW arrived, he escorted a "shell-shocked" [redacted] into his truck and was soon confronted by an "aggressive" CM and appellant. (R. at 98, 101). While en route to the Fort Drum Military Police [MP] station, [redacted] "sobb[ed]" and "blubber[ed]" as she told JW that appellant "put it in. (R. at 102). I told [appellant] not to; [appellant] put it in." (R. at 104–05). JW requested a Sexual Harassment/Assault Response and Prevention [SHARP] representative upon arriving at the MP station. (R. at 105).

Assignment of Error I

WHETHER THE MILITARY JUDGE ERRED IN DENYING DEFENSE COUNSEL'S MISTRIAL MOTION.

Additional Facts

A. Investigator KR's testimony.

The day following the sexual assault, appellant asked to speak with Investigator [INV] KR of the New York State Police, in order to "tell [INV KR] what happened." (R. at 169–70). Appellant told INV KR that while at the party, appellant went to his bedroom in order to call to girlfriend in California. (R. at 158–59). Appellant said that [redacted] then entered his bedroom and that they then had consensual vaginal sex. (R. at 159). Appellant did not know whether [redacted] wore a pad or tampon at the time, nor could he remember whether she wore underwear that night. (R. at 165–66).

Appellant repeatedly denied having anal sex with [redacted] or anyone else. (R. at 159, 170). He maintained that, "[he] do[es not] do anal sex" and that anal sex "[is] not [appellant's] thing." (R. at 170–710). Instead, appellant explained that [redacted] continually tried to redirect his penis from her vagina into her anus. (R. at 159, 170). Further, appellant claimed that "he had never had anal sex before and that if his penis did have contact or enter [redacted]s anus, he would not have been able to tell the difference between an anus and a vagina." (R. at 160, 171). Appellant also

denied scratching or hitting [redacted] and instead offered the possibility that CM's dog caused the scratches found on [redacted] neck. (R. at 160–61, 172). Investigator [redacted] testified that appellant was "cooperative with signing the [DNA collection] consent form and providing his DNA." (R. at 173). The interview was recorded and admitted into evidence, without objection, as Prosecution Exhibit 7. (R. at 155). Appellant's Criminal Investigation Command [CID] interview was admitted into evidence, also without objection, into evidence as Prosecution Exhibit 8. (R. at 107–08).

B. The military judge denied appellant's mistrial motion and his motion for reconsideration.

The government and appellant both referenced appellant's law enforcement interviews during their closing arguments on the merits. (R. at 277, 282, 289, 292). The government summarized several of appellant's statements and provided the military judge with time hacks to the corresponding portions of the videos. (R. at 277–283). Similarly, appellant's trial defense counsel's closing argument referenced and contextualized several statements appellant made to law enforcement interviews. (R. at 292, 295–96). The military judge closed the court for deliberations at 1518. (R. at 300). He called the court to order at 1618 and announced that appellant was guilty of The Charge and its Specification. (R. at 301).

After sentencing, but prior to adjournment, appellant moved for a mistrial under R.C.M. 915. (R. at 327). Appellant noted that the military judge had only deliberated for "approximately one hour and ten minutes," and that "both videos, in their entirety, take about an hour to view." (R. at 327). Appellant then argued that "both videos contain evidence that is favorable to the defense that the Court did not view." (R. at 327–28). The government did not believe the "timing discrepancy" was grounds for mistrial. (R. at 328).

The military judge recessed the court before issuing his findings and ruling on appellant's mistrial motion. (R. at 328). First, the military judge noted that he listened to all of the portions that the government specified, as well as "significantly more portions of the video that the Court deemed relevant." (R. at 328). Additionally, the military judge found that, "there was a lot of what the Court would consider downtime in the video, matters that were not relevant" such as rapport building. (R. at 328–29). Finally, the military judge confirmed that he "considered all relevant portions of both video statements during the deliberations process" and then denied appellant's mistrial motion. (R. at 328).

Appellant renewed his mistrial motion and argued that the videos were admitted in their entirety and "what the Court defines as downtime or rapport building would be more appropriately characterized as to weight, not admissibility." (R. at 329). The military judge stated, "The Court considered

everything requested by both parties. The Court has considered all relevant portions of the video, both video statements," before again denying appellant's mistrial motion again. (R. at 330).

Standard of Review

An appellate court must not reverse a military judge's decision regarding a motion for mistrial absent clear evidence that the military judge abused his discretion. *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000). "'A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law.'" *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019) (quoting *United States v. Kelly*, 72 M.J. 237, 242 (C.A.A.F. 2013)). "This standard requires more than just [this court's] disagreement with the military judge's decision." *United States v. Bess*, 75 M.J. 70, 73 (C.A.A.F. 2016) (citing *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015)).

Law and Argument

A military judge has the discretion to "declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the

proceedings." Rule for Courts-Martial [R.C.M.] 915(a). "[A] mistrial is a drastic remedy to be used only sparingly to prevent manifest injustice." *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003) (citations omitted). This court should affirm the military judge's R.C.M. 915 ruling because appellant has not proven the necessity for this severe sanction.

A. The military judge was well within his discretion when he denied appellant's mistrial motion.

Appellant's predicates his basis for relief upon the military judge's alleged failure to consider all of the evidence in the case against him. (Appellant's Br. 12). Although appellant mentions other pieces of documentary and photographic evidence, appellant asserts that Prosecution Exhibits 7 and 8, "loom particularly large" because they "were the sum and substance of the defense case, as the defense did not put on a case-in-chief and appellant did not testify." (Appellant's Br. 12, 13). Accordingly, the remainder of appellee's treatment of this assignment of error will focus upon Prosecution Exhibits 7 and 8.

As a preliminary matter, the videos' combined duration is approximately three hours in length. (Pros. Ex 7, 00:00–00:57; Pros. Ex. 8, 00:00–02:06:14). However, Prosecution Exhibit 7 consisted of approximately forty minutes of substance and Prosecution Exhibit 8 contained only approximately thirty-seven minutes of substance. (Pros. Ex. 7, 05:50–40:50, 41:34–46:17, 52:47–53:20; Pros. Ex. 8, 26:12–46:57, 01:30:23–01:46:41). Thus, the substantive portion of the

combined interviews amounted to approximately seventy-seven minutes of recording.

1. The military judge, made clear on the record, that he considered all relevant evidence prior in reaching his findings.

Appellant avers that it was "objectively impossible" for the military judge consider all of the evidence and fairly deliberate prior to announcing a finding of guilt. (Appellant's Br. 18). In so doing, appellant invites this court to equate the length of the deliberative processes with its fairness and thoroughness. However, this court should refuse to find material prejudice to a substantial right, and thus reverse a conviction, merely because of an allegedly abbreviated deliberation. *See United States v. Lentz*, 54 M.J. 818, 821 (N-M Ct. Crim. App. 2001) ("Brief deliberation, by itself, does not necessarily show that the trier of fact failed to give full, conscientious, or impartial consideration to the evidence . . . Neither the [UCMJ] nor the [M.C.M.] requires the fact-finder to deliberate for any particular length of time, whether it be on findings or sentence") (internal citations omitted); *United States v. Moysiuk*, 38 C.M.R. 568 (A.B.R. 1967) (affirming appellant's conviction where panel members deliberated for only six minutes); *United States v. Ward*, 48 C.M.R. 617 (A.C.M.R. 1974) (affirming appellant's conviction despite deliberations lasting through the early morning hours following a full day's trial); *United States v. Silver*, 1993 CMR LEXIS 372, at *17 (A.F.C.M.R. 1993) (finding

that fifty-six minutes was adequate deliberation in a burglary, rape, and indecent liberties case involving three victims and at least four witnesses).

2. The military judge considered all of the substantive evidence, whether favorable or unfavorable to appellant, stemming from appellant's law enforcement interviews, and thus, appellant suffered no material prejudice to his substantial rights.

Appellant's allegation that the military judge was unwilling to consider evidence impliedly invites this court to likewise ignore the evidence adduced at trial. Specifically, appellant gives INV KR's testimony short-shrift likely because his testimony captured the relevant parts of Prosecution Exhibit 7, including those the statements potentially favorable to appellant. (R.158–173).

For instance, on cross-examination, INV KR stated that appellant not only willingly provided a DNA sample, he also initiated the interview, which in turn implied his innocence. (R. at 169–70). Additionally, trial defense counsel elicited appellant's statements that contradicted [redacted] account of the events, including that appellant did not know whether [redacted] wore a tampon or pad, his inattention to her underwear, the possibility that at least some of [redacted] injuries may have been attributable to CM's dog, and that [redacted] remained conscious throughout their interaction. (R. at 166, 171–72). Investigator KR recalled that appellant expressed a distaste for anal sex. (R. at 170–71).

Perhaps most importantly, INV KR repeated appellant's claim that [redacted] continually redirected appellant's penis to her anus. (R. at 169–70). Investigator

KR also relayed appellant's statement that he had never engaged in anal sex, that appellant did not believe he had anal sex with [redacted] and that he would not be able to feel the difference between vaginal and anal sex. (R. at 170–71). The military judge's evidentiary rulings, peppered throughout INV KR's approximately twenty pages of testimony, along with the clarifying questions he asked INV KR indisputably confirmed that military judge considered the substance of appellant's civilian law enforcement interview, including any parts of the interview that were favorable to appellant. (R. at 164, 170, 173–74).

Although Prosecution Exhibit 8 was admitted into evidence, neither the government nor appellant called CID Special Agent [SA] DB as a witness. (R. at 107–08). This is may be due to the fact that, as mentioned *supra*, the substantive portion of the interview was minimal relative to the length of the recording. (Appellee's Br. 8–9). Furthermore, the fact that trial defense counsel only referred to appellant's CID interview to minimize the inconsistencies with his earlier statements to INV KR belies appellant's contention that the CID interview contained favorable to him. (R. at 289). Moreover, the military judge, aided by the government's time hacks, had ample time to review the relatively brief substantive portions of appellant's CID interview during his deliberations. (R. at 330).

The military judge prudently decided against watching the portions of appellant's law enforcement interviews where appellant sat alone, provided DNA samples, or bantered with law enforcement agents about unrelated items like the drab architectural design of Army barracks. (R. at 328–29). "In the clear absence of manifest injustice, the military judge did not abuse his discretion by denying the defense's motion for mistrial." *United States v. Thompkins*, 58 M.J. 43, 47–48 (C.A.A.F. 2003). This court should find that there was no prejudice to appellant's material rights because the military judge heard appellant's statements, through INV KR's testimony and during his hour long deliberation that was "more than adequate for [the military judge] to complete [his] required task" of reviewing and deliberating upon the evidence. *Silver*, 1993 CMR LEXIS 372, at *17. The military judge's findings of fact were not clearly erroneous, nor were his conclusions based upon erroneous law, and his denial of appellant's mistrial motion was squarely within the range of acceptable choices given the facts and the law. Accordingly, this court should refrain from reversing the military judge's decision because he did not abuse his discretion when he denied appellant's mistrial motion. *Taylor*, 53 M.J. at 198.

B. Appellant is not entitled to relief under R.C.M. 902.

Appellant, for the first time on appeal, requests relief under R.C.M. 902, alleging "the military judge's impartiality might reasonably be questioned"

because he did not watch the non-substantive parts of appellant's law enforcement interviews. (Appellant's Br. 12). Courts review the issue of judicial disqualification, when raised only on appeal, for plain error. *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice." *Id.* (internal citations omitted).

> There is a strong presumption that a military judge is impartial in the conduct of judicial proceedings. When a military judge's impartiality is challenged on appeal, the test is whether, taken as a whole in the context of [the] trial, [the] court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions. We apply this test from the viewpoint of the reasonable person observing the proceedings.

United States v. Foster, 64 M.J. 331, 333 (C.A.A.F. 2007) (internal citations omitted).

i. The military judge's decision against watching the non-substantive portions of appellant's interviews is not error.

There is no error here because a reasonable person would not question the military judge's impartiality simply because the military judge decided against watching appellant sit alone, engaging in unrelated rapport building or providing administrative data. Rather, as established *supra* (Appellee's Br. 10–12), a reasonable person observing the proceedings would see that the military judge in fact considered all of the evidence admitted at trial prior to rendering his verdict.

ii. The alleged error is neither plain nor obvious.

Assuming arguendo that the military judge erred, the error is neither plain or obvious. First, appellant's trial defense counsel never made a motion for relief under R.C.M. 902. This fact alone mitigates against a finding that the error was plain or obvious. Furthermore, trial defense counsel did not request relief under R.C.M. 915—and not R.C.M. 902—immediately following the military judge's announcement of guilt, when the alleged error was most apparent. Rather, appellant levied his allegation only after the military judge announced appellant's sentence. (R. at 327).

iii. No Prejudice.

As established *supra* (Appellee's Br. 11–12), appellant's suffered no material prejudice to his substantial rights. Article 59(a), UCMJ. Thus, appellant is not entitled to relief.

B. Appellant is not entitled to relief under *Liljeberg*.[4]

Notwithstanding a lack of material prejudice to a substantial right, military courts also consider "the three-part test identified by the Supreme Court in *Liljeberg* to determine if reversal is otherwise warranted under the circumstances to vindicate the public's confidence in the military justice system." *Martinez*, 70

[4] Appellee does not concede that *Liljeberg* is the appropriate analytical framework for appellant's allegation of error given the factual circumstances of this case but nevertheless analyzes the *Liljeberg* factors should this court determine otherwise.

M.J. at 159 (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, (1988)). The three *Liljeberg* factors are: "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Liljeberg* 486 U.S. at 864. In this case, an analysis of these factors, viewed independently or cumulatively, militate against reversal.

First, the risk of injustice to appellant is minimal. The government asked for a sentence to confinement for thirty-six months, trial defense counsel requested nine months, and appellant was ultimately sentenced to only twelve months' despite facing a maximum term of confinement of thirty years. (R. at 327); *Manual for Courts- Martial, United States* (2016 ed.), App'x 12. *See United States v. Hannah*, ARMY 20190514, 2021 CCA LEXIS 192, at *38 (Army Ct. Crim. App. 19 Apr. 2021) (mem. op.) (noting the relatively short length of appellant's sentence diminished the risk of injustice to appellant).

Second, appellant does not identify how requiring a fact finder to watch an appellant sitting idly in a room alone or speaking about non-substantive matters like his barracks' address, or performing fifteen buccal swabs of his cheeks would prevent future injustice. Thus, "it is not necessary to reverse the results of the present trial in order to ensure that military judges exercise the appropriate degree

of discretion in the future." *United States v. Butcher*, 56 M.J. 87, 93 (C.A.A.F. 2001).

Finally, there is minimal risk that the military judge's actions, viewed in context of the entire proceedings, would undermine public confidence in the military justice system. *Martinez*, 70 M.J. at 60. First, upon being questioned about the perceived brevity of his deliberations, the military judge delineated between the non-substantive and substantive portions of appellant's law enforcement interviews and then explained that he considered "all relevant portions of . . . both video statements." (R. at 330). This contemporaneous clarification was "sufficient to minimize the risk that the conduct would undermine the public's confidence in the military justice system." *Martinez*, 70 M.J. at 160. Additionally, appellant fails to identify any other actions, such as blatant ire towards defense counsel or an inappropriate relationship with a counsel's spouse, that would place the military judge's conduct within the ambit of *Hannah's* or the *United States v. Lopez* line of cases. ARMY 20170386, 2020 CCA LEXIS 161 (Army Ct. Crim. App. 11 May 2020) (mem. op.). Simply stated, the military judge's conduct does not warrant reversal.

Assignment of Error II

WHETHER THE MILITARY JUDGE ERRED IN FINDING PAGES 25 THROUGH 28 OF PROSECUTION EXHIBIT 6 WERE NONTESTIMONIAL.

Additional Facts

A. Medical examination reveals [redacted] suffered from anal fissures.

An ambulance transported [redacted] from the MP station to a civilian hospital at 0041 on 4 November 2018. (Pros. Ex. 6, p.29). An emergency room assistant logged [redacted] into the hospital's systems at 0103. (Pros. Ex. 6, p. 29). A nurse initiated the triage process at 0107 and then performed a series of assessments, including gathering information on various bodily systems, [redacted] vital statistics, and medical history. (Pros. Ex. 6, p. 29–34). The nurse transported [redacted] to the examination room via stretcher and the SANE exam began at approximately 0348.[5] (Pros. Ex. 6, p. 35).

Dr. CS, performed a comprehensive examination and recorded his findings on a form entitled "SAMARITAN Medical Center EMERGENCY PHYSICIAN RECORD Reported Sexual Assault" [Physician's Record].[6, 7] (Pros. Ex. 6, p. 25).

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[5] The record does not indicate exactly what the SANE acronym stands for but traditionally it stands for Sexual Assault Nurse Examination.

[6] Dr. CS died prior to trial. (R. at 146). The record does not indicate his cause of death.

[7] The Physician Report consists of pages 25 through 28 of Prosecution Exhibit 6.

The Physician Record documented [redacted] report of rectal pain and that rectal penetration was the mechanism of injury. (Pros. Ex. 6, p. 25). The Physician's Record also noted menstrual bleeding and that an anoscope examination revealed rectal fissures at the 12 and 6 o'clock positions of [redacted] rectum. (Pros. Ex. 6, p. 26). The Physician's Record also shows that Dr. CS ordered a battery of laboratory tests and prescribed an antibiotic and viral prophylactic treatment. (R. at 26, 28, 36–7). Dr. CS completed his examination at 0500. (Pros. Ex. 6, p. 26, 28).

B. Law enforcement presence at the hospital.

Approximately two hours elapsed between the triage nurse's initial assessments and [redacted] comprehensive medical examination. (Pros. Ex. 6, p. 34–35). Investigator KR "had a very brief opportunity to speak with [redacted] during that interim period. (R. at 110). However, "[INV KR] wasn't able to interview [redacted] at length because a sexual assault examination needed . . . to occur." (R. at 110). Investigator KR left the hospital and spoke to [redacted] again later that day. (R. at 110–11). He was not present during the sexual assault examination. (R. at 156). Neither INV KR or any other law enforcement personnel directed the doctors or nurses to conduct a sexual assault examination on [redacted] (R. at 156–57). Indeed, "[t]he hospital medical staff had already made the determination that [a sexual assault examination] was going to be conducted before any law enforcement was

on scene." (R. at 157). Investigator KR's interactions with the medical staff were limited to receiving directions to [redacted] hospital room and being told "that it was time to leave so they could conduct a sexual assault examination." (R. at 157).

C. Admission of the Physician's Report into evidence.

The government moved to admit the Physician's Record as part of Prosecution Exhibit 6. (R. at 196). Ms. KR, Director of Medical Records at Samaritan Medical Center's, testified that Prosecution Exhibit 6 were the records she certified from [redacted] medical file. (R. at 191). Additionally, she affirmed the Physician's Record was not a forensic evaluation and that its purpose is "to document the encounter that the provider has with a patient." (R. at 193). She further testified that the Physician's Record has no law enforcement purpose, but rather "[the Physician's Record is] how we document care and that's how the providers would support any billing that they might do to the insurance companies or to the patient." (R. at 193–94).

At trial, appellant's sole objection to Prosecution Exhibit 6 was the government's belated delivery of the documents. (R. at 196). The military judge asked whether appellant wished to make any additional objections and appellant responded, "[n]o additional objections, Your Honor." (R. at 196). The military judge then analyzed Prosecution Exhibit 6's admissibility under Military Rules of Evidence [Mil. R. Evid.] 803(6) and 902(11), and found that the government failed

to prove that Prosecution Exhibit 6 was a self-authenticating document. (R. at 196).

However, the military judge found that the government, through Ms. KR's testimony, laid an adequate foundation for the document's admissibility. (R. at 196–97). The military judge then specifically analyzed the admissibility of the Physician's Report and placed his findings on the record. (R. at 197). First, the military judge noted Ms. KR's testimony that the purpose of the "form was for the doctor to document the reported incident, the reported sexual assault, that it was for billing purposes, of the insurance purposes." (R. at 197). Further, the military judge found that despite its potentially misleading name, the Physician's Report was not intended for the law enforcement or prosecution purposes. (R. at 197).

Next, the military judge examined the Physician's Report under the *United States v. Rankin*, 64 M.J. 348 (C.A.A.F. 2007), three factor test. (R. at 198). The military judge noted that INV KR had no involvement with the Physician's Report and thus found that the first factor, whether the statements contained within the Physician's Report were elicited or "in response to law enforcement or prosecutorial inquiry," weighed in favor of admissibility. (R. at 198). Next, the military judge found, based upon Ms. KR's testimony, that the Physician's Report's primary purpose was not "the production of evidence with an eye towards trial." (R. at 198). The military judge stated that he was aware that Dr. CS had

died and thus appellant had no opportunity to cross-examine Dr. CS but nevertheless found that the Physician's Report was admissible as non-testimonial hearsay because the *Rankin* factors "tipped the scales in favor of showing that [the Physician's Report] is not testimonial in nature." (R. at 199). The military judge ultimately admitted pages 25 through 28 of Prosecution Exhibit 6 under Mil. R. Evid. 803(4).[8] (R. at 199–200, 271).

Standard of Review

Whether a statement is testimonial hearsay under the Sixth Amendment is reviewed de novo. *United States v. Baas*, 80 M.J. 114, 120 (C.A.A.F. 2020).

Law and Argument

An objective analysis of all of the facts and circumstances surrounding [redacted] medical examination supports the entirely unremarkable conclusion that medical personnel elicited the statements contained within the Physician's Report to further [redacted] medical treatment. Consequently, the military judge properly admitted the Physician's Report under the non-testimonial hearsay exception to the Sixth Amendment's Confrontation Clause. Appellant's contentions aside, the hospital staff's notification to law enforcement of the existence of a potential crime victim at the hospital and law enforcement personnel's fleeting contact with [redacted] does not

[8] The military judge also noted that defense had no objection to Prosecution Exhibit 6, pages 1 through 24. (R. at 197).

transmute the Physician's Report into testimonial hearsay. Accordingly, this court should affirm the military judge's evidentiary ruling.

A. A minor law enforcement presence at the hospital and a brief conversation do not demonstrate prosecutorial purpose.

Appellant draws parallels to *United States v. Gardinier* to illustrate the principle that substantial law enforcement involvement during a medical examination may, warrant "a conclusion that the statements were elicited in response to law enforcement inquiry with the primary purpose of producing evidence with an eye toward trial." 65 MJ. 60, 66 (C.A.A.F. 2007). It is undeniable that both cases involve law enforcement and a medical examination performed subsequent to a sexual assault allegation. However, appellant's case is temporally, substantively, and factually distinguishable from *Gardinier* and thus this court should affirm the military judge's ruling that the Physician's Report was non-testimonial hearsay.

First, the cases are temporally distinguishable. In *Gardinier*, the medical examination occurred "a few days" after the victim reported the sexual assault and only after the local sheriff's department and the human services department conducted a joint victim interview. 65 M.J. at 65. In appellant's case, [redacted] received a medical examination mere hours after the reporting the sexual assault. (R. at 105; Pros. Ex. 6, p. 29, 35). The close proximity between the sexual assault and examination supports the conclusion that the examination's purpose was

medical treatment of an injured patient who was transported to the hospital in an ambulance and carted to the examination room upon a stretcher.

Second, unlike *Gardinier*, there is no indication that law enforcement requested or funded [redacted] medical examination. 65 M.J. at 66. In fact, INV KR affirmed that neither he, nor any other member of law enforcement directed medical staff to conduct any such examination. (R. at 156–57). Furthermore, INV KR was "[un]able to interview [redacted] at length because a sexual assault examination . . . needed to occur." (R. at 110). This distinction alone is dispositive. *Gardinier*, 65 M.J. at 66 (noting, "[nurse] performed a forensic medical exam on [the victim] at the behest of law enforcement with the forensic needs of law enforcement and prosecution in mind" before finding that the statements made during the examination were testimonial).

Third, the forms used to record the medical examinations were substantively dissimilar. In *Gardinier*, the CAAF noted that the examination results were recorded on a form entitled, "Forensic Medical Examination Form" and that the government's expert witness referred to the form as a "medical legal record." 65 M.J. at 66. In contrast, Ms. KR testified that, "The Samaritan Medical Center Emergency Physician Record of Reported Sexual Assault" is not a forensic evaluation and has no law enforcement purpose. (R. at 193). Rather, the form

documents patient care, as well as enables the hospital to bill the patient or insurance provider.[9] (R. at 193–94).

Finally, although the military judge did not explicitly analyze the second *Rankin* factor, the record supports a finding that "the statement [did not] involve more than a routine and objective cataloging of unambiguous factual matters." *Rankin*, 64 M.J. at 352. The Physician's Report merely documents the results of [redacted] medical examination, including [redacted] medical history, any symptoms and injuries she was suffering at the time, and the resultant medical prescriptions. (Pros. Ex. 6, p. 25–26, 28). Each of the *Rankin* factors, analyzed objectively and under the totality of the circumstances, support the military judge's finding that the Physician's Report was non-testimonial hearsay.

B. Any alleged error was harmless beyond a reasonable doubt.

Assuming arguendo that the military judge erred in admitting the Physician's Report, the error was nonetheless harmless beyond a reasonable doubt. Appellant avers that the Physician's Report was the "only admitted evidence of trauma to [redacted] rectum . . . ." (Appellant's Br. 28). However, appellant's contention ignores the fact that [redacted] provided direct evidence of rectal injury—she testified that she felt a "burning and ripping pain" as appellant thrust his penis "all

[9] At least four pages' mention billing, payment, or guarantor. (Pros. Ex. 6, p. 2–4, 11).

the way in[to] her anus" and that she "[her] anal area hurt. It hurt to sit," after the anal sexual assault. (R. at 41, 65). Furthermore, [redacted] received follow-on treatment for her injuries and her provider noted [redacted] "complaints of rectal pain and blood in her stool [two days after the sexual assault]." (R. at 226). This evidence is sufficient to prove appellant's guilt beyond a reasonable doubt and thus this court should affirm appellant's conviction and sentence.

Assignment of Error III

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING THE DOCTOR'S STATEMENTS IN PAGES 25 THROUGH 28 OF PROSECUTION EXHIBIT 6 PURSUANT TO MILITARY RULE OF EVIDENCE 803(4).

Standard of Review

A military judge's decision to admit evidence under Mil. R. Evid. 803(4) is reviewed for an abuse of discretion. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 381 (C.A.A.F. 2006).

Law and Argument

"Hearsay is not admissible except as provided by the rules of evidence or an act of Congress." *United States v. Cucuzzella*, 66 M.J. 57, 59 (C.A.A.F. 2008); Mil. R. Evid. 802. Military Rule of Evidence 803(4) permits the admission of statements made for medical diagnosis or treatment so long as "(A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and (B) describes

medical history; past or present symptoms or sensations; their inception; or their general cause." The medical diagnosis or treatment exception, "is premised on the theory that the declarant has an incentive to be truthful because he or she believes that disclosure will enable a medical professional to provide treatment or promote the declarant's own well-being." *Cucuzzella*, 66 M.J. at 59.

The indicia of reliability central to the admissibility of a patient's statements made to a medical provider are likewise present in that medical provider's notes regarding diagnoses made or treatments rendered. Appellant cites *Bulthuis v. Rexall Corp*., 789 F.2d 1315, 1316 (9th Cir. 1985) and *Bombard v. Fort Wayne Newspapers*, 92 F.3d 560, 564 (7th Cir. 1996) to support his contention that Mil. R. Evid. 803(4) does not extend to Dr. CS's notes regarding his medical findings, diagnosis or treatment. (Appellant's Br. 32) ("Mil. R. Evid. 803(4) is identical to [Fed. R. Evid. 803(4), and multiple federal circuits have confirmed the rule [']applies only to statements made by the patient to the doctor, not the reverse.[']").

These cases are immediately distinguishable from appellant's case because both *Bulthuis* and *Bombard* involve patients repeating their respective doctors' purported statements in court. In *Bulthuis*, the plaintiff's mother testified that thirty years prior to trial, her doctor told her she was prescribed drug at issue. 789 F.2d at 1316. The plaintiff's mother's testimony was "plainly self-serving" and

thus untrustworthy. *Id*. (finding that the plaintiff could not avail herself of Federal Rule of Evidence [Fed. R. Evid.] 803(4) or Fed. R. Evid. 803(24)). Similarly, *Bombard* offered his doctor's supposed statements, that the plaintiff could work in a part-time role, to support his Americans with Disabilities Act claim. 92 F.3d at 564.

As a preliminary matter, the admission of Dr. CS's statements does not present the same parroting concerns extant in *Bulthuis* and *Bombard*—the military judge did not have to rely upon [redacted] potentially self-serving recollection of what Dr. CS said to her because Dr. CS's statements are captured on the Physician's Record. (Pros. Ex. 6, p. 25–28). Furthermore, Dr. CS's notes bear the indicia of reliability central to rationale for the admissibility of statements under Mil. R. Evid. 803(4) because they were made pursuant to his diagnosis and treatment of [redacted] A patient is uniquely "incentive[ized] to be truthful" with a medical provider in the hopes of securing accurate and helpful treatment. *Cucuzzella*, 66 M.J. at 59. A medical provider, such as Dr. CS, is likewise motivated to accurately document his observations, diagnosis, and the treatments he administered to facilitate patient care, such as the medicines he prescribed, as well as aid the insurance billing process. Accordingly, the military judge did not abuse his discretion when he admitted Dr. CS's statements, contained within the Physician's Report, into evidence.

A. The alleged error did not materially prejudice appellant's substantial rights.

As established *supra* (Appellee's Br. 24–25), any alleged error in admitting the Physician's Report was harmless error. [redacted] testified that she felt a burning, ripping sensation as appellant thrust his penis into her anus. (R. at 41). Further, [redacted] reported the sexual assault immediately after it occurred. (R. at 50–51, 104). [redacted] continued to receive treatment for rectal injuries, including pain and bloody stool, in the period following her sexual assault. (R. at 226). The evidence, independent of the Physician's Record, proves appellant's guilty beyond a reasonable doubt and thus this court should affirm appellant's conviction and sentence.

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and sentence.

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CERTIFICATE OF SERVICE, U.S. v. SOLA (20210322)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at ***usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@mail.mil***, on this 5th day of August, 2022.

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