IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.	Docket No. ARMY 20210376
Major (O-4) **ANTHONY R. RAMIREZ,** United States Army, Appellant	Tried at Fort Bragg, North Carolina, on 22-23 June and 25-26 June 2021 before a general court-martial convened by Commander, 82d Airborne Division, Colonel J. Harper Cook, military judge, presiding.

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

Assignments of Error

I.

THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT FINDINGS OF GUILTY FOR ABUSIVE SEXUAL CONTACT, ASSAULT CONSUMMATED BY A BATTERY, AND CONDUCT UNBECOMING AN OFFICER.

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN NOT ALLOWING THE DEFENSE TO INQUIRE INTO RACIAL BIAS DURING VOIR DIRE.

III.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING THE ALLEGED VICTIM'S STATEMENT TO A WITNESS AS AN EXCITED UTTERANCE UNDER MIL. R. EVID. 803(2).

IV.

THE MILITARY JUDGE ERRED IN ADMITTING AN UNAUTHENTICATED TRANSCRIPT OF AN AUDIO RECORDING AND FAILING TO INSTRUCT THE PANEL ON ITS USE.

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Statement of the Case

On 26 June 2021, an officer panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of abusive sexual contact, two specifications of assault consummated by a battery, and one specification of conduct unbecoming an officer, in violation of Articles 120, 128, and 133, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 928, and 933 (2018) [UCMJ]. (R. at 595). The panel acquitted appellant of abusive sexual contact (two specifications) and attempted sexual assault in violation of Articles 120 and 80, UCMJ, 10 U.S.C. §§880 and 920. (R. at 595). The military judge sentenced appellant to confinement for five months and a dismissal.[1] (R. at 643). The convening authority took no action on the adjudged sentence, and approved appellant's request for deferment of waiver of automatic forfeitures for five months. (Action). On 6 August 2021, the military judge entered judgment. (Judgment).

[1] The military judge sentenced appellant to five months for Specification 2 of Charge I, four months for Specification 1 of Charge III, three months for Specification 2 of Charge III, and no confinement for The Specification of Charge IV. All sentences to confinement were to be served concurrently. (R. at 643).

Statement of Facts

A. [redacted] met appellant for the first time when he returned from deployment.

On 1 June 2020, First Lieutenant (1LT) LH deployed to Iraq as a signal officer with the 82d Airborne Division.[2] (R. at 336, 432). During the deployment, 1LT L[redacted] served under appellant as his deputy in the brigade S6. (R. at 432). Appellant was the highest ranking signal officer during the deployment, and 1LT [redacted] considered him a mentor. (R. at 433, 435).

On 15 January 2021, 1LT [redacted] returned from the deployment to the home he shared with his wife, [redacted] in Broadway, North Carolina. (R. at 343, 433).

On Sunday, 7 February 2021, around 0100 or 0200 hours, appellant returned from the deployment and called 1LT [redacted] to pick him up from the brigade. (R. at 340–41, 434). Soon after he was picked up, appellant discovered his lodging arrangements were no longer available, so 1LT [redacted] agreed to allow appellant to spend the rest of the night at his house. (R. at 435). When appellant and 1LT [redacted] arrived, [redacted] was awake to greet them. (R. at 341). This was the first time [redacted] met appellant. (R. at 341). Following brief introductions, everyone went to sleep. (R. at 342).

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[2] First Lieutenant [redacted] was promoted to Captain (CPT) less than two months before trial. (R. at 333).

B. Appellant invited himself to watch the Super Bowl at 1LT [redacted] residence.

After everyone woke up later that day, 1LT [redacted] drove appellant to pick up appellant's truck and move him to his original lodging arrangement. (R. at 436). While on these errands, appellant asked 1LT [redacted] if he could watch the Super Bowl with 1LT [redacted] and his wife that evening. (R. at 436). Although 1LT [redacted] and his wife had not planned on watching the game, they agreed. (R. at 342, 436). Neither 1LT [redacted] nor his wife anticipated that appellant would be staying at their home for a second night. (R. at 437).

When appellant arrived, "he pretty much immediately started drinking […] [H]e was drinking very heavily just to start out." (R. at 437). During the Super Bowl, appellant, 1LT [redacted], and [redacted] were all drinking beer on the couch in the living room. (R. at 345). First Lieutenant [redacted] had a beer or two and [redacted] drank three beers, while appellant was "drinking very heavily" and had at least a six pack of beer. (R. at 346, 437–38). [redacted] fell asleep on the couch during the Super Bowl and slept through most of the game. (R. at 353). Appellant also fell asleep on the couch about halfway through the game, but woke up during the fourth quarter and finished watching the game with 1LT [redacted]. (R. at 438). After the game was over, appellant, 1LT [redacted], and [redacted] were all awake, but at some point 1LT [redacted] fell asleep on the couch. (R. at 438).

C. After the Super Bowl, appellant lingered and conversed with [redacted]

Appellant and [redacted] casually conversed while sitting on the living room couch while 1LT [redacted] slept next to them on the same couch. (R. at 354). Appellant told [redacted] about his wife and children, and the two discussed the difficulties of deployment and family life. (R. at 354–55). At some point, [redacted] disclosed that she had concerns about her husband's well-being since his return from the deployment. (R. at 355). [redacted] also explained that she discovered a text message exchange on 1LT [redacted] phone between 1LT [redacted] and a female soldier. (R. at 355). [redacted] asserted that, in the text exchange, her husband told the female soldier that he loved her. (R. at 398–99). [redacted] understood that although she could have been jeopardizing her husband's career, she also felt appellant was in a position to encourage or even order 1LT [redacted] to seek the help she felt he needed. (R. at 355).

After appellant and [redacted] began to discuss 1LT [redacted], appellant suggested they continue their conversation in the kitchen, away from 1LT [redacted] who was still sleeping on the couch. (R. at 356). Around 0200 or 0300, 1LT [redacted] woke up and joined appellant and [redacted] in the kitchen, and appellant and [redacted] stopped talking about him. (R. at 356, 438). Appellant asked 1LT [redacted] to drink a beer with him, so 1LT [redacted] joined them for one beer and then 1LT [redacted] retired to the couple's

bedroom around 0500.[3] (R. at 439).

First Lieutenant [redacted] had a car service in a few hours and planned to use [redacted] car to go to work after dropping his car off at the repair shop. (R. at 438–39). Because [redacted] slept during the Super Bowl, she was wide awake when her husband went back to bed. (R. at 357). [redacted] was concerned that she would not wake up for the car service appointment so she decided to stay awake. (R. at 357). Appellant continued to converse with [redacted] about her concerns for her husband's well-being, and at one point he offered to give her a hug. (R. at 357). She "thought it was a little strange," but [redacted] agreed and appellant hugged her. (R. at 358, 402).

D. Appellant made unwanted sexual advances towards [redacted]

Appellant and [redacted] continued to talk, and appellant offered to give [redacted] another hug. (R. at 358). Although it struck her as odd, she felt somewhat obligated because appellant was her husband's boss. (R. at 358). The second hug lasted longer than the first, and appellant started to rub her back before he reached down and "grabbed her butt" over her leggings.[4] (R. at 358–59, 403). As appellant pulled away from her, he started to kiss her on her mouth. (R. at 360,

[3] First Lieutenant [redacted] recalls that "[i]t was probably about 4, maybe 4:30 in the morning." (R. at 439).

[4] The panel convicted appellant of abusive sexual contact related to this allegation in Specification 2 of Charge I. (R. at 595).

403). Shocked, [redacted] did not kiss him back, and reminded him that he had a wife and kids and "can't do this." (R. at 360).

Appellant then started to ask [redacted] for sex by asking her, "when are we going to fuck?" (R. at 360). [redacted] continued to remind appellant of his family and of her husband, and left the kitchen and went to the couch in the living room to try and "process what was going on." (R. at 362, 403). Appellant followed her into the living room and sat beside her on the couch. (R. at 362). [redacted] stood to walk away, but he continued to ask her for sex, to "go upstairs" and "fuck." (R. at 363, 406). [redacted] testified that when she turned to face him, appellant pulled down the front of her leggings and her underwear and touched her vagina.[5] (R. at 364, 408). [redacted] was frozen. (R. at 364). She didn't say anything, but she pulled away and sat back down on the couch. (R. at 365, 404). Appellant stepped back into the entryway to the kitchen. (R. at 365, 410).

[redacted] decided to go to her bedroom, but she realized that appellant "was really drunk, and he shouldn't have been driving." (R. at 366). As she passed appellant in the entryway to the kitchen she turned towards him, asked him for his keys, and told him he should go to bed. (R. at 365, 410). Appellant continued to ask [redacted] for sex. (R. at 367). [redacted] testified that he then pulled out his

[5] The panel acquitted appellant of abusive sexual contact related to this allegation in Specification 1 of Charge I. (R. at 595).

penis from his pants, grabbed the back of her neck, and pulled her head towards his penis. (R. at 367–68, 410–11).[6] [redacted] resisted and pulled away from appellant. (R. at 368). Appellant put his arms around [redacted] backed her into the stove, and continued to try and kiss her on her mouth. (R. at 368). [redacted] continued to remind appellant of his wife and children, and told him to stop and "no." (R. at 368–69). She tried to get away from him and break out of his arms, but appellant was strong and she was unable to escape. (R. at 369–70).

E. [redacted] recorded appellant on her phone.

At some point during appellant's groping, [redacted] began to audio record their interactions on her phone.[7] (R. at 368, 415). Her recording captured the last 6 minutes and 25 seconds of her encounter with appellant. (R. 378–83; Pros. Ex. 2). During this time, appellant continued to kiss and grab [redacted] and ask her for sex, while she continued to remind appellant of his family and urged him to go to bed. (R. at 377–81). While her phone was recording, [redacted] told appellant "no" 53 times, and told him to "stop" 16 times. (Pros. Ex. 2; Pros. Ex. 3). She went into the guest bedroom to look for appellant's keys. (R. at 380, 416; Pros. Ex. 2; Pros. Ex. 3). While in the guest bedroom, appellant continued to kiss and touch

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[6] The panel acquitted appellant of attempted sexual assault related to this allegation in The Specification of Charge II. (R. at 595).

[7] Prosecution Exhibits 4 and 5 (screenshots of [redacted] phone) reflect the recording began at 0606. (R. at 372).

[redacted] at one point pushing her against the wall. (R. at 382).

F. [redacted] informed her husband of appellant's offensive behavior at her first opportunity.

Eventually, [redacted] finally located appellant's keys and walked down the hall to the couple's bedroom where 1LT [redacted] was sleeping. (R. at 383, 408). Once in the bedroom, [redacted] locked the door behind her and shook 1LT [redacted] awake. (R. at 383–84, 426, 440). She was crying, and she asked 1LT [redacted] to go into their walk-in closet to prevent appellant from hearing their conversation. (R. at 384, 441). [redacted] told her husband that appellant kissed and touched her. (R. at 384). She also played the recording for him. (R. at 384, 442).

G. 1LT [redacted] confronted appellant and removed him from his house.

After listening to about a minute or a minute-and-a-half of the recording, 1LT [redacted] "couldn't listen to it anymore." (R. at 442). He told his wife to remain in the closet and not to leave the bedroom. (R. at 443). He then went into the guest bedroom, where appellant "was asleep slumped over in a chair[.]" (R. at 443). First Lieutenant [redacted] shook appellant to wake him, held him by his shirt and picked him up out of the chair. (R. at 443). He told him he needed to leave the house immediately. (R. at 443). First Lieutenant [redacted] tried to pull him out of the room, but appellant refused to leave. (R. at 443). First Lieutenant [redacted] then punched appellant in his face and smashed his head into the wall, after which time appellant "realized that it was time for him to leave." (R. at 443). He held on to appellant as

he walked him out of the bedroom and into the living room to get his shoes, threw him his keys, and said "I don't care if you crash your car right now, you are leaving my house." (R. at 443). He then "kicked" appellant out the front door before locking it and returning to his wife in the bedroom. (R. at 443–44).

About thirty to forty-five minutes after appellant left the house, 1LT [redacted] began receiving phone calls from him.[8] (R. at 444). First Lieutenant [redacted] answered one of the calls, and appellant said "let's talk like men." (R. at 446). First Lieutenant [redacted] told appellant he knew exactly what had happened, and that he had a recording of appellant during the assaults. (R. at 446). "And at that point, [appellant] kind of shut down and didn't really say too much after that." (R. at 446). First Lieutenant [redacted] told him:

> [L]ook, your career is over. You're screwed at this point. Like how could you do this? You have a family. How could you not think about these things? And I just told him he's done. And then I hung up the phone at that point.

(R. at 446).

Additional facts are incorporated below.

[8] Prosecution Exhibit. 7 is a screenshot from 1LT [redacted]s phone reflecting a missed call from appellant at 0646. (R. at 445, Pros. Ex. 7). First Lieutenant [redacted] could not recall which of the "six or seven phone calls" he received from appellant was the 0646 call reflected in the screenshot, but he believed it "was probably one of the first calls." (R. at 445–46).

Assignment of Error I

THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT FINDINGS OF GUILTY FOR ABUSIVE SEXUAL CONTACT, ASSAULT CONSUMMATED BY A BATTERY, AND CONDUCT UNBECOMING AN OFFICER.

Standard of Review

This court reviews de novo a record of trial for legal and factual sufficiency. *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003).

Law

A. Legal sufficiency.

Findings of guilt are legally sufficient when "any rational fact-finder could have found all essential elements of the offense beyond a reasonable doubt." *United States v. Nicola*, 78 M.J. 223, 226 (C.A.A.F. 2019) (citations omitted). Under this limited inquiry, courts "give full play to the responsibility of the trier of fact [to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995) (citation omitted). When this court conducts a legal sufficiency review, it is obligated to draw "every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Robinson*, 77 M.J. 294, 298 (C.A.A.F. 2018) (citations omitted). "As such, the standard for legal sufficiency involves a very low threshold to sustain a

conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (citation and internal quotation marks omitted).

B. Factual sufficiency.

For factual sufficiency, this court takes "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). This court may not affirm a conviction unless, "after weighing the evidence in the record of trial and making allowances for not having personally observed the witness[es]," it is personally convinced beyond a reasonable doubt of appellant's guilt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

Article 66, UCMJ, requires a court of criminal appeal to grant appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence when considering whether a finding is correct in fact. Article 66(d)(1)(B), UCMJ; *Turner*, 25 M.J. at 325. This court has explained that where "witness credibility plays a critical role in the outcome of trial this Court should hesitate to second-guess the trial court's findings." *United States v. Stanley*, 43 M.J. 671, 674 (Army Ct. Crim. App. 1995). Additionally, "the degree to which we 'recognize' or give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witness is at issue." *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015);

see also United States v. Jimenez-Victoria, 75 M.J. 768, 771 (Army Ct. Crim. App. 2012) (affirming where the findings turned on witness credibility).

C. Abusive sexual contact without consent (Specification 2 of Charge I).

The elements of abusive sexual contact as charged in Specification 2 of Charge I are: (1) that the accused committed sexual contact upon another person; (2) that the accused did so without the consent of the other person. Article 120(d), UCMJ; MCM, pt. IV, ¶60.b.(4)(d). "The term 'sexual contact' means touching … either directly or through the clothing, the […] buttocks of any person, with an intent to … gratify the sexual desire of any person. Touching may be accomplished by any part of the body[.]" Article 120(g)(2), UCMJ.

D. Assault consummated by a battery (Specifications 1 and 2 of Charge III).

The elements of assault consummated by a battery as charged in Specifications 1 and 2 of Charge III are: (1) that the accused did bodily harm to a certain person; (2) that the bodily harm was done unlawfully; and (3) that the bodily harm was done with force or violence. Article 128(a), UCMJ; MCM, pt. IV, ¶77.b.(2).

"A battery is an assault in which the attempt or offer to do bodily harm is consummated by the infliction of that harm." MCM, pt. IV, ¶77c.(3)(a). "'Bodily harm' means an offensive touching of another, however slight. An infliction of bodily harm is 'unlawful' if done without legal justification or excuse and without

the lawful consent of the victim." Dep't of Army, Pam. 27-9, Legal Services: Military Judge's Benchbook, para 3A-52-2 (29 Feb. 2020) [Benchbook].

E. Conduct unbecoming an officer (The Specification of Charge IV).

The elements of conduct unbecoming an officer as charged in The Specification of Charge IV are: (1) that the accused did a certain act; and (2) that, under the circumstances, the act constituted conduct unbecoming an officer and a gentleman. Article 133, UCMJ; MCM, pt. IV, ¶90.b.

"'Conduct violative of this article is action or behavior […] in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of . . . indecency, indecorum, [or] lawlessness[.]" MCM, pt. IV, ¶90.b.(c)(2).

Argument

A. Appellant's convictions are legally sufficient.

[redacted] testimony, along with the corroborating testimony of 1LT [redacted] and the audio recording, were legally sufficient for each of appellant's three convictions. She testified that he "reached down and grabbed [her] butt" without her consent, satisfying both elements of abusive sexual contact as charged in

Specification 2 of Charge I.[9] (R. at 358–59, 409; Charge Sheet).

[redacted] testified—and stood firm in her position—that appellant's actions were not an accidental grab—it was "very intentional." (R. at 359). While appellant notes that there is no evidence that he caused [redacted] any harm or pain, such evidence is not legally required for an abusive sexual contact conviction as charged in this case. (Appellant's Br. 17; MCM, pt. IV, ¶60.b.(4)(d)).

[redacted] testified that appellant kissed her on her mouth several times, never reciprocated and never with her consent, and in spite of her physical resistance and verbal protests. (R. at 360, 362, 368–69, 370, 378, 379, 380, 381, 382, 403). She said at one point during the encounter he "had his arms around [her]," was "pulling [her] out of the kitchen [and] had [her] in his arms." (R. at 368–69). She described him as "strong," and that she could feel his strength when he grabbed her as "[she] was trying to get away." (R. at 369). She explained how "[she] was trying to break out of his arms" but was unable: "It was really stifling. Like I said, I was being pushed up against things." (R. at 370). Again, she denied consenting to appellant grabbing her in this way. (R. at 370). This testimony established all three elements of assault consummated by a battery as charged in Specifications 1

[9] Specification 2 of Charge I alleged in relevant part that appellant "touch[ed] the buttocks of [redacted] over her clothing, with his hand, with an intent to gratify his sexual desire, without the consent of [redacted] (Charge Sheet).

and 2 of Charge III.[10] (Charge Sheet).

[redacted] also testified that appellant continuously pleaded with her for sex, specifically asking her numerous times "when are we going to fuck?" (R. at 360–61, 363, 367, 371, 380, 406, 407, 419, 421–23, 427). This dishonorable and disgraceful behavior by a field grade officer towards his subordinate's wife in their family home was legally sufficient to satisfy both elements of conduct unbecoming an officer as charged in The Specification of Charge IV.[11] (Charge Sheet).

Certainly, "any rational fact-finder could have found all essential elements of the offense beyond a reasonable doubt" based solely upon the testimony of the victim in this case. *Nicola*, 78 M.J. at 226 (citations omitted); *see also United States v. Rodriguez-Rivera*, 63 M.J. 372, 383 (C.A.A.F. 2006) (citations omitted) (holding the government may meet its burden to prove each element beyond a reasonable doubt through testimony of only one witness "so long as the members find that the witness's testimony is relevant and is sufficiently credible."). [redacted] account of the episode describes a "sloppy drunk" appellant intent upon

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[10] Specification 1 of Charge III alleged that appellant "on divers occasions, unlawfully kiss[ed] [redacted] on her mouth with his lips." (Charge Sheet). Specification 2 of Charge III alleged that appellant "unlawfully touch[ed] [redacted] by wrapping his arms around her body." (Charge Sheet).

[11] The Specification of Charge IV alleged that appellant "[made] unwanted sexual advances upon [redacted] the wife of his subordinate, to wit: asking her multiple times, 'when are we going to fuck,' or words to that effect, which conduct constituted conduct unbecoming an officer." (Charge Sheet).

having sex with his subordinate's wife in their home. (R. at 407). Accordingly, [redacted] testimony, along with the corroborating testimony of 1LT [redacted] and the audio recording, easily surpasses the "very low threshold" needed to sustain these convictions as legally sufficient. *King*, 78 M.J. at 221.

B. Appellant's convictions are factually sufficient.

As any rational fact-finder could have found all essential elements of the offense beyond a reasonable doubt, so too should this court find that appellant's convictions are factually sufficient. Appellant advances three arguments why the evidence is factually insufficient for appellant's convictions: (1) [redacted] had strong motives to fabricate her allegations against appellant; (2) her description of the moment that appellant grabbed her buttocks defies logic; and (3) her memory of her second interaction with appellant in the kitchen and guest bedroom was "abysmal and uncorroborated." (Appellant's Br. 19).

1. [redacted] alleged motives to fabricate are belied by the evidence and common sense.

After 1LT [redacted] fell asleep on the couch following the Super Bowl, appellant and [redacted] who had each slept through most of the game—casually conversed in the living room and later in the kitchen. (R. at 354–56). During this conversation, [redacted] asked him how he balanced his many deployments with his family needs, which led to a conversation about her concerns for 1LT [redacted]s well-being. (R. at 354). She confided in appellant and told him that she and her

husband had been quarantined for two weeks together and were not doing well.[12] (R. at 355). She also told appellant that she had discovered a text message on her husband's phone in which 1LT [redacted] told an enlisted soldier that he loved her. (R. at 355).

Appellant urges this court to regard [redacted] conversation with her husband's boss, whom she had never met before, as giving rise to appellant's reasonable mistake that she was interested in a sexual encounter with him. (Appellant's Br. 15–19). Moreover, appellant suggests that [redacted] (after consenting to appellant's advances) was then strongly motivated to describe the encounter as nonconsensual in order "to protect her husband's career, and second, to protect her relationship with her husband." (Appellant's Br. 19).

The evidence presented at trial did not support appellant's theory. [redacted]

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[12] Earlier in her testimony, [redacted] explained that following his return from deployment 1LT [redacted]

> …wasn't himself. So he sat on the couch a lot. He wasn't taking care of himself. He wasn't eating. I would make meals and he wouldn't touch them. It was really hard. We were sleeping—he was sleeping on the couch. I was sleeping on the bed. Just not a lot of communication going on. […] [I had never seen him like that] to that extent. We'd been together for 8 and a half years. So I had seen him go through life and hard times, but nothing like this.

(R. at 339).

had never met or had any contact with appellant before. (R. at 337–38, 341She shared her concerns about her husband with appellant because

> [she] knew, as his boss, from what he understood, he was the only person that could order him to seek help. So I opened up to [appellant] about that so that he could encourage my husband to get help, because he really seemed to care for [1LT [redacted]. […] I was hoping—and what we had talked about was—and I just make it clear that my husband's career was really important, he's a good person. He's going through a lot right now. I was just hoping that [appellant] reaching out to him, asking him to get help would help my husband and help our marriage.

(R. at 355).

The record reflects that [redacted] was trying to manage an unruly houseguest and minimize the fallout from appellant's drunken behavior. Recognizing appellant's intoxicated state and apparent inability to drive, she demanded (and ultimately secured) appellant's keys. (R. at 416). At one point, just before she found appellant's keys, she told appellant "why don't you go jack off in the bathroom," hoping that "if he had that kind of release, he would leave me alone." (R. at 383; Pros. Ex. 2; Pros. Ex. 3). While her phone was recording, [redacted] told appellant "no" 53 times, and told him to "stop" no less than 16 times. (Pros. Ex. 2; Pros. Ex. 3). Once she had secured appellant's keys, she immediately locked herself in the couple's bedroom where 1LT [redacted] was sleeping and woke him up. (R. at 384, 426, 440). She was crying, overcome by "a wave of emotion," and her voice was "very low and shaky" when she told her husband "we have a problem"

and described appellant's outrageous behavior. (R. at 383–84, 440–41).

No reasonable interpretation of these facts could possibly suggest that [redacted] consented to appellant's drunken advances. Rather, the evidence demonstrates that an officer's wife was embarrassed and disturbed by drunken sexual advances from her husband's superior officer in her home. Appellant seems to suggest that one would have expected [redacted] to run screaming through her house to the couple's bedroom at the first sign of an unwanted advance, and that her failure to do so suggests that she must have consented to appellant's abuse. However, rather than suggesting consent or a motive to fabricate, her actions reveal that she was considerate of appellant's liabilities to his family and the army, as well as his potential danger to himself and others were he to drive in that state. [redacted] responses—shock, disbelief, polite but firm resistance, and appeals to his better judgment—perfectly reflect what one would expect under these circumstances.

2. That appellant grabbed [redacted] buttocks while she was seated does not defy logic.

Appellant suggests that it was physically impossible to grab [redacted] buttocks while he was standing and she was seated. (Appellant's Br. 21). He takes issue with the fact that [redacted] provided no further details about the incident other than her assertion that "[h]e just grabbed it. I don't know what to say." (R. at 358; Appellant's Br. 21).

Appellant is not clear as to what further details would be necessary for [redacted]

[redacted] testimony to have established the factual sufficiency of appellant's conviction for abusive sexual contact. When trial counsel asked [redacted] what she meant by "grabbed her butt," and she replied "[h]e just grabbed it …I don't know what to say[,]" her answer anticipated appellee's response here: he grabbed her buttocks without her consent, and therefore committed sexual contact upon another person without the consent of the other person. Nothing further is required.

Neither is the act physically impossible. [redacted] testified that as appellant stood over her as she was seated, he hugged her, and began to rub her back, and then "reached down and grabbed her butt." (R. at 361). No imagination is necessary to envision this sequence of events; a moment's reflection demonstrates that even a seated person may still have their buttocks grabbed.

3. [redacted] testimony was sufficiently detailed and consistent, and was further corroborated by her audio recording and 1LT [redacted] testimony.

Appellant argues that [redacted] memory of her encounter with appellant in the kitchen and guest bedroom was "abysmal and uncorroborated." (Appellant's Br. 21). To the contrary, [redacted] testimony was both detailed and corroborated by her contemporaneous audio recording.

With respect to the encounter in the kitchen, appellant alleges that [redacted]

memory was "by her own admission, weak and confused." (Appellant's Br. 21).[13] However, [redacted] testimony was consistent and accounted for both her and appellant's significant acts in the kitchen. [redacted] testified that after their interaction in the living room, she "got up to go to her bedroom." (R. at 410). On her way, as she walked past appellant who was in the entrance to the kitchen, she "stopped, told him he should go to bed, [and] asked for his keys." (R. at 410). [redacted] testified that it was at this point appellant unzipped his pants and exposed himself, and began to grab, pull, hug and kiss [redacted] in the kitchen. As she resisted, he "had his arms around her" and "backed [her] up on the stove." (R. at 368). He was still kissing her and asking her for sex, while she repeatedly said the

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[13] Appellant cites to page 375 of the record for this alleged admission. (Appellant's Br. 21). Appellant has taken an unwarranted liberty with the transcript. The relevant exchange from page 375 reads:

> [TC]: So he's got his arms around you. How were you able to do a recording?
>
> [redacted] I didn't start the recording when his arms were around me.
>
> [TC]: How were you able to do it then?
>
> [redacted] My arms were free, so that's—*I don't know the exact sequence of how everything happened in the kitchen*.

(R. at 375) (emphasis added). This can hardly be said to constitute an admission that her memory was "weak and confused."

word "no," told him to stop, and was "continuously remind[ing] him of his wife and kids." (R. at 367, 369). She was trying to get away, "trying to break out of his arms." (R. at 369–70). During the struggle, she was being "pushed up against things," starting off by a framed board, moving towards the center of the kitchen, and then over towards the stove."[14] (R. at 370). He asked her to go with him to an upstairs "bonus" room to have sex. (R. at 371).

It was "around this time" that [redacted] began audio-recording on her phone. (R. at 374). She began recording so her husband would believe her, "not that he wouldn't, but it's his boss." (R. at 376).

This litany of details belies appellant's argument that [redacted] "was unable to give a clear description of the events that occurred while she was in the kitchen." (Appellant's Br. 22). To the contrary, [redacted] testimony painted a vivid picture of appellant's behavior in the kitchen immediately prior to the beginning of the audio recording. In a fast-moving, traumatic encounter, it is neither expected nor necessary for a victim to describe every discrete kiss, grope, and obscenity in granular detail; it is sufficient for the fact-finder that the witness credibly testifies to the elements of the offense.

With the benefit of the audio recording, [redacted] account of the few

[14] The government introduced photos of 1LT and [redacted] home reflecting the layout of the relevant rooms. (Pros. Ex. 1).

minutes in the guest bedroom are rendered even more reliable. In fact, she testified about the encounter in the guest bedroom by way of explaining what could be heard on the audio recording, narrating at incremental pauses as the government published the recording to the court-martial. (R. at 377–83, Pros. Ex. 2). Combined, the audio recording and [redacted] narration corroborate her account of appellant's behavior generally; namely, of a drunken officer repeatedly making verbal and physical advances towards his subordinate officer's wife, who would not take "no" (or 53 "no's") for an answer. (Pros. Ex. 2).

Appellant attempts to dismiss the strength of Pros. Ex. 2 by pointing out that [redacted] voice is calm in the recording; that she only mentions he had "kissed her several times" and not that he had sexually assaulted her; that she uses "we" in some instances; that she responds with "I don't have your number" rather than flatly deny appellant's suggestion that they could exchange text messages; and that appellant can never be heard to say "when are we going to fuck" in the recording. (Appellant's Br. 22–23).

He fails, however, to otherwise account for what can be plainly heard on the recording: appellant aggressively attempted to convince [redacted] to sleep with him, while [redacted] firmly refused and resisted his advances. Throughout the recording appellant whispered in a tone that clearly demonstrated his intent to be discrete and hide his actions from 1LT [redacted] In fact, at one point during the

recording, appellant asked [redacted] "why are you being so loud." (Pros. Ex 2, 005:12; Pros. Ex. 3, pg. 4). The audio recording corroborates [redacted] testimony that her primary goals were to secure appellant's keys to prevent him from driving while impaired,[15] and then getting appellant to bed or otherwise away from her.[16] Given that appellant continued to physically impose himself on [redacted] and also that he was her husband's superior officer and a guest in her home, it is not surprising that she was non-confrontational in both her tone and choice of words. Finally, although appellant cannot be heard saying "when are we going to fuck" on the audio recording, he can be heard to whisper "lay down with me" and the broader context of the recording affirms his relentless sexual advances. (Pros. Ex. 2, 00:03:03; Pros. Ex. 3, p. 2).

Taking into account that the panel saw and heard [redacted] testimony and all the other evidence, this court should find that the evidence proved appellant's guilt beyond a reasonable doubt. Article 66(d)(1)(B), UCMJ.

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[15] "Where are your keys? […] I mean you have your truck keys somewhere. I just want to make sure you're not driving." (Pros. Ex. 2, 00:01:55; Pros. Ex. 3, p. 2).

[16] [redacted] Tells appellant to go to bed ten times during the recording. (Pros. Ex. 2; Pros. Ex. 3).

Assignment of Error II

THE MILITARY JUDGE ABUSED HIS DISCRETION IN NOT ALLOWING THE DEFENSE TO INQUIRE INTO RACIAL BIAS DURING VOIR DIRE.

Additional Facts

Prior to trial, appellant submitted proposed voir dire questions to the military judge. (App. Ex. I at 7). In proposed question sixteen, appellant requested to ask the members "[d]oes anyone's cultural background influence your perception on relationships between individuals of different races?"[17] (App. Ex. I at 8). The military judge denied appellant's request because the question was "too confusing, a trick question, or unhelpful to ferreting out sincerity and ability to sit as member." (App. Ex. I at 5).

Following arraignment on 22 June 2021, and prior to voir dire, the military judge summarized the pre-trial discussions concerning voir dire:

> [MJ]: Next on my to-do list is voir dire. I gave you a deadline of 1700 last night to identify any questions which you requested reconsideration. I didn't receive notice from either side, but I'm happy to entertain a motion on the fly if anyone wants a reconsideration of the court's voir dire ruling. How about you, government?
>
> TC: No, Your Honor.

[17] Appellant is Hispanic while appellant asserts on appeal that [redacted] and 1LT are Caucasian. (Def. App. Ex. A). The record does not otherwise mention the races of either [redacted] or 1LT [redacted]. Accordingly, the government does not concede their races here.

MJ: And defense?

CDC: Your Honor, I just had a question about your ruling.

MJ: Sure.

CDC: *It's not an objection*. I just want to make sure I understand before we begin.

(R. at 16–17) (emphasis added). The civilian defense counsel then requested clarification on an unrelated, procedural matter.

Standard of Review

A military judge's refusal to allow defense voir dire questions for an abuse of discretion. *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001).

Law and Argument

A. The military judge's decision to disallow appellant's question was harmless error.

Rosales-Lopez acknowledged the possibility that a trial judge's error in excluding a racial bias question in an interracial violent crime case will be found harmless where "there is no rational possibility of racial prejudice" or where the defendant has failed to "claim[] a meaningful ethnic difference between himself and the victim[.]" 451 U.S. 182, 191, n. 7 (1981). *See also id.* (Rehnquist, J., concurring in the result) ("I would also not rule out the possibility of a finding of harmless error, but that may well be embraced in footnote 7 to the plurality's opinion.").

Appellant has failed to claim a meaningful ethnic difference between himself and [redacted] Race was simply not a salient variable in the disposition of appellant's case, accounting for the absence of any discussion of anyone's race during the trial, and for appellant's need to supplement the record with both his and his victim's apparent race on appeal. (Def. App. Ex. A). Moreover, "there is no rational possibility of racial prejudice" in his case, particularly given that appellant was acquitted of the most serious offenses charged by the government. (R. at 595).

B. The military judge did not abuse his discretion in rejecting appellant's confusing proposed voir dire question.

"The nature and scope of the examination of members is within the discretion of the military judge." Rule for Courts-Martial [R.C.M.] 912 discussion. Here, the military judge used his discretion to prevent a "confusing" question which would have been "unhelpful to ferret[] out sincerity and ability to sit as member." (App. Ex. I at 5). The question was plainly confusing. Arguably, any "perception on relationships between individuals of different races"—whether positive, negative, or ambivalent—would be influenced by a person's cultural background. Therefore, *any* answer to the question would fail to meaningfully illuminate a member's possible racial or ethnic prejudice. *See United States v. Witherspoon*, 12 M.J. 588, 589 (A.C.M.R. 1981) ("Depending on the circumstances of the particular case, counsel for an accused may properly inquire into possible racial or ethnic prejudice on the part of court-members.").

The military judge did not abuse his discretion in rejecting appellant's confusing and unhelpful voir dire question.

Assignment of Error III

THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING THE VICTIM'S STATEMENT TO A WITNESS AS AN EXCITED UTTERANCE UNDER MIL. R. EVID. 803(2).

Standard of Review

This court reviews a military judge's decision to admit evidence of an excited utterance for an abuse of discretion. *United States v. Henry*, 81 M.J. 91, 95 (C.A.A.F. 2021) (citing *United States v. Feltham*, 58 M.J. 470, 474–75 (C.A.A.F. 2003)). "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). "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

Out-of-court statements offered by a party for the truth of the matter asserted

constitute hearsay. Mil. R. Evid. 801(c). Courts-martial do not admit hearsay in the absence of an exception to this general rule against hearsay. Mil. R. Evid. 802.

A hearsay statement is admissible as an excited utterance under Mil. R. Evid. 803(2) if: "(1) the statement relates to a startling event; (2) the declarant makes the statement while under the stress of excitement caused by the startling event; and (3) the statement is spontaneous, excited or impulsive rather than the product of reflection and deliberation." *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003) (cleaned up); *see also United States v. Arnold*, 25 M.J. 129, 132 (C.M.A. 1987). The last two requirements center on whether the declarant was under the stress or excitement caused by the startling event. *See Feltham*, 58 M.J. at 470, 475 (C.A.A.F. 2003) ("The critical determination is whether the declarant was under the stress or excitement caused by the startling event.") (citation omitted). In assessing these last two requirements, military courts look to "the lapse of time between the startling event and the statement, whether the statement was made in response to an inquiry, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statement." *Donaldson*, 58 M.J. at 483 (internal citations omitted).

"However, '[i]t is the totality of the circumstances, not simply the length of time that has passed between the event and the statement, that determines whether

a hearsay statement was an excited utterance.'" *United States v. Henry*, 81 M.J. 91, 96 (C.A.A.F. 2021) (citing *United States v. Belfast*, 611 F.3d 783, 817 (11th Cir. 2010)). "The proponent of the excited utterance has the burden to show by a preponderance of the evidence that each element is met." *Id.*

Argument

The evidence before the military judge established [redacted] statement to 1LT [redacted] was an excited utterance because her statement related to a startling event, because at the time she remained under the stress of appellant's assaults, and because her outcry was spontaneous. Therefore, the military judge did not abuse his discretion in admitting [redacted] statements to 1LT [redacted]

A. [redacted] statement related to a startling event.

In the early morning hours of Monday, 8 February 2021, only a few minutes after appellant assaulted [redacted] she told 1LT [redacted] that appellant would not stop trying to kiss her, that "he had touched her and grabbed her, grabbed her butt and touched her vagina area[,] [a]nd the she says that he also pulled his penis out to her and tried to force her head down on to it." (R. at 440, 442). Certainly, the ordeal of a sexual assault qualifies as a startling event. *See United States v. Smith*, 606 F.3d, 1270, 1279 (10th Cir. 2010) (holding that a "sexual assault" was a "startling event."). As such, [redacted] statement met the first prong of the *Donaldson* test. 58 M.J. at 482.

B. The evidence established that [redacted] remained under the stress of excitement caused by appellant's assaults when she made the statement.

[redacted] was clearly still under the stress of the startling event when she reported the incident to 1LT [redacted]; thus the second *Donaldson* factor is met. *Id*. at 483. Appellant assaulted [redacted] during the early morning hours of 8 February 2021. Immediately following the assault, once she was safely locked in her bedroom with her husband, she said that "part of me felt relief, but it's like a wave of emotion hit me. […] Everything I'd been feeling, fear, betrayal, sadness, some different emotions." (R. at 383–84). When her husband woke up, she was crying, and she told him what had happened. (R. at 384). Because she didn't know whether appellant was listening on the other side of the bedroom door, she took 1LT [redacted] into their walk-in closet and played the recording for him. (R. at 384). At this time, she was "[p]anicking a little bit. I didn't get ahold of my emotions yet." (R. at 384). She was "[i]n a state of shock." (R. at 417).

First Lieutenant [redacted] described his wife's demeanor at trial:

> I can see her face. She's very frantic looking. And her voice is very low and shaky, when she says to me . . . we have an issue, we have a problem. She says, [appellant] won't stop trying to kiss me. […] And she, again, she's frantic. She's struggling to get out what she is trying to say. And she says, I think he's behind the door listening, so I don't want to say anymore.

(R. at 440–41).

In sum, the testimonies of both parties to the statement at issue establish that

[redacted] was clearly still under the stress of the startling event when she described the events to her husband minutes after appellant's assaults.

C. [redacted] statement was spontaneous.

[redacted] statements to 1LT [redacted] were spontaneous; therefore, the third *Donaldson* factor is met. 58 M.J. at 483. Immediately before [redacted] went into the couple's bedroom where her husband was sleeping, she was effectively alone with appellant while he relentlessly assaulted and propositioned her. During this time, she described her state of shock:

> Shocked is just like carrying on like normal, your brain is like not catching up with what's going on. […] I could only repeat certain things, like you have a wife and kids, like my husband is here. You're my husband's boss, like just these things going over and over in my head, not knowing what to do.

(R. at 429)

It was only once she was with her husband in the bedroom with a locked door between her and appellant that the full depth of her ordeal could find expression. She had no time to reflect on what had just occurred. *See United States v. Keatts*, 20 M.J. 960, 963 (A.C.M.R. 1985) (quoting 6 Wigmore, *Evidence* § 1747 at 135 (Chadbourn rev. 1976)) ("The fundamental principle of the excited utterance hearsay exception is that a declarant's ability to reflect and shade the truth is temporarily suspended after a startling event, 'so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and

perceptions already produced by the external shock.'")

The record establishes that [redacted] outcried to her husband mere minutes (or even seconds) after she secured appellant's keys and locked herself in her bedroom.[18] On appeal, appellant attempts to demonstrate that [redacted] could have spent between 15-25 minutes "thinking about her next steps" before waking her husband. (Appellant's Br. 34). Given that the record of trial cannot support his theory, he relies upon government notes from a pre-trial interview with 1LT [redacted] included in the "allied papers" as justification.[19] (Appellant's Br. 31). Appellant's calculation is entirely arbitrary. His rationale would as easily support the possibility that 1LT [redacted] spent ten minutes trying to wake appellant, or five minutes

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[18] [redacted] began recording the final six-and-a-half minutes of her encounter with appellant at 0606. (Pros. Exs. 4 and 5). After 1LT [redacted] ejected him from his house, appellant called him several times but no later than 0646. (Pros. Ex. 7). Therefore, in the intervening thirty-four minutes: [redacted] walked to her room, woke her husband, explained the situation to him and played him a portion of the recording. Then, 1LT [redacted] went to the guest bedroom, woke appellant and told him to leave, assaulted him when appellant refused to comply, walked appellant to the living room to get appellant's shoes, and kicked him out of his house. Finally, appellant left and attempted to contact 1LT [redacted] on the phone.

[19] In the pretrial interview, 1LT [redacted] said that appellant began calling him within "minutes" of leaving the house. (Allied Papers, CPT [redacted] Office Memorandum, p. 2). At trial, 1LT [redacted] said that appellant called him "probably about 30 to 45 minutes after he had left the house." (R. at 444). Appellant styles this as "changed testimony" and contradictory. (Appellant's Br. 31). Relying on the "minutes" language from the allied papers, appellant then calculates that "approximately 15-25 minutes passed between the moment that [redacted] left appellant in the guest bedroom and the moment she entered the bedroom where her husband was sleeping." (Appellant's Br. 34).

beating him up, or eight minutes walking him to the living room to find his shoes. The far more reasonable way to account for the 34 minutes at issue is to attribute the balance of time (remaining after [redacted] outcried and 1LT [redacted] ejected appellant) to appellant's leaving the home and deciding to try and call 1LT [redacted] The record establishes this could not have been 45 minutes, though it may have been as many as thirty, but in any event would have been mere "minutes." (Allied Papers, CPT [redacted]s Office Memorandum, p. 2).

Finally, even if [redacted] waited 15-25 minutes before telling her husband about the assaults she had just endured, her outcry would have still constituted an excited utterance. In light of the surrounding circumstances, and given her demeanor when she woke her husband, [redacted] clearly was still under the stress of a startling event when she reported the assaults to 1LT [redacted] and her statements were admissible as an excited utterance. *See Henry*, 81 M.J. at 96 (noting "[i]t is the totality of the circumstances, not simply the length of time that has passed between the event and the statement") (internal quotations omitted).

Assignment of Error IV

THE MILITARY JUDGE ERRED IN ADMITTING AN UNAUTHENTICATED TRANSCRIPT OF AN AUDIO RECORDING AND FAILING TO INSTRUCT THE PANEL ON ITS USE.

Additional Facts

During the direct examination of [redacted] the government moved to enter Pros. Exs. 2 and 3 for identification into evidence. (R. at 373). When the military judge invited appellant's response, the following exchange occurred:

> CDC: No objection to 2, and no objection to 3, but we would object to 3 being published before 2, the actual recording.
>
> MJ: Okay. So that's just—that's just a comment on the sequence of publishing.
>
> CDC: Yes, Your Honor. That's Correct.
>
> MJ: Any problem with that there, government?
>
> TC: No, Your Honor.
>
> CDC: No objections, Your Honor. Thank you.
>
> [. . .]
>
> MJ: Without objection, [Pros. Ex 2 and Pros. Ex. 3] are admitted.

(R. at 373).

During cross-examination, civilian defense counsel referenced Pros. Ex. 3 to challenge [redacted] memory of her discussion of texting with appellant:

> Q: And then you said, you explain—you kind of give a quizzical, what? And then he said, we can text and shit.
>
> A: No.
>
> Q: So that—what we heard on the tape *and what is in Prosecution Exhibit 3*, doesn't comport.
>
> A: I don't remember him ever asking to text.
>
> […]
>
> Q: *So what's in Prosecution Exhibit 3 and admitted by the government into evidence*, this is the government's—the prosecution exhibit, that says, and we can text and shit, after explaining that he had—am I going to hear about this. […]."

(R. at 424–25) (emphasis added).

During closing arguments, trial counsel never alluded to the transcript. Civilian defense counsel, however, emphasized the importance of Pros. Ex. 3 to appellant's case:

> …but I would ask that, and suggest that listening to that tape, or listening to the audio recording *and reading through the transcript* ought to be near the top of the list, because *we believe that is the crucial piece of evidence in this case*.

(R. at 556) (emphasis added). Civilian defense counsel went on to specifically reference the transcript an additional three times in closing argument. (R. at 557, 559, 566).

Standard of Review

"Whether an accused has waived an issue is a question of law [appellate courts] review de novo." *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017).

Law and Argument

A. Appellant waived this issue when he affirmatively declined to object to the evidence at trial.

"Waiver is the intentional relinquishment or abandonment of a known right." *United States v. Cooper*, 78 M.J. 283 (C.A.A.F. 2019) (citing *United States v. Olano*, 507 U.S. 725, 733 (1993). This Court does "not review waived issues because a valid waiver leaves no error to correct on appeal." *Id*. (citing *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009)). Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake. *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) (internal quotation marks omitted) (quoting *Olano*, 507 U.S. at 733).

The right at stake in this case is contained within a Military Rule of Evidence (Mil. R. Evid.), promulgated by the President pursuant to his authority to prescribe rules of evidence for courts-martial under Article 36, UCMJ. Military Rule of Evidence 901(a), provides that "to satisfy the requirement of authenticating

or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Military Rule of Evidence 103(a), Preserving a Claim of Error, requires that:

> A party may claim error in a ruling to admit or exclude evidence only if the error materially prejudices a substantial right of the party and:
>
> (1) if the ruling admits evidence, a party, on the record:
>
> (A) timely objects or moves to strike; and
>
> (B) states the specific ground, unless it was apparent from the context[.]

Appellant argues that the military judge erred in admitting an unauthenticated transcript and failing to instruct the panel on its proper use. (Appellant's Br. 40–42). However, appellant's statement that he had no objection constitutes waiver of his right to object to this court regarding the admission and use of the transcript. *See Campos*, 67 M.J. at 332 ("[A] valid waiver leaves no error for us to correct on appeal."). "[U]nder the ordinary rules of waiver, appellant's affirmative statement[] that he had no objection [to the admission of the evidence] also operate[s] to extinguish his right to complain about [the evidence's] admission on appeal. *Ahern*, 76 M.J. at 198.

B. Appellant is not entitled to relief because he failed to demonstrate prejudice.

Appellant argues that "the military judge's admission of the transcript and

failure to instruct the panel on its proper use[] resulted in material prejudice to a substantial right of the accused." (Appellant's Br. 41). Specifically, appellant argues that the transcript is both under-inclusive (failing to denote certain difficult to hear portions of the audio recording as "indiscernible"); and over-inclusive (denoting one point of the recording as a "kissing sound"). (Appellant's Br. 41; Pros. Ex. 3, p. 3).

Appellant's basic contention is that "[b]ecause the document was not authenticated, panel members had no information about who created the transcript and thus had no way to determine its reliability." (Appellant's Br. 41–42). Of course, this argument ignores the fact that the panel heard the recording played in open court, and had recourse to review the recording at their discretion during deliberation. The panel had the means—and the encouragement of both trial and defense counsel—to make its own determination as to which parts of the audio recording were discernible or indiscernible, or whether sounds heard were fairly considerable as "kissing sounds."

Moreover, while it is true that appellant was accused of unlawfully kissing [redacted] the fact that the transcript described sounds heard on the recording as "kissing sounds" is hardly "essentially convicting" appellant of that specification. After all, appellant's strategy at trial was never to deny that the appellant and [redacted] had kissed, but rather that it was consensual. During closing argument,

defense counsel specifically quoted the audio recording (and therefore, the transcript) in support of this theory:

> [Appellant], "Oh my gosh, you're out of control." [redacted] "I'm like a what?" [Appellant], "you're out of control." [redacted] "me? I'm out of control?" "Yeah. You kissed me several times." "No, you kissed me." [Appellant], "no, you kissed me."
>
> […]
>
> [I]f your intent is to create evidence for your husband […] [y]ou'd say something [about the other allegations] to get him to acknowledge that it happened or didn't happen, but you say something. If that's your plan, it didn't work, because all she says is, you kissed me several times. She doesn't say, you kissed me and I didn't want you to several times. She says, you kissed me several times. You kissed me several times. Oh please.

(R. at 557–58). Counsel also suggested that [redacted] may have considered that her husband "may have heard something[,] may have heard the kissing[,] he may have heard the hugging." (R. at 562).

The conclusion of appellant's closing argument concedes the kissing explicitly: "And [appellant] should not have been in that situation. […] He shouldn't have been there with [redacted] and hugging, and engaging in kissing. That just simply shouldn't have happened." (R. at 565).

In conclusion, even if this Court pierces waiver and finds admission of the transcript was error, the error was harmless.

CONCLUSION

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

ANDREW M. HOPKINS
CPT, JA
Appellate Government Counsel

PAMELA L. JONES
MAJ, JA
Branch Chief, Government Appellate Division

JACQUELINE J. DeGAINE
LTC, JA
Deputy Chief, Government Appellate Division

CHRISTOPHER B. BURGESS
COL, JA
Chief, Government Appellate Division

CERTIFICATE OF SERVICE U.S. v. RAMIREZ (20210376)

I certify that a copy of the foregoing was sent via electronic submission to Mr. William Cassara, civilian appellate defense counsel, at [redacted] and the Defense Appellate Division, at [redacted] on this 19th day of September, 2022.

[redacted]

DANIEL L. MANN
Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
[redacted]