

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES
Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Specialist (E-4)
JORGE G. MARTINEZCOLON,
United States Army,
Appellant

Docket No. ARMY 20210071

Tried at Fort Hood, Texas, on 9-12
February 2021, before a general
court-martial convened by the
Commander, III Corps and Fort
Hood, Colonel Scott Z. Hughes,
military judge, presiding.

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

Assignments of Errors

**I. SPECIFICATION 1 OF CHARGE I MUST BE SET
ASIDE BECAUSE APPELLANT WAS CHARGED
WITH SEXUAL ASSAULT “ON ONE OR MORE
OCCASION;” THE GOVERNMENT PRESENTED
EVIDENCE THAT THE MISCONDUCT
OCCURRED ON MORE THAN ONE OCCASION;
THE MILITARY JUDGE FOUND APPELLANT
NOT GUILTY OF THE WORDS “OR MORE”
WITHOUT SPECIFYING WHICH INCIDENT
FORMED THE BASIS OF THE CONVICTION;
RENDERING AN AMBIGUOUS VERDICT WHICH
THIS COURT CANNOT REVIEW FOR FACTUAL
SUFFICIENCY UNDER ARTICLE 66(d), UCMJ.**

**II. THE MILITARY JUDGE ABUSED HIS
DISCRETION IN PERMITTING THE
GOVERNMENT, OVER DEFENSE OBJECTION,
TO PRESENT EVIDENCE PURSUANT TO MIL. R.
EVID. 413 BECAUSE THE GOVERNMENT
FAILED TO PROVIDE ADEQUATE NOTICE OF**

THE “SEXUAL OFFENSE” THAT WAS SUPPOSED TO HAVE BEEN COMMITTED, AND FAILED [TO] PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT ANY “SEXUAL OFFENSE” WAS, IN FACT, COMMITTED.

III. APPELLANT WAS DENIED THE RIGHT TO A UNANIMOUS VERDICT UNDER THE SIXTH AMENDMENT AND THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FIFTH AMENDMENT.

IV. THE EVIDENCE IS FACTUALLY INSUFFICIENT TO SUPPORT ANY OF THE CHARGES AND SPECIFICATIONS.

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Statement of the Case

On 12 February 2021, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of five specifications of sexual assault, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 [UCMJ]. (R. at 394).¹ The military judge sentenced appellant to reduction to the grade of E-1, confinement for four years,² and a dishonorable discharge.³ (R. at 433). The military judge credited appellant with ninety-one days of confinement credit. (R. at 432). The convening authority took no action on the findings or sentence. (Action). On 9 April 2021, the military judge entered judgment. (Judgment).

¹ Regarding Specification 1 of Charge I, the military judge found appellant guilty, except the words “or more” and not guilty of the excepted words. (R. at 394).

² Specifically, the military judge sentenced appellant to be confined as follows: one-year for Specification 1 of Charge I, one-year for Specification 2 of Charge I, one-year for Specification 3 of Charge I, and one-year for The Specification of Charge II, with all sentences of confinement to be served consecutively. (R. at 433).

³ Before announcing the sentence, the military judge found that the two specifications in Charge II were an unreasonable multiplication of charges and asked the government to select one specification for the court to dismiss. (R. at 428). In accordance with the government’s selection, the military judge conditionally dismissed Specification 1 of Charge II. (R. at 429).

Statement of Facts

A. Appellant sexually assaulted Ms. [REDACTED]

Ms. [REDACTED] met appellant through her sister, Ms. [REDACTED]'s,⁴ ex-boyfriend around February 2019 in Austin, Texas. (R. at 266). They began a romantic relationship soon thereafter in March or April 2019. (R. at 267). Throughout their relationship appellant lived on Fort Hood, Texas, and Ms. [REDACTED] lived in Houston, Texas. (R. at 267).

1. Appellant sexually assaulted Ms. [REDACTED] in Killeen, Texas.

From approximately March or April 2019 until the end of June or early July 2019, Ms. [REDACTED] would travel to Killeen, Texas. (R. at 267, 322). While there, she went to parties at Mr. [REDACTED] house. (R. at 267–68). Mr. [REDACTED] was her friend whom she met through appellant and her sister's ex-boyfriend. (R. at 297). Appellant also went to some of these parties. (R. at 268). After parties, Ms. [REDACTED] would stay over at Mr. [REDACTED] house. (R. at 269). At times, appellant stayed overnight at Mr. [REDACTED] house too. (R. at 269). Mr. [REDACTED] would let Ms. [REDACTED] have his room. (R. at 269). There were times when appellant would come into the room after Ms. [REDACTED] had fallen asleep. (R. at 269–70).

⁴ Ms. [REDACTED] does not refer to her sister by name, but the trial counsel does during direct examination of Ms. [REDACTED] (R. at 153).

On multiple occasions, Ms. [REDACTED] awoke to appellant digitally penetrating her vagina. (R. at 271). Ms. [REDACTED] would typically wear “spandex fitted stretchy shorts” to bed. (R. at 269). Appellant would put his hand through the opening in the waistband or the “thigh area” of Ms. [REDACTED] spandex shorts. (R. at 270). When this happened, Ms. [REDACTED] told appellant “no” and “stop.” (R. at 272). Appellant would respond by repeating the same thing “in a playful manner, saying no okay, no, okay.” (R. at 272). Ms. [REDACTED] did not consent to this sexual act. (R. at 273–74).

Appellant also penetrated Ms. [REDACTED] vulva with his penis.⁵ (R. at 271). To access her “vaginal area,” appellant would move Ms. [REDACTED] spandex shorts to the side. (R. at 271). In response, Ms. [REDACTED] told appellant “no.” (R. at 272). Appellant responded by “repeating the same thing just no okay.” (R. at 272). If Ms. [REDACTED] tried to move, appellant would “either push [her] back down through [her] chest area or [her] arm.” (R. at 272). Ms. [REDACTED] would “try to either move [appellant’s] arm or push him from the chest,” but “most of the time,” she was not successful in getting him off of her. (R. at 273). She was unsuccessful because when she “tried pushing him with [her] arm, he’d hold [her] arm so [she] couldn’t reach for him or just you know [she] might just go back down.” (R. at 273). This usually lasted

⁵ During cross-examination, defense counsel confronted Ms. [REDACTED] with her earlier statements to law enforcement regarding both the number of times appellant sexually assaulted her in Killeen, Texas and the timeframe in which she alleged these assaults occurred. (R. at 299–305).

around twenty minutes. (R. at 273). These sexual acts were done without Ms. [REDACTED] consent. (R. at 274). Ms. [REDACTED] told her friends, Mr. [REDACTED] and Ms. [REDACTED] about the sexual assaults that occurred in Killeen, Texas. (R. at 274, 299).

2. Appellant sexually assaulted Ms. [REDACTED] in Houston, Texas.

Ms. [REDACTED] lived with her parents and brother in Houston, Texas. (R. at 278). Approximately one week before Thanksgiving in 2019, appellant showed up at Ms. [REDACTED] house uninvited. (R. at 277). At the time, Ms. [REDACTED] was approximately four months pregnant with appellant's child. (R. at 275). This pregnancy was the result of appellant "forcefully" sexually assaulting her. (Def. Ex. S, p. 93). Ms. [REDACTED] did not want appellant at her house. (R. at 309).⁶ In fact, she had tried to break up with him. (R. at 277). However, appellant did not want to break up. (R. at 316).

Ms. [REDACTED] was not home when appellant arrived at her house, but her brother let him inside. (R. at 277–78). Ms. [REDACTED] parents and brother did not know what was going on between them. (R. at 278). When Ms. [REDACTED] returned home that night around 2200 or 2300, appellant was "laying on the couch upset" because she had not been home when he arrived. (R. at 278). Appellant stayed at her house for "less than a week." (R. at 278). While appellant was there, Ms. [REDACTED] "made him sleep on the couch in the living area" because she did not want him in her room.

⁶ During cross-examination, Ms. [REDACTED] agreed that she did invite appellant to "hang out" at times while he was in Houston, Texas stating "[t]here's a reason for it, but yes." (R. at 315–16).

(R. at 278). While appellant was staying with her, he performed sexual acts on her without her consent. (R. at 278).

A couple of days after he arrived, appellant digitally penetrated Ms. [REDACTED] while she was asleep on her back. (R. at 279–80). Ms. [REDACTED] was “very sick” and “very weak” due to being pregnant and “threw up a lot.” (R. at 279). Although the door to Ms. [REDACTED] room was closed, she had left it unlocked so that her sister could come in and help her if she started throwing up. (R. at 279). Instead, appellant came into her room at some point while she was napping and “slipped his hand” into her shorts. (R. at 279). Ms. [REDACTED] was wearing “fitted” spandex shorts. (R. at 279). Appellant put his hand through the bottom of those shorts by her “thigh area.” (R. at 279). He digitally penetrated her for “not more than 5 to 10 minutes.” (R. at 279–80). As soon as Ms. [REDACTED] awoke, she wanted appellant to stop. (R. at 280). Ms. [REDACTED] told appellant “[t]o stop, that didn’t feel good. [She] felt sick.” (R. at 280). Appellant did not stop. (R. at 280).

On another occasion, appellant performed a sexual act on Ms. [REDACTED] that started as consensual. (R. at 280). When appellant first told her he wanted to have sex, she told him “no,” but then she “felt guilty or bad in a way, so [she] eventually consented to it.” (R. at 280). She did not want to have sex with him at first because she “felt disgusted and [she] didn’t want to be touched by him.” (R. at 281). However, Ms. [REDACTED] felt “guilty” and initially agreed to have sex with him.

(R. at 281). She felt guilty because “if things didn’t go in [appellant’s] way most of the time he’d throw a fit, he’d get upset, he’d start name calling [her].” (R. at 281). Appellant called Ms. [REDACTED] names like “bitch” and “whore.” (R. at 281).

A couple of minutes into the sexual intercourse, Ms. [REDACTED] revoked her consent. (R. at 281–82). She told appellant “no and that [she] didn’t want to do it anymore.” (R. at 282). Appellant acknowledged this, but instead of stopping, he responded by “repeating . . . no, okay, no okay like if [Ms. [REDACTED]] was joking.” (R. at 282). Ms. [REDACTED] was not joking. (R. at 282). She was also “too sick to move,” so she could not push appellant off of her, and she “just kept repeating no.” (R. at 282). Finally, appellant stopped when he was “finished” inside Ms. [REDACTED] vagina. (R. at 282). After he was done, appellant got up and left the room. (R. at 282). After that night, Ms. [REDACTED] told appellant she “didn’t want him there when [she] came back.” (R. at 282). Appellant had a friend come pick him up. (R. at 282).

The following week, Ms. [REDACTED] had an abortion “a couple of days before Thanksgiving.” (R. at 276). Appellant had initially agreed to pay for the abortion after Ms. [REDACTED] asked him for help, but he ultimately did not pay for it. (R. at 276). During a phone conversation, appellant had told Ms. [REDACTED] he would help her. (R. at 320). After the phone conversation, appellant and Ms. [REDACTED] exchanged several text messages discussing among other things their relationship, his sexual assaults of Ms. [REDACTED] and the abortion. (R. at 320; Pros. Ex. 7; Def. Ex. S; *see infra* pp. 46–48).

She was also “upset” by appellant’s lack of help.⁷ (R. at 277). On 12 December 2019, Ms. ■■■ reported she was sexually assaulted by appellant to the Houston Police Department. (R. at 324).

B. Appellant sexually assaulted Ms. ■■■

Ms. ■■■ formerly Specialist (SPC) ■■■ was stationed at Fort Hood, Texas, beginning in November 2017. (R. at 137–38). Ms. ■■■ met appellant through her friend, Ms. ■■■ (R. at 138). They were in the same squadron, and she considered appellant an acquaintance. (R. at 138–39).

In March 2018, Ms. ■■■ and her friends went to San Antonio, Texas, for a “little mini vacation.” (R. at 139–40). Her friends included Mr. ■■■ SPC ■■■ SPC ■■■ and Ms. ■■■⁸ (R. at 138). Upon arriving in San Antonio, Texas, the group checked in at the hotel. (R. at 140). There were roughly five people staying in one room. (R. at 141). After they checked in, the group went downtown to eat, and after dinner, they walked around downtown before heading back to the hotel to get ready to go out to the bar. (R. at 141).

⁷ During cross-examination, Ms. ■■■ agreed that she decided to report appellant when he refused to give her money for the abortion. (R. at 320).

⁸ While Ms. ■■■ did not include appellant, it is understood from her later testimony that appellant was present on this trip. The likely reason she did not include him is that in answering trial counsel’s question about who was on the trip, instead of listing each person Ms. ■■■ referred to her earlier testimony about who her friends were in the unit and stated, “the friends that I spoke about earlier,” in which appellant was not named. (R. at 140).

The group left the hotel and went to a nearby bar on Bowie Street. (R. at 142). The bar was “very pink inside” and had “a handful of people in there.” (R. at 142). While at the bar, Ms. ■ danced and drank alcohol. (R. at 143). She had “two margaritas and a lot of . . . fireball whiskey shots.” (R. at 143). The margaritas were “pretty big” and approximately sixteen to twenty ounces. (R. at 143).

While at the bar, Ms. ■ started to feel the effects of the alcohol. (R. at 145). She felt “[d]izziness to the point where [she] couldn’t walk in a straight line.” (R. at 145). Ms. ■ had difficulty walking in the “high heeled black boots” that she had on. (R. at 145). Once Ms. ■ realized she was feeling the effects of the alcohol, she “decided to go back and call it a night. Go back to the hotel room to sleep it off.” (R. at 145). Appellant noticed Ms. ■ was “very drunk” and unable to walk on her own. (R. at 146–47). Appellant helped Ms. ■ back to the hotel room by putting her arm over his shoulder and his arm around her waist. (R. at 146–47). Once they returned to the hotel, the two of them went up the elevator alone. (R. at 147). While in the elevator, Ms. ■ “mind was in and out of consciousness.” (R. at 147). She also leaned on appellant because she could not stand on her own. (R. at 147).

When the door to the hotel room opened, Ms. ■ saw “darkness and fell in it.” (R. at 148). The lights were off in the room. (R. at 148). Ms. ■

“immediately blacked out and fell on a cot that was laying in front of the beds.”

(R. at 147). There were two queen-sized beds and one cot in the room. (R. at 148; Pros. Ex. 1). SPC [REDACTED] was already sleeping in one of the beds. (R. at 148). Ms. [REDACTED] slept on the cot because that was “where [she] landed first.” (R. at 148). She did not change her clothes, brush her teeth, or do any of her nighttime routine. (R. at 148). Ms. [REDACTED] was wearing “a crop top” and a “high waisted,” “mid-thigh” length “jean type skirt.” (R. at 149).

The next thing Ms. [REDACTED] remembered was “heavy breathing on [her] ear and thrusting.” (R. at 149). She was still on the cot. (R. at 149). Ms. [REDACTED] was lying on her left side and felt heavy breathing on her right ear. (R. at 149). Appellant’s “penis was in [her] vagina.” (R. at 149). Appellant’s right hand was “under [her] thigh, holding it up.” (R. at 150). Ms. [REDACTED] did not want appellant to penetrate her vagina while she was asleep. (R. at 150). Once she realized what was happening, Ms. [REDACTED] told appellant “to stop,” but “he just kept going.” (R. at 150). After she told him to stop, she “fell into a deep sleep again. [Her] body just couldn’t get up. [Her] mind knew what was going on. [She] didn’t have the strength to get up.” (R. at 150). Her body felt “numb.” (R. at 150).

At one point, SPC [REDACTED] came into the hotel room. (R. at 150). When SPC [REDACTED] opened the door, Ms. [REDACTED] knew it was her because of her blonde hair, which was illuminated by the light outside the door. (R. at 150). The door was “very

loud” when it opened. (R. at 151). It was so loud that “it scared [Ms. ■■■■■]. Something in [her] just shot up and [she] woke up and fell on the right bed.” (R. at 151). After Ms. ■■■■■ stood up, she “stumbled on to . . . the bed on the right.” (R. at 151). Ms. ■■■■■ fell asleep on top of the covers and slept through the night. (R. at 151).

When Ms. ■■■■■ woke up the next morning, she felt “weird” and “went to the restroom to kind of remember what happened.” (R. at 151). She “thought it was a dream . . . until [she] felt a little sore.” (R. at 151). Ms. ■■■■■ felt “shocked, betrayed, [she] just didn’t believe it happened.” (R. at 152). SPC ■■■■■ walked into the restroom to check on Ms. ■■■■■ and asked if she was okay. (R. at 152). Ms. ■■■■■ “brushed it off and pretended everything was fine and said yes.” (R. at 152). She responded that way because the group “w[as] all having a good time that weekend so [she] didn’t want to ruin anything.” (R. at 152). Once everyone else woke up, they decided to go to Six Flags. (R. at 152). Ms. ■■■■■ did not tell anyone about the sexual assault. (R. at 152).

Following the trip, Ms. ■■■■■ would see appellant “at work all the time.” (R. at 153). She also saw him at a house party where she “asked the owner of the house, who was throwing the party, if he could please ask [appellant] to leave.” (R. at 153).

Ms. [REDACTED] deployed to Iraq with her unit in May 2018. (R. at 139). Appellant was also on this deployment. (R. at 155). While deployed in June 2018, Ms. [REDACTED] confronted appellant. (R. at 154–55). She confronted him “when [they] were switching off on tower guard and [she] confronted him about rumors he was spreading about [her].” (R. at 155). The rumors were that appellant had consensual sex with Ms. [REDACTED] and that appellant, Ms. [REDACTED] and Ms. [REDACTED] all had sex together. (R. at 166). These rumors upset Ms. [REDACTED] “[b]ecause [she] and him both kn[ew] what happened that night and then the fact that [she] didn’t report and he still had the audacity to start rumors and saying that it was consensual plus one of [her] best friends [Ms. [REDACTED] that pissed [her] off, that set [her] off.” (R. at 169). Appellant responded by “treating it like a joke and he just smiled.” (R. at 155). During the confrontation, Ms. [REDACTED] “hit [appellant] in the nuts.” (R. at 167). Ms. [REDACTED] command was aware of this altercation. (R. at 167). At some point, Ms. [REDACTED] also confronted appellant on Instagram, and he blocked her on “every social media.” (R. at 155). Ms. [REDACTED] returned from deployment around January 2019. (R. at 157).

At some point after she returned from deployment, Ms. [REDACTED] sister, Ms. [REDACTED] contacted Ms. [REDACTED] through Facebook messenger and asked if she knew who appellant was. (R. at 153). Ms. [REDACTED] confirmed she knew him. (R. at 153). Ms. [REDACTED] told Ms. [REDACTED] what happened to her sister and “it gave [Ms. [REDACTED] the strength to

report as well.” (R. at 154). After she spoke with Ms. [REDACTED] she “felt like all of that could have been avoided if—if [she] had reported when it first happened to [her].” (R. at 154). Ms. [REDACTED] reported “[b]ecause of [Ms. [REDACTED]] [She] felt guilty that [she] never reported. Had[n’t] had the courage at the time and that another poor innocent girl was one of his victims.” (R. at 169). Ms. [REDACTED] reported by telling her section sergeant, Staff Sergeant (SSG) [REDACTED] (R. at 154). This occurred a few months after she returned from deployment, in the “summer-fall timeframe” of 2019. (R. at 158, 221). After that, United States Army Criminal Investigation Division (CID) interviewed her. (R. at 154).

C. Appellant’s sexual assault of Ms. [REDACTED] was introduced under Mil. R. Evid. 413.

Before trial, Ms. [REDACTED] left the Army. (R. at 234). While in the Army, Ms. [REDACTED] was stationed at Fort Hood, Texas. (R. at 234). Ms. [REDACTED] was in the same squadron as appellant and Ms. [REDACTED] (R. at 235). In addition, Ms. [REDACTED] and Ms. [REDACTED] were roommates and friends. (R. at 246).

Ms. [REDACTED] was contacted by CID about whether she had seen anything with Ms. [REDACTED] and appellant during the trip to San Antonio, Texas. (R. at 235–37). CID contacted Ms. [REDACTED] because she had paid for the hotel room. (R. at 237). Ms. [REDACTED] had not noticed anything with Ms. [REDACTED] and appellant. (R. at 236). Ms. [REDACTED] was “very surprised” to hear that something may have happened between appellant and

Ms. ■ because Ms. ■ “had a previous incident with the accused” that she had not told anyone about. (R. at 237).

The previous incident happened in 2018, “a week before [they] went to Six Flags” and San Antonio, Texas. (R. at 235, 237). On that night, a group planned to go to “Fuego Night Club.” (R. at 238). Before going out, they were “hanging out” in another soldier’s room and “just pregaming.” (R. at 238). The group consisted of Ms. ■ Mr. ■ and SPC ■ (R. at 239). Although appellant was not in the room, he was invited to go to the club. (R. at 239). Before going out, Ms. ■ drank “[a] beer or two.” (R. at 239). Around midnight, the group went to the club located in Killeen, Texas. (R. at 239–40). Ms. ■ drank and danced while at the club. (R. at 240–41). Additionally, she had “more than two . . . green tea” shots throughout the night. (R. at 240–41). The group stayed at the club for three to three and a half hours. (R. at 241).

The group left the bar “a little bit after 0330.” (R. at 241). Ms. ■ did not remember leaving the club or getting into the vehicle; she only remembered being back at the barracks. (R. at 242). She could not remember because of her level of intoxication. (R. at 242). She remembered sitting in the back seat of what she believed to be Mr. ■ truck. (R. at 242). The next thing she remembered was being in appellant’s room. (R. at 242). Appellant and Ms. ■ lived in the same barracks building where he lived on the second floor, and she lived on the third

floor. (R. at 237–38). Ms. ■ did not remember how she got up to appellant’s room. (R. at 242). However, she had wanted to go to her room, not appellant’s room. (R. at 242).

In appellant’s room, the next thing Ms. ■ remembered was “just flashes of light in the corner of the room and then [her] waking up hanging off the bed.” (R. at 243). She remembered “opening [her] eyes, but [she] felt like [she] wasn’t fully awake and [she] was just like [her] eyes were open, but [she] felt like [her] body was paralyzed. [She] couldn’t like consciously do what [she] wanted to do.” (R. at 243). Appellant was on top of her, and he was “penetrating” her. (R. at 243). She was lying on the bed while his penis was inside her vagina. (R. at 243). Next, she remembered appellant “flipping [her] over as you would say doggy style and the only thing [she] would pinpoint was the lamp in the corner turned on.” (R. at 244).

When she awoke to appellant penetrating her, she had a bra on but did not have pants or underwear on. (R. at 244). She believed appellant took those items off of her. (R. at 244). Once awake, Ms. ■ did not feel she was able to move or get away due to “the level of intoxication [she] was in . . . [she] couldn’t consciously make [her] own decisions at that moment.” (R. at 244). She was not in control of her own body. (R. at 244–45). She also recalled appellant putting his hand over her mouth because she was being “loud.” (R. at 245). Ms. ■ described

her noises as “moaning pains.” (R. at 250). She did not consent to appellant penetrating her that night and once she woke up she did not want him to continue. (R. at 245).

Additional facts are incorporated below.

Assignment of Error I

SPECIFICATION 1 OF CHARGE I MUST BE SET ASIDE BECAUSE APPELLANT WAS CHARGED WITH SEXUAL ASSAULT “ON ONE OR MORE OCCASION;” THE GOVERNMENT PRESENTED EVIDENCE THAT THE MISCONDUCT OCCURRED ON MORE THAN ONE OCCASION; THE MILITARY JUDGE FOUND APPELLANT NOT GUILTY OF THE WORDS “OR MORE” WITHOUT SPECIFYING WHICH INCIDENT FORMED THE BASIS OF THE CONVICTION; RENDERING AN AMBIGUOUS VERDICT WHICH THIS COURT CANNOT REVIEW FOR FACTUAL SUFFICIENCY UNDER ARTICLE 66(d), UCMJ.

Standard of Review

“Whether a verdict is ambiguous and thus precludes a [Court of Criminal Appeals] from performing a factual-sufficiency review is a question of law reviewed *de novo*.” *United States v. Ross*, 68 M.J. 415, 417 (C.A.A.F. 2010) (citation omitted).

Law

Pursuant to Article 66(d), UCMJ, this court “may affirm only such findings of guilty . . . as the Court finds correct in law and fact.” UCMJ art. 66. Courts of

Criminal Appeal (CCA) “may not conduct a factual sufficiency review when the findings are ambiguous because such action creates the possibility that the court would affirm a finding of guilt based on an incident of which the appellant had been acquitted by the factfinder at trial.” *United States v. Wilson*, 67 M.J. 423, 428 (C.A.A.F. 2009) (citing *United States v. Walters*, 58 M.J. 395, 396–97 (C.A.A.F. 2003)).

The rule from *Walters* “applies only in those narrow circumstance[s] involving the conversion of a divers occasions’ specification to a one occasion specification through exceptions and substitutions.” *United States v. Rodriguez*, 66 M.J. 201, 205 (C.A.A.F. 2008) (cleaned up). In *United States v. Pasay*, this court further discussed its understanding of the narrow applicability of *Walters*:

As the CAAF made clear in *United States v. Rodriguez*, the *Walters* issue is only triggered when the accused is acquitted of certain language by exceptions. 66 M.J. 201, 204–05 (C.A.A.F. 2008). In that case, the CAAF refused to extend *Walters* to circumstances where it may be unclear which instances formed the basis of the court-martial’s findings, but where the findings did not include findings by exceptions. *Id.* If the government charged the language “one or more” instead of “two or more,” the *Walters* issue would be eliminated, the amount of admissible evidence would be the same, and the accused would continue to receive notice and double jeopardy protection of the charges he is facing. To the extent that charging “one or more” presents disjunctive charging, it is a problem already present when the government charges the conduct happened on “divers” or “two or more” occasions.

United States v. Pasay, ARMY 20140930, 2017 CCA LEXIS 268, at *n.4, 3 (Army Ct. Crim. App. 19 Apr 2017) (mem. op.); *see also United States v. Wood*, ARMY 20160364, 2018 CCA LEXIS 112, at *n.4, 5 (Army Ct. Crim. App. 27 Feb. 2018) (mem. op.). “The longstanding common law rule is that when the factfinder returns a guilty verdict on an indictment charging several acts, the verdict stands if the evidence is sufficient with respect to any one of the acts charged.” *Rodriguez*, 66 M.J. at 204.

Argument

This court should reject appellant’s invitation to extend the holding of *Walters* to this case. (Appellant’s Br. 4–11). As this court acknowledged in both *Pasay* and *Wood*, when the government charges the language “one or more” instead of “two or more” or “on divers occasions,” “the *Walters* issue [is] eliminated, the amount of admissible evidence [is] the same, and the accused [] continue[s] to receive notice and double jeopardy protection of the charges he is facing.” *Pasay*, 2017 CCA LEXIS 268, at *n.4, 3; *Wood*, 2018 CCA LEXIS 112, at *n.4, 5. Therefore, because the government charged Specification 1 of Charge I using the language “one or more” instead of “on divers occasions,” there was no ambiguity created when the military judge found the appellant guilty of the

specification except the words “or more” and not guilty of the excepted words. (R. at 394).⁹

Assignment of Error II

THE MILITARY JUDGE ABUSED HIS DISCRETION IN PERMITTING THE GOVERNMENT, OVER DEFENSE OBJECTION, TO PRESENT EVIDENCE PURSUANT TO MIL. R. EVID. 413 BECAUSE THE GOVERNMENT FAILED TO PROVIDE ADEQUATE NOTICE OF THE “SEXUAL OFFENSE” THAT WAS SUPPOSED TO HAVE BEEN COMMITTED, AND FAILED [TO] PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT ANY “SEXUAL OFFENSE” WAS, IN FACT, COMMITTED.

Additional Facts

A. Ms. [REDACTED] testimony during the Article 39(a) session.

Ms. [REDACTED] formerly SPC [REDACTED] was in the Army and stationed at Fort Hood, Texas. (R. at 31). While at Fort Hood, Ms. [REDACTED] was roommates and good friends with Ms. [REDACTED] the named victim for the specifications contained in Charge II. (R. at 32). Ms. [REDACTED] and appellant knew each other because they lived in the same barracks building and had common friends. (R. at 33).

On the evening of 24 March 2018, Ms. [REDACTED] SPC [REDACTED] Mr. [REDACTED] and appellant went together to “Fuego” in Killeen, Texas. (R. at 35). Before going out, Ms. [REDACTED]

⁹ If this court agrees with appellant that (1) *Pasay* and *Woods* are not applicable to this case and (2) the holding of *Walters* should be extended to this case, appellee requests permission to file a supplemental brief on this matter.

had been drinking alcohol in the barracks. (R. at 34). She drank a “medium amount” while still at the barracks. (R. at 35). Once at the club, Ms. ■■■ drank heavily and consumed more than three to four shots of alcohol. (R. at 35). Although Ms. ■■■ did not remember leaving the club that night, (R. at 36), she took a Snapchat video with appellant around 0300 on 25 March 2018 at the club. (R. at 46). The next thing Ms. ■■■ remembered was a “little bit of being in the back seat of the car” during the return trip to Fort Hood, Texas. (R. at 36). Mr. ■■■ was driving the vehicle. (R. at 47). Ms. ■■■ also remembered appellant was next to her in the backseat. (R. at 37).

Once back at Fort Hood, Ms. ■■■ next memory was being in appellant’s room. (R. at 37). Appellant placed Ms. ■■■ on his bed. (App. Ex. XIII, p. 5). Ms. ■■■ remembered being on appellant’s bed and that there was a light on in the corner. (R. at 38). Ms. ■■■ appellant, and appellant’s roommate were in the room. (R. at 38). However, she could not recall any other details that occurred between leaving the car and ending up in appellant’s room, to include how she got to his room. (R. at 37).¹⁰ She also did not remember any of her actions toward appellant. (R. at 38).

¹⁰ During cross-examination by the government, Ms. ■■■ agreed with trial counsel that she had previously stated she was led back to appellant’s room. (R. at 47). However, when asked to clarify what she meant by “being led to [appellant’s] room” she stated she did not remember getting out of Mr. ■■■ vehicle, so she “put [her] trust into [her] friends to take [her] back to [her] room.” (R. at 48).

Ms. ■ next memory was waking up to appellant “doing a sexual act towards [her] on the bed.” (R. at 39). This sexual act was vaginal sexual intercourse. (App. Ex. XIII, p. 3, 5). When defense counsel asked Ms. ■ whether she was “awake at this time?” Ms. ■ answered, “[n]o.” (R. at 39). Defense counsel then asked, “[b]ut you had woken up [to] the sexual act being performed?” Ms. ■ replied, “[o]nce it was getting aggressive, yes. That’s when I was able to open my eyes, and I was wondering what was happening.” (R. at 39). She recalled, “the bed was banging against the wall, and [she] felt pain.” (R. at 39). She also remembered appellant “flipped [her] over” and had her in the “doggy style” position. (R. at 40).¹¹ Ms. ■ did not remember whether she said anything to appellant, told him to stop, or tried to push him away. (R. at 39). Once she awoke, she remembered feeling that she could not say anything and “felt basically paralyzed and non-coherent to [herself] due to the alcohol.” (R. at 49). In addition, Ms. ■ could not recall whether appellant was wearing a condom or whether he ejaculated. (R. at 42).

Ms. ■ agreed with defense counsel that she had told CID that she “grunted” during sex and was “kind of enjoying” the sexual activity with appellant. (R. at 41–42). During cross-examination by trial counsel, Ms. ■ explained that “[her]

¹¹ During the government’s cross-examination, Ms. ■ stated that the first thing she remembered when she awoke was that she was “already on [her] stomach and it was pretty aggressive.” (R. at 49).

body was the one enjoying it. Like the penetration the moaning was because of that, not that [she] was enjoying it overall. So it was just [her] body's reaction to the act.” (R. at 49). Ms. ■ did not want to have sex with appellant that night. (R. at 50). She also did not consent to any sexual acts with appellant that night. (R. at 50). Although Ms. ■ could not remember her actions between the club and appellant's barracks room, she knew that if she were “in a sober state [she] would not want that to happen.” (R. at 53).

Around 0500 on 25 March 2018, Ms. ■ woke up and left appellant's room. (R. at 42). After leaving, she went straight to her room. (R. at 42). Following this incident, she went on leave to Puerto Rico to visit her mother. (R. at 43). Ms. ■ developed a urinary tract infection after the incident that she believed was caused by the sexual assault. (R. at 43). About one week after this incident, Ms. ■ went to six flags with a group, including appellant. (R. at 53). In addition, on or about 31 March 2018, Ms. ■ Ms. ■ appellant, and other friends went to San Antonio, Texas, together and shared a hotel room. (R. at 33).

Ms. ■ did not report or tell anyone about the sexual assault until on or about 14 January 2020 when CID contacted her. (R. at 40). CID contacted her telephonically as part of the investigation into Ms. ■ sexual assault allegation against appellant. (App. XIII, p. 3). CID called her because the hotel room they had stayed at the night Ms. ■ was assaulted by appellant was under her name.

(R. at 41). Ms. [REDACTED] only became aware of Ms. [REDACTED] allegation against appellant when CID contacted her. (R. at 44). Ms. [REDACTED] delayed reporting because she “was ashamed and [she] was scared of what would happen because [she] was still working in the same unit with [appellant].” (R. at 50).

Following Ms. [REDACTED] initial contact with CID—and before CID conducted a full interview with her—Ms. [REDACTED] discussed Ms. [REDACTED] allegation with her. (R. at 44). The only details Ms. [REDACTED] provided to Ms. [REDACTED] were that the allegation stemmed from the hotel they all stayed at in San Antonio, Texas, in 2018, (R. at 45), and that Ms. [REDACTED] “was drunk passed out” and she woke up with appellant on top of her. (R. at 51). Ms. [REDACTED] told Ms. [REDACTED] that appellant had done “something” to her too. (R. at 51). On or about 19 January 2020, Ms. [REDACTED] had a full interview with CID regarding her own allegation against appellant. (R. at 45).

B. Procedural posture.

On 17 November 2020, the government provided notice under Mil. R. Evid. 413 of its intent to offer evidence of appellant’s uncharged sexual assault of Ms. [REDACTED] (App. Ex. XIII). The government proffered the following:

[o]n or about 24 March 2018, the Accused went to Fuego night club in Killeen, Texas, with [Ms. [REDACTED] and several other individuals. Throughout the night, Ms. [REDACTED] became intoxicated. When the group left and went back to the barracks building, the Accused led Ms. [REDACTED] to his room and placed her on his bed. Ms. [REDACTED] next remembered waking up to the Accused on top of her,

penetrating her vulva with his penis. Ms. [REDACTED] did not consent to the sexual act.

(App. Ex. XIII, p. 1). The government stated this evidence was “relevant to show that the Accused has a propensity to commit sexual assaults. Specifically the Government may introduce this evidence to illustrate the Accused’s propensity to sexually assault intoxicated women after they fall asleep.” (App. Ex. XIII, p. 1–2).

On 3 December 2020, defense counsel filed a motion *in limine* to preclude the government from offering this evidence. (App. Ex. XII). On 10 December 2020, the government filed its response and requested that the military judge deny defense’s request. (App. Ex. XVI). Both parties included enclosures in support of their motions. (App. Exs. XIII, XVII). Neither party objected to the military judge’s consideration of the enclosures. (R. at 30, 61–63). Defense counsel called Ms. [REDACTED] as a witness in support of defense’s motion *in limine*. (R. at 31). Ms. [REDACTED] was subject to direct examination by defense, cross-examination by the government, and re-direct by defense. (R. at 31–53).

Both parties presented oral arguments regarding their motions. (R. at 55–61). Defense made the following main arguments: (1) the government was “getting very close to alleging the *Pease* standard,” which defense argued Ms. [REDACTED] testimony did not meet; (2) “there [was] no strength of proof” because Ms. [REDACTED] waited twenty-two months to report, she only reported after she learned of Ms. [REDACTED] report, and she spoke with Ms. [REDACTED] about Ms. [REDACTED] allegation before her

interview with CID; and (3) the probative weight of the evidence was “minimal” while the prejudice to appellant was “immense,” especially in light of the victims’ intertwined timelines of reporting these allegations. (R. at 55–58). On the other hand, the government made the following key arguments: (1) there was “a strong presumption in favor of admitting the evidence” in light of “the stark similarity between what Ms. [REDACTED] sa[id] versus the other two named victims” (R. at 58); (2) there was no evidence of collusion between any of the victims regarding their allegations, (R. at 59); and (3) defense’s issues with the evidence “should be considered impeachment evidence” and the fact finder should be able to weigh all the evidence. (R. at 60). Defense countered that “[w]e can impeach Ms. [REDACTED] the issue is you can’t unring the bell in front of the trier of fact.” (R. at 60–61).

After considering the written motions and enclosures, the testimony of Ms. [REDACTED] at the Article 39(a) session, and the arguments of counsel, the military judge denied defense’s motion *in limine* and ruled that the evidence of appellant’s sexual assault of Ms. [REDACTED] could be offered under Mil. R. Evid. 413. (App. Ex. XXXIX). On 30 January 2021, the military judge issued a fifteen-page written ruling that detailed his factual findings and conclusions of law. (App. Ex. XXXIX).

Standard of Review

“Court[s] review[] a military judge’s decision to admit evidence for an abuse

of discretion.” *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013) (citation omitted). A military judge abuses his discretion “when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law.” *United States v. Seay*, 60 M.J. 73, 77 (C.A.A.F. 2007) (citation omitted).

Law

“In a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense.” Mil. R. Evid. 413(a). This evidence “may be considered on any matter to which it is relevant.” *Id.* This includes using evidence of sexual assaults to prove the accused has a propensity to commit sexual assault. *See United States v. James*, 63 M.J. 217, 220 (C.A.A.F. 2006) (noting “an exceptionally strong preference in favor of admitting propensity evidence in cases involving specific sexual misconduct in M.R.E. 413 and M.R.E. 414.”).

“There are three threshold requirements for admitting evidence of similar offenses in sexual assault cases under M.R.E. 413: (1) the accused must be charged with an offense of sexual assault; (2) the proffered evidence must be evidence of the accused’s commission of another offense of sexual assault; and (3) the evidence must be relevant under M.R.E. 401 and M.R.E. 402.” *Solomon*, 72 M.J. at 179 (citing *United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2000)).

Regarding the second threshold requirement, “the Court must conclude that the members could find by a preponderance of the evidence that the offenses occurred.” *Id.* (citation omitted). “‘Sexual offense’ means an offense punishable under the [UCMJ], or a crime under federal or state law” and includes “any conduct prohibited by Article 120.” Mil. R. Evid. 413(d), (d)(1). Relevant evidence under Mil. R. Evid. 401 is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *United States v. Berry*, 61 M.J. 91, 95 (C.A.A.F. 2005).

“Once the evidence meets these threshold requirements, a military judge must apply the balancing test of M.R.E. 403 under which the testimony may be excluded if its ‘probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members.’” *Id.* at 95 (quoting Mil. R. Evid. 403). In *Wright*, the Court of the Appeals for the Armed Forces (CAAF) laid out nine non-exhaustive factors for military judges to consider when conducting the Mil. R. Evid. 403 balancing test:

[T]he strength of the proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence; the possible distraction of the fact-finder; the time needed to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties.

Berry, 61 M.J. at 95 (citing *Wright*, 53 M.J. at 482).

Argument

A. The evidence of appellant’s sexual assault of Ms. ■ met the threshold admissibility requirements of Mil. R. Evid. 413.

Appellant specifically challenges the second threshold finding arguing that it “is not supported by the evidence because Ms. ■ own testimony refutes an element of the case.” (Appellant’s Br. 11). Contrary to appellant’s argument, the evidence of appellant’s sexual assault of Ms. ■ meets all three threshold admissibility requirements under Mil. R. Evid. 413. The government addresses each requirement in turn.

1. Appellant was charged with an offense of sexual assault.

Appellant was charged with five specifications of sexual assault in violation of Article 120, UCMJ. (Charge Sheet). The military judge correctly identified that “Charge I and its three specifications involve allegations of Sexual Assault occurring in 2019, and thus covered under Article 120, UCMJ in effect on or after 1 January 2019. Charge II and its two specifications involve allegations of Sexual Assault occurring in 2018, and thus covered under Article 120, UCMJ in effect after 28 June 2012.” (App. Ex. XXXIX, p. 9).

2. The proffered evidence was evidence of appellant's commission of a sexual offense.

The military judge correctly concluded, “that a factfinder could reasonably find by a preponderance of the evidence that the offense[] occurred.” *Solomon*, 72 M.J. at 179 (citing *Wright*, 53 M.J. at 483); (App. Ex. XXXIX, p. 11). He considered the fact that “[a]lthough [Ms. ■■■ has some gaps in memory, [Ms. SP’s] Article 39(a) testimony and statements to CID are consistent and describe the alleged sexual assault by the Accused.” (App. Ex. XXXIX, p. 10). The military judge’s finding also noted Ms. ■■■ “also describe[d] waking up to the [appellant] on top of her while having sexual intercourse without her consent, which she characterizes as ‘aggressive.’” (Appellant’s Br. 31; App. Ex. XXXIX, p. 11–12).

Appellant argues this “evidence was inadmissible because there was no evidence presented that Appellant knew or should have known that ■■■ was asleep or intoxicated.” (Appellant’s Br. 31). This argument fails because the support appellant cites for this contention paints an incomplete picture of the evidence. Appellant argues that “there was no evidence presented that appellant knew or should have known ■■■ was asleep or intoxicated, particularly where ■■■ was ‘moaning’” and “■■■ told CID that she ‘kind of enjoyed it.’”. (Appellant’s Br. 31–32). However, appellant’s argument is entirely silent regarding Ms. ■■■ testimony that before the “moaning”—which she described as her “body’s reaction

to the act” (R. at 49)—she had been asleep and awoke to appellant performing this sexual act on her. (R. at 39).

While appellant acknowledges the correct standard of proof—preponderance of the evidence—his argument discounts what a low evidentiary standard this is. Under Mil. R. Evid. 413, the military judge only needed to determine that a fact finder reasonably could find by a preponderance of the evidence that the uncharged offense occurred. *Solomon*, 72 M.J. at 179 (citing *Wright*, 53 M.J. at 483). Ms. [REDACTED] testimony was more than sufficient to meet this low evidentiary threshold and show both that Ms. [REDACTED] (1) was asleep when appellant began sexually assaulting her and thus could not consent and (2) that after she awoke, she did not consent. *See Huddleston v. United States*, 485 U.S. 681, 690 (1988) (noting “the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence[,]” but instead “simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence”); *see also United States v. Deless*, ARMY MISC 20220317, 2022 CCA LEXIS 637, at *15 (Army Ct. Crim. App. 2 Nov 22) (mem. op.) (citing same and finding “the military judge improperly placed himself in the shoes of the factfinder and assessed [the witness’s] credibility when it was not his role as ‘gatekeeper’ to do so.”).

The following testimony by Ms. ■ shows that she was asleep when appellant began sexually assaulting her: (1) in reference to the sexual act being performed, defense counsel asked Ms. ■ whether she was “awake at this time?” Ms. ■ unequivocally answered “[n]o” (R. at 39) and (2) when defense counsel proceeded to ask Ms. ■ “[b]ut you had woken up [to] the sexual act being performed?” Ms. ■ replied, “[o]nce it was getting aggressive, yes. That’s when I was able to open my eyes, and I was wondering what was happening.” (R. at 39). Ms. ■ testimony was also consistent with her CID interview, which defense included as an enclosure to their motion *in limine*. (App. Ex. XIII, p. 5).

Furthermore, a fact finder could conclude that appellant knew or reasonably should have known Ms. ■ was asleep because appellant had placed Ms. ■ on his bed, (App. Ex. XIII, p. 5), and Ms. ■ testified that her eyes were closed when she woke up to the sexual act being performed. (R. at 39). Ms. ■ testimony regarding “moaning” does not negate the fact that Ms. ■ was asleep when the sexual act began and awoke to the appellant sexually assaulting her.

Appellant next argues that “by not charging [this offense] the government was permitted to bridge the spillover gap in a way it could not have done had Appellant been charged with this offense.” (Appellant’s Br. 32). This argument is misplaced. Courts have long recognized the government’s broad discretion when it comes to selecting the charges that will be brought in a particular case. *United*

States v. Wheeler, 77 M.J. 289, 293 (C.A.A.F. 2018) (citing *Ball v. United States*, 470 U.S. 856, 859 (1985)). Consequently, the military judge properly found that the evidence met the second threshold requirement under Mil. R. Evid. 413.

3. Appellant's sexual assault against Ms. ■ was relevant to show his propensity to commit the charged sexual assaults against Ms. ■ and Ms. ■

The military judge acknowledged “the relatively low burden to find that evidence is relevant” and correctly found that “this evidence may be relevant in showing the Accused’s propensity to commit a sexual assault.” (App. Ex. XXXIX, p. 11). In analyzing the *Wright* factors, the military judge noted “the strong similarities of how all three victims were allegedly sexually assaulted by the Accused.” (App. Ex. XXXIX, p. 15). These commonalities are relevant to show appellant’s propensity to commit this type of offense. *See United States v. Dewrell*, 55 M.J. 131, 137–38 (C.A.A.F. 2011) (holding the military judge did not abuse his discretion when he found propensity evidence under Mil. R. Evid. 414 was admissible because “the acts of having young girls . . . grabbing their hands, putting their hands on his penis, and masturbating him . . . is of such similar nature.”).

Accordingly, the military judge did not abuse his discretion when he determined the evidence met the threshold requirements of Mil. R. Evid. 413.

B. The military judge conducted a proper balancing test under Mil. R. Evid. 403 when he correctly determined that seven out of the nine *Wright* factors weighed in favor of admissibility.

1. Strength of proof of the prior act.

The military judge properly determined that this factor weighed in favor of admission because “[b]ased on [Ms. ■■■■■] testimony, a trier of fact could conclude by a preponderance of the evidence that uncharged misconduct occurred.” (App. Ex. XXXIX, p. 12). In his ruling, the military judge acknowledged the concerns raised by defense regarding Ms. ■■■■■ credibility, which included: “her friendship with [Ms. ■■■■■] her inability to remember some of the details leading up to the alleged sexual assault; whether she consented to the sexual act with the Accused, [] whether her actions may have caused the Accused to believe she consented”, “her delayed reporting of the alleged assault, the sequence of events leading up to her reporting of the allegations, and any other motives she may have to lie.” (App. Ex. XXXIX, p. 12). In addition to addressing defense counsel’s concerns about Ms. ■■■■■ credibility, the military judge also observed that “[Ms. ■■■■■ Article 39(a) testimony and statements to CID are consistent and describe the alleged sexual assault by the accused.” (App. Ex. XXXIX, p. 10). Also, the military judge noted that there was no evidence before the court that Ms. ■■■■■ had fabricated the allegations. (App. Ex. XXXIX, p. 11).

Appellant now argues that these same items “directly undermined” the strength of proof and the military judge should have considered these items in evaluating the strength of proof. (Appellant’s Br. 33). This argument is misplaced as the military judge clearly *did* consider these items before arriving at the reasonable conclusion that a fact finder could fairly consider any impeachment evidence that defense brought out at trial along with Ms. [REDACTED] allegation. (App. Ex. XXXIX, p. 12). Indeed, one of the significant duties of the fact finder is “to determine the believability of the witnesses.” Dep’t of Army, Pam. 27-9, Legal Services: Military Judges’ Benchbook, para. 7-7-1 (29 Feb. 2020) [Benchbook]. Although appellant may disagree with the military judge’s conclusion, that is not enough to establish an abuse of discretion. *See United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (citation and internal quotation marks omitted) (stating “[t]he abuse of discretion standard is a strict one, calling for more than a mere difference of opinion.”).

Appellant also cautions this court not to “confuse the *form* of proof—witness testimony—with the strength of proof.” (Appellant’s Br. 33). However, this argument discounts the significance of Ms. [REDACTED] being the only witness with first-hand knowledge of the offense. *See Berry*, 61 M.J. at 96 (finding “the proof of the prior similar act was strong because it involved the testimony of the only witness who had first-hand knowledge about the event.”). Moreover, the strength of proof

factor ranges from a high of conviction to a low of gossip. *See Wright*, 53 M.J. at 482. Here, considering Ms. [REDACTED] testimony along with the potential for impeachment by defense, this evidence falls comfortably between these two extremes. Accordingly, the military judge properly found that this factor weighed in favor of admission. (App. Ex. XXXIX, p. 12).

2. Probative weight of the evidence.

The military judge did not abuse his discretion by finding that “the probative weight of this evidence is high because the charged allegations made by [Ms. [REDACTED] and [Ms. [REDACTED] are extremely similar to the uncharged allegations made by [Ms. [REDACTED] (App. Ex. XXXIX, p. 13). *See United States v. Essary*, ARMY 20170556, 2019 CCA LEXIS 325, at *10 (Army Ct. Crim. App. 9 Aug. 2019) (unpub.) (finding “the conduct during these incidents involving [the victim of the charged offense] and [the victim of the uncharged offense] was strikingly similar, making the evidence highly probative, but not unfairly prejudicial”).

Appellant reasserts that this uncharged misconduct does not meet the second threshold requirement and therefore “is not probative of anything.” (Appellant’s Br. 34). As discussed above, *supra* p. 30, Ms. [REDACTED] testimony establishes both that she was asleep when the sexual act commenced, that appellant knew or reasonably should have known she was asleep, and that once she was awake, she did not consent to sex. Thus, regardless of her latter actions, the fact remains that a

reasonable fact finder could find by a preponderance of the evidence that Ms. ■ was asleep when she awoke to appellant performing a sexual act on her and appellant knew or reasonably should have known she was asleep at the time he began having sex with her. Moreover, a reasonable fact finder could find that once Ms. ■ was awake, she did not consent to sex with appellant. This evidence supports the military judge's conclusion that "[t]he proffered evidence establishes that the Accused is inclined to engage in sexual assaults against women who are asleep and/or intoxicated." (App. Ex. XXXIX, p. 13). Accordingly, the military judge properly found this factor weighed in favor of admission. (App. Ex. XXXIX, p. 13).

3. Potential to present less prejudicial evidence.

While appellant at least implicitly agrees that there is no less prejudicial evidence because Ms. ■ is the only one that could testify to this evidence, he disagrees with the military judge's finding that this fact favors admission. (Appellant's Br. 34–35; App. Ex. XXXIX, p. 13). Again, appellant raises the argument that "[t]here was no other evidence presented about what Appellant knew or should have known with respect to ■ state of wakefulness or her ability to consent." (Appellant's Br. 35). This argument fails. *See supra* pp. 30.

Appellant also argues that "[t]he government should not be permitted to fill the spill-over gap with evidence of an offense it knows it cannot prove at trial."

(Appellant’s Br. 35). As discussed earlier, the government has broad discretion in its charging decisions. *See supra* p. 31. Additionally, appellant’s argument is seriously undercut by the fact that even incidents for which an appellant has been acquitted may be admissible under Mil. R. Evid. 413. *See United States v. Dowling*, 493 U.S. 342, 348-49 (1990); *Solomon*, 72 M.J. at 182; *United States v. Griggs*, 51 M.J. 418, 420 (C.A.A.F. 1999); *United States v. Bridges*, 74 M.J. 779, 781 (Army Ct. Crim. App. 2015) (all recognizing that a prior acquittal on a charge of sexual assault does not per se bar subsequent admission of the same allegation under Mil. R. Evid. 413). Moreover, the fact that this was a military judge alone trial should resolve any concerns regarding spillover.

The military judge correctly found that this factor weighed in favor of admission. (App. Ex. XXXIX, p. 13).

4-5. Possible distraction of the fact finder and time needed to prove the prior conduct.¹²

Appellant “takes no specific issue” with the military judge’s finding that the presentation of evidence “should not take very long and should not pose a distraction.” (Appellant’s Br. 35). Consequently, the military judge correctly

¹² At trial, the military judge combined these factors for purposes of his analysis, and the government likewise combines these factors here. (App. Ex. XXXIX, p. 13).

found that these two factors weigh in favor of admission. (App. Ex. XXXIX, p. 13).

6. Temporal proximity.

Appellant does not challenge the military judge's finding that "[t]he alleged sexual assault of [Ms. ■■■] occurred approximately six days prior to the alleged sexual assault of [Ms. ■■■] in a similar manner, while the alleged victim was asleep and/or intoxicated." (Appellant's Br. 36; App. Ex. XXXIX, p. 14). Although the military judge did not specifically reference the time between the sexual assault offenses in Charge I, both defense counsel and the military judge recognized that Mil. R. Evid. 413 does not set a time limit for past sexual assault offense evidence nor prohibit the introduction of those that occurred after the charged offense. (App. Ex. XXXIX, p. 13; App. Ex. XII, p. 12); *James*, 63 M.J. at 222.

Finally, appellant again disputes that it was in a "similar manner" based on his view that the government failed to prove that appellant knew or reasonably should have known Ms. ■■■ was asleep. (Appellant's Br. 36). This argument is misplaced for the same reasons discussed above. *See supra* p. 31–34. Accordingly, this factor weighs in favor of admission.

7. Frequency of the acts.

The military judge did not abuse his discretion when he found that since the uncharged misconduct only occurred once, “this factor weighs against admission.” (App. Ex. XXXIX, p. 14).

8. Presence or lack of intervening circumstances.

The military judge did not abuse his discretion by concluding that there did “not appear to be any *significant* intervening circumstance.” (App. Ex. XXXIX, p. 14) (emphasis added).

Appellant cites a dearth of case law regarding the meaning of the term “intervening circumstances,” and poses the question of whether the dates at issue consist of the “dates of the incidents or the dates between the first alleged incident and when subsequent allegations arose?” (Appellant’s Br. 36). In *United States v. Crump*, a case from our sister service, the court discusses this term in relation to “the presence or absence of intervening circumstances between the prior acts and charged offenses.” No. ACM 39628, 2020 CCA LEXIS 405, at *83 (A.F. Ct. Crim. App. 10 Nov. 20) (unpub.). Appellee suggests this court adopt the same interpretation of this factor.

None of the “intervening circumstances” raised by appellant undermine the military judge’s finding. (Appellant’s Br. 37). Appellant argues that the following “intervening circumstances” diminish the probative weight of the evidence: (1)

“█ never told anyone” about the sexual assault until she was contacted by CID; (2) Ms. █ purchased a hotel room in San Antonio, Texas for a group that included appellant and had no objection to him going on the trip or staying in the same room; and (3) Ms. █ and Ms. █ were roommates “who obviously would have had an opportunity to discuss Ms. █ allegation.” (Appellant’s Br. 37). First, these items are inconsequential compared to the type of intervening circumstances courts have recognized as favoring exclusion under Mil. R. Evid. 413. *See Berry*, 61 M.J. at 97 (holding the accused’s development from childhood to adulthood constituted a “notable intervening circumstance” between the two events.). Second, all these items go to Ms. █ credibility, and the military judge already addressed these issues when he weighed the probative weight of the evidence and found these issues could be handled appropriately as impeachment evidence. (App. Ex. XXXIX, p. 12).

Finally, to the extent this court finds any of appellant’s arguments regarding this factor to be persuasive, appellant waived this issue by failing to make any of these arguments at trial. However, because appellee does not believe there is any legal error to correct, the application of waiver is unnecessary here. *See, e.g., United States v. Hardy*, 77 M.J. 438, 442-43 (C.A.A.F. 2018) (quoting *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001)); *United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016) (all standing for the proposition that “[CCAs] have

discretion in their exercise of authority under Article 66, UCMJ, to determine whether to apply waiver or forfeiture in a particular case, or to pierce waiver or forfeiture in order to correct a legal error.”).

9. Relationship between the parties.

The final factor weighs in favor of admissibility for two overarching reasons. First, Ms. ■■■ and Ms. ■■■ were similar victims. (App. Ex. XXXIX, p. 14). Ms. ■■■ and Ms. ■■■ were close friends and had been friends since basic training. (App. Ex. XXXIX, p. 14). They were roommates with one another at the time appellant sexually assaulted them. (App. Ex. XXXIX, p. 14). Finally, Ms. ■■■ Ms. ■■■ and appellant were all Soldiers in the Army and had common friends. (App. Ex. XXXIX, p. 14). This court has previously found that such similarities weigh in favor of admission. *See Essary*, 2019 CCA LEXIS 325, at *12 (noting that the “relationship between the parties” factor weighed in favor of admission because “the victims were similar” where one “was the appellant’s adult girlfriend” and the other “was the appellant’s wife”). Here, the similarities are even more stark.

Second, even though Ms. ■■■ and appellant had a romantic relationship as opposed to appellant’s lack of a prior romantic relationship with Ms. ■■■ and Ms. ■■■ all three women were “relatively similar” in that appellant sexually assaulted all three victims while they were asleep in a similar manner. (App. Ex. XXXIX, p.

14). In *Crump*, our sister court found “the manner in which force was reported by each victim to be significantly more important to the determination that the offenses were similar than any of the differences cited by Appellant.” 2020 CCA LEXIS 405, at *82–83.

Additionally, the military judge discussed that Ms. [REDACTED] sister contacted Ms. [REDACTED] about appellant sexually assaulting Ms. [REDACTED] which then led to the CID investigations into the allegation made by Ms. [REDACTED] and Ms. [REDACTED] (App. Ex. XXXIX, p. 14). On this point, appellant argues that “the military judge did not actually analyze the importance of the relationship between the parties in evaluating whether this evidence should be admitted under Mil. R. Evid. 403.” (Appellant’s Br. 38). Yet again, appellant alleges the military judge’s conclusion—that defense would have the opportunity to impeach the credibility of all three victims—constitutes insufficient analysis. However, the military judge arrives at a reasonable conclusion and appropriately observes that defense’s ability to impeach the victims or highlight any motives to fabricate “should help to neutralize any potential prejudice.” (App. Ex. XXXIX, p. 15). Accordingly, this factor weighed in favor of admission.

C. Appellant cannot overcome the presumption in favor of admissibility.

There is a “general presumption in favor of admission” for evidence proffered under Mil. R. Evid 413. *Berry*, 61 M.J. at 94–95. Appellant claims that

the military judge abused his discretion because, based on appellant's analysis, the *Wright* factors weigh against admission of the evidence of appellant's sexual assault of Ms. ■ in this case. (Appellant's Br. 32). However, his claim fails because it amounts to little more than a difference of opinion with the military judge's decision which does satisfy the abuse of discretion standard. *See Solomon*, 72 M.J. at 179 ("The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion.") (quoting *White*, 69 M.J. 236, at 239). The military judge properly considered all relevant evidence, correctly applied the *Wright* factors based on the evidence before him, and thoroughly articulated his Mil. R. Evid. 403 balancing test. This court must afford deference to his determinations. *See Solomon*, 72 M.J. at 180 ("When a military judge articulates his properly conducted [Mil. R. Evid.] 403 balancing test on the record, the decision will not be overturned absent a clear abuse of discretion.") (citing *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000)). Consequently, this court should find the military judge did not abuse his discretion when he admitted appellant's sexual assault of Ms. ■ as propensity evidence under Mil. R. Evid. 413.¹³

¹³ The government addresses prejudice at the conclusion of Assignment of Error IV.

Assignment of Error III

APPELLANT WAS DENIED THE RIGHT TO A UNANIMOUS VERDICT UNDER THE SIXTH AMENDMENT AND THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FIFTH AMENDMENT.

Additional Facts

On 3 December 2020, before his court-martial, appellant filed a motion requesting that the military judge require a unanimous verdict for any finding of guilty or, alternatively, that the military judge provide an instruction that the President must announce whether the verdict was unanimous. (App. Ex. VII). On 10 December 2020, the government opposed appellant's motion. (App. Ex. XVIII). Neither party requested oral argument. (App. Exs. VII, XVIII). At the pre-trial Article 39(a) session, the military judge asked whether either side wished to be heard on the matter. (R. at 29). Both parties affirmed they did not request to be heard on the matter. (R. at 29). Prior to trial, the military judge issued a written ruling denying defense's motion. (App. Ex. XXXVI). On 4 February 2021, appellant and his defense counsel filed a request for trial before military judge alone. (App. Ex. XLIII). The military judge approved this request on 9 February 2021. (R. at 119; App. Ex. XLIII).

Standard of Review

The constitutionality of a statute is a question of law, reviewed de novo. *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000). Whether a panel was properly instructed is also reviewed de novo. *United States v. Torres*, 74 M.J. 154, 157 (C.A.A.F. 2015).

Law & Argument

As a threshold matter, this issue is moot because although appellant did file a motion requesting that the military judge require a unanimous verdict for any finding of guilty, appellant ultimately opted for a military-judge alone trial. However, if this court finds the issue is not moot, then it should apply the analysis discussed below.

A. Fifth and Sixth Amendment Rights.

Contrary to appellant's argument, (Appellant's Br. 52), *Ramos v. Louisiana* did not alter the longstanding precedent of both the Supreme Court and the CAAF that the Sixth Amendment right to a jury trial does not apply to service members facing court-martial.¹⁴ 140 S. Ct. 1390 (2020). Furthermore, this court rejected a

¹⁴ See *Ex parte Quirin*, 317 U.S. 1, 45 (1942) (holding that military tribunals were explicitly exempted in the Constitution from the Sixth Amendment requirement for a jury); *United States v. Begani*, 81 M.J. 273, 280 n.2 (C.A.A.F. 2021) (rejecting appellant's invitation to apply strict scrutiny to an equal protection challenge because appellant, as "part 'of the land and naval Forces,'" did not have a Sixth Amendment right to a jury trial); *United States v. Easton*, 71 M.J. 168, 175

substantially similar claim in in *United States v. Apgar*, ARMY 20200615, 2022 CCA LEXIS 278 (Army Ct. Crim. App. 10 May 2022) (per curiam) (affirming a less than unanimous verdict when reviewing the issue of whether an appellant was denied a fundamentally fair trial as guaranteed by the Fifth and Sixth Amendments).¹⁵ As such, appellant’s claim should be denied.

B. Equal Protection.

Accused service members and civilian defendants are not similarly situated for equal protection purposes. *See United States v. Pritchard*, 82 M.J. 686, 693 (Army Ct. Crim. App. 9 Jun 2022) (holding the appellant’s equal protection claim was meritless because military accused and civilian defendants are not similarly situated for purposes of criminal trials). Accordingly, Appellant’s claim on this assignment of error lacks merit.¹⁶

(C.A.A.F. 2012) (holding “[t]he Sixth Amendment right to a jury trial does not apply to courts-martial); *United States v. Weisen*, 57 M.J. 48, 50 (C.A.A.F. 2002) (stating same); *United States v. Kemp*, 22 U.S.C.M.A. 152, 154 (1973) (stating that because courts-martial “derive their authority from the enactments of Congress under Article I of the Constitution . . . the Sixth Amendment right to trial by jury . . . has no application to appointment of members of courts-martial”).

¹⁵ *See also United States v. Ferreira*, ARMY MISC 20220034, ___ M. J. ___, 2022 CAAF LEXIS 524, at *1 (C.A.A.F. 22 Jul. 2022), where appellant’s motion to stay the court-marital proceedings in light of the military judge’s ruling granting the defense motion to instruct the panel that any finding of guilty must be by unanimous vote was denied.

¹⁶ Indeed, persuasive authority exists, as our sister courts in *Albarda*, *Brown*, *Garrett*, *Causey*, and *Anderson* have already rejected appellant’s precise invitation to adopt unanimous verdicts based on *Ramos*. *United States v. Albarda*, No. ACM

Assignment of Error IV

THE EVIDENCE IS FACTUALLY INSUFFICIENT TO SUPPORT ANY OF THE CHARGES AND SPECIFICATIONS.

Additional Facts

A. Additional evidence for the Specifications of Charge I relating to Ms. [REDACTED]

1. Text messages between Ms. [REDACTED] and appellant.

Between 22 and 26 November 2019, Ms. [REDACTED] told appellant multiple times that she was not feeling well, did not want him at her house, and did not want him to touch her. (Def. Ex. S, pp. 10–24, 46–47, 50–53). Additionally, on 26 November 2019, appellant and Ms. [REDACTED] exchanged the following messages:

[Ms. [REDACTED] 6:14:55 pm: And I fee[l] disgusted when you touch me because before I got preg you'd force you[r] dick in me after I would tell you no and I fee[l] like that's why I just can't be around you.

...

[Appellant] 6:15:22 pm: And i been stopping that

...

[Ms. [REDACTED] 6:15:56 pm: Yea did you even think of it that I said no the first time because I meant it it's not okay to do that and you'd do that so often

39734, 2021 CCA LEXIS 347 (A.F. Ct. Crim. App. 7 Jul. 2021) (per curiam); *United States v. Brown*, No. ACM 39728, 2021 CCA LEXIS 414 (A.F. Ct. Crim. App. 16 Aug. 2021), pet. denied, 2022 CAAF LEXIS 8 (C.A.A.F. 5 Jan. 2022); *United States v. Garrett*, No. 202000028, 2021 CCA LEXIS 135 (N.M. Ct. Crim. App. 30 Mar. 2021), pet. denied, 2021 CAAF LEXIS 767 (C.A.A.F. 23 Aug. 2021); *United States v. Causey*, No. 202000228, 2022 CCA LEXIS 176 (N.M. Ct. Crim. App. 23 Mar. 2022); *United States v. Anderson*, No. ACM 39969, pet. granted, 2022 CCA LEXIS 181, (A.F. Ct. Crim. App. 25 Mar. 2022) (unpub.).

[Ms. ■■■ 6:16:07: Like you literally disgust me
[Appellant] 6:16:12 pm: And I've been stopping
[Appellant] 6:16:56 pm: Ok
[Appellant] 6:17:10 pm: I'm sorry for all that
...
[Appellant] 6:34:43 pm: ... As to touching you and
forcing you I'm sorry that's now (sic) how I should
behave towards you. I am truly sorry for that and I will
make it up to you.

(Def. Ex. S, pp. 56–59, 62). Ms. ■■■ testified that appellant's responses related to
appellant forcing himself on her. (R. at 292, 313).

On 27 November 2019, appellant and Ms. ■■■ exchanged the following
messages:

[Appellant] 3:24:22 pm: Are you on hulu
[Appellant] 3:24:25 pm: If so hop off
[Ms. ■■■ 3:24:48 pm: You logged me off and can you
stop texting me you creep
[Appellant] 3:25:05 pm: Alright lol
[Appellant] 3:26:05 pm: Creep that's real funny crazy
ass butch (sic) that wants to kill their own child
[Ms. ■■■ 3:26:44 pm: It would suck if I told the Army
you basically raped me.
[Appellant] 3:27:02 pm: I didn't tho lol
[Appellant] 3:27:10 pm: Because we were in a
relationship
[Appellant] 3:27:24 pm: I knew all you wanted was
benefits and abuse my shit lol
[Ms. ■■■ 3:27:33 pm: Relationship?
[Ms. ■■■ 3:27:44 pm: Rape is rape
[Appellant] 3:27:54 pm: Yeah boyfriend and girlfriend
and I have people that will say the same
[Ms. ■■■ 3:27:56 pm: If you wanna play that game I
will
[Appellant] 3:28:10 pm: Its not when you're only gonna
say it when shit ain't going your way

(Def. Ex. S, pp. 75–79).

On 28 November 2019, Ms. [REDACTED] exchanged several messages with appellant regarding issues with paying for the abortion, (Def. Ex. S, pp. 80–92), culminating in the following exchange:

[Ms. [REDACTED] 2:02:48 pm: I’m getting it done it’s either you help me or I ask for help from the military and tell them how I got preg and you thought it was okay to do it forcefully

[Ms. [REDACTED] 2:03:04 pm: I’m not trying to ruin your career but if your trying to be like that then I’ll be like that

...

[Ms. [REDACTED] 2:10:06 pm: Hurry up and decide I need to know today what imma do

[Appellant] 2:10:23 pm: Alright give me a couple minutes

[Ms. [REDACTED] 2:11:54 pm: For what

[Ms. [REDACTED] 2:28:12 pm: So are you helping me or not

[Ms. [REDACTED] 2:28:34 pm: I need it tomorrow when I get the thing inserted

[Ms. [REDACTED] 2:44:20 pm: Since your taking your time I’ll just report you

(Def. Ex. S, pp. 93–95).

2. Ms. [REDACTED] testimony.

Ms. [REDACTED] was friends with Ms. [REDACTED] (R. at 327). In March 2019, Ms. [REDACTED] and Ms. [REDACTED] were together at Stillhouse lake in Killeen, Texas, “drinking, listening to music and hanging out.” (R. at 327–28). During that time, Ms. [REDACTED] confided in Ms. [REDACTED] about sex with appellant. (R. at 350). Ms. [REDACTED] told Ms. [REDACTED] that appellant “wanted to do stuff and sometimes she just didn’t want to do it and she just went—she just

did it because he wanted to.” (R. at 350). Ms. ■ described certain times when she did not want to have sex with appellant, but appellant would still have sex with her. (R. at 350). Ms. ■ also noticed that Ms. ■ “had markings, bruises on her inner thighs.”¹⁷ (R. at 350). Ms. ■ thought this “seemed off and wrong” because what appellant did is “something that you wouldn’t do to a loved one or someone that you were within a relationship.” (R. at 351).

B. Additional witness testimony for the Specifications of Charge II relating to Ms. ■

At trial, Ms. ■ SPC ■ SPC ■ Mr. ■ and Ms. ■ all testified that they went on a trip to San Antonio, Texas in March 2018. (R. at 173, 178, 182, 203, 235).

1. Witness testimony regarding Ms. ■ level of intoxication.

Ms. ■ observed Ms. ■ was intoxicated at the club. (R. at 176). Ms. ■ was “stumbling around, she could barely talk, she could barely walk.” (R. at 176).

Specialist ■ observed Ms. ■ out at the club that night, and saw that “she was drunk,” but did not “know how drunk she was.” (R. at 180). Ms. ■ was “stumbling and she used [SPC AM’s] shoulder as a way to help her.” (R. at 180).

Specialist ■ saw Ms. ■ “drinking some mixed drinks at the club.” (R. at 184). Specialist ■ did not drink anything at the bar other than “a sip of corona.”

¹⁷ Ms. ■ did not testify as to how Ms. ■ got these bruises. (R. at 350).

(R. at 184–85). Specialist ■ saw appellant look down Ms. ■ shirt at the bar.

(R. at 189). Ms. ■ appeared intoxicated and “she started slurring her words and she was stumbling as she walked.” (R. at 185). Ms. ■ told SPC ■ and others that “she was tired, that she was just going to head back to the hotel for the night.”

(R. at 185). Specialist ■ saw Ms. ■ walk back to the hotel after she and others continued to the next club. (R. at 185). Appellant walked back towards the hotel with Ms. ■¹⁸ (R. at 185). Appellant’s left arm was around Ms. ■ waist. (R. at 186). Ms. ■ could not walk on her own. (R. at 186).

Mr. ■ observed Ms. ■ take “at least a couple of shots and a couple of mixed drinks.” (R. at 206). Ms. ■ “started stumbling around walking up to random people and like hanging on them” due to her level of intoxication. (R. at 206). Ms. ■ level of intoxication was “pretty noticeable to the entire group.” (R. at 207). Appellant told Mr. ■ that he “wanted to go back to the hotel room because he was tired.” (R. at 207). Appellant was trying to get Ms. ■ to go back to the hotel room with him by “grabbing her arm saying he was going to take her back to a hotel room because she looked like she was really messed up and she needed to get some sleep.” (R. at 207).

¹⁸ Mr. ■ recalled SPC ■ and another girl took Ms. ■ back to the hotel. (R. at 209). Mr. ■ agreed that he was having trouble remembering some events from the night. (R. at 208).

2. Specialist [REDACTED] testimony regarding appellant and Ms. [REDACTED] in the hotel room.

When SPC [REDACTED] returned to the hotel room, [i]t was a little dark, but the curtains were open,” and she saw “[appellant] and [Ms. [REDACTED] sharing a cot.” (R. at 186). Specialist [REDACTED] later testified, “When [she] arrived to the room, it was dark and there was no lights on.” (R. at 356). It was “[d]ark enough that [she] couldn’t see anything when [she] walked in.” (R. at 356). Ms. [REDACTED] was “on her back and [appellant] was on his right side, kind of flopped over her.” (R. at 187). Appellant’s “upper torso [] was on the cot. His legs were on the floor.” (R. at 187). Specialist [REDACTED] “kicked [appellant’s] shin and told him to get up” and find somewhere else to sleep. (R. at 188). The first time SPC [REDACTED] tried to wake appellant up “he just told [her] to fuck off.” (R. at 188). Ultimately, appellant moved elsewhere. (R. at 188). Appellant’s “pants were at his ankles.” (R. at 188). Specialist [REDACTED] could see Ms. [REDACTED] bra and the garment on the lower half of her body “was unbuttoned and pulled down a little bit.” (R. at 188).

3. Staff Sergeant [REDACTED] testimony regarding Ms. [REDACTED] outcry.

Staff Sergeant [REDACTED] was Ms. [REDACTED] platoon sergeant. (R. at 220). In the “summer-fall timeframe” of 2019, Ms. [REDACTED] reported appellant’s crime against her to SSG [REDACTED] (R. at 221). Ms. [REDACTED] demeanor “seemed off and then at some point in time her voice just seemed really shaky,” and she was crying. (R. at 221–22). Staff Sergeant [REDACTED] put Ms. [REDACTED] in touch with the current SARC. (R. at 222).

Staff Sergeant [REDACTED] was aware of the incident where Ms. [REDACTED] kicked appellant “in the nuts.” (R. at 224, 230). He heard about this incident through some of his former soldiers who said, “[Ms. [REDACTED] had attacked him.” (R. at 224–25, 230). However, he was not sure if the command knew or if any action was taken. (R. at 225).

C. Additional witness testimony relating to appellant’s sexual assault of Ms. [REDACTED]

1. Specialist [REDACTED] testimony.

Specialist [REDACTED] went to Club Fuego with appellant, Ms. [REDACTED] and another person she could not remember. (R. at 253). She observed that Ms. [REDACTED] was highly intoxicated that night. (R. at 254). On the way back from the club, Ms. [REDACTED] “opened the door of the car and she threw up.” (R. at 255).

2. Mr. [REDACTED] testimony.

About a week before the San Antonio, Texas trip, Mr. [REDACTED] went to Club Fuego with SPC [REDACTED] appellant, and Ms. [REDACTED] (R. at 255–56). When they left the club, Ms. [REDACTED] appeared intoxicated, and she was having some difficulty walking on her own. (R. at 257). Mr. [REDACTED] drove SPC [REDACTED] appellant, and Ms. [REDACTED] home after the club. (R. at 257). Appellant and Ms. [REDACTED] were in the backseat of his truck. (R. at 258). Mr. [REDACTED] took them back to the barracks. (R. at 258). Ms. [REDACTED] could not walk when she got out of the truck. (R. at 259). Mr. [REDACTED] observed appellant assisting Ms. [REDACTED] and

“helping her up the stairs towards the CQ area.”¹⁹ (R. at 259). Earlier in the evening, appellant “seemed very interested in [Ms. ■■■] like was she single, did [Mr. ■■■] have her number, just small stuff like that.” (R. at 260).

Standard of Review

This court reviews questions of factual sufficiency de novo. *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017).

Law

A. Factual sufficiency.

Regarding factual sufficiency, the test is “whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the service court are themselves convinced of appellant’s guilt beyond a reasonable doubt.” *Rosario*, 76 M.J. at 117 (citations and internal quotation omitted). When conducting this review, 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). In its factual sufficiency review, this court “in considering

¹⁹ During cross-examination, defense counsel questioned Mr. ■■■ about a previous statement he had made to Special Agent (SA) ■■■ that he and SPC ■■■ had carried Ms. ■■■ up the stairs, and appellant was trailing behind them. (R. at 261). Defense called SA ■■■ as a witness during their case-in-chief, and SA ■■■ testified that Mr. ■■■ “described how he and [SPC ■■■] assisted [Ms. ■■■] up to the bedroom and [appellant] followed behind” and that they put Ms. ■■■ in her bedroom. (R. at 400).

the record . . . may weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard witnesses.” Article 66(d)(1), UCMJ.

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 of deference this court affords the trial court for having seen and heard the witnesses will typically reflect the materiality of witness credibility to the case. *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). In analyzing factual sufficiency, our superior court “has long recognized that the government is free to meet its burden of proof with circumstantial evidence.” *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019).

B. Sexual assault.

1. Post- 1 January 2019 sexual assault offenses.

Charge I and its three specifications involve allegations of sexual assault occurring in 2019, and thus covered under Article 120, UCMJ in effect on or after 1 January 2019. Specifications 1 and 3 of Charge I are charged as sexual assault without consent. These offenses have the following elements: (1) that the accused

committed a sexual act upon another person; and (2) that the accused did so without the consent of the other person. Article 120(b)(2)(A), UCMJ. “The term ‘sexual act’ means . . . the penetration, however slight, of the penis into the vulva [. . . .]” Article 120(g)(1)(A), UCMJ. Consent means:

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

Article 120(g)(7)(A), UCMJ.

Additionally, “[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent.” Article 120(g)(7)(C), UCMJ. “Consent is to be determined objectively.” *United States v. McDonald*, 78 M.J. 376, 380 (C.A.A.F. 2019). “It is also to be determined from the alleged victim’s perspective—consent is his or her *freely given agreement*.” *Id.* (emphasis in original). Finally, “[t]he burden is on the actor to obtain consent, rather than the victim to manifest lack of consent.” *Id.* at 381.

Specification 2 of Charge I is charged as a sexual assault of a person who is asleep. It consists of the following elements: (1) that the accused committed a sexual act upon another person; (2) that the other person was asleep; and (3) that the accused knew or reasonably should have known that the other person was asleep. Article 120(b)(2)(e)(i)–(iii), UCMJ. A “sexual act” is defined as “the

penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.” Article 120(g)(1), UCMJ. A sleeping person cannot consent. Article 120(b)(7)(B), UCMJ.

2. Pre- 1 January 2019 sexual assault offenses.

Charge II and its two specifications involve allegations of sexual assault occurring in 2018, and thus covered under Article 120, UCMJ in effect after 28 June 2012. Specification 1 of Charge II is charged as sexual assault by bodily harm and contains the following elements: (1) the accused committed a sexual act upon another person; (2) the accused did so by causing bodily harm to that other person, (Article 120(b)(2)(B), UCMJ), and (3) the accused did so without the consent of the alleged victim. *See* Benchbook para. 3-45-14 (instructing that lack of consent is the final element “[w]hen the same physical act is alleged as both the actus reus and the bodily harm for charged sexual assault”). “The term ‘bodily harm’ means any offensive touching of another, however slight, including nonconsensual sexual act.” Article 120(g)(3), UCMJ. “Consent” means “a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance . . . does not constitute consent.” Article 120(g)(8)(A), UCMJ.

Specification 2 of Charge II is charged as sexual assault of a person who is asleep, unconscious, or otherwise unaware the sexual act is occurring and contains the following elements: (1) that the accused committed a sexual act upon another person by causing penetration, however slight, of the vulva by the penis; (2) that the other person was asleep, unconscious, or otherwise unaware that the sexual act was occurring; and (3) that the accused knew or reasonably should have known that the other person was asleep, unconscious, or otherwise unaware that the sexual act was occurring. Article 120(b)(3)(e)(i)–(iii), UCMJ.

Argument

A. Appellant’s convictions are factually sufficient.

1. Charge I and its three specifications are factually sufficient.

Appellant argues that the offenses relating to Ms. [REDACTED] are factually insufficient for the following reasons: (1) the court cannot know which conduct formed the basis of the conviction or the acquittal regarding Specification 1; (2) Ms. [REDACTED] had a motive to fabricate the allegations; (3) and Ms. [REDACTED] conduct was inconsistent with sexual assault. (Appellant’s Br. 87–90). On the contrary, this court should be convinced beyond a reasonable doubt that appellant sexually assaulted Ms. [REDACTED] based on: Ms. [REDACTED] credible testimony, Ms. [REDACTED] corroborating testimony, and appellant’s text messages. Moreover, Ms. [REDACTED] proffered motive to fabricate was outweighed by appellant’s admissions in the same text messages.

a. Specification 1 of Charge I.

As discussed above, contrary to appellant's assertion, (Appellant's Br. 87), because *Walters* is not triggered, this court need not undertake the analysis of which conduct may have formed the basis for the military judge's decision to except out the words "or more." *See supra* pp. 15–18.

Ms. [REDACTED] credible testimony established every element of sexual assault without consent. First, there is no question appellant committed a sexual act when he "penetrated his penis into [Ms. [REDACTED]] (R. at 271). Second, Ms. [REDACTED] repeatedly expressed her lack of consent both verbally and physically: (1) Ms. [REDACTED] told appellant "no," (R. at 272), but he did not listen and instead mocked her by repeating "no okay," (R. at 272), and (2) Ms. [REDACTED] would try to move, but appellant would "either push [her] back down through [her] chest area or [her] arm." (R. at 272). An expression of lack of consent through words or conduct means there is no consent. Article 120(g)(7)(A), UCMJ. In complete disregard of Ms. [REDACTED] clear lack of consent, appellant would "hold [Ms. AV's] arm so [she] couldn't reach for him." (R. at 273). Appellant also left bruises on Ms. [REDACTED] "arm area." (R. at 298). Ms. [REDACTED] also unequivocally stated at trial that she did not want appellant to penetrate her with his penis nor had she not consented to this sexual act. (R. at 273–74).

The testimony of her friend, Ms. ■■■ also corroborated Ms. ■■■ testimony. Ms. ■■■ testified that in March 2019, Ms. ■■■ confided in her that there were certain times when she did not want to have sex with appellant, but appellant would still have sex with her. (R. at 350). Ms. ■■■ also noticed Ms. ■■■ “had markings, bruises on her inner thighs,” which a fact finder could reasonably infer were caused by appellant. (R. at 350). Appellant’s argument that “a woman going along with sex even if it is not what she wanted is not sexual assault under any definition” represents an incomplete picture of Ms. ■■■ testimony. (Appellant’s Br. 88–89). Ms. ■■■ testimony also supported the conclusion that appellant was aware that Ms. ■■■ did not want to have sex but would have sex with her anyway. (R. at 350). Contrary to appellant’s assertion, that is within the definition of sexual assault. *See McDonald*, 78 M.J. at 380 (stating that “[c]onsent is to be determined objectively” and “[i]t is also to be determined from the alleged victim’s perspective—consent is his or her *freely given agreement*.”) (emphasis in original). Thus, because appellant was aware Ms. ■■■ did not want to have sex but did it anyway, his actions constituted sexual assault.

Appellant’s text messages to Ms. ■■■ strongly support the finding of guilt for this specification. Appellant downplays the significance of these text messages and describes them as merely “conciliatory.” (Appellant’s Br. 89). However, a fact finder could reasonably conclude that these text messages show both

consciousness of guilt, constitute admissions of sexual assault, and reveal a deep misunderstanding of consent on appellant's part. First, appellant's consciousness of guilt was displayed by appellant's response to Ms. [REDACTED] message: "And I fee[l] disgusted when you touch me because before I got preg you'd force you dick in me after I would tell you no and I fee[l] like that's why I just can't be around you." Appellant responded not only by saying "I'm sorry for all that," but also by stating twice that he has "been stopping" that. (Def. Ex. S, pp. 56–59, 62). *See United States v. Tovarchavez*, 78 M.J. 458, 469 (C.A.A.F. 2020) (stating while appellant's text message apologies could be interpreted as establishing consciousness of guilt, they could also have been "statements from someone who knows they have acted inappropriately, but not criminally."). Appellant's brief offers no explanation for his damning admission to sexually assaulting Ms. [REDACTED] Appellant texted Ms. [REDACTED] "As to touching you and forcing you I'm sorry that's now how I should behave towards you. I am truly sorry for that and I will make it up to you." At trial, Ms. [REDACTED] explained that appellant's responses were in relation to him forcing himself on her. (R. at 292, 313).

Appellant's text messages also reveal a deep misunderstanding of the consent landscape. This misunderstanding is evident from the following exchange:

[Ms. [REDACTED] 3:26:44 pm: It would suck if I told the Army
you basically raped me.
[Appellant] 3:27:02 pm: I didn't tho lol

[Appellant] 3:27:10 pm: Because we were in a relationship
[Appellant] 3:27:24 pm: I knew all you wanted was benefits and abuse my shit lol
[Ms. ██████] 3:27:33 pm: Relationship?
[Ms. ██████] 3:27:44 pm: Rape is rape
[Appellant] 3:27:54 pm: Yeah boyfriend and girlfriend and I have people that will say the same

(Def. Ex. S, pp. 93-95). As the government argued at trial, these “texts show [appellant’s] mistaken belief that so long as you’re boyfriend girlfriend it’s absolutely impossible to sexually assault your girlfriend.” (R. at 370–71). *See* R.C.M. 916(l)(1) (“Ignorance or mistake of law, including general orders or regulations, ordinarily is not a defense.”).

Finally, appellant argues that Ms. ██████ behavior in continuing to travel to Killeen was inconsistent with how a victim would act. (Appellant’s Br. 88). However, Ms. ██████ is not required to justify her behavior after being sexually assaulted by appellant. This court has consistently and recently acknowledged that there is no prescribed way in which a victim must act. *See United States v. Cruz*, ARMY 20200389, 2022 CCA LEXIS 130, at *4 (Army Ct. Crim. App. 23 Feb. 2022) (mem. op.) (“[W]e refrain from overlaying, against the weight of evidence here, our possible expectations of how a victim would react in the moment or thereafter. No one can know how a victim will react—other than knowing that the reaction will be unique to the circumstances.”). Additionally, Ms. ██████ clearly

indicated during cross-examination that when she went to Killeen, she went to visit others and “not specifically [appellant].” (R. at 296).

b. Specification 2 of Charge I.

Regarding Specification 2 of Charge I, Ms. [REDACTED] credible testimony established that appellant sexually assaulted her while she was asleep. First, appellant committed a sexual act on Ms. [REDACTED] when he “slipped his hand” into her shorts and digitally penetrated her vulva. (R. at 279–80). Second, Ms. [REDACTED] was asleep and napping on her back in her bedroom when appellant performed this act. (R. at 279–80). Once Ms. [REDACTED] woke up and realized what was happening, she told appellant “[t]o stop, that didn’t feel good. She felt sick.” (R. at 280). Third, appellant knew or reasonably should have known that Ms. [REDACTED] was asleep because when appellant entered her bedroom, it would have been readily observable that she was asleep on her back. (R. at 279, 280).

Moreover, appellant also knew or should have known Ms. [REDACTED] did not want him in her room because (1) she told him as much and “made [appellant] sleep on the couch in the living area” and (2) the door to her bedroom was closed when appellant entered her room. (R. at 278–79). Finally, applying common sense and knowledge of the ways of the world, a reasonable fact finder could infer that appellant putting his fingers inside Ms. [REDACTED] vulva—a woman who he texted

“[y]ou’re my girlfriend” when he showed up at her house in Houston, Texas—was done with an intent to arouse or gratify his own sexual desire. (Def. Ex. S, p. 16).

Additionally, a portion of the text messages exchanged between Ms. [REDACTED] and appellant also corroborate her testimony. (Def. Ex. S, pp. 18–19, 23, 25). Ms. [REDACTED] testified that this sexual assault occurred a couple of days after appellant arrived. (R. at 279). Thus, at the very least, a fact finder could reasonably look to text messages exchanged on 22 and 23 November 2019 for further support for Ms. [REDACTED] testimony. Indeed, these text messages provide: (1) circumstantial evidence to support Ms. [REDACTED] testimony that when appellant sexually assaulted her she was “very sick,” “very weak,” and napping in her room; and (2) show that appellant knew about her illness due to pregnancy, how much she had been sleeping, and that he had specifically been told to stay out of her room. (Def. Ex. S, pp. 18–19, 23, 25). On 22 November 2019, the day appellant arrived at her house, Ms. [REDACTED] texted appellant “[d]on’t speak to me or touch me when I get there” and “I told you how I’ve been feeling and you come at me all retarded.” (Def. Ex. S, p. 18). On 23 November 2019, Ms. [REDACTED] texted him, “[c]an you go back sooner I’m not feeling well and I don’t want you around I just want to relax and sleep,” “[p]lease I’m not feeling good I just want to lay down and you of course make yourself at home,” and “I just want to be by myself.” (Def. Ex. S, pp. 19). That same day appellant responded by stating “I’ll sleep on the couch” and “I won’t [b]e in your room

simple as that.” (Def. Ex. S, pp. 23, 25). Clearly, these text messages not only corroborate Ms. [REDACTED] testimony, but also establish components of appellant’s knowledge that are relevant to whether he knew Ms. [REDACTED] was asleep at the time he sexually assaulted her.

c. Specification 3 of Charge I.

Regarding Specification 3 of Charge I, Ms. [REDACTED] credible testimony established beyond a reasonable doubt that appellant sexually assaulted Ms. [REDACTED] without her consent. First, appellant committed a sexual act by engaging in sexual intercourse with Ms. [REDACTED] (R. at 280–81). Appellant “finished” inside Ms. [REDACTED] vagina. (R. at 282). Second, although Ms. [REDACTED] had initially consented to sex with appellant out of feelings of “guilt,” (R. at 281), she unequivocally revoked that consent a couple of minutes into sex when she told appellant “no and that [she] didn’t want to do it anymore.” (R. at 282). In doing so, Ms. [REDACTED] clearly expressed her lack of consent. Article 120(g)(7)(A), UCMJ (stating “[a]n expression of lack of consent through words or conduct means there is no consent); *see also United States v. Wilson*, No. 201700098, 2018 CCA LEXIS 451, *10 (N.M. Ct. Crim. App. 20 Sep. 2018) (stating “it is axiomatic that a woman may revoke consent to sexual intercourse at any time—even immediately after initially consenting to it”).

However, appellant did not stop, but rather, he responded by “repeating . . . no, okay, no okay like if [Ms. [REDACTED] was joking.” (R. at 282). Under the

circumstances, no reasonable person would believe Ms. ■■■ was joking about her lack of consent. Ms. ■■■ was experiencing a difficult pregnancy in which she was often sick, weak, and throwing up. (R. at 278). Indeed, Ms. ■■■ described that during the sexual assault she was “too sick to move, so if [she] couldn’t obviously push [appellant] off. [She] couldn’t and [she] just kept repeating no.” (R. at 282).

In addition, appellant’s text messages provide essential context for the fact finder in evaluating appellant’s subjective understanding of consent. (Def. Ex. S, pp. 93-95). Appellant’s text messages strongly suggest that he believes it would be impossible to sexually assault someone you are in a relationship with. (Def. Ex. S, pp. 93–95). The definition of consent strictly bars such an interpretation. *See* Article 120(g)(7)(A), UCMJ (stating “[a] current or previous dating or social or sexual relationship by itself . . . does not constitute consent”). Appellant’s subjective beliefs regarding consent are absolutely relevant for a fact finder to consider and weigh in determining whether appellant may have mistakenly believed Ms. ■■■ consented.

Finally, Ms. ■■■ behavior after the assault provides further support that she did not consent. After the sexual assault, Ms. ■■■ told appellant she “didn’t want him there when [she] came back.” (R. at 282). In turn, appellant had a friend come pick him up. (R. at 282). Appellant argues it “seems unlikely that ■■■ would have allowed Appellant into her home in Houston if he had been assaulting

her.” (Appellant’s Br. 88). However, this argument completely glosses over the difficult dynamics of Ms. ■ being pregnant with appellant’s child and also the fact that she repeatedly told him to leave and that she did not want him there. (Def. Ex. S, pp. 7, 9–12, 19, 47, 50–51, 53, 62). Moreover, as discussed above, Ms. ■ is not required to justify her behavior as it is commonly accepted that victims may exhibit counterintuitive behavior. *See supra* p. 62.

d. Ms. ■ alleged motive to fabricate.

Appellant argues that he “can think of no more powerful motive for making a false allegation of sexual assault than revenge, and there is nothing ‘fanciful or ingenious about the notion that ■ lodged these allegations against Appellant because she was angry at him for not paying for an abortion that he clearly did not want her to get.” (Appellant’s Br. 90). A fact finder could reasonably conclude that the weight of the evidence discredited this motive to fabricate. First, appellant’s own text messages corroborate Ms. ■ testimony that he sexually assaulted her. (Def. Ex. S). Critically, appellant admits “[a]s to touching you and forcing you I’m sorry that’s now how I should behave towards you. I am truly sorry for that and I will make it up to you.” (Def. Ex. S, p. 62). Second, Ms. ■ testimony regarding Ms. ■ outcry to her in March 2019 predates this motive to fabricate as Ms. ■ was not pregnant at the time. (R. at 327, 350–51). Ms. ■ statements to Ms. ■ were admissible as prior consistent statements. *See*

Benchbook, para. 7-11-2 (stating prior consistent statements may be considered by the fact finder to refute the charge of improper motives and may be used as evidence of the truth of the matters expressed therein).

Moreover, the military judge was in the best position to assess Ms. [REDACTED] credibility, and an appellate court should hesitate to overturn his findings. *Stanley*, 43 M.J. at 674. *See also Davis*, 75 M.J. at 546 (noting the degree of deference this court affords the trial court for having seen and heard the witnesses will typically reflect the materiality of witness credibility to the case). This court should also credit Ms. [REDACTED] version of events and find “the evidence constitutes proof of each required element beyond a reasonable doubt.” *Washington*, 57 M.J. at 399.

2. Charge II and its two specifications are factually sufficient.

a. Specifications 1 and 2 of Charge II.

Regarding the first element of both Specifications 1 and 2, Ms. [REDACTED] credible testimony established that appellant committed a sexual act by penetrating Ms. [REDACTED] vagina with his penis. (R. at 149). Ms. [REDACTED] woke up to appellant’s “heavy breathing on [her] ear and thrusting” and his penis inside her vagina. (R. at 149). Ms. [REDACTED] also testified that she “felt a little sore” the morning after the sexual assault. (R. at 151). Based on this testimony alone, appellant’s argument that “the evidence is factually insufficient to prove that he and [REDACTED] even engaged in sexual intercourse that night” fails. (Appellant’s Br. 86). *See United States v. Rodriguez-*

Rivera, 63 M.J. 372, 383 (C.A.A.F. 2006) (discussing that “[t]he testimony of only one witness may be enough . . . so long as the [fact finder] find[s] that the witness’s testimony is relevant and is sufficiently credible”).

However, Ms. [REDACTED] testimony does not stand alone because SPC [REDACTED] testimony provided corroboration. Although appellant correctly points out that none of the government witnesses actually witnessed the sexual assault itself, (Appellant’s Br. 77), SPC [REDACTED] testimony provides circumstantial evidence that the fact finder could find supports that appellant committed a sexual act upon Ms. [REDACTED]. When SPC [REDACTED] returned to the hotel room, she saw appellant and Ms. [REDACTED] in the same cot, (R. at 186), with appellant only half on the cot, and his “pants were at his ankles.” (R. at 188). Also, SPC [REDACTED] testified that she could see Ms. [REDACTED] bra and the garment on the lower half of her body “was unbuttoned and pulled down a little bit.” (R. at 188). Specialist [REDACTED] also testified that she “didn’t trust” the fact that appellant was in same bed given “how drunk [Ms. [REDACTED] was.” (R. at 200). Specialist [REDACTED] had very little to drink that night, so a fact finder would have little reason to doubt her observations. (R. at 184–85). Using common sense and knowledge of human nature and ways of the world, a fact finder could reasonably view SPC [REDACTED] testimony as circumstantial evidence that appellant performed a sexual act on Ms. [REDACTED] given his state of undress, Ms. [REDACTED] state of undress, and appellant’s positioning near Ms. [REDACTED].

Regarding Specification 2 of Charge II, Ms. [REDACTED] credible testimony also established that she was asleep, unconscious, or otherwise unaware the sexual act was occurring. Importantly, evidence of Ms. [REDACTED] high level of intoxication is inextricably linked to this element because it shows why she was asleep or unconscious. Regarding her high level of intoxication, Ms. [REDACTED] testified to the following: (1) while at the bar, she felt “[d]izziness to the point where [she] couldn’t walk in a straight line” and she had difficulty walking in her “high heeled black boots,” (R. at 145); (2) while in the elevator at the hotel, Ms. [REDACTED] “mind was in and out of consciousness” and she leaned on appellant because she was not able to stand on her own, (R. at 147); (3) once in the hotel room, she “immediately blacked out and fell on a cot that was laying in front of the beds,” (R. at 147), and Ms. [REDACTED] slept on the cot because that was “where [she] landed first.” (R. at 148). This same testimony supports Ms. [REDACTED] lack of consent concerning Specification 1 of Charge I. *See United States v. Roe*, ARMY 20200144, 2022 CCA LEXIS 248, at *14 (Army Ct. Crim. App. 27 Apr. 22) (mem. op.) (stating “[b]y way of logic, if the government proves that a victim is asleep or unconscious and therefore legally incapable of consenting at the time of a sexual act, that is strong evidence that the victim did not, in fact, consent”). As acknowledged by appellant, several other witnesses corroborated Ms. [REDACTED] high level of intoxication. (Appellant’s Br. 84).

Indeed, SPC [REDACTED] SPC [REDACTED] SPC [REDACTED] and Mr. [REDACTED] all corroborated Ms. [REDACTED] testimony regarding her level of intoxication. *See supra* pp. 54–55.

The same facts described in the paragraph above also support why appellant knew or reasonably should have known that Ms. [REDACTED] was asleep, unconscious, or otherwise unaware the sexual act was occurring in relation to Specification 2 of Charge I. In addition, Mr. [REDACTED] testimony that appellant was “grabbing her arm saying he was going to take her back to a hotel room because she looked like she was really messed up and she needed to get some sleep” also provided evidence of appellant’s subjective understanding of Ms. [REDACTED] level of intoxication. (R. at 207).

Ms. [REDACTED] testimony also supported her lack of consent in relation to Specification 1 of Charge I. To that end, Ms. [REDACTED] testified that when she awoke and realized what was happening, she told appellant to stop, but he kept going. (R. at 150). “An expression of lack of consent through words or conduct means there is no consent.” Article 120(g)(8)(A), UCMJ.

Finally, the following actions and demeanor by Ms. [REDACTED] also provide support for a finding of guilt for both specifications: (1) Ms. [REDACTED] testimony that she felt “shocked, betrayed, [she] just didn’t believe it happened,” (R. at 152); (2) at some point after the sexual assault Ms. [REDACTED] saw appellant at a house party and asked the owner of the house “if he could please ask [appellant] to leave” (R. at 153); (3) Ms.

█ kicked appellant “in the nuts” after learning “he still had the audacity to start rumors and saying that it was consensual plus one of [her] best friends [Ms. █ that pissed [her] off, that set [her] off,” (R. at 169); (4) Ms. █ also confronted appellant on Instagram after which he blocked her on “every social media,” (R. at 155); and (5) Ms. █ demeanor when she reported appellant’s crime against her to SSG █ in the “summer-fall timeframe” of 2019. (R. at 221–22). Staff Sergeant █ testified that Ms. █ demeanor “seemed off and then at some point in time her voice just seemed really shaky,” and she was crying when she reported to him that she had been sexually assaulted by appellant. (R. at 221–22).

b. Alleged inconsistencies.

Appellant highlights several inconsistencies, all of which a fact finder could reasonably determine did not contradict Ms. █ testimony concerning the material elements of the charged offenses. First, appellant highlights the fact that many of the people who witnesses alleged were also present in San Antonio, Texas were not called as witnesses by the government. (Appellant’s Br. 73). While appellant states he “is not asking this Court to speculate about what these witnesses would have said had they been called to testify,” in effect that is exactly what he is asking this court to do. However, case law dictates that it would be improper to draw any negative inference given the fact that if any of these witnesses were pertinent, they would have been equally available to either party. *See United*

States v. Swoape, 21 M.J. 414, n.2, 416 (C.M.A. 1986) (explaining “[i]f it is peculiarly within the power of either the prosecution or the defense to produce a witness who could give material testimony on an issue in the case, failure to call that witness may give rise to an inference that his testimony would be unfavorable to that party. However, no such conclusion should be drawn by you with regard to a witness who is equally available to both parties, or where the witness’s testimony would be merely cumulative”).

Next, appellant argues the witness testimony is inconsistent regarding the following: (1) who was on the trip to San Antonio, Texas; (2) the sleeping arrangements and who was likely present in the room when the assault occurred; (3) what happened when SPC [REDACTED] returned to the hotel room; (4) how dark the hotel room was; and (5) who escorted Ms. [REDACTED] back to the hotel. (Appellant’s Br. 73–84). While many of these inconsistencies may exist, a fact finder could reasonably conclude these inconsistencies are the result of an “innocent mistake” as opposed to a “deliberate lie.” *See* Benchbook para. 7-7-1 (instructing that in weighing discrepancies between witnesses the fact finder should consider whether the discrepancies resulted from an “innocent mistake” or “deliberate lie”). The fact that the incident occurred approximately two years before trial likely had an impact on witnesses’ ability to recall these minor details. To that end, a fact finder could conclude these minor inconsistencies had no bearing on whether the elements of

the charged offenses were established beyond a reasonable doubt, especially considering the credible testimony from Ms. [REDACTED] about the sexual assault. *See King*, 78 M.J. at 221 (stating “‘reasonable doubt’ does not mean that the evidence must be free from any conflict”).

There are a few points of distinction regarding some of the inconsistencies raised by appellant. First, regarding sleeping arrangements, regardless of who was present in the room, the testimony at trial establish that only SPC [REDACTED] had knowledge concerning Ms. [REDACTED] and appellant in the hotel room. *See supra* p. 51–52. Second, appellant asserts that had Ms. [REDACTED] stood up or moved to the other bed as she testified, SPC [REDACTED] would certainly have seen it “given that she claimed she could see well enough to see [REDACTED] exposed chest and the color of Appellant’s underwear.” (Appellant’s Br. 77–79). However, conspicuously absent from appellant’s discussion is SPC [REDACTED] testimony that “[w]hen [she] arrived to the room, it was dark and there w[ere] no lights on” and it was “dark enough that [she] couldn’t see anything when [she] walked in.” (R. at 356). Finally, appellant also launches a broader attack on inconsistencies in witness testimony regarding the room’s darkness. (Appellant’s Br. 80–81). Specialist’s [REDACTED] testimony demonstrates that descriptions of the darkness of the room could vary based on what point in time the witness was asked to describe: the level of darkness they observed upon opening the door to the room versus once they were already in the

room. When SPC [REDACTED] first arrived at the room, it was dark and she could not see anything when she walked in. (R. at 356). However, when she was asked to describe what she saw while in the room, she answered it was “a little dark, but the curtains were open,” which allowed her to see “[appellant] and [Ms. [REDACTED]] sharing a cot.” (R. at 186). Taken in full context, a reasonable fact finder “using common sense and knowledge of human nature” could properly weigh all of the witness testimony and conclude that the government established every element of the offense beyond a reasonable doubt. R.C.M. 918(c) discussion; *See* Benchbook, para. 2-5-12 (“the fact finder may properly believe one witness and disbelieve another or several other witnesses whose testimony conflicts with the one. The final determination as to the weight or significance of the evidence and credibility of the witnesses rests upon the fact finder.”)

In cases such as this one, where “witness credibility plays a critical role in the outcome of trial this Court should hesitate to second-guess the trial court’s findings.” *Stanley*, 43 M.J. at 674. Here, the military judge was in the best position to assess the credibility of all witnesses, and an appellate court should hesitate to overturn his findings. Based on the ample evidence of appellant’s guilt, this court should find “the evidence constitutes proof of each required element beyond a reasonable doubt.” *Washington*, 57 M.J. at 399.

c. Ms. [REDACTED] alleged motives to fabricate.

Appellant argues that Ms. [REDACTED] has multiple motives to fabricate: “she colluded with [REDACTED] and [REDACTED] to ‘help’ in her allegations against Appellant; that she was angry with Appellant for spreading ugly rumors about having had sex with her and her friend [REDACTED] and she faced potential administrative and punitive sanctions for having assaulted Appellant herself.” (Appellant’s Br. 69–73).

First, appellant poses the question: “If [REDACTED] testimony about not telling anyone about the rape allegation until after [REDACTED] contacted her is true, how did [REDACTED] know to contact [REDACTED] in the first place?” (Appellant’s Br. 71). Appellant then offers a false dichotomy stating Ms. [REDACTED] either “testified falsely that she had not told anyone else about the allegation until she told [SSG [REDACTED] or the allegation itself is false, made with the intent to ‘help [REDACTED] with the rape allegation, as she told CID.” (Appellant’s Br. 71). Significantly, there was no evidence introduced at trial that cuts against Ms. [REDACTED] testimony that she did not tell anyone about the sexual assault until she reported. Also, it is relevant for consideration that Ms. [REDACTED] ex-boyfriend was friends with appellant, (R. at 266), Ms. [REDACTED] testified that appellant spread rumors to others about having consensual sex with her, (R. at 166), and SSG [REDACTED] testified that he was informed by soldiers about Ms. [REDACTED] attacking appellant. (R. at 224–25, 230). Given these facts, clearly there are

numerous other potential explanations for how Ms. ■ knew to get in touch with Ms. ■

Second, appellant argues that another “extraordinarily sinister reason for making the report” existed because Ms. ■ was angry with appellant for spreading “ugly rumors about having had sex with her and her friend ■ (Appellant’s Br. 71–72). However, logic dictates that if Ms. ■ had truly wished to retaliate against appellant for these rumors, then she would have been much more likely to do it when she heard about the rumors as opposed to a year later. The more likely explanation as to why Ms. ■ helped Ms. ■ when it appeared from the record they had never met (Appellant’s Br. 71)—is exactly what she testified to: she “felt like all of that could have been avoided if—if [she] had reported when it first happened to [her].” (R. at 154). Thus, once Ms. ■ learned she was not the only one and that her assault was not an isolated event, she wanted to protect others.

Finally, appellant argues Ms. ■ had a motive to fabricate because she faced potential administrative and punitive sanctions for having assaulted appellant herself. (Appellant’s Br. 72–73). This motive to fabricate is highly unlikely based on the evidence elicited at trial. First, the command approached Ms. ■ after the incident, and she did not report the sexual assault. (R. at 170). If she was in fact concerned about facing adverse action then that would have been the logical time to report, not a year later. (Appellant’s Br. 73). In anticipation of this

counterargument, appellant “submits that the reason Ms. ■■■ did not tell the command about the sexual assault allegation after she assaulted appellant is because there was nothing to tell.” (Appellant’s Br. 73). However, as discussed above, Ms. ■■■ explained why she came forward. A reasonable fact finder could conclude her stated reason was a logical and credible reason for reporting: to help prevent another innocent woman from being sexually assaulted by appellant. (R. at 154, 169).

Moreover, the independent corroboration of Ms. ■■■ high level of intoxication in this case cuts against all motives to fabricate. Numerous witnesses established Ms. ■■■ high level of intoxication. *See supra* pp. 53–54. It is fanciful to believe that once Ms. ■■■ contacted Ms. ■■■ “that ■■■ realized that she could both further retaliate against Appellant for the rumors and avoid any trouble as a result of her assaulting Appellant by claiming that she, too, was the victim of a sexual assault.” (Appellant’s Br. 73). Rather, Ms. ■■■ reported the sexual assault because she was in fact sexually assaulted by appellant.

B. The propensity evidence under Mil. R. Evid. 413 further supported appellant’s guilty verdict.

Although this court can be convinced of appellant’s guilt beyond a reasonable doubt without using the propensity evidence the government admitted under Mil. R. Evid. 413, Ms. ■■■ testimony about appellant’s uncharged sexual

assault against her further solidifies the findings of guilt in this case. Ms. [REDACTED] testimony showed that appellant had the propensity to sexually assault women who are asleep, intoxicated, or both. Ms. [REDACTED] testified that a week before the San Antonio, Texas trip she went out to a club with appellant and others. (R. at 237–39). While at the club, Ms. [REDACTED] drank multiple shots to the point where she could not remember leaving the club. (R. at 240–42). The next thing she remembered was “waking up hanging off the bed” in appellant’s room. (R. at 243). Appellant was on top of her, and he was “penetrating” her. (R. at 243). Once she awoke, Ms. [REDACTED] could not move or get away due to her level of intoxication. (R. at 244). She did not consent to appellant penetrating her that night and once she woke up she did not want him to continue. (R. at 245). While this evidence was unnecessary to prove appellant’s guilt beyond a reasonable doubt, the similarities—specifically between Ms. [REDACTED] and Ms. [REDACTED] accounts—make his guilt even more apparent.

Appellant argues “the content of [REDACTED] interview with CID suggests that this incident in Appellant’s room never happened, [REDACTED] later denials notwithstanding.” (Appellant’s Br. 91). While appellant’s argument may go to the weight of the evidence, it does not change the character of its admissibility under Mil. R. Evid. 413. Multiple witnesses established Ms. [REDACTED] high level of intoxication, and Ms.

█ provided credible testimony about waking up to appellant having sex with her without her consent. (R. at 253–60, 243–45).

C. Even if the military judge erred in admitting Ms. █ testimony as propensity evidence under Mil. R. Evid. 413, appellant suffered no material prejudice to a substantial right.

“A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.” Article 59(a), UCMJ. An erroneous admission of evidence under Mil. R. Evid. 413 is a nonconstitutional error. *Solomon*, 72 M.J. at 182–83 (citing *Berry*, 61 M.J. at 97). “For [preserved] nonconstitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings.” *United States v. Clark*, 79 M.J. 449, 455 (C.A.A.F. 2020) (quoting *United States v. Kohlbeck*, 78 M.J. 326, 333 (C.A.A.F. 2019)). Reviewing courts consider four factors in evaluating whether the erroneous admission of government evidence is harmless, weighing: (1) the strength of the government’s case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. *Berry*, 61 M.J. at 98 (citing *McDonald*, 59 M.J. at 430). The government addresses each factor in turn and groups factors three and four together for its analysis.

1. The government's case was strong.

As discussed above, the government's case was strong due to the credible testimony of both named victims, Ms. [REDACTED] and Ms. [REDACTED] as well as the evidence corroborating each of their testimonies.

Regarding the offenses relating to Ms. [REDACTED] Ms. [REDACTED] testimony and appellant's own text messages corroborated that he sexually assaulted her. In these text messages, appellant exhibited consciousness of guilt by repeatedly saying "I'm sorry" in response to Ms. [REDACTED] accusations. (Def. Ex. S, pp. 56–59).

Furthermore, concerning appellant forcing himself on Ms. [REDACTED] he admitted: "As to touching you and forcing you I'm sorry that's now how I should behave towards you. I am truly sorry for that and I will make it up to you." (Def. Ex. S, p. 62).

Finally, these messages also expose appellant's apparent belief that it's impossible to sexually assault one's girlfriend. (Def. Ex. S, pp. 75–79).

Regarding the offenses relating to Ms. [REDACTED] several witnesses corroborated her high level of intoxication, including Ms. [REDACTED] SPC [REDACTED] SPC [REDACTED] and Mr. [REDACTED] (R. at 176, 180, 184–85, 206–07). Evidence of Ms. [REDACTED] high level of intoxication supported finding appellant guilty under both charging methods. Furthermore, SPC [REDACTED] testimony provided strong circumstantial evidence that appellant had committed a sexual act when SPC [REDACTED] saw appellant sharing a cot with Ms. [REDACTED]

with his pants “at his ankles” and Ms. [REDACTED] bra exposed and the garment on the lower half of her body “was unbuttoned and pulled down a little bit.” (R. at 188).

2. The defense’s case was weak.

Defense’s theory of the case at trial and on appeal revolved around the alleged motives to fabricate for both Ms. [REDACTED] and Ms. [REDACTED]. As discussed above, neither the alleged motives to fabricate nor the alleged inconsistencies undercut the overwhelming evidence of appellant’s guilt. *See supra* pp. 66–67, 71–78.

Regarding the offenses involving Ms. [REDACTED] defense touted a theory of “abortion extortion.” (R. at 372). However, nothing in the text messages indicates these allegations are false. (Def. Ex. S). Ms. [REDACTED] threatened to report something that actually happened. Also, the sexual assaults are corroborated by appellant’s own text messages and by Ms. [REDACTED] testimony of an early outcry that predates any motive to fabricate that defense lodges against her. (R. at 327, 350–51).

Regarding the offenses involving Ms. [REDACTED] the independent corroboration cuts against any motive to fabricate. Ms. [REDACTED] high level of intoxication was well-established by numerous witnesses. Also, a fact finder could conclude the alleged inconsistencies were minor and had no bearing on whether the elements of the charged offenses were established beyond a reasonable doubt.

3. The evidence did not impact the findings of guilt.

“In examining [the materiality and quality of the evidence in question], we essentially are assessing how much the erroneously admitted evidence may have affected the court-martial.” *Washington*, 80 M.J. at 111. While this evidence was helpful to the government’s case, it was not essential.

One of the factors courts look at in assessing materiality and quality is the extent to which the government referred to the evidence in argument. *Id.* at 111. Here, the government’s primary use of this evidence was to support the offenses relating to Ms. ■■■ due to the extensive similarities between Ms. ■■■ and Ms. ■■■ as victims and between the sexual assaults committed against them by the accused. (R. at 130, 368). Unlike Ms. ■■■ and Ms. ■■■ Ms. ■■■ was in a romantic relationship with appellant. Moreover, other factors likely affected the weight the military judge gave the evidence: (1) Ms. ■■■ did not report the sexual assault until twenty-two months after it occurred, and (2) she admitted that she was moaning and kind of enjoyed the sex once she was awake.

Finally, “this was a military judge alone trial.” *United States v. Hamilton*, 78 M.J. 335, 343 (C.A.A.F. 2019) (finding the quality of improperly admitted evidence relatively low in part because of the judge alone forum and the military judge’s reiteration that he would give evidence only the weight it deserves). Based on the relative strength of the parties’ cases, even if the military judge erred, the

admission of evidence relating to Ms. [REDACTED] sexual assault under Mil. R. Evid. 413 did not substantially influence his findings. Thus, even assuming error, the government satisfies its burden of demonstrating the admission of this evidence did not substantially influence the military judge's findings.

Conclusion

WHEREFORE, the government respectfully requests this honorable court affirm the findings and sentence.



CYNTHIA A. HUNTER
CPT, JA
Appellate Attorney, Government
Appellate Division



MARK A. ROBINSON
MAJ, JA
Branch Chief, Government
Appellate Division



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

APPENDIX



United States v. Albarda

United States Air Force Court of Criminal Appeals

July 7, 2021, Decided

No. ACM 39734 (f rev)

Reporter

2021 CCA LEXIS 347 *; 2021 WL 2843821

UNITED STATES, Appellee v. Danber S. ALBARDA, Senior Airman (E-4), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Upon Further Review. Military Judge: W. Shane Cohen. Approved sentence: Dishonorable discharge, confinement for 6 years, and reduction to E-1. Sentence adjudged on 8 March 2019 by GCM convened at Fort George G. Meade, Maryland.

[United States v. Albarda, 2021 CCA LEXIS 75, 2021 WL 682160 \(A.F.C.C.A., Feb. 22, 2021\)](#)

Counsel: For Appellant: Major Alexander A. Navarro, USAF.

For Appellee: Major Jessica L. Delaney, USAF; Mary Ellen Payne, Esquire.

Judges: Before MINK, KEY, and ANNEXSTAD, Appellate Military Judges.

Opinion

PER CURIAM:

This case was originally submitted for our review with Appellant alleging multiple assignments of error. On 22 February 2021, we issued our opinion in Appellant's case and concluded that the approved findings and

sentence were correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, we affirmed the findings and sentence. United States v. Albarda, No. ACM 39734, 2021 CCA LEXIS 75, at *32 (A.F. Ct. Crim. App. 22 Feb. 2021) (unpub. op.). However, we also concluded that both the action and the court-martial order erroneously failed to report the deferral of the reduction in grade. Therefore, we returned the record of trial to the Judge Advocate General for remand to the convening authority to withdraw the incomplete action, substitute a corrected [*2] action, and issue a corrected court-martial order. Further, we ordered that the record of trial be returned to this court for completion of appellate review under *Article 66, UCMJ. Id.*

On 12 March 2021, both a corrected action and court-martial order were completed by the convening authority. Subsequently, the record of trial was returned to this court. We have reviewed the convening authority's corrected action and court-martial order. We find that the corrections comply with our order. On 17 May 2021, Appellant filed a brief with this court and raised one additional issue for our consideration: whether Appellant's court-martial conviction, which had no unanimity requirement, is invalid in light of the United States Supreme Court's decision in Ramos v. Louisiana, 140 S. Ct. 1390, 206 L. Ed. 2d 583

(2020), that the [Sixth Amendment](#)¹ requires unanimous verdicts for federal and state criminal trials.² We have carefully considered Appellant's contention and find it does not require further discussion or warrant relief. See [United States v. Matias, 25 M.J. 356, 361 \(C.M.A. 1987\)](#).³

Upon further review, the approved findings and sentence are correct in law and fact, and no error materially prejudicial to Appellant's substantial rights occurred. [Articles 59\(a\)](#) and 66(c), UCMJ, [10 U.S.C. §§ 859\(a\)](#), 866(c).

Accordingly, the findings and sentence are **AFFIRMED**.

End of Document

¹ U.S. Const. amend. VI.

² Appellant raised this issue pursuant to [United States v. Grostefon, 12 M.J. 431 \(C.M.A. 1982\)](#).

³ "[T]here is no [Sixth Amendment](#) right to trial by jury in courts-martial." [United States v. Easton, 71 M.J. 168, 175 \(C.A.A.F. 2012\)](#) (citations omitted); see also [Ex parte Quirin, 317 U.S. 1, 45, 63 S. Ct. 2, 87 L. Ed. 3 \(1942\)](#); [Ex parte Milligan, 71 U.S. 2, 123, 18 L. Ed. 281 \(1866\)](#); [United States v. McClain, 22 M.J. 124, 130 \(C.M.A. 1986\)](#). Therefore, there can be no requirement for a unanimous jury verdict at courts-martial under that amendment.

United States v. Anderson

United States Air Force Court of Criminal Appeals

March 25, 2022, Decided

No. ACM 39969

Reporter

2022 CCA LEXIS 181 *; 2022 WL 884314

UNITED STATES, Appellee v. Anthony A.
ANDERSON, Master Sergeant (E-7), U.S. Air
Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed
by [United States v. Anderson, 2022 CAAF
LEXIS 367, 2022 WL 2191244 \(C.A.A.F., May
17, 2022\)](#)

Motion granted by [United States v. Anderson,
2022 CAAF LEXIS 376 \(C.A.A.F., May 19,
2022\)](#)

Review granted by, in part [United States v.
Anderson, 2022 CAAF LEXIS 529, 2022 WL
3219303 \(C.A.A.F., July 25, 2022\)](#)

Motion granted by [United States v. Anderson,
2022 CAAF LEXIS 649 \(C.A.A.F., Sept. 13,
2022\)](#)

Motion granted by [United States v. Anderson,
2022 CAAF LEXIS 712 \(C.A.A.F., Oct. 5,
2022\)](#)

Prior History: [*1] Appeal from the United
States Air Force Trial Judiciary. Military Judge:
Willie J. Babor. Sentence: Sentence adjudged
3 June 2020 by GCM convened at Ramstein
Air Base, Germany. Sentence entered by
military judge on 21 August 2020:
Dishonorable discharge, confinement for 12
months, and reduction to E-1.

Case Summary

Overview

HOLDINGS: [1]-The evidence was legally
sufficient to support appellant's convictions for
attempted sexual abuse of a child on divers
occasions because the Government proved
appellant sent a series of sexually provocative
messages to an individual who he believed to
be a 13-year-old child and appellant sent the
individual two different sexually explicit photos
of himself. Additionally, the evidence
supported finding beyond a reasonable doubt
that the criminal design did not originate with
the Government, and even if it had, that
appellant was predisposed to commit the
offenses.

Outcome

Findings and sentence affirmed.

Counsel: For Appellant: Major Jenna M.
Arroyo, USAF; William E. Cassara, Esquire.

For Appellee: Lieutenant Colonel Matthew J.
Neil, USAF; Captain Cortland T. Bobczynski,
USAF; Mary Ellen Payne, Esquire.

Judges: Before JOHNSON, RICHARDSON,
and ANNEXSTAD, Appellate Military Judges.
Chief Judge JOHNSON delivered the opinion
of the court, in which Judge RICHARDSON
and Judge ANNEXSTAD joined.

Opinion by: JOHNSON

Opinion

JOHNSON, Chief Judge:

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of two specifications of attempted sexual abuse of a child on divers occasions, in violation of [Article 80](#), Uniform Code of Military Justice (UCMJ), [10 U.S.C. § 880](#).¹ Appellant elected to be sentenced by the military judge, who sentenced Appellant to a dishonorable discharge, 12 months of confinement for each specification to run concurrently, and reduction to the grade of E-1. The convening authority took "no action" [*2] on the sentence; however, he deferred the automatic forfeiture of pay and the adjudged reduction in grade until the entry of judgment, and waived the automatic forfeitures for a period of six months for the benefit of Appellant's spouse and dependent child. See [Articles 57\(b\)\(1\)](#) and [58b\(b\), UCMJ, 10 U.S.C. §§ 857\(b\)\(1\), 858b\(b\)](#). The military judge entered the judgment of the court-martial.

Appellant raises six issues for our consideration on appeal: (1) whether the evidence is legally and factually sufficient to support his convictions; (2) whether the definition of "lewd act" as it relates to indecent conduct prohibited by Article 120b, UCMJ, [10 U.S.C. § 920b](#), impermissibly lowers the Government's burden of proof; (3) whether the

military judge abused his discretion by admitting evidence under Mil. R. Evid. 404(b); (4) whether the military judge erroneously admitted the testimony of the Government's digital forensic expert witness in violation of the [Confrontation Clause of the Sixth Amendment](#);² (5) whether Appellant was denied his right to a unanimous verdict in violation of the [Sixth Amendment](#), the [Fifth Amendment's Due Process Clause](#), and the [Fifth Amendment](#) right to equal protection; and (6) whether Appellant is entitled to appropriate relief due to the convening authority's failure to take action on the sentence. [*3] We find no error materially prejudicial to Appellant's substantial rights, and we affirm the findings and sentence.

I. BACKGROUND

In the fall of 2018, Special Agent (SA) MN, an Air Force Office of Special Investigations (AFOSI) agent stationed in Germany, created the fictitious persona "Sara" for an undercover operation using Whisper, an Internet application that permitted users to post and send photos and messages anonymously. "Sara," as created by SA MN, was a 13-year-old female who lived on Ramstein Air Base (AB), Germany, with her single mother, an Air Force member.

Employing the user name "Sara_2005," on 1 December 2018, SA MN as "Sara" posted the following message on Whisper: "Moving sucks when u dnt have a b/f. #maninuniform #new2ramstein."⁴ On 11 December 2018, "Sara" received the following message from

¹ References to Article 80, UCMJ, in relation to Specification 1 of the Charge, which alleged Appellant attempted to commit a lewd act on divers occasions between on or about 11 December 2018 and on or about 13 February 2019 by communicating indecent language, are to the *Manual for Courts-Martial, United States* (2016 ed.). Unless otherwise indicated, all other references to the UCMJ, Rules for Courts-Martial (R.C.M.), and Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2019 ed.) (MCM).

² [U.S. Const. amend. VI](#).

³ [U.S. Const. amend. V](#).

⁴ The Whisper messages quoted in this opinion are reproduced verbatim without attempting to correct or identify abbreviations or errors in spelling and grammar.

Appellant employing the user name "ar_tbone": "Hey Sara, let's chat and possibly catch a movie is things go well." "Sara" responded on the same day, and Appellant and "Sara" continued to exchange messages on Whisper. Appellant quickly revealed that he was 34 years old and stationed at Ramstein AB; in response to a question from Appellant, "Sara" told him that she was 13 years old. [*4] Rather than ending the exchange at that point, Appellant's next message asked "Sara" for a photograph of herself. When "Sara" replied "Lol, no!" Appellant asked her why she was using Whisper, and told her he used it "[f]or entertainment, to talk to chicks when they don't know anything about me."

On the same day he initially contacted "Sara," Appellant suggested that they "play a game" and sent her an image of a list of 46 questions. Some of the questions were innocuous, such as "age," "height," "favorite color," and "favorite movie;" however, a number of them were sexual in nature, for example, "When was the last time you had sex" and "What's your favorite sex position." Appellant explained to "Sara" that the "game" involved picking a question that the other person was required to answer. Through the game, Appellant asked "Sara" her height, what kind of underwear she was wearing, her relationship status, and whether she was a virgin.

As the message exchange continued, Appellant sent "Sara" a clothed head-and-shoulders photo of himself seated in a car. "Sara" replied, "U look so mature." In return, "Sara" sent Appellant a clothed photo of herself which was in reality an age-regressed photo [*5] of a 25-year-old woman. In addition to being digitally modified to make "Sara" appear younger, the photo had a filter applied to give "Sara's" face two ears and a nose similar to a teddy bear. After receiving "Sara's" photo, Appellant replied, "It's really you? Your

super cute," and later, "Well it's what I really think [] You look more mature."

Later in their exchanges, Appellant asked "Sara" several additional sexually-oriented questions. Among other questions and comments, Appellant asked "Sara" whether she had kissed a boy, and told her, "French kissing is fun." He asked whether "Sara" masturbated and whether it felt "good" when she did. Appellant sent "Sara" a chart of 21 cartoon-style images of women with bare breasts of different shapes, and he asked "Sara," "Which one are you?" He also asked "Sara" if she let her supposed ex-boyfriend touch her breasts.

During their communications, Appellant revealed that he was in the Air Force and worked in aircraft maintenance. He further revealed that he was married. After "Sara" agreed with Appellant that "Sara's" mother would be angry if she knew about their Whisper conversations, Appellant proposed he and "Sara" "both will promise to [*6] keep it a secret."

On 18 December 2018, after a week of messages, "Sara" initiated the following exchange:

["Sara:"] Hey, so this is real hard 4 me 2 say but idk if we shuld talk n e more. U seem real nice an all but I'm lookin 4 a b/f 2 go 2 movies w/ an stuff. An I no ur weirded out cuz I'm 13

[Appellant:] Sorry I was asleep. [] If that's what you want to do that's fine. [] I just figured we could talk till you got a bf then we can stop. How about that?

["Sara:"] I meen, I guess that's ok. I jus kind of want a bf 2 go 2 movies an stuff w/

["Sara:"] And I meen I no u wuldnt want 2 date me cuz I'm 13

[Appellant:] Yea I know you want to find someone to go to the movies with. [] We can talk but I can get into a lot of trouble

for hanging out with you. Espieccally in public

The exchanges continued, and at a later point Appellant suggested they might be able to meet in person sometime in the future. Appellant also repeatedly requested additional photos of "Sara." On 20 January 2019, Appellant sent "Sara" a photo of himself taken in a mirror with his face obscured, wearing only underwear through which the outline of his penis was visible. Appellant subsequently told "Sara," "I'd love to see [*7] you the same way too." "Sara" responded, "Like w/ my shirt off?" to which Appellant replied, "Sure but not naked though." "Sara" told Appellant she would not take her shirt off, but would send him another photo. "Sara" re-sent Appellant the same age-regressed and filtered photo she sent before, and then sent him a different fully clothed age-regressed photo of the same woman holding a cat. Appellant asked "Sara" if she wanted another photo of him, to which she replied "Sure." Appellant then sent "Sara" another photo similar to his previous one, wearing only underwear and with the shape of his penis clearly visible through the fabric.

Appellant subsequently wrote, "I'd like to show you more but then I could go to jail lol." When "Sara" asked what he meant, Appellant responded, "Cuz your underage and if anyone finds out I can be in trouble [] For showing you my naked pics [] Or if you show me anything naked too." However, Appellant continued to ask for more photos of "Sara," including requests to see what was "under [her] sweater" and of "Sara" wearing her bra. After "Sara" expressed concern that Appellant might be "a cop," at her request Appellant sent her a photo of his face next to [*8] a piece of paper with "Hi Sara" written on it.

SA MN was able to identify Appellant by showing his photograph to the first sergeants of the maintenance squadrons at Ramstein

AB. The message exchanges on Whisper continued until 13 February 2019, when AFOSI agents apprehended Appellant at his duty location. The AFOSI seized Appellant's phone, and subsequent forensic analysis recovered the messages and photos Appellant had exchanged with "Sara" on Whisper.

The AFOSI recovered additional relevant information from Appellant's phone that was subsequently admitted as evidence in his trial. On 10 December 2018, the day before he first contacted "Sara," Appellant viewed an Internet article entitled "13 popular new apps teens are using," which described Whisper as an application where users "post random or deeply private thoughts" which "are often sexual," and "also has a 'Meet Up' section." In addition, the AFOSI discovered that on 11 and 12 February 2019, Appellant contacted and exchanged Whisper messages with a user known as "Kittycat" who had posted the message, "Who goes to Ramstein High School?" Appellant asked "Kittycat" if she was "into guys older than [her]." After "Kittycat" told Appellant [*9] she was 15 years old, Appellant continued sending her messages, exchanged clothed photos with her, sent her the same image with 46 questions that he had sent to "Sara," and suggested they play the same "game." When "Kittycat" indicated she was not interested in the game because she had a boyfriend, Appellant told her "It's ok" because her boyfriend "won't know." The AFOSI subsequently identified "Kittycat" as an actual 15-year-old female high school student at Ramstein AB.

Appellant was charged with two specifications of attempted sexual abuse of a child with regard to his communication with "Sara." He was not charged in relation to his communication with "Kittycat."

II. DISCUSSION

A. Legal and Factual Sufficiency

1. Law

"We review issues of legal and factual sufficiency de novo." [*United States v. Knarr*, 80 M.J. 522, 528 \(A.F. Ct. Crim. App. 2020\)](#) (citation omitted), *rev. denied*, 80 M.J. 348 (C.A.A.F. 2020). "Our assessment of legal and factual sufficiency is limited to evidence produced at trial." *Id.* (citing *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993)).

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [*United States v. Robinson*, 77 M.J. 294, 297-98 \(C.A.A.F. 2018\)](#) (quoting [*United States v. Rosario*, 76 M.J. 114, 117 \(C.A.A.F. 2017\)](#)). "[T]he term 'reasonable doubt' [*10] does not mean that the evidence must be free from any conflict" [*United States v. King*, 78 M.J. 218, 221 \(C.A.A.F. 2019\)](#) (citation omitted). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." [*United States v. Barner*, 56 M.J. 131, 134 \(C.A.A.F. 2001\)](#) (citations omitted). Thus, the "standard for legal sufficiency involves a very low threshold to sustain a conviction." [*King*, 78 M.J. at 221](#) (internal quotation marks and citation omitted).

"The test for factual sufficiency is 'whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt.'" [*Knarr*, 80 M.J. at 528](#) (alterations in original) (quoting [*United States v. Turner*, 25 M.J. 324, 325 \(C.M.A. 1987\)](#)). "In

conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" [*United States v. Wheeler*, 76 M.J. 564, 568 \(A.F. Ct. Crim. App. 2017\)](#) (alteration in original) (quoting [*United States v. Washington*, 57 M.J. 394, 399 \(C.A.A.F. 2002\)](#)), *aff'd*, [*77 M.J. 289 \(C.A.A.F. 2018\)*](#).

In order to find Appellant guilty of attempted sexual abuse of a child in violation of Article 80, UCMJ, as alleged in Specification 1 of the Charge, the court [*11] members were required to find the following beyond a reasonable doubt: (1) that on divers occasions between on or about 11 December 2018 and on or about 13 February 2019, in or near Germany, Appellant did a certain overt act, that is, intentionally communicated indecent language to "Sara" via communication technology, with the intent to gratify his sexual desires; (2) that the act was done with the specific intent to commit a certain offense under the UCMJ, specifically, sexual abuse of a child in violation of Article 120b, UCMJ; (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to effect the commission of the intended offense. See *Manual for Courts-Martial, United States* (2016 ed.) (2016 MCM), pt. IV, ¶ 4.b. The attempted offense, sexual abuse of a child in violation of Article 120b, UCMJ, [*10 U.S.C. § 920b \(2016 MCM\)*](#), required the commission of a "lewd act" on a child under the age of 16 years. See 2016 MCM, pt. IV, ¶ 45.a.(c). In this context, a "lewd act" included, *inter alia*, "intentionally communicating indecent language to a child by any means, including via any communication technology, with an intent to . . . arouse or gratify the sexual desire of any person." 2016

MCM, pt. IV, ¶ 45b.a.(h)(5)(C). "'Indecent' language is that which is grossly [*12] offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts." 2016 *MCM*, pt. IV, ¶ 89.c.

In order to find Appellant guilty of attempted sexual abuse of a child as alleged in Specification 2 of the Charge, the court members were required to find the following beyond a reasonable doubt: (1) that on divers occasions between on or about 20 January 2019 and on or about 22 January 2019, in or near Germany, Appellant did a certain overt act, that is, intentionally displayed his genitalia through his clothing in the presence of "Sara" via communications technology; (2) that the act was done with the specific intent to commit a certain offense under the UCMJ, specifically sexual abuse of a child in violation of Article 120b, UCMJ; (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to effect the commission of the intended offense. See *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 4.b. As with Specification 1, sexual abuse of a child in violation of [*13] Article 120b, UCMJ, [10 U.S.C. § 920b](#), required the commission of a "lewd act" on a child under the age of 16 years. See *MCM*, pt. IV, ¶ 62.a(c). For purposes of Specification 2, the relevant definition of a "lewd act" included, *inter alia*,

any indecent conduct, intentionally done with or in the presence of a child, including via any communication technology, that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

MCM, pt. IV, ¶ 62.a.(h)(5)(D).

Rule for Courts-Martial (R.C.M.) 916(g) states: "It is a defense that the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense." Applying what has been called the "subjective" test for entrapment, the defense has the initial burden of showing some evidence that an agent of the Government originated the suggestion to commit the crime. [United States v. Whittle, 34 M.J. 206, 208 \(C.M.A. 1992\)](#).⁵ Once raised, "the burden then shifts to the Government to prove beyond a reasonable doubt that the criminal design did not originate with the Government or that the accused had a predisposition to commit the offense." *Id.* (citations omitted). [*14] When a person accepts a criminal offer without an extraordinary inducement to do so, he demonstrates a predisposition to commit the crime in question. *Id.* (citations omitted). "Inducement" means more than merely providing the means or opportunity to commit a crime; the Government's conduct must "create[] a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense." [United States v. Howell, 36 M.J. 354, 359 \(C.M.A. 1993\)](#) (internal quotation marks and citations omitted).

2. Analysis

Appellant contends the evidence is legally and factually insufficient to support his conviction of

⁵ In addition to the "subjective" test for entrapment, military appellate courts have recognized an "objective" test whereby a court may find the Government's conduct so outrageous or shocking to the judicial conscience that it violates an accused's right to due process under the [Fifth Amendment](#), and thereby constitutes entrapment as a matter of law. [United States v. Berkheimer, 72 M.J. 676, 679-80 \(A.F. Ct. Crim. App. 2013\)](#). Appellant does not contend, and we do not find, the facts of the instant case implicate "objective" entrapment.

either Specification 1 or Specification 2 of the Charge. We disagree. The Government introduced convincing evidence for each specification.

a. Sufficiency of the Evidence Generally

With regard to Specification 1, the Government proved Appellant sent a series of sexually provocative messages to "Sara," who he believed to be a 13-year-old child. Although the specification did not recite the allegedly indecent language from Appellant's messages, the military judge's instructions provided to the court members the particular language upon which the specification was based.⁶ That language is directly supported by the messages exchanged [*15] between Appellant and SA MN as "Sara," which were also recovered from Appellant's phone. There is no question as to Appellant's identity as Whisper user "ar_t-bone." A reasonable factfinder could conclude that, under the circumstances, Appellant's messages to someone he believed to be a 13-year-old girl were indecent and communicated with the intent to gratify his sexual desires.

With regard to Specification 2, the Government proved Appellant sent "Sara" two different

photos of himself displaying his penis through his underwear. Again, there is no question about the identity of Appellant as the sender. In addition, the Government provided ample proof that the photos Appellant sent were of himself. Although Appellant's face is [*16] not visible in the photos, Appellant told "Sara" the images were of him. In addition, the visible skin tone generally matches Appellant's, and a tattoo on one arm partially visible in both photos matches a distinctive tattoo on Appellant's arm in a photo AFOSI agents took and that the Government entered into evidence. Furthermore, the distinctive coloration and bathroom furnishings visible behind the figure in the photos matches those photographed in Appellant's residence. Although the penis is not exposed, its shape is discernible under the clothing and prominent in the photo. A reasonable factfinder could conclude Appellant's conduct in sending such images to someone he believed to be a 13-year-old girl was indecent in that it "amount[ed] to a form of immorality relating to sexual impurity which [was] grossly vulgar, obscene, and repugnant to common propriety, and tend[ed] to excite sexual desire or deprave morals with respect to sexual relations." See *MCM*, pt. IV, ¶ 62.a.(h)(5).

With regard to each of the specifications, a reasonable fact-finder could conclude beyond a reasonable doubt Appellant committed the charged overt acts, beyond mere preparation, with the specific intent to commit the offense of sexual [*17] abuse of a child in violation of Article 120b, UCMJ, and which apparently tended to effect the commission of the offense.

On appeal, Appellant raises two specific arguments challenging the sufficiency of the evidence: first, that he was entrapped; and second, specifically with regard to Specification 1, that the Government failed to prove that he intended to gratify his sexual

⁶ Specifically, the military judge instructed that the charged indecent language consisted of the following:

The accused sending "Sara" the number game; asking "Sara" what kind of underwear she had on; asking if "Sara" was a virgin; asking when "Sara" last masturbated; asking "Sara" if masturbation felt good to her; asking for descriptions of "Sara's" breasts; telling "Sara" he was in his underwear; asking "What are you wearing?" and including a flirtatious "winking" emoji; asking for pictures of "Sara" in a sports bra; and asking if "Sara" needs him to "warm her up."

Appellant was on notice that these specific messages formed the basis for the specification; the specific language cited by the military judge mirrored the Government's bill of particulars, provided to the Defense on 27 May 2020.

desires. We address each argument in turn.

b. Entrapment

At trial, the military judge instructed the court members on the defense of entrapment. The court members evidently found this defense did not apply to Appellant's actions; neither do we. The evidence supports finding beyond a reasonable doubt that the criminal design did not originate with the Government, and even if it had, that Appellant was predisposed to commit the offenses.

"The essence of entrapment is an improper inducement by government agents to commit the crime." [*Wheeler, 76 M.J. at 574*](#) (citing [*Howell, 36 M.J. at 359*](#)). "Such improper inducement does not exist if government agents merely provide the opportunity or facilities to commit the crime." *Id.* In this case, SA MN merely provided Appellant the opportunity to commit the offense through the persona of "Sara." It was consistently Appellant who turned the conversation [*18] to sexual subjects. For example, Appellant initiated the "game" involving the list of 46 questions, which he used to ask "Sara" about her underwear and sexual experience; he sent "Sara" the breast chart to ask about the shape of her breasts; he asked whether she masturbated; and he sent her two photos with the shape of his penis visible through his underwear. Appellant contends SA MN's initial Whisper post targeted active duty Air Force members with "#maninuniform," but that is hardly an improper inducement to send sexual messages to a child after being informed "Sara_2005" was a 13-year-old girl. Nor does the fact that "Sara" continued to exchange messages with Appellant and sent the first message on certain days demonstrate an improper inducement. SA MN did not ask sexual questions of Appellant, even as part of the "game," and did not solicit sexual photos

from him. Appellant could have easily ceased communicating with SA MN at any point, or refrained from injecting sexually-charged content in his messages to her.

Furthermore, assuming *arguendo* that the criminal design did originate with the Government, the evidence supports the court members finding beyond a reasonable doubt that [*19] Appellant was predisposed to commit the offense. An accused who commits an offense without an extraordinary inducement from a Government agent to do so demonstrates a predisposition to commit the offense and is not the victim of entrapment. [*Whittle, 34 M.J. at 208*](#) (citations omitted). For entrapment to exist, the government conduct must:

create[] a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense . . . [and may take the form of] pressure, assurances that a person is not doing anything wrong, persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship.

[*Wheeler, 76 M.J. at 574-75*](#) (alterations in original) (quoting [*Howell, 36 M.J. at 359-60*](#)). "Sara" provided Appellant no such extraordinary inducements in this case. Moreover, Appellant's messages to "Kittycat," who (accurately) identified herself as a 15-year-old girl, including Appellant's attempt to initiate with "Kittycat" the same 46-question "game" he played with "Sara," are powerful evidence he was predisposed to such behavior and not entrapped by SA MN.

Embedded in his argument that he was entrapped, Appellant contends he did not actually believe "Sara" was 13 years [*20] old. He argues that SA MN used odd language that a 13-year-old would not use, such as

"#maninuniform;" that "Sara" sent numerous messages at times when she should have been in school; and that the two age-regressed photos SA MN sent Appellant were "obviously doctored." We are not persuaded "Sara's" language was significantly implausible for a 13-year-old girl, and we do not find it unlikely that a middle school student would find opportunities to send text messages while at school. How genuine the photos appear may be a matter of opinion, but more importantly, Appellant's messages provide no substantial indication that he doubted "Sara" was 13 years old. On the contrary, he asked "Sara" to hide their correspondence from her mother; warned her not to send him nude pictures because it would be illegal; and explained he did not want to meet her in person because he could "get into a lot of trouble for hanging out with [her]." Appellant cites his comment that "Sara's" photo looked "more mature," but this comment—which echoes "Sara's" prior statement that Appellant looked "so mature"—can readily be interpreted as an effort to compliment "Sara" and make her more comfortable with their communications. [*21]⁷ At no point in his messages did Appellant suggest he doubted "Sara" was who she said she was.

c. Intent to Gratify Sexual Desires

Appellant contends the Government failed to prove beyond a reasonable doubt that the indecent language he sent "Sara" was intended to gratify his sexual desires. However, Appellant does not suggest a non-sexual reason why he would ask "Sara" what kind of underwear she was wearing, what her breasts were like, whether she masturbated, et cetera. Instead, he emphasizes that he did not

solicit nude photos from "Sara," discuss sexual acts they could perform together, attempt to meet with her, or escalate the level of their interactions in other ways. However, Appellant's own messages indicate this reluctance was significantly motivated by his fear of "get[ting] into a lot of trouble" because of "Sara's" age, rather than an absence of sexual interest. More generally, evidence that Appellant was willing to engage in some forms of sexual abuse of a child but not in other sexual offenses does not disprove his sexual intent or his guilt. A reasonable finder of fact could easily conclude beyond a reasonable doubt that Appellant sent indecent messages to "Sara" for the [*22] purpose of gratifying his sexual desires.

d. Conclusion as to Legal and Factual Sufficiency

Drawing every reasonable inference from the evidence of record in favor of the Government, we conclude the evidence was legally sufficient to support Appellant's convictions beyond a reasonable doubt. See [Robinson, 77 M.J. at 297-98](#). Additionally, having weighed the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt and find his convictions factually sufficient. See [Turner, 25 M.J. at 325](#).

B. Mens Rea for Indecent Conduct Under Article 120b, UCMJ

1. Law

Whether the military judge correctly instructed the court members is a question of law we review de novo. [United States v. Payne, 73 M.J. 19, 22 \(C.A.A.F. 2014\)](#) (citation omitted).

⁷ Relevantly, Appellant also told "Kittycat" that she looked older than 15 years.

The constitutionality of a statute and the mens rea requirement applicable to a particular offense are also questions of law reviewed de novo. [*United States v. Gifford*, 75 M.J. 140, 142 \(C.A.A.F. 2016\)](#) (citations omitted); [*United States v. Ali*, 71 M.J. 256, 265 \(C.A.A.F. 2012\)](#) (citation omitted). However, "[f]ailure to object to an instruction or to omission of an instruction before the members close to deliberate forfeits the objection." R.C.M. 920(f). We review forfeited issues for plain error. [*United States v. Davis*, 79 M.J. 329, 331 \(C.A.A.F. 2020\)](#) (citation omitted). In a plain error analysis, the appellant "has the burden [*23] of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." [*United States v. Girouard*, 70 M.J. 5, 11 \(C.A.A.F. 2011\)](#) (footnote and omitted omitted).

In addition, where an appellant "affirmatively declined to object to the military judge's instructions and offered no additional instructions," he may thereby affirmatively waive any right to raise the issue on appeal, even "in regards to the elements of the offense." [*Davis*, 79 M.J. at 331](#) (citations omitted). "However, in [*Davis*](#), [the Court of Appeals for the Armed Forces (CAAF)] noted that [it] review[s] a matter for plain error when there is a new rule of law, when the law was previously unsettled, and when the [trial court] reached a decision contrary to a subsequent rule." [*United States v. Schmidt*, M.J. , No. 21-0004, 82 M.J. 68, 2022 CAAF LEXIS 139, at *10-11 \(C.A.A.F. 11 Feb. 2022\)](#) (fourth alteration in original) (internal quotation marks and citations omitted). "Whether an appellant has waived an issue is a legal question we review de novo." *Id.* at *8-9 (citations omitted).

As discussed above with regard to the sufficiency of the evidence, Specification 2 alleged Appellant attempted to commit the

offense of sexual abuse of a child, in violation of Article 120b, UCMJ, [10 U.S.C. § 920b](#), by committing a "lewd act" upon "Sara," specifically, by intentionally displaying [*24] his genitalia through his clothing in her presence via communications technology. For purposes of Specification 2, the relevant definition of a "lewd act" included, *inter alia*,

any indecent conduct, intentionally done with or in the presence of a child, including via any communication technology, that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

MCM, pt. IV, ¶ 62.a.(h)(5)(D).

"In determining the mens rea applicable to an offense, we must first discern whether one is stated in the text, or, failing that, whether Congress impliedly intended a particular mens rea." [*United States v. McDonald*, 78 M.J. 376, 378-79 \(C.A.A.F. 2019\)](#) (citation omitted). "[T]he existence of a mens rea is presumed in the absence of clear congressional intent to the contrary." *Id.* at 379 (citing [*United States v. Haverty*, 76 M.J. 199, 203-04 \(C.A.A.F. 2017\)](#)). "[A] general intent mens rea is not the absence of a mens rea, and such offenses remain viable in appropriate circumstances post-*Elonis*." *Id.* (citing [*Elonis v. United States*, 575 U.S. 723, 736, 135 S. Ct. 2001, 192 L. Ed. 2d 1 \(2015\)](#)). A general intent offense implies a mens rea that the accused intentionally committed the charged act. *Id.* at 381.

2. Analysis

As clarified by his reply brief, Appellant contends that Article 120b, UCMJ, is unconstitutional [*25] to the extent that the definition of a "lewd act" permits conviction for

indecent conduct according to an objective standard, and without requiring proof that the accused acted with subjective intent with respect to indecency. Appellant contrasts Specification 1, which as charged required the Government to prove he communicated indecent language to "Sara" with the specific intent to gratify his sexual desires, with Specification 2, which required that the alleged *conduct* be intentional but meet an *objective* standard of immorality as determined by the court members, without any requirement to prove Appellant's subjective intent to gratify sexual desires. Appellant relies on [Elonis](#), where the United States Supreme Court overturned a conviction based on an erroneous jury instruction "that the Government need prove only that a reasonable person would regard [the petitioner's] communications as threats." [575 U.S. at 740](#). Doing so, the Court noted, would effectively create a mens rea of negligence based on an objective standard. *Id.* Accordingly, Appellant contends this court should set aside the finding of guilty as to Specification 2.

However, as an initial matter we must address whether, as the Government contends, [*26] Appellant waived this issue when trial defense counsel told the military judge the Defense did not have any objection with regard to the court member instructions on the elements of Specification 2. See [Davis, 79 M.J. at 331](#) (citations omitted). Appellant has not specifically addressed this point. In order to answer this question, we must consider whether the situation in Appellant's trial was more analogous to [Davis](#), where the CAAF applied waiver, or to its recent decision in [Schmidt](#), where it did not.

In [Davis](#), the CAAF held the appellant "expressly and unequivocally acquiesce[ed]" to the military judge's findings instructions when

the defense "affirmatively declined to object [twice] and offered no additional instructions." [79 M.J. at 331](#) (citations omitted). Similarly, in the instant case, before the military judge provided the findings instructions to the court members, the civilian trial defense counsel agreed that the instructions were "a correct statement of law." In addition, after the military judge read the instructions to the court members he asked the parties if there were any objections or requests for additional instructions; the civilian trial defense counsel responded, "No, Your Honor."

In [Schmidt](#), Judge Sparks, announcing the [*27] opinion of the court,⁸ acknowledged trial defense counsel "assented" to the legal definition the military judge provided the court members, which the appellant subsequently challenged on appeal. [Schmidt, 82 M.J. 68, 2022 CAAF LEXIS 139, at *10](#). Although "[i]n light of [Davis](#), this affirmative declination to object to the military judge's definition . . . would appear to waive [the appellant's] right to challenge that definition on appeal," Judge Sparks explained the defense's "failure to object was not waiver given the unsettled nature of the law" at the time of the trial with respect to the specific definition at issue. *Id.* at *11. Accordingly, Judge Sparks reviewed the challenged instruction for plain error. *Id.* at *11-15.

Returning to the instant case, similar to [Davis](#), and contrary to his argument on appeal, Appellant affirmatively acquiesced in the military judge's definition of the elements of attempted sexual abuse of a child by indecent conduct in violation of Article 120b, UCMJ, as

⁸ Judge Sparks's opinion was not joined by any other judge. However, Chief Judge Ohlson writing separately and concurring in the judgment, joined by Senior Judge Erdmann, "agree[d] with Judge Sparks that this is not a waiver case." [Schmidt, 82 M.J. 68, 2022 CAAF LEXIS 139, at *15-16](#) (Ohlson, C.J., concurring in the judgment).

alleged in Specification 2. Therefore, applying [Davis](#) in light of [Schmidt](#), the question becomes whether the legal point Appellant now asserts on appeal was "unsettled" in a manner similar to the definition at issue in [Schmidt](#). On one hand, the language of the statute appears clear, and Appellant [*28] cites no decision by the CAAF, by this court, or by our sister Courts of Criminal Appeals that suggests the objective standard for indecency under Article 120b, UCMJ, may be unconstitutional. Cf. [United States v. Miller, No. ACM 39747, 2021 CCA LEXIS 95 \(A.F. Ct. Crim. App. 3 Mar. 2021\)](#) (unpub. op.) (affirming convictions for attempted sexual abuse of a child by indecent conduct), *rev. denied*, 81 M.J. 334 (C.A.A.F. 2021). However, we have not found "binding precedent" applying [Elonis](#) to the objective standard of indecency in Article 120b, UCMJ, as Appellant now seeks to do. See [Schmidt, 82 M.J. 68, 2022 CAAF LEXIS 139, at *11](#). Recognizing our authority under Article 66, UCMJ, 10 U.S.C. § 866, to pierce waiver in order to ensure an appellant has not been unfairly prejudiced by a legal error, we will assume, without deciding, that Appellant forfeited rather than waived this issue. See [United States v. Hardy, 77 M.J. 438, 442-43 \(C.A.A.F. 2018\)](#) (citing [United States v. Quiroz, 55 M.J. 334, 338 \(C.A.A.F. 2001\)](#)).

Reviewing Appellant's claim for plain error, we find Appellant is entitled to no relief. Questions of statutory construction begin with the language of the statute. [McDonald, 78 M.J. at 379](#) (citation omitted). [Elonis](#) explained that "[w]hen interpreting federal criminal statutes that are silent on the required mental state, we read into the statute only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct." [575 U.S. at 736](#) (internal quotation marks and citations omitted). Moreover, courts "'must give effect to the clear meaning of [*29] statutes as written'

and questions of statutory interpretation should 'begin and end . . . with [statutory] text, giving each word its ordinary, contemporary, and common meaning.'" [United States v. Andrews, 77 M.J. 393, 400 \(C.A.A.F. 2018\)](#) (alterations in original) (quoting [Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. 405, 137 S. Ct. 1002, 1010, 197 L. Ed. 2d 354 \(2017\)](#)). The statute challenged in [Elonis](#) expressly provided for a "reasonable person" standard with respect to the definition of a "true threat," effectively applying a negligence standard with regard to the content of the communication. [575 U.S. at 731](#). In contrast, [Article 120b\(h\)\(5\)\(D\), UCMJ](#), at issue in the instant case, provides a definition for indecency that does not rely on a reasonable person standard. Thus, we find that in the absence of any defense objection, a military judge would not "plainly" or "obviously" conclude *sua sponte* that Article 120b, UCMJ, was unconstitutional in light of [Elonis](#). Furthermore, we find the statute's requirement that the conduct be intentionally performed with or in the presence of a child under the age of 16 years, coupled with the requirement that the conduct be "indecent" and actually "tend[] to excite sexual desire or deprave morals with respect to sexual relations," sufficiently separates wrongful conduct from otherwise innocent conduct. Accordingly, we find Appellant has failed to demonstrate plain [*30] or obvious error.

C. Mil. R. Evid. 404(b)

1. Additional Background

On 1 May 2020, a month before Appellant's trial, the Government provided the Defense written notice in accordance with Mil. R. Evid. 404(b) that it might seek to introduce evidence of the following acts: (1) that Appellant "sent

the same breast chart cartoon and 'pick a number game' to multiple users on the Whisper chat application," as evidence of a common scheme or plan; (2) that Appellant "sent the same clothed image of himself to both [SA MN] as he did to a Whisper user identified as '[K]ittycat' who told [Appellant] she was fifteen" and who "was later identified as a fifteen year old Ramstein high school student," as potential rebuttal evidence; and (3) that Appellant "spoke with a user [on Whisper] who identified herself as a 17 year old and [Appellant] asked her for 'sexy' pictures," also as potential rebuttal evidence.

On 26 May 2020, less than a week before Appellant's trial, the Government provided additional Mil. R. Evid. 404(b) notice regarding searches Appellant performed on a particular website, and evidence Appellant exchanged messages and photos with two additional Whisper users, as evidence of Appellant's intent, "knowledge" that "Sara" was a child, absence of mistake, [*31] and the existence of a common scheme or plan.

At trial, after opening statements, the Defense submitted a motion to exclude the evidence referred to in the Government's 26 May 2020 notice on the grounds that it was untimely, that the Government provided insufficient information regarding the specifics and context of the noticed evidence, and that any probative value would be substantially outweighed by the danger of unfair prejudice. The Government submitted a written opposition to the defense motion with several attachments, including the AFOSI Report of Investigation (ROI).

The military judge held a hearing on the motion at which he received argument from counsel. The scope of the hearing expanded to address the admissibility of the evidence identified in the Government's 1 May 2020 notice as well as the 26 May 2020 notice. At

the conclusion of the hearing, the military judge issued an oral ruling which he subsequently supplemented in writing. With respect to the 1 May 2020 notice, the military judge noted the Government had "withdrawn" its use of evidence that Appellant sent the "breast chart cartoon" and "pick a number game" to multiple Whisper users, as well as evidence Appellant [*32] requested "sexy pictures" from a Whisper user who described herself as 17 years old, and that such evidence was "not admissible without further notice." The military judge further noted the Government had withdrawn the use of evidence that Appellant sent the same clothed image of himself to "Kittycat" that he had sent to "Sara." However, he ruled that evidence Appellant communicated with a Whisper user identified as "Kittycat" who told Appellant she was 15 years old, and was in fact a 15-year-old high school student, was relevant and admissible to show the existence of a common plan or scheme and to show Appellant's intent in his communications with "Sara," and its probative value was not substantially outweighed by the danger of unfair prejudice. In addition, the military judge excluded the evidence identified in the 26 May 2020 notice because the notice was untimely and not in compliance with the military judge's scheduling order.

After trial defense counsel cross-examined the Government's first witness, SA MN, the Government requested an Article 39(a), UCMJ, [10 U.S.C. § 839\(a\)](#), hearing. There, trial counsel argued the Defense had opened the door to several matters in the 1 May 2020 Mil. R. Evid. 404(b) notice. Trial counsel pointed to [*33] questions the Defense had asked which suggested Appellant may have believed "Sara" was actually an adult, such as the number of times SA MN had sent messages to Appellant on Whisper when a 13-year-old would have been at school, and the

fact that the person depicted in the age-regressed photos SA MN sent Appellant was actually 25 years old. The military judge agreed with trial counsel that the door had been opened, and further indicated he believed the issue of entrapment had been raised. The military judge permitted the Government to introduce evidence of the entirety of the Whisper conversation between Appellant and "Kittycat." However, the military judge continued to exclude evidence addressed in the 26 May 2020 Mil. R. Evid. 404(b) notice.

The military judge subsequently issued a supplemental written ruling on the Defense's motion to exclude Mil. R. Evid. 404(b) evidence. The ruling held that evidence Appellant communicated on Whisper with "Kittycat," who identified herself as 15 years old and was later identified as an actual 15-year-old high school student, was admissible as evidence of a common scheme or plan, of Appellant's intent, and to rebut the defense of entrapment. However, the ruling did not specifically address [*34] the substance of the communications between Appellant and "Kittycat." The ruling also reiterated that the Government had withdrawn its use of the other evidence addressed in its 1 May 2020 Mil. R. Evid. 404(b) notice, and that the motion to exclude was granted with respect to the evidence addressed in the 26 May 2020 notice.

The Government introduced the entirety of Appellant's messages with "Kittycat." Her initial Whisper post asked, "Who goes to Ramstein High School?" Appellant responded on 11 February 2019 by asking "Kittycat," "You know what I like about high school girls?" After "Kittycat" responded, "What," Appellant replied, "I keep getting older and they stay the same age [laughing emoji]." Appellant then asked if "Kittycat" was "into guys older than

[her]." After "Kittycat" informed Appellant she was 15 years old and a sophomore in high school, Appellant continued to exchange messages with her. When Appellant told "Kittycat" he was curious what she looked like, she sent him an actual clothed photo of her upper torso and head. Appellant told "Kittycat" she was "cute" and looked 17 or 18 years old rather than 15. Appellant then sent "Kittycat" the "pick a number game" and invited her to play with [*35] him. When "Kittycat" responded "Eh" and told him she had a boyfriend, Appellant responded, "It's ok, it's a chat on whisper. He won't know," and then sent her the same photo of himself sitting in a car that he had sent "Sara." Appellant asked "Kittycat" if her boyfriend was in Germany, to which she replied, "Yes." Appellant then responded, "Right on, [] What are you doing on whisper?" The following afternoon, 12 February 2019, Appellant attempted to reinitiate contact with "Kittycat," asking, "Hey how are you?" which was the last message.

AFOSI agents apprehended Appellant the following day.

2. Law

Mil. R. Evid. 404(b) provides that evidence of a crime, wrong, or other act by a person is generally not admissible as evidence of the person's character in order to show the person acted in conformity with that character on a particular occasion. However, such evidence may be admissible for another purpose, including, *inter alia*, proving intent or the existence of a plan. Mil. R. Evid. 404(b)(2). The list of potential purposes in Mil. R. Evid. 404(b)(2) "is illustrative, not exhaustive." [*United States v. Ferguson*, 28 M.J. 104, 108 \(C.M.A. 1989\)](#). "When the defense of entrapment is raised, evidence of uncharged misconduct by the accused of a nature similar

to that charged is admissible to show predisposition." [*36] R.C.M. 916(g), Discussion (citing Mil. R. Evid. 404(b)). We apply a three-part test to review the admissibility of evidence under Mil. R. Evid. 404(b): (1) does the evidence "reasonably support a finding" that the accused committed the prior crime, wrong, or act; (2) what "fact of . . . consequence is made more or less probable" by the proffered evidence; and (3) is the "probative value . . . substantially outweighed by the danger of unfair prejudice?" [*United States v. Reynolds*, 29 M.J. 105, 109 \(C.M.A. 1989\)](#) (alterations in original) (internal quotation marks and citations omitted).

Mil. R. Evid. 403 provides that evidence that is relevant and otherwise admissible may be excluded if its probative value is substantially outweighed by the danger of, *inter alia*, unfair prejudice or confusion of the issues.

We review a military judge's decision to admit or exclude evidence for an abuse of discretion. [*United States v. Freeman*, 65 M.J. 451, 453 \(C.A.A.F. 2008\)](#) (citing [*United States v. Ayala*, 43 M.J. 296, 298 \(C.A.A.F. 1995\)](#)). "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." [*United States v. Ellis*, 68 M.J. 341, 344 \(C.A.A.F. 2010\)](#) (citation omitted). "If the military judge fails to place his findings and analysis on the record, less deference [*37] will be accorded." [*United States v. Flesher*, 73 M.J. 303, 312 \(C.A.A.F. 2014\)](#).

3. Analysis

Appellant contends the military judge abused his discretion both by permitting the Government to introduce evidence that

Appellant communicated on Whisper with "Kittycat," who told Appellant she was 15 years old and was in fact 15 years old, as well as by permitting the Government to introduce the actual messages themselves. As an initial matter, Appellant correctly notes that neither the military judge's initial oral ruling nor his supplemental written ruling addressed the content of Appellant's communications with "Kittycat" beyond the fact that she told Appellant her age; therefore, the military judge's decision to admit the actual communications is afforded less deference. Accordingly, we analyze the two prongs of Appellant's argument separately.

a. Evidence that Appellant Communicated with "Kittycat"

First, Appellant contends the military judge's findings of fact are not supported by the record. We disagree. The relevant finding of fact, as stated in the written ruling, was that "[t]he search of [Appellant's] cellular phone revealed Whisper chat messages between [Appellant] and a user identified as '[K]ittycat' who told [Appellant] she was fifteen [*38] and that this user was later identified as a fifteen[-]year-old Ramstein Air Base high school student." The ruling further stated the military judge "adopted as findings of fact" the "relevant statements" contained in the ROI attached to the Government's response to the defense motion to dismiss. Although the ROI did not include the actual messages between Appellant and "Kittycat," it did include sufficient information regarding what the AFOSI obtained from Appellant's phone and learned about "Kittycat" to support the military judge's finding of fact.

Appellant next argues that the evidence that Appellant communicated with "Kittycat" does not make a fact of consequence to the trial more or less probable. He cites the comment

in the AFOSI report that "[Appellant] did not discuss sexual information or share inappropriate photos with ['Kittycat']." Appellant also cites *United States v. Morrison* for the principle that "uncharged acts must be almost identical to the charged acts to be admissible as evidence of a plan or scheme." [52 M.J. 117, 122 \(C.A.A.F. 1999\)](#) (internal quotation marks and citations omitted). Yet Appellant's conduct with "Kittycat," so far as it went, was extremely similar to his conduct with "Sara." [*39] In both cases, Appellant initiated contact with a female in Appellant's geographic area who had made a Whisper post; in both cases, Appellant carried on the conversation with someone who identified themselves as a child under 16 years old; and Appellant's contact with "Kittycat" occurred close in time to his communication with "Sara." We find the military judge did not abuse his discretion by concluding this evidence was admissible as some evidence of a scheme or plan on Appellant's part to "initiate sexual conversations with other Whisper users" under the age of 16 years.⁹

For similar reasons, contrary to Appellant's argument, we find this evidence also met the lower standard for evidence relevant to Appellant's intent—that the "wrongs or acts need only be similar to the offense charged and not too remote therefrom." [United States v. Woodyard, 16 M.J. 715, 718 \(A.F.C.M.R. 1983\)](#) (footnote and citation omitted). As explained above, Appellant's actions with "Kittycat" were very similar to his actions with "Sara," so far as they went, and close in time with them. Appellant argues the ROI does not indicate the date or month when Appellant's communications with "Kittycat" took place. However, the ROI does include interview

summaries that indicate [*40] "Kittycat" moved to Germany in the fall of 2018, which would support the military judge's determination that "Kittycat's" contact with Appellant must have been sufficiently close in time to the charged conduct to be relevant.

Appellant does not address the military judge's ruling that this evidence would be admissible to rebut a defense of entrapment, and we find no abuse of discretion in that respect. The fact that Appellant knowingly communicated with an actual 15-year-old child on Whisper regarding sexual matters was strong evidence that he was predisposed to engage in indecent sexual conversations with children under the age of 16 years, and was not lured into doing so by an extraordinary inducement. See [Whittle, 34 M.J. at 208](#); Mil. R. Evid. 405(b) (allowing "character or [a] character trait [that] is an essential element" of a claim or defense to be "proved by relevant specific instances of the person's conduct"); see also [United States v. Schelkle, 47 M.J. 110, 112 \(C.A.A.F. 1997\)](#) ("Character might be an element of a defense if entrapment is claimed and the [G]overnment wants to prove predisposition.").

The military judge included his balancing of the probative value of the evidence against the danger of unfair prejudice, and accordingly his determination is entitled to greater [*41] deference. The military judge explained the probative value was "not substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." The military judge further explained:

Specifically, presenting this evidence will take very little additional time as the [G]overnment was already going to call the law enforcement agent to testify regarding [Appellant's] use of Whisper and this portion of their testimony will not take a

⁹ Assuming *arguendo* the military judge did abuse his discretion by admitting evidence Appellant communicated with "Kittycat" as evidence of a scheme or plan, we find such an error did not materially prejudice Appellant's substantial rights.

significant period of time, the evidence is not cumulative as to any other evidence, and the danger of unfair prejudice to [Appellant] is minimal given the nature of the charged misconduct.

We find no abuse of discretion in the military judge's balancing of the relevant factors. Accordingly, we find the military judge did not err in admitting evidence to the effect that Appellant communicated on Whisper with a 15-year-old female Ramstein High School student who identified herself as such.

b. Specific Communications between Appellant and "Kittycat"

As indicated above, the military judge's rulings did not specifically address the actual communications between Appellant [*42] and "Kittycat," and our review of the admission of this evidence calls for a less deferential standard. However, even reviewing the military judge's action de novo, we find no error in the admission of this evidence.

First, the messages introduced through an AFOSI digital forensic consultant, SA JB, reasonably support a finding that Appellant engaged in the asserted communications with "Kittycat" on Whisper. In addition, the substance of the messages were relevant for reasons similar to those articulated above. The Defense's cross-examination of SA MN implicated the defense of entrapment and attempted to raise doubt that Appellant believed "Sara" was 13 years old. Therefore, evidence of Appellant's Whisper communications with "Kittycat" depicting a similar pattern of behavior—including attempting to initiate the same "game" involving sexually oriented questions—with another self-identified girl under 16 years of age became relevant evidence of Appellant's intent and predisposition to engage in such behavior. The fact that Appellant was not able

to progress as far with "Kittycat" as he was with "Sara" due to "Kittycat's" reluctance or disinterest does not eliminate the relevance of Appellant's [*43] behavior.

We further find the probative value of these messages was not substantially outweighed by the danger of unfair prejudice—for reasons similar to those articulated by the military judge with respect to the general evidence that Appellant had communicated with the 15-year-old "Kittycat" on Whisper. Introducing the messages did not require additional witnesses or involve significant confusion or delay. Although the "Kittycat" communications were certainly damaging to the Defense, they were not *unfairly* prejudicial. To the extent those messages tended to indicate a pattern of behavior, intent, or predisposition to engage in sexual communications with underage girls, that was exactly why they were relevant to the court members' deliberations as to Appellant's intent and the defense of entrapment as to the charged offenses.

D. Digital Forensic Expert Testimony

1. Additional Background

At trial, the Government intended to call SA JB, the AFOSI digital forensic consultant stationed in Germany who created multiple reports based on the data extracted from Appellant's phone. Before SA JB testified, the Defense raised an oral objection and asked to voir dire the witness "for the purposes [*44] . . . of a *Melendez-Diaz* type issue."¹⁰ The military judge agreed to permit counsel to voir dire SA JB.

In SA JB's testimony for purposes of the

¹⁰ [*Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 \(2009\)](#).

defense objection, he explained that another AFOSI agent, SA DF, performed the actual extraction of data from Appellant's phone. SA JB was not present when SA DF extracted the data, but SA JB later analyzed the extraction—which he referred to as a "dot-TAR file"—to generate his report. When the military judge asked SA JB what SA DF had told him about the data, the following colloquies ensued:

[SA JB:] Well, he provided me a report, as well as all his notes. I don't recall if I was -- I don't believe I was there for him to do the extraction, like I said earlier, but I was intimately familiar with what he found, the Whisper messages, other stuff that were Whisper messages that were concerning to us, possibly another underage person and things of the sort.

[Military Judge:] And is there anything from that report that [SA DF] produced that you then kind of adopted and put into your report?

[SA JB:] I can't say for sure, Your Honor, but I don't believe so.

....

[Circuit Trial Counsel (CTC):] The reports that we intended to introduce at trial today, [*45] those are reports that you created within the last few days, within the last week?

[SA JB:] Yes, sir. But they're from the TAR file. They're not from any of [SA DF's] analysis or anything like that. It's basically straight from the archive of the phone.

[CTC:] So they're -- it's your independent analysis . . . based on the machine generated TAR file?

[SA JB:] Yes, yeah.

....

[CTC:] Did [SA DF] in any way contribute to the creation of the reports that we intend to offer at trial?

[SA JB:] No.

In response to additional questioning by the

military judge, SA JB reiterated that although his report was based on data extracted by SA DF, he did not rely on SA DF's report when he generated his own report.

After SA JB was excused, the military judge instructed the parties to provide written briefs on the issue that night. The Defense subsequently filed a written motion to exclude SA JB's testimony regarding his analysis of the data extracted by SA DF. Essentially, the Defense argued that by calling SA JB rather than SA DF, who performed the actual extraction, the Government would violate the [Confrontation Clause of the Sixth Amendment](#) under [Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 \(2004\)](#). The Government evidently did not provide a written brief.

At the outset of the next day of trial, [*46] the military judge provided a written ruling denying the Defense's motion and objection, and read his analysis and conclusion on the record. The military judge explained that the machine-generated data itself was not testimonial and therefore did not implicate the [Confrontation Clause](#). He further explained:

[T]estimony of [] SA [JB] does not and will not violate [Appellant's] right to confrontation. . . . SA [JB's] personal knowledge regarding the derivation of the evidence at issue made him neither a "surrogate" expert nor a mere "conduit" for the testimonial statements of another. . . . [SA JB] also personally conducted an independent analysis, without relying upon SA [DF's] prior reports and formulated his own carefully considered conclusions and report. All of the data underlying his opinion was not testimonial, and, assuming *arguendo* that [] any prior report or conversation with SA [DF] was testimonial, there is no evidence before this [c]ourt that

SA [JB] acted as a mere conduit for the report.

[T]estimony by SA [JB] regarding his own analysis of the extraction of [Appellant]'s cell phone is testimonial This testimonial hearsay, however, satisfies the [Confrontation Clause](#) because the declarant of that hearsay, [*47] SA [JB], will be subject to cross-examination at trial.

SA JB was subsequently called and testified as an expert in digital forensics regarding his analysis of the data extracted from Appellant's phone.

2. Law

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." [U.S. Const. amend. VI](#). "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." [Crawford, 541 U.S. at 59](#).

"[A] statement is testimonial if 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" [United States v. Sweeney, 70 M.J. 296, 301 \(C.A.A.F. 2011\)](#) (quoting [United States v. Blazier, 68 M.J. 439, 442 \(C.A.A.F. 2010\)](#)). "[M]achine-generated data and printouts are not statements and thus not hearsay -- machines are not declarants -- and such data is therefore not 'testimonial.'" [United States v. Blazier, 69 M.J. 218, 224 \(C.A.A.F. 2010\)](#) (citations omitted). Chain of custody documents may also be non-testimonial. [United States v. Tearman, 72 M.J. 54, 59 \(C.A.A.F. 2013\)](#).

"[A]n expert witness may review and rely upon the work of others, including laboratory testing conducted by others, so long as they reach their own opinions in conformance with evidentiary rules regarding expert opinions." [Blazier, 69 M.J. at 224](#) (citations omitted). [*48] "An expert witness need not necessarily have personally performed a forensic test in order to review and interpret the results and data of that test." [Id. at 224-25](#) (citations omitted). "That an expert did not personally perform the tests upon which his opinion is based . . . goes to the weight, rather than to the admissibility, of that expert's opinion." [Id. at 225](#) (citation omitted). However, an expert witness may not circumvent the rules of evidence and [Sixth Amendment](#) by acting "as a conduit for *repeating* testimonial hearsay." [Id.](#) (citation omitted).

We review a military judge's ruling on a motion to exclude evidence for an abuse of discretion. [United States v. Katso, 74 M.J. 273, 278 \(C.A.A.F. 2015\)](#) (citation omitted). Whether a statement is testimonial for purposes of the [Sixth Amendment](#) is a question of law we review de novo. [United States v. Baas, 80 M.J. 114, 120 \(C.A.A.F. 2020\)](#) (citation omitted).

3. Analysis

Appellant contends the military judge abused his discretion in admitting SA JB's testimony because his findings of fact were not supported by the record. Appellant argues that, contrary to the military judge's findings, SA JB's analysis of the extraction relied on testimonial hearsay as well as machine-generated data, and the military judge should have excluded it. We disagree.¹¹

¹¹ The Government asserts trial defense counsel affirmatively waived this issue at an earlier point in the trial. We find the record does not support the Government's assertion.

Appellant first contends the military judge erroneously [*49] states in his findings of fact, "SA [DF] seized the accused's phone before conducting the extraction." As the Government concedes, this finding is not supported by the record in that a different agent actually seized the phone before SA DF performed the extraction. However, this error was immaterial to the military judge's analysis. The salient point for purposes of the military judge's ruling was not the identity of the agent who initially seized the phone, but the fact that SA JB relied on the extraction performed by SA DF. Evidence regarding the chain of custody preceding that point goes to the weight of SA JB's testimony, not its admissibility. See [Blazier, 69 M.J. at 225](#). Thus, although Appellant correctly identified an error in the military judge's findings, that error did not render the admission of SA JB's testimony an abuse of discretion.

Appellant next asserts the military judge erred in finding SA JB did not rely on SA DF's analysis, citing SA JB's testimony that he received a report and notes from SA DF. We disagree. SA JB's subsequent clarifications that his own report was the product of his independent analysis of the extraction, and that he did not rely upon SA DF or SA DF's report "in any [*50] way," was more than adequate to support the military judge's conclusion. See [United States v. Donaldson, 58 M.J. 477, 482 \(C.A.A.F. 2003\)](#) (stating a military judge's findings of fact are reviewed for clear error).

Because Appellant fails to demonstrate the military judge clearly erred in finding SA JB did not rely on any testimonial hearsay from SA DF, his argument that SA JB's testimony violated the [Confrontation Clause](#) also fails.

E. Unanimous Verdict

1. Additional Background

Before trial, the Defense moved the military judge "to require a unanimous verdict for any finding of guilty," or, in the alternative, to "provide an instruction that the President must announce whether any finding of guilty was or was not the result of a unanimous vote without stating any numbers or names." The Defense asserted that in light of the Supreme Court's decision in [Ramos v. Louisiana, 140 S. Ct. 1390, 206 L. Ed. 2d 583 \(2020\)](#), the [Sixth Amendment](#), the [Fifth Amendment's Due Process Clause](#), and the [Fifth Amendment](#) right to equal protection all required a unanimous verdict in trials by court-martial with court members. The Government opposed the motion, asserting that binding precedent from the Supreme Court and the CAAF held that the [Sixth Amendment](#) right to a jury trial did not apply to courts-martial; citing several unpublished opinions of this court holding that [Fifth Amendment](#) due process does not require unanimous court-martial verdicts; [*51] and asserting the right to a unanimous verdict was not a "fundamental right" that would implicate [Fifth Amendment](#) equal protection, and if it did, Congress's statutory provision for non-unanimous verdicts in courts-martial would pass judicial scrutiny.

The military judge denied the motion in a written ruling which he supplemented after the court-martial adjourned. He found [Ramos](#) neither explicitly nor implicitly overruled prior Supreme Court and CAAF precedent holding that the [Sixth Amendment](#) right to a jury trial did not apply to courts-martial. He further found any due process considerations weighing in favor of unanimous verdicts were not "so extraordinarily weighty as to overcome the balance struck by Congress" in Article 52, UCMJ, [10 U.S.C. § 852](#), in light of the "specific military conditions" favoring finality of verdicts

and the avoidance of unlawful command influence. He further explained that a unanimous verdict in a jury trial was not a fundamental right guaranteed in a court-martial because the right to a jury trial did not apply to court-martial panels; moreover, he agreed with the Government that even if such a fundamental right did apply, Congress's provision for non-unanimous verdicts would survive either rational basis review or heightened [*52] scrutiny by the courts.

The court members convicted Appellant of two specifications of attempted sexual abuse of a child on divers occasions in violation of Article 80, UCMJ, as described above. The vote of the court members was not disclosed.

2. Law

[Article I, Section 8 of the Constitution](#) provides, "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces." "[J]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." [Solorio v. United States](#), 483 U.S. 435, 447, 107 S. Ct. 2924, 97 L. Ed. 2d 364 (1987) (second alteration in original) (internal quotation marks and citations omitted); cf. [Loving v. United States](#), 517 U.S. 748, 768, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996) ("[W]e give Congress the highest deference in ordering military affairs.").

[Article 52, UCMJ, 10 U.S.C. § 852](#), provides, "No person may be convicted of an offense in a general or special court-martial, other than . . . in a courtmartial with members . . . by the concurrence of at least three-fourths of the members present when the vote is taken."

The [Sixth Amendment](#) provides, "In all criminal

prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed" However, "constitutional rights [*53] may apply differently to members of the armed forces than they do to civilians." [United States v. Easton](#), 71 M.J. 168, 175 (C.A.A.F. 2012) (quoting [United States v. Marcum](#), 60 M.J. 198, 205 (C.A.A.F. 2004)). "[T]here is no [Sixth Amendment](#) right to trial by jury in courts-martial." *Id.* (citing [Ex parte Quirin](#), 317 U.S. 1, 39, 63 S. Ct. 2, 87 L. Ed. 3 (1942); [United States v. Wiesen](#), 57 M.J. 48, 50 (C.A.A.F. 2002) (per curiam)); see also [Whelchel v. McDonald](#), 340 U.S. 122, 127, 71 S. Ct. 146, 95 L. Ed. 141 (1950); [United States v. Begani](#), 81 M.J. 273, 280 n.2 (C.A.A.F. 2021); [United States v. Riesbeck](#), 77 M.J. 154, 162 (C.A.A.F. 2018).

"Congress, of course, is subject to the requirements of the [Due Process Clause](#) when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings." [Weiss v. United States](#), 510 U.S. 163, 176, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994) (citations omitted). However, "in determining what process is due, courts must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces" *Id.* at 177 (internal quotation marks and citations omitted). Where the Supreme Court has "faced a due process challenge to a facet of the military justice system," it has asked whether the factors militating in favor of the asserted due process right "are so extraordinarily weighty as to overcome the balance struck by Congress." *Id.* at 177-78 (quoting [Middendorf v. Henry](#), 425 U.S. 25, 44, 96 S. Ct. 1281, 47 L. Ed. 2d 556 (1976)).

Equal protection "is generally designed to

ensure that the Government treats similar persons in a similar manner." United States v. Gray, 51 M.J. 1, 22 (C.A.A.F. 1999) (internal quotation marks and citation omitted).

For the Government to make distinctions does not violate equal protection guarantees unless [*54] constitutionally suspect classifications like race, religion, or national origin are utilized or unless there is an encroachment on fundamental constitutional rights like freedom of speech or of peaceful assembly. The only requirement is that reasonable grounds exist for the classification used.

Id. at 22-23 (quoting United States v. Means, 10 M.J. 162, 165 (C.M.A. 1981)) (additional citations omitted).

"An 'equal protection violation' is discrimination that is so unjustifiable as to violate due process." United States v. Akbar, 74 M.J. 364, 406 (C.A.A.F. 2015) (quoting United States v. Rodriguez-Amy, 19 M.J. 177, 178 (C.M.A. 1985)). However, an accused servicemember is "not similarly situated to a civilian defendant." *Id.* (citing Parker v. Levy, 417 U.S. 733, 743, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974)). Fundamental rights "are only fundamental to the extent (and to the persons to whom) the Constitution grants them in the first place." United States v. Begani, 79 M.J. 767, 776 (N.M. Ct. Crim. App. 2020), *aff'd*, 81 M.J. 273 (C.A.A.F. 2021).

"When no suspect class or fundamental right is involved, . . . the [Supreme] Court requires only a demonstration of a rational basis as support for the law." United States v. Wright, 48 M.J. 896, 901 (A.F. Ct. Crim. App. 1998) (citing Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996)). "Under the rational basis test, the burden is on the appellant to demonstrate that there is no rational basis for the rule he is challenging.

The proponent of the classification 'has no obligation to produce evidence to sustain the rationality of a statutory classification.'" United States v. Paulk, 66 M.J. 641, 643 (A.F. Ct. Crim. App. 2008) (quoting Heller v. Doe, 509 U.S. 312, 320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993)). "As long as there is a plausible [*55] reason for the law, a court will assume a rational reason exists for its enactment and not overturn it." *Id.* (citing Heller, 509 U.S. at 320; United States v. Carolene Products Co., 304 U.S. 144, 153, 58 S. Ct. 778, 82 L. Ed. 1234 (1938)).

Under the doctrine of vertical stare decisis, courts must strictly follow the decisions issued by higher courts. United States v. Andrews, 77 M.J. 393, 399 (C.A.A.F. 2018) (citation omitted). "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989).

3. Analysis

On appeal, Appellant reasserts that in light of Ramos the Sixth Amendment and the Fifth Amendment rights to due process and equal protection all required a unanimous verdict by the court-martial panel in order to convict him of any offense. We are not persuaded.

In Ramos, the Court overruled its prior decisions in Apodaca v. Oregon, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972), and Johnson v. Louisiana, 406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972), to hold that the Sixth Amendment's guarantee of the right to trial "by an impartial jury" required a

unanimous verdict in state as well as federal criminal trials. [Ramos](#), 140 S. Ct. at 1396-97. However, the essence of the Court's opinion is to explain that the jury required by the [Sixth Amendment](#) is one that renders a unanimous verdict. [Ramos](#) does not purport, explicitly or implicitly, to extend the scope of the [Sixth Amendment](#) right to a jury trial [*56] to courts-martial; nor does the majority opinion in [Ramos](#) refer to courts-martial at all. Accordingly, after [Ramos](#), this court remains bound by the plain and longstanding precedent from our superior courts that the [Sixth Amendment](#) right to a jury trial does not apply to trial by courts-martial—and, by extension, neither does the unanimity requirement announced in [Ramos](#).¹²

Appellant's due process argument is equally unavailing. This court has repeatedly held that [Fifth Amendment](#) due process does not require unanimous verdicts in courts-martial. See, e.g., [United States v. Canada](#), No. ACM S32298, 2016 CCA LEXIS 610, at *34 (A.F. Ct. Crim. App. 20 Oct. 2016) (unpub. op.), *aff'd on other grounds*, 76 M.J. 127 (C.A.A.F. 2017); [United States v. Spear](#), No. ACM 38537, 2015 CCA LEXIS 310, at *9 (A.F. Ct.

[Crim. App. 30 Jul. 2015](#)) (unpub. op.); [United States v. Daniel](#), No. ACM 38322, 2014 CCA LEXIS 224, at *7-10 (A.F. Ct. Crim. App. 1 Apr. 2014) (unpub. op.), *aff'd*, 73 M.J. 473 (C.A.A.F. 2014). We are similarly unconvinced that the factors weighing in favor of a heretofore unrecognized unanimity requirement in courts-martial are so extraordinarily weighty as to override Congress's determination that a three-fourths vote strikes the correct balance of competing considerations in the administration of military justice, potentially including the prevention of unlawful command influence and securing finality of verdicts.¹³

Finally, we find no equal protection violation either. The non-unanimity requirement of Article 52, UCMJ, does not implicate a suspect classification. Furthermore, a servicemember standing trial in a court-martial is not similarly situated to a civilian accused in this respect, and the unanimity requirement announced in [Ramos](#) is not a "fundamental right" afforded to the former. As described above, [Ramos](#) established that the jury trial guaranteed by the [Sixth Amendment](#) requires a unanimous verdict, but it did not purport to expand the scope of the [Sixth Amendment](#) jury trial right to servicemembers tried by courts-martial. To the extent Article 52, UCMJ, is therefore subject to rational basis review, we find Appellant has failed to meet his burden to demonstrate no plausible rational reason exists for the three-fourths provision; therefore, we find no cause to overturn it. See [Paulk](#), 66 M.J. at 643.

¹² We recognize that, as Appellant notes, several rights guaranteed by the [Sixth Amendment](#) have been applied to courts-martial. See, e.g., [United States v. Danylo](#), 73 M.J. 183, 186 (C.A.A.F. 2014) (speedy trial); [United States v. Fosler](#), 70 M.J. 225, 229 (C.A.A.F. 2011) (notice); [United States v. Gooch](#), 69 M.J. 353, 361 (C.A.A.F. 2011) (effective counsel); [Blazier](#), 69 M.J. at 222 (confrontation); [United States v. Hershey](#), 20 M.J. 433, 435 (C.M.A. 1985) (public trial). However, Appellant has not drawn our attention to any case in which a [Sixth Amendment](#) right has been found applicable to trial by courts-martial in direct contradiction to express statutory language enacted by Congress pursuant to its [Article I, Section 8](#) authority to make rules for the government of the land and naval forces. Rather, the CAAF has found [Sixth Amendment](#) guarantees applicable where they are also consistent with the statutory regime Congress enacted. In contrast, in the instant case Appellant would have us, in effect, declare Article 52, UCMJ, unconstitutional, notwithstanding [Article I, Section 8](#).

¹³ Cf. [United States ex rel. Toth v. Quarles](#), 350 U.S. 11, 17, 76 S. Ct. 1, 100 L. Ed. 8 (1955):

[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain [*57] discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served.

F. Convening Authority's Failure to Take Action

1. Additional Background

The offenses of which Appellant was convicted occurred between [*58] on or about 11 December 2018 and on or about 13 February 2019. The convening authority referred the charges and specifications on 28 January 2020 for trial by a general court-martial. The court-martial concluded on 3 June 2020, and the military judge signed the Statement of Trial Results on the same day.

On 12 June 2020, Appellant submitted a request that the convening authority defer his adjudged confinement and reduction in grade, and the automatic forfeitures, until the military judge entered the judgment of the court-martial. See [10 U.S.C. § 857\(b\)\(1\)](#). In addition, Appellant requested the convening authority waive his automatic forfeitures for a period of six months, his release from confinement, or the expiration of his term of service, whichever occurred first, for the benefit of his wife and dependent child. See [10 U.S.C. § 858b\(b\)](#). Appellant did not request a reduction in his sentence pursuant to R.C.M. 1106.

On 4 August 2020, the convening authority signed a Decision on Action memorandum wherein he stated he took "no action" on the findings or the sentence in Appellant's case. The convening authority further stated that he granted the requested deferment of the reduction in grade and automatic forfeitures, and that he also granted [*59] the waiver of automatic forfeitures in order "to maximize the financial benefit to [Appellant's] dependents." However, the convening authority denied the request to defer Appellant's confinement; he

did not provide a reason for the denial.¹⁴

On 21 August 2020, the military judge signed the entry of judgment. Appellant did not object to the convening authority's decision on action or to any other aspect of the post-trial process prior to submitting his assignments of error to this court. See R.C.M. 1104(b) (governing post-trial motions).

2. Law

[I]n any court-martial where an accused is found guilty of at least one specification involving an offense that was committed before January 1, 2019, a convening authority errs if he fails to take one of the following post-trial actions: approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part.

[United States v. Brubaker-Escobar, 81 M.J. 471, 472 \(C.A.A.F. 2021\)](#) (per curiam); see also [Article 60, UCMJ, 10 U.S.C. § 860](#) (2016 MCM). The convening authority's failure to explicitly take one of those actions is a "procedural" error. [Brubaker-Escobar, 81 M.J. at 475](#). "Pursuant to Article 59(a), UCMJ, [10](#)

¹⁴ Although not raised by Appellant, we note the convening authority erred by failing to state the reasons why he denied Appellant's request to defer confinement. See [United States v. Sloan, 35 M.J. 4, 7 \(C.M.A. 1992\)](#), overruled on other grounds by [United States v. Dinger, 77 M.J. 447, 453 \(C.A.A.F. 2018\)](#); see also R.C.M. 1103(d)(2) (stating decisions on deferment requests are subject to judicial review for abuse of discretion). We further note Appellant did not object to the convening authority's failure to state the reasons for denying the request. See R.C.M. 1104(b) (permitting parties to file post-trial motions to address various matters, including errors in post-trial processing). Reviewing for plain error, under the circumstances of this case, we find the omission did not materially prejudice Appellant's substantial rights. See [United States v. Scalo, 60 M.J. 435, 436 \(C.A.A.F. 2005\)](#) (citations omitted).

[U.S.C. § 859\(a\) \(2018\)](#), procedural errors are 'test[ed] for material prejudice to a substantial right to determine whether relief is warranted.'" [*60] *Id.* (alteration in original) (quoting [United States v. Alexander, 61 M.J. 266, 269 \(C.A.A.F. 2005\)](#)).

3. Analysis

Appellant requests that we remand the record in order for the convening authority to take action on the sentence as Article 60, UCMJ, required him to do. However, Appellant—who submitted his assignment of error on this issue before the CAAF issued its opinion in [Brubaker-Escobar](#) quoted above—does not allege that he was prejudiced by the convening authority's failure to take action on the sentence. Instead, Appellant reviews several unpublished opinions of this court that pre-date [Brubaker-Escobar](#), in which various panels reached conflicting conclusions as to whether the convening authority's failure to take action on the entire sentence was an error and, if so, under what circumstances corrective action was required.¹⁵ Relying particularly on [United States v. Lopez, No. ACM S32597, 2020 CCA LEXIS 439, at *9 \(A.F. Ct. Crim. App. 8 Dec. 2020\)](#) (unpub. op.), *rev. denied*, __ M.J. __, 82 M.J. 99, 2021 CAAF LEXIS 978 (C.A.A.F. 9 Nov. 2021), and [United States v. Finco, No. ACM S32603, 2020 CCA LEXIS 246, at *11-17 \(A.F. Ct. Crim. App. 27 Jul. 2020\)](#) (unpub. op.), *rev. denied*, __ M.J. __, 2022 CAAF LEXIS 168

(C.A.A.F. 3 Mar. 2022), Appellant contends Article 60, UCMJ, "must be scrupulously honored" and that action on the sentence is required.

However, in light of [Brubaker-Escobar](#), the convening authority's failure to take action on the sentence was a non-jurisdictional procedural error to be tested for material prejudice. We find no such prejudice to Appellant's substantial rights in this case. The convening [*61] authority was not authorized to disapprove, commute, or suspend Appellant's adjudged bad-conduct discharge or term of confinement. See [10 U.S.C. § 860\(c\)\(4\) \(2016 MCM\)](#). The convening authority did have power to disapprove, commute, or suspend Appellant's adjudged reduction in grade, see [Article 60\(c\)\(2\)\(B\)](#) and [\(c\)\(4\), UCMJ, 10 U.S.C. § 860\(c\)\(2\)\(B\), \(c\)\(4\)](#); however, Appellant requested no such relief. Considering the totality of the circumstances, including Appellant's failure to identify specific prejudice, the sentence imposed, the absence of any request for clemency with respect to the sentence (as opposed to deferment or waiver), the convening authority's limited ability to modify the sentence, and the nature and seriousness of the offenses of which Appellant was convicted, we find no material prejudice to Appellant's substantial rights by the convening authority's failure to take action on the sentence.

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. [Articles 59\(a\)](#) and 66(d), UCMJ, [10 U.S.C. §§ 859\(a\), 866\(d\)](#). Accordingly, the findings and sentence are **AFFIRMED**.

¹⁵ See [United States v. Lopez, No. ACM S32597, 2020 CCA LEXIS 439, at *9 \(A.F. Ct. Crim. App. 8 Dec. 2020\)](#) (unpub. op.); [United States v. Aumont, No. ACM 39673, 2020 CCA LEXIS 416 \(A.F. Ct. Crim. App. 20 Nov. 2020\)](#) (en banc) (unpub. op.); [United States v. Barrick, No. ACM S32579, 2020 CCA LEXIS 346, at *3-5 \(A.F. Ct. Crim. App. 30 Sep. 2020\)](#) (unpub. op.); [United States v. Finco, No. ACM S32603, 2020 CCA LEXIS 246, at *11-17 \(A.F. Ct. Crim. App. 27 Jul. 2020\)](#) (unpub. op.), *rev. denied*, __ M.J. __, 2022 CAAF LEXIS 168 (C.A.A.F. 3 Mar. 2022).



Caution

As of: November 18, 2022 9:10 PM Z

United States v. Apgar

United States Army Court of Criminal Appeals

May 10, 2022, Decided

ARMY 20200615

Reporter

2022 CCA LEXIS 278 *

UNITED STATES, Appellee v. Private E1
NICHOLAS J. APGAR, United States Army,
Appellant

Subsequent History: Petition for review filed
by [United States v. Apgar, 2022 CAAF LEXIS
476, 2022 WL 3223344 \(C.A.A.F., July 8,
2022\)](#)

Motion granted by [United States v. Apgar,
2022 CAAF LEXIS 483, 2022 WL 3213651
\(C.A.A.F., July 11, 2022\)](#)

Review granted by [United States v. Apgar,
2022 CAAF LEXIS 600 \(C.A.A.F., Aug. 18,
2022\)](#)

Prior History: [*1] Headquarters, Fort Drum.
Teresa L. Raymond and James Barkei, Military
Judges, Colonel Robert C. Insani, Staff Judge
Advocate.

Counsel: For Appellant: Colonel Michael C.
Friess, JA; Major Rachel P. Gordienko, JA;
Captain Lauren M. Teel, JA (on brief);
Lieutenant Colonel Dale C. McFeatters, JA;
Captain Lauren M. Teel, JA; Captain Julia M.
Farinas, JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess,
JA; Lieutenant Colonel Craig J. Schapira, JA;
Major Mark T. Robinson, JA; Captain Cynthia
A. Hunter, JA (on brief).

Judges: Before WALKER, EWING, and
PARKER Appellate Military Judges.

Opinion

DECISION

Per Curiam:

On consideration of the entire record, including
consideration of the issues personally
specified by the appellant, we hold the findings
of guilty and the sentence, as entered in the
Judgment, correct in law and fact. Accordingly,
those findings of guilty and the sentence are
AFFIRMED

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United States v. Brown

United States Air Force Court of Criminal Appeals

August 16, 2021, Decided

No. ACM 39728

Reporter

2021 CCA LEXIS 414 *; 2021 WL 3626397

UNITED STATES, Appellee v. Jamie L. BROWN, Master Sergeant (E-7), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by [United States v. Brown, 2021 CAAF LEXIS 931, 2021 WL 5139091 \(C.A.A.F., Oct. 21, 2021\)](#)

Motion granted by [United States v. Brown, 2021 CAAF LEXIS 932, 2021 WL 5177053 \(C.A.A.F., Oct. 22, 2021\)](#)

Motion granted by [United States v. Brown, 2021 CAAF LEXIS 981, 2021 WL 5773718 \(C.A.A.F., Nov. 9, 2021\)](#)

Review denied by [United States v. Brown, 2022 CAAF LEXIS 8 \(C.A.A.F., Jan. 5, 2022\)](#)

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Christina M. Jimenez. Approved sentence: Dishonorable discharge, confinement for 34 months, and reduction to E-4. Sentence adjudged 22 March 2019 by GCM convened at Moody Air Force Base, Georgia.

Case Summary

Overview

HOLDINGS: [1]-The evidence was legally sufficient to support appellant's convictions for

sexual assault and attempted sexual assault beyond a reasonable doubt because the evidence indicated that the victim's impairment by alcohol would have been obvious to appellant as appellant undressed the victim himself and would have observed her unresponsiveness and immobility; [2]-The military judge properly denied the severance motion and appellant was not denied a fair trial because trial counsel generally adhered to the military judge's admonition to keep the evidence of the two sets of charges separate, and appellant did not contend otherwise.

Outcome

Findings and sentence affirmed.

Counsel: For Appellant: Major David A. Schiavone, USAF; Robert A. Feldmeier, Esquire.

For Appellee: Lieutenant Colonel Brian C. Mason, USAF; Major Jessica L. Delaney, USAF; Major Dayle P. Percle, USAF; Mary Ellen Payne, Esquire.

Judges: Before JOHNSON, LEWIS, and CADOTTE, Appellate Military Judges. Chief Judge JOHNSON delivered the opinion of the court, in which Senior Judge LEWIS and Judge CADOTTE joined.

Opinion by: JOHNSON

Opinion

JOHNSON, Chief Judge:

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of attempted sexual assault and one specification of sexual assault in violation of [Articles 80 and 120](#), Uniform Code of Military Justice (UCMJ), [10 U.S.C. §§ 880, 920](#).^{1,2} The court members sentenced Appellant to a dishonorable discharge, confinement for 34 months, and reduction to the grade of E-4. The convening authority approved the adjudged sentence but waived mandatory forfeitures for a period of six months for [*2] the benefit of Appellant's spouse and dependent children.

Appellant raises nine issues on appeal: (1) whether Appellant's convictions are legally and factually sufficient; (2) whether the military judge erred in denying the Defense's motion to sever charges; (3) whether the military judge provided erroneous instructions on findings; (4) whether trial counsel's closing argument was improper; (5) whether trial defense counsel were ineffective; (6) whether the military judge erred when she refused to permit the Defense to confront the victim with evidence contained in the Sexual Assault

Forensic Examination (SAFE) report; (7) whether the non-unanimous verdict violated Appellant's [Fifth Amendment](#)³ and [Sixth Amendment](#)⁴ rights in light of [Ramos v. Louisiana, 140 S. Ct. 1390, 206 L. Ed. 2d 583 \(2020\)](#); (8) whether Appellant is entitled to relief for unlawful post-trial punishment that is not raised in the record of trial and does not amount to cruel or unusual punishment in violation of the [Eighth Amendment](#)⁵ or [Article 55, UCMJ, 10 U.S.C. § 855](#);⁶ and (9) whether Appellant is entitled to relief for unreasonable appellate delay.

We have carefully considered issues (7) and [*3] (8), and we find they warrant neither further discussion nor relief. See [United States v. Willman, 81 M.J. 355, No. 21-0030, 2021 CAAF LEXIS 697, at *6 \(C.A.A.F. 21 Jul. 2021\)](#); [United States v. Jessie, 79 M.J. 437, 444-45 \(C.A.A.F. 2020\)](#); [United States v. Easton, 71 M.J. 168, 175 \(C.A.A.F. 2012\)](#); [United States v. Matias, 25 M.J. 356, 361 \(1987\)](#). As to the remaining issues, we find no error that materially prejudiced Appellant's substantial rights, and we affirm the findings and sentence.⁷

³ U.S. Const. amend. V.

⁴ U.S. Const. amend. VI.

⁵ U.S. Const. amend. VIII.

¹ Unless otherwise noted, all references in this opinion to the UCMJ, Rules for Courts-Martial, and Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2016 ed.).

² The attempted sexual assault of which the court-martial convicted Appellant was a lesser-included offense of a second charged sexual assault in violation of [Article 120, UCMJ](#), of which the court-martial found Appellant not guilty. The court-martial also found Appellant not guilty of two specifications of abusive sexual contact on a child and one specification of indecent liberties with a child, in violation of [Article 120, UCMJ](#) (*Manual for Courts-Martial, United States* (2008 ed.) (2008 MCM)), and four specifications of battery upon a child under the age of 16 years, in violation of [Article 128, UCMJ, 10 U.S.C. § 928](#) (*Manual for Courts-Martial, United States* (2002 ed.), 2008 MCM, and *Manual for Courts-Martial, United States* (2012 ed.)).

⁶ We have slightly reordered the issues presented in Appellant's brief. Appellant personally asserts issues (7) and (8) pursuant to [United States v. Grostefon, 12 M.J. 431 \(C.M.A. 1982\)](#).

⁷ Although not raised by Appellant, we note the convening authority erroneously failed to state the reasons why he denied Appellant's post-trial request that the reduction in grade and automatic forfeitures be deferred until convening authority action on the sentence pursuant to [Articles 57\(a\)\(2\) and 58b\(a\)\(1\), UCMJ, 10 U.S.C. §§ 857\(a\)\(2\), 858b\(a\)\(1\)](#). See [United States v. Sloan, 35 M.J. 4, 7 \(C.M.A. 1992\)](#), overruled on other grounds by [United States v. Dinger, 77 M.J. 447, 453 \(C.A.A.F. 2018\)](#); see also R.C.M. 1101(c)(3), Discussion ("If the request for deferment is denied, the basis for the denial

I. BACKGROUND

In June 2017, Appellant completed a one-year assignment at Kunsan Air Base (AB), Republic of Korea. On 15 June 2017, Appellant was at the all-ranks club on Kunsan AB when he was introduced to NM⁸ by a mutual friend. NM was a married female stationed at Osan AB, Republic of Korea, who frequently visited her then-husband, Senior Airman (SrA) TM,⁹ at Kunsan AB where he was stationed. During their conversation, NM learned that Appellant was due to leave Korea soon. Appellant invited NM and SrA TM to Appellant's farewell barbeque at Osan AB on Saturday, 17 June 2017. However, NM and SrA TM remained at Kunsan AB that day and did not attend.

On 19 June 2017, Appellant was still at Osan AB awaiting his flight out of Korea. NM was also back at Osan AB. That evening NM went to dinner at an off-base restaurant with several co-workers, after which she and three of her co-workers went to a bar to play pool. At 1955, NM [*4] sent Appellant a text message which read, "So tell me you're out on the sed¹⁰ so I can get you a drink for not making it Saturday." Appellant and a friend, Technical Sergeant (TSgt) JN, met NM at the bar where she was playing pool; however, Appellant and TSgt JN

soon left, apparently because Appellant was not on good terms with the bartender. TSgt JN later invited NM to meet them at another club, which she did, bringing her pool cue. NM did not previously know TSgt JN, but in the course of the evening NM learned that TSgt JN had been deployed with her husband SrA TM and they were acquaintances. Appellant, TSgt JN, and NM later went to a hookah bar together.

At trial, NM estimated that over the course of the evening she consumed, at a minimum, four or five soju drinks,¹¹ three or four shots of whiskey, three or four shots of an alcoholic drink with unknown ingredients known as "Apple Pie," one shot of vodka, and perhaps more. Appellant and TSgt JN also drank alcohol throughout the evening.

After leaving the hookah bar, Appellant, TSgt JN, and NM decided to go to TSgt JN's off-base apartment. At trial, NM did not fully recall how this decision came about, but she testified:

I remember the conversation [*5] of [the 0100 hours] curfew coming up, the fact that my dorm was on the other side of base. That there weren't going to be any taxis whenever I got through the gate to get home. So it was going to be me walking back by myself.

NM explained that it was "[o]ver a mile" to walk from the gate to her dorm and further testified, "I was in a safer place if I went with them to have somebody to look after, make sure I would get to work on time, rather than trying to walk home by myself because I don't know what could happen."

On the way to TSgt JN's apartment, which was an approximately five-minute walk from the

should be in writing and attached to the record of trial."). The denial was recorded in the staff judge advocate's recommendation to the convening authority which was served on the Defense, and the Defense did not object to the omission. Reviewing for plain error, under the circumstances of this case, we find the omission did not materially prejudice Appellant's substantial rights. See [United States v. Scalo](#), 60 M.J. 435, 436 (C.A.A.F. 2005) (citations omitted).

⁸ NM was an active duty enlisted member of the Air Force in June 2017 and at the time of Appellant's trial.

⁹ NM and SrA TM were no longer married at the time of Appellant's trial.

¹⁰ The abbreviation "SED" refers to the "Songtan Entertainment District," an area with numerous bars and clubs located outside the Osan AB main gate.

¹¹ At trial, NM described soju as "Korean rice liquor" of variable strength, "commonly mixed with other things." TSgt JN described soju as "Korean rice vodka," some varieties of which were "unregulated" and "might be stronger than others."

Osan AB main gate, the group stopped at a food truck to buy food and at a convenience store where NM bought cigarettes and Appellant and TSgt JN used the restroom. At trial, NM described her condition at this point as "very, very fuzzy." NM could not remember walking to TSgt JN's apartment. However, video introduced at trial from several security cameras in TSgt JN's apartment building depicted Appellant, TSgt JN, and NM walking through the building's parking garage and into the rear elevator. In the video, NM walks without apparent difficulty and appears to be conversing with the others, [*6] and at one point slaps hands with TSgt JN in a "high-five." NM remembered going up in the apartment building's elevator, entering the apartment, taking off her shoes, going onto the balcony to smoke at one point, and vomiting in TSgt JN's bathroom twice.

The original plan was that Appellant would sleep in TSgt JN's guest bedroom and NM would sleep on the sofa. However, after NM vomited, Appellant told TSgt JN he did not think NM should sleep on the couch. According to TSgt JN's testimony, when NM came out of the bathroom after vomiting, Appellant took her into the guest bedroom. At that point, TSgt JN went into his bedroom and went to sleep.

NM did not remember going into the bedroom. Her next memories were of briefly awakening and falling asleep again a series of times. On the first occasion, NM recalled waking up lying on her back and feeling that her shorts were unbuttoned. Her next memory was of waking up again and feeling her shirt had been removed. The next time NM woke up, she felt her arms were raised over her head and her sports bra had been pulled up to her elbows. The next time she awoke, she felt her hand had been moved onto a penis, which caused a "jerk reaction" on her [*7] part to move her

hand away. On the next occasion, NM woke up and "jump[ed] because [she] felt a penis near [her] anus." The next time she awoke, NM was lying on her back and "felt what seemed to be like a penis pressing up against [her] vagina." NM testified "[i]t felt like" the "pressure" was "beginning to be inserted into [her] vagina." The next time she awoke, she was still on her back and felt a "face in [her] vagina," and specifically felt the warmth, moisture, and "heavy breathing" of a mouth, although she did not recall penetration of her vagina at that point. NM did not know how much time elapsed between each of these memories. NM testified that throughout these occasions, her eyes remained closed and she could not see anything; she felt she could not move or speak, and did not have "any control over [her] body."

NM awoke at approximately 0500 on 20 June 2017 wearing only her socks, which had a spot of vomit on them. She still felt effects from the alcohol. Appellant was also in the room. NM found her clothes on the floor, hurriedly got dressed, and told Appellant that she needed to leave. Appellant suggested they go smoke together on the balcony. Instead, NM went to the bathroom, [*8] and when she emerged Appellant was waiting for her and again requested she smoke with him. Appellant seemed "adamant," so NM went to smoke with him on the balcony.

On the balcony, Appellant asked if NM wanted to talk about the prior night. NM said she did not. Appellant responded, "Well, I think we should for my safety." Appellant then told NM that she "got hot, [she] took off all [her] clothes, [she] started cuddling up next to him, and that [she] wanted to have sex." NM testified Appellant's account was not consistent with what she remembered. Moreover, NM testified that she would not have moved once she fell asleep drunk, that she would not leave her

socks on if she was hot, and that she did not sleep naked. Appellant's claims made her angry and upset. NM then left the apartment, leaving behind her pool cue.

After she left the apartment, NM called her friend and co-worker, Staff Sergeant (SSgt) GS. NM sounded to SSgt GS like she was crying and asked SSgt GS to "cover" for her because she would be late to work. SSgt GS could tell NM was off-base because of the traffic sounds; NM said she did not know where she was, and SSgt GS helped her find her way back to the main gate. SSgt GS [*9] met NM at the gate. NM was crying and shaking, "appeared sick," and was "holding her stomach." SSgt GS later testified that NM kept repeating words to the effect of, "I'm not that dumb. I'm not that stupid. I'm a married woman." They took a taxi back to their dormitory, where they sat outside and smoked. NM was still crying and shaking and said little. NM tried to drink a sports drink, but vomited again. Eventually, SSgt GS asked NM if she needed to see the Sexual Assault Response Coordinator (SARC), to which NM responded, "Yes."

NM decided to shower before meeting with the SARC representative because she "smelled like vomit and alcohol." While NM was in the shower she made a video call to her husband, SrA TM, at approximately 0600. NM told SrA TM an abbreviated account of her memory of what occurred at TSgt JN's apartment that was largely consistent with her later trial testimony. SrA TM described NM's voice as "very shaky" and crying. After the conversation, SrA TM requested emergency leave and arrived at Osan AB later that day, where he stayed with NM for several days.

NM met with a SARC representative that day, 20 June 2017. NM underwent a Sexual Assault Forensic Examination (SAFE) [*10] on 23 June 2017. Subsequent analysis by the

United States Army Criminal Investigation Laboratory (USACIL) of evidence collected during the SAFE revealed partial male DNA profiles consistent with Appellant from swabs from NM's vaginal wall and cervix,¹² and a male DNA profile matching Appellant from NM's underwear. Also on 23 June 2017, NM met with agents of the Air Force Office of Special Investigations (AFOSI).

II. DISCUSSION

A. Legal and Factual Sufficiency

1. Law

We review issues of legal and factual sufficiency de novo. [*United States v. Washington*, 57 M.J. 394, 399 \(C.A.A.F. 2002\)](#) (citation omitted). Our assessment of legal and factual sufficiency is limited to evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [*United States v. Robinson*, 77 M.J. 294, 297-98 \(C.A.A.F. 2018\)](#) (quoting [*United States v. Rosario*, 76 M.J. 114, 117 \(C.A.A.F. 2017\)](#)). "[T]he term 'reasonable doubt' does not mean that the evidence must be free from any conflict" [*United States v. King*, 78](#)

¹² The USACIL report indicated "[Appellant] and his paternal male relatives cannot be excluded from the partial Y-STR DNA profile[s]" obtained from NM's vaginal swabs and cervical swabs. "The probability of randomly selecting a male individual with this profile from the same population group as [Appellant]" would be 1 in 1300 for the vaginal swabs and 1 in 390 for the cervical swabs, respectively.

[M.J. 218 \(C.A.A.F. 2018\)](#), cert. denied, ___ U.S. ___, 139 S. Ct. 1641, 203 L. Ed. 2d 902 (2019) (citation omitted). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." [United States v. Barner](#), 56 M.J. 131, 134 (C.A.A.F. 2001) (citations [*11] omitted). Thus, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." [King](#), 78 M.J. at 221 (alteration in original) (citation omitted).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." [United States v. Turner](#), 25 M.J. 324, 325 (C.M.A. 1987). "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" [United States v. Wheeler](#), 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (citation omitted), *aff'd*, 78 M.J. 218 (C.A.A.F. 2018) (quoting [Washington](#), 57 M.J. at 399).

Appellant's conviction for sexual assault in violation of [Article 120, UCMJ](#), required the Government to prove: (1) on or about 20 June 2017, at or near Osan AB, Republic of Korea, Appellant committed a sexual act upon NM by causing penetration of NM's vulva by Appellant's penis; (2) Appellant did so when NM was incapable of consenting to the sexual act due to impairment by alcohol; and (3) Appellant knew or reasonably should have known NM was incapable of consenting [*12] to the sexual act due to impairment by alcohol. See *Manual for Courts-Martial, United States*

(2016 ed.) (2016 MCM), pt. IV, ¶ 45.b.(3)(f). Appellant's conviction for attempted sexual assault in violation of [Article 80, UCMJ](#), required the Government to prove: (1) on or about 20 June 2017, at or near Osan AB, Republic of Korea, Appellant did a certain act, that is, attempted to penetrate NM's vulva with his tongue when NM was incapable of consenting to the sexual act due to impairment by alcohol, and NM's impairment was known or reasonably should have been known by Appellant; (2) that Appellant did the act with the specific intent to commit the offense of sexual assault in violation of [Article 120, UCMJ](#); (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to bring about the commission of the intended sexual assault. See 2016 MCM, pt. IV, ¶ 4.(b), ¶ 45.b.(3)(f). "The term 'consent' means a freely given agreement to the conduct at issue by a competent person." [10 U.S.C. § 920\(g\)\(8\)\(A\)](#). A person is incapable of consenting if she lacks the cognitive ability to appreciate the sexual conduct in question or lacks the physical or mental ability to make or to communicate a decision about whether she agrees [*13] to the conduct. See [United States v. Pease](#), 75 M.J. 180, 185-86 (C.A.A.F. 2016) (citation omitted).

2. Analysis

a. Sufficiency of the Government's Evidence

The Government introduced sufficient evidence for a rational trier of fact to find every element of the offenses proven beyond a reasonable doubt. Although at trial NM did not specifically remember Appellant's penis

penetrating her,¹³ the DNA evidence obtained from NM's cervix, vaginal wall, and underwear, coupled with all of the other circumstantial evidence, was powerful proof Appellant's penis had in fact penetrated her vulva. See [King, 78 M.J. at 221](#) (citations omitted) ("[T]he [G]overnment is free to meet its burden of proof with circumstantial evidence"). Similarly, although NM testified she did not specifically remember feeling Appellant's tongue, her testimony that she felt a mouth on her vagina, under the circumstances, was convincing evidence that Appellant at least attempted to penetrate her vulva with his tongue.

Most of the litigation, at trial and on appeal, concerns whether the Government proved NM was incapable of consenting to the sexual acts due to her impairment by alcohol. We find that a rational trier of fact could find this element proven beyond a reasonable doubt. Several considerations [*14] lead us to this conclusion.

NM testified that she consumed a large quantity of alcohol that night, including several drinks of unknown strength. Although testimony indicated NM was an experienced drinker, further evidence indicated NM's physical and mental state were heavily impaired by alcohol at the time of the offenses. Although NM was able to walk and converse before she arrived at TSgt JN's apartment, her memory was already being affected and she described partial blackouts in her testimony. After arriving at the apartment, NM vomited twice in TSgt JN's bathroom. When SSgt GS saw NM the following morning, she still appeared ill and vomited again. Most significantly, NM testified that as she intermittently awoke and lost consciousness as

Appellant undressed her and sexually assaulted her, she felt that she could not speak, move, or open her eyes. The court members observed NM's testimony and evidently found her credible. We do as well.

Furthermore, the evidence indicates NM's impairment by alcohol would have been obvious to Appellant. Appellant was with NM for most of the evening, including most of the time during which she was consuming alcohol. He knew that she was ill to the point [*15] of vomiting, and according to TSgt JN used her illness to justify taking her into the guest bedroom. Appellant was evidently with her throughout the night, undressed her himself, and would have observed her unresponsiveness and immobility.

NM's testimony regarding Appellant's behavior after she awoke suggested his consciousness of guilt and strengthened the Government's case. Appellant insisted on talking to NM about the previous night for his own "safety." Appellant did not ask NM what she remembered or what she thought about the events of the prior night. Instead, as described by NM, Appellant appears to have assumed either that NM would not remember, or could be pressured into accepting Appellant's manifestly self-serving version of events. Either explanation tends to suggest consciousness of guilt on his part. NM explained that what Appellant described was both contrary to the memories she did have, and did not make sense given how she reasonably would have behaved.

b. Appellant's Arguments

Appellant does not contest the sufficiency of the evidence that he committed the sexual act of penetrating NM's vulva with his penis and attempted to penetrate her vulva with his tongue. Instead, [*16] he raises several

¹³ The SAFE report created on 23 June 2017 and admitted into evidence recorded that NM said at that time she "slightly remember[ed] penetration," without specifying body parts.

arguments related to the sufficiency of the evidence of NM's impairment by alcohol. We address the most significant of these in turn.

As at trial, Appellant emphasizes the security video which depicts NM walking unassisted and conversing with Appellant and TSgt JN before she arrived at TSgt JN's apartment. In addition, Appellant notes that after trial defense counsel had NM watch the video during her cross-examination, NM agreed with trial defense counsel's statement that "you can't confidently say that you weren't -- just like you were in the video, awake, active, engaged and you just don't remember it." We are not persuaded. The security video does not depict the point in time that is relevant to the charge, which is when Appellant was committing the offenses. A rational trier of fact could conclude that neither the video nor NM's admission on cross-examination, based on her partial lack of memory, counteract NM's clear and repeated testimony that, while Appellant was undressing and assaulting her in the guest bedroom, she felt she could not speak or move.

Appellant contends NM's marriage to SrA TM provided "a strong motive for an alleged victim to transform an ill-advised [*17] consensual encounter into a non-consensual one." We agree that desire to protect a marriage relationship can be a motive to deny or misrepresent a consensual extramarital sexual encounter. However, a rational factfinder could reasonably conclude the evidence in this case suggests such a scenario. There is no evidence of flirtatious behavior between NM and Appellant at any point. By all accounts, NM began vomiting at TSgt JN's apartment and vomited again the following morning. Appellant's description to NM of a consensual encounter is patently self-serving, implausible, and suggestive of consciousness of guilt. Furthermore, the court members observed

NM's testimony and evidently found her credible.

Appellant argues NM gave differing accounts of the alleged sexual assault to the SARC representative, during her video call with SrA TM, and during her SAFE. For example, according to SSgt GS,¹⁴ NM told the SARC representative that she initially went to sleep on TSgt JN's couch; whereas she told SrA TM she went to sleep on the couch, woke up to vomit in the bathroom, and then woke up in the bed with Appellant trying to have sexual intercourse with her; and she told the sexual assault medical [*18] forensic examiner that she was not sure whether Appellant penetrated her vagina. We find none of these minor distinctions significant, and we find that on the whole NM's descriptions of events in TSgt JN's apartment were substantially consistent.

Appellant compares his case to two cases in which our sister courts found sexual assault convictions to be factually insufficient. We find neither comparison persuasive.

The facts of [*United States v. Pease*, 74 M.J. 763 \(N.M. Ct. Crim. App. 2015\)](#), *aff'd*, [*75 M.J. 180 \(C.A.A.F. 2016\)*](#), are similar to the instant case in some respects. In *Pease*, the appellant was convicted of committing sexual assault against two alleged victims who were incapable of consenting due to intoxication by alcohol. *Id.* at 764. There was testimony regarding how much alcohol the alleged victims consumed on the nights in question and how intoxicated they appeared to be, and one of the alleged victims testified that she vomited during the charged sexual assault. Each alleged victim had only fragmentary memories of the periods when the charged sexual assaults occurred. The United States

¹⁴ SSgt GS was present when NM spoke with the SARC representative on 20 June 2017.

Navy-Marine Corps Court of Criminal Appeals (NMCCA) concluded, based on the "totality of the record," that the Government had failed to prove beyond a reasonable doubt that the alleged victims [*19] were incapable of consenting, or that the appellant knew or reasonably should have known they were incapable of consenting. *Id. at 770*. However, there are substantial differences between *Pease* and the instant case. The NMCCA noted that one of the alleged victims remembered kissing the appellant and telling him he was "cute," and of supporting her own weight on her elbows while having sexual intercourse with him. *Id. at 771*. The other alleged victim testified that she remembered she enjoyed some of the sexual activity with the appellant, that at one point she was on top of him and at another point was supporting herself on her hands and knees, and that when she did not like an activity she told the appellant so and he stopped. *Id. at 768, 771*. In contrast, NM provided no equivalent testimony in the instant case; on the contrary, she testified that while the offenses were occurring she felt that she could not speak or move, and—other than Appellant's self-serving assertion the following morning—there was no evidence NM actively participated.

Appellant's comparison to *United States v. Dorr*, ARMY 20170172, 2019 CCA LEXIS 229 (A. Ct. Crim. App. 22 May 2019) (unpub. op.), is similarly unconvincing. In *Dorr*, the appellant testified at trial that the sexual encounter was consensual, albeit rough, and his account [*20] was corroborated to an extent by physical evidence, such as visible hickeys on the appellant's neck. *Id. at *5*. In contrast, the alleged victim "remember[ed] nothing about the sexual interaction with appellant, other than a snippet where appellant was on top of her, engaged in sexual intercourse, telling [her] that she was beautiful." *Id.* Appellant emphasizes that in *Dorr*, the

evidence included a video taken outside a bar shortly before the alleged victim and the appellant returned to their barracks together; although the video showed the alleged victim was "without question" drunk, it also indicated she had the "ability to understand her surroundings and freely interact with those around her, to include [the] appellant." *Id. at *7-8*. We agree with our sister court and with Appellant "[t]hat lack of memory . . . does not equate with an inability to consent." *Id. at *8*; see also *United States v. Yates*, No. ACM 39444, 2019 CCA LEXIS 391, at *18 (A.F. Ct. of Crim. App. 30 Sep. 2019), rev. denied, 80 M.J. 80 (C.A.A.F. 2020) ("[T]he essential question with regard to proof of the offense of sexual assault is not how alcohol affected [the victim's] memory of that night, but how it affected her capacity to consent to sexual activity."). However, *Dorr* is clearly distinguishable from the instant case by Dorr's testimony, [*21] by the physical evidence supporting that testimony, and again most importantly, by NM's testimony regarding her inability to move or speak in response to Appellant's actions.

c. Conclusion as to Legal and Factual Sufficiency

Drawing every reasonable inference from the evidence of record in favor of the Government, we conclude the evidence was legally sufficient to support Appellant's convictions for sexual assault and attempted sexual assault beyond a reasonable doubt. Additionally, having weighed the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt.

B. Severance

1. Additional Background

In addition to the two specifications of sexual assault committed against NM, Appellant was charged with several alleged offenses against his step-daughter AS, including two specifications of abusive sexual contact on a child and one specification of indecent liberties with a child, and four specifications of battery upon a child under the age of 16 years. The charged offenses against AS allegedly occurred between March 2005 and January 2013, and were unrelated to the June 2017 offenses [*22] against NM.

Before trial, the Defense moved to sever the specifications involving AS from the specifications involving NM to prevent "manifest injustice." The Defense contended that the allegations involving AS would inevitably impermissibly spill over into the court members' consideration of the charged sexual assaults against NM. The Government opposed the motion, contending there was no danger of spillover because the circumstances of the alleged offenses involving AS and NM were "radically different," and the Defense had failed to demonstrate manifest injustice.

The military judge issued a written ruling in which she applied the three-part analysis set forth in [*United States v. Curtis*, 44 M.J. 106, 128 \(C.A.A.F. 1996\)](#), *rev'd as to sentence on recon*, [*46 M.J. 129 \(C.A.A.F. 1997\)*](#), found no manifest injustice, and denied the motion. The military judge provided the court members the following instructions regarding spillover:

An accused may be convicted based only on evidence before this court, not on evidence of a general criminal disposition. Each offense must stand on its own and you must keep the evidence of each offense separate. Stated differently, if you find or believe that the accused is guilty of

one offense, you may not use the finding or belief as a basis [*23] for inferring, assuming, or proving that he committed any other offense.

The burden is on the prosecution to prove each and every element of each offense beyond reasonable doubt. Proof of one offense carries with it no inference that the accused is guilty of any other offense.

The Defense did not object to the spillover instruction or request any additional instructions with respect to spillover.

As described above, the court members found Appellant guilty of one specification of sexual assault and one specification of attempted sexual assault against NM. The court members found Appellant not guilty of all of the charged offenses against AS.

2. Law

We review a military judge's ruling on a motion to sever for an abuse of discretion. [*United States v. Giles*, 59 M.J. 374, 378 \(C.A.A.F. 2004\)](#) (citation omitted). "A military judge abuses [her] discretion when [her] findings of fact are clearly erroneous, when [she] is incorrect about the applicable law, or when [she] improperly applies the law." [*United States v. Roberts*, 59 M.J. 323, 326 \(C.A.A.F. 2004\)](#).

"The military justice system encourages the joinder of all known offenses at one trial" [*United States v. Simpson*, 56 M.J. 462, 464 \(C.A.A.F. 2002\)](#) (citing Rule for Courts-Martial (R.C.M.) 601(e)(2)). "Under R.C.M. 906(b)(10), a military judge is required to grant a severance motion when necessary to avoid a 'manifest injustice.'" [*Giles*, 59 M.J. at 378](#). On appeal, "the appellant must [*24] demonstrate more than the fact that separate trials would have provided a better opportunity for an acquittal;" he must demonstrate "the ruling

caused actual prejudice by preventing the appellant from receiving a fair trial." *Id.* (citations omitted). Appellate courts review such rulings by applying the same factors employed by the military judge: "(1) Do the findings reveal an impermissible crossover of evidence? (2) Would the evidence of one offense be admissible proof of the other? (3) Did the military judge provide a proper limiting instruction?" *Id.* (citing [Curtis, 44 M.J. at 128](#)).

Court members are presumed to follow the military judge's instructions in the absence of evidence to the contrary. See [United States v. Taylor, 53 M.J. 195, 198 \(C.A.A.F. 2000\)](#) (citations omitted).

3. Analysis

The military judge did not abuse her discretion by denying the defense motion to sever the specifications. As to the first [Curtis](#) factor, the military judge concluded that the evidence of Appellant's alleged offenses against AS were not admissible to prove Appellant sexually assaulted NM, and vice versa. For purposes of our analysis, we agree. See generally [United States v. Hills, 75 M.J. 350 \(C.A.A.F. 2016\)](#). We further agree with the military judge that the remaining two [Curtis](#) factors support denial of the motion to sever. [*25]

The military judge correctly anticipated that she would give appropriate limiting instructions and indicated she would entertain requests for additional instructions. She in fact gave the members appropriate instructions, to which trial defense counsel did not object and requested no supplemental instructions.

Furthermore, contrary to Appellant's argument on appeal, the findings do not demonstrate impermissible spillover. We agree with the military judge that the separation in time and dissimilarity of the circumstances between the

alleged offenses against AS and NM reduced the risk that the court members would impute evidence with regard to one alleged victim as proof of offenses allegedly committed against the other. Moreover, the fact that the court members acquitted Appellant of all the alleged offenses against AS indicates they could distinguish between the two sets of offenses. *Cf. United States v. Kerr, 51 M.J. 401, 407 (C.A.A.F. 1999)* (stating "the record negates any reasonable possibility of spillover" where the appellant "was convicted of only one of the three specifications of indecent assault"). Moreover, we note trial counsel generally adhered to the military judge's admonition to keep the evidence of the two sets of charges [*26] separate, and Appellant does not contend otherwise. Appellant's argument regarding proof of spillover is essentially that the Government's proof of the offenses against NM was weak; we disagree for the reasons stated above in our review of the legal and factual sufficiency of the evidence. Accordingly, we conclude the military judge properly denied the severance motion and Appellant was not denied a fair trial. See [Giles, 59 M.J. at 378](#).

C. Findings Instructions

1. Additional Background

Trial defense counsel requested that the military judge provide the court members with the following special instructions regarding intoxication and capacity to consent.

- a. You have heard evidence that [NM] consumed alcohol on the night in question. Some, or perhaps all, of you have received some type of training in the military about the relationship between alcohol and sexual activity. You may have been told, for example, that someone who drinks

alcohol cannot consent to sexual acts. That is an incorrect statement of the law. You are required to follow the law as I instruct you, and you must ignore any training or briefings you have received outside of this courtroom regarding the issue of alcohol and its effect on the ability [*27] of a person to consent to sexual acts. The law does not prohibit engaging in sexual acts with a person who is drunk or impaired by alcohol.[] A person may be impaired by alcohol, yet still possess the applicable levels of ability. Charge I, Specifications 1 and 2 allege sexual assault when [NM] was incapable of consenting. As such, the relevant question is whether [NM] lacked the cognitive ability to appreciate the sexual conduct in question, or the physical or mental ability to make or to communicate a decision about whether she agreed to the conduct.

A person may be impaired by alcohol, yet still have the ability to make decisions and appreciate their circumstances. Put another way, a person who is impaired by alcohol may still be competent, as they may still possess the cognitive ability to appreciate the sexual conduct in question, and the physical and mental ability to make and to communicate a decision about whether they agree to the conduct. An incompetent person is a person whose impairment rises to the level of depriving him or her of the cognitive ability to appreciate the nature of the conduct in question or the physical or mental ability to communicate a decision about [*28] whether they agreed to that conduct.

b. Additionally, you have heard evidence that [NM] may have been asleep at various points throughout the evening in question. [Appellant] is not charged with the offense [of] sexual assault when [NM] was asleep. Sexual assault while the alleged victim is

asleep is a separate offense under the UCMJ and one which the prosecution has not charged in this case. The prosecution in this case has charged that, at the time of the acts, [NM] was incapable of consenting due to impairment by alcohol. You are to apply the definition of "incapable of consenting" as I have previously given it to you.

In addition, the Defense requested the military judge not provide the court members with the definition of an "incompetent person." See *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 602 (29 Feb. 2020) (*Benchbook*). The Government objected to the proposed special instructions.

The military judge declined to give the requested special instructions. Applying the three-part analysis the United States Court of Appeals for the Armed Forces (CAAF) set forth in [*United States v. Carruthers*, 64 M.J. 340, 345-46 \(C.A.A.F. 2007\)](#), the military judge found that part "a." of the proposed instruction was not a correct statement of [*29] law because it "redefines 'incompetent person' and attempts to define 'competency' by way of exception," and was therefore misleading. Furthermore, she explained that the instructions she intended to give adequately defined the elements and enabled the Defense to argue NM's capacity to consent and lack of impairment by alcohol. The military judge found part "b." of the proposed instruction "misconstrue[d] the definitions of the elements that the [G]overnment is required to prove," that the instructions she intended to provide adequately distinguished "asleep" from "impaired by alcohol," and her instructions would enable the Defense to argue the Government had failed to prove NM was incapable of consent and not merely asleep. In addition, contrary to the Defense's request, the military judge found it appropriate to provide

the court members with the definition of both offenses involving NM.
"incompetent person."

The military judge's instructions to the court members related to consent included, *inter alia*, the following:

"Consent" means a freely given agreement to the conduct at issue by a competent person. . . .

A sleeping, unconscious, or incompetent person cannot consent.

Lack of consent may be inferred based on [*30] the circumstances. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions.

A "competent person" is a person who possesses the physical and mental ability to consent.

An "incompetent person" is a person who lacks either the mental or physical ability to consent because he or she is: (1) asleep or unconscious; (2) impaired by a drug, intoxicant or other similar substance; or (3) suffering from a mental disease or defect or a physical disability.

To be able to freely make an agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question and then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person. . . .

A person is "incapable of consenting" when she lacks the cognitive ability to appreciate the sexual conduct in question or the physical or mental ability to make or to communicate a decision about whether she agrees to the conduct.

Without objection, the military judge also instructed the court members on the defense of mistake of fact [*31] as to consent as to

2. Law

Whether the military judge correctly instructed the court members is a question of law we review de novo. [United States v. Payne, 73 M.J. 19, 22 \(C.A.A.F. 2014\)](#) (citation omitted). "[A] military judge has wide discretion in choosing the instructions to give but has a duty to provide an accurate, complete, and intelligible statement of the law." [United States v. Behenna, 71 M.J. 228, 232 \(C.A.A.F. 2012\)](#) (citations omitted). "[T]he military judge . . . is required to tailor the instructions to the particular facts and issues in a case." [United States v. Baker, 57 M.J. 330, 333 \(C.A.A.F. 2002\)](#) (citations omitted).

"[A]ny party may request that the military judge instruct the members on the law as set forth in the request." R.C.M. 920(c). Denial of a defense-requested instruction is reviewed for abuse of discretion. [Carruthers, 64 M.J. at 345-46](#) (citations omitted). We apply a three-part test to evaluate whether the failure to give a requested instruction is error: "(1) [the requested instruction] is correct; (2) it is not substantially covered in the main [instruction]; and (3) it is on such a vital point in the case that the failure to give it deprived [Appellant] of a defense or seriously impaired its effective presentation." [Id. at 346](#) (first and second alteration in original) (quoting [United States v. Gibson, 58 M.J. 1, 7 \(C.A.A.F. 2003\)](#)). All three prongs of the test must be satisfied in order to [*32] find error. [United States v. Barnett, 71 M.J. 248, 253 \(C.A.A.F. 2012\)](#).

3. Analysis

Appellant contends the military judge erred with respect to findings instructions in three respects: by denying the Defense's request for

special instructions; by providing an instruction regarding lack of consent; and by providing an erroneous definition of an "incompetent person." We address each contention in turn.

a. Denial of Defense-Requested Special Instructions

Although it is not a focus of his argument on appeal, Appellant asserts "[t]he military judge erred when she denied the defense request for a specially tailored instruction." Assessing his claim in light of the analysis set forth in [Carruthers](#), we disagree. We are not as convinced as was the military judge that the proposed special instructions were incorrect statements of law that would have been misleading. However, their substance was substantially covered by the instructions the military judge provided, and the proposed instructions did little to clarify the applicable terms and definitions. In addition, as the military judge observed, the instructions she gave enabled the Defense to argue the Government had failed to prove NM was incapable of consenting due to intoxication by alcohol and not [*33] merely asleep. Because the Defense failed to satisfy all three prongs of the test, we conclude the military judge did not abuse her discretion by denying the requested instructions.

b. Instruction Regarding Lack of Consent

Appellant contends that the military judge erred by instructing that "[l]ack of consent may be inferred based on the circumstances" because bodily harm due to lack of consent and inability to consent due to intoxication are different and "mutually exclusive" theories of sexual assault. Although Appellant does not claim the military judge's instruction on absence of consent was an incorrect statement of the law, he argues that the

instruction on the *uncharged* bodily harm theory of liability was an error of constitutional dimensions. We disagree. The military judge correctly instructed the court members on the elements of the charged sexual assaults on NM, including the requirement that the members find beyond a reasonable doubt that NM was incapable of consenting due to impairment by alcohol, and that Appellant knew or reasonably should have known NM was so impaired. Court members are presumed to follow the military judge's instructions absent evidence to the contrary. [*34] See [Taylor, 53 M.J. at 198](#) (citations omitted). We see no such evidence here, and we find no basis to conclude Appellant was convicted on an uncharged bodily harm theory.

c. Instruction on the Definition of an "Incompetent Person"

The military judge provided the court members the standard definition of an "incompetent person" from the *Benchbook*, defined as someone who lacked either the mental or physical ability to consent due to being, *inter alia*, asleep, unconscious, or impaired by a drug, intoxicant, or similar substance. Dept. of the Army Pamphlet 27-9 at 602. Appellant contends this definition erroneously suggests that incompetence "*ipso facto* results from being asleep or unconscious," when in fact sleep or unconsciousness are different theories of criminal liability from incompetence. We note that [Article 120, UCMJ](#), does contain language that suggests sleep, unconsciousness, and incompetence are distinct conditions, rather than sleep and unconsciousness being lesser-included types of incompetence. [10 U.S.C. § 920\(g\)\(8\)\(B\)](#) ("A sleeping, unconscious, or incompetent person cannot consent."); cf. [United States v. Sager, 76 M.J. 158, 162 \(C.A.A.F. 2017\)](#) (holding the

words "asleep, unconscious, or otherwise unaware" in [10 U.S.C. § 920\(b\)\(2\)](#) create separate theories of criminality). However, assuming for purposes of our analysis [*35] that the instruction given failed to correctly portray the relationship between incompetence and sleep, we find any such error did not materially prejudice Appellant's substantial rights. See [United States v. Payne, 73 M.J. 19, 25 \(C.A.A.F. 2014\)](#). Again, the military judge clearly and correctly instructed the court members that in order to find Appellant guilty of the charged sexual assaults against NM, they must find beyond a reasonable doubt that NM was incapable of consenting due to impairment by alcohol, and that Appellant knew or reasonably should have known NM was so impaired. Moreover, the military judge provided an accurate definition of "incapable of consenting" based on the CAAF's holding in [Pease, 75 M.J. at 185-86](#) (citation omitted), which Appellant does not challenge on appeal. Accordingly, we presume the court members followed the military judge's instructions and applied the correct standard in their deliberations.

D. Trial Counsel Closing Argument

1. Additional Background

The military judge's instructions on findings included, *inter alia*, that the court members:

have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness'[s] intelligence, ability to observe and accurately remember, sincerity [*36] and conduct in court, friendships and prejudices, and character for truthfulness. Consider the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness

may have with either side; and how much each witness might be affected by the verdict. In weighing a discrepancy by or between witnesses, you should consider whether it resulted from an innocent mistake or a deliberate lie.

...

[Y]ou must base the determination of the issues in the case on the evidence as you remember it and apply the law as I instruct you. Counsel may refer to the instructions I have given you. If there is any inconsistency between what counsel have said about the instructions and the instructions which I gave you, you must accept my statement as being correct.

The circuit trial counsel's (CTC) closing argument on findings included the following comments regarding the military judge's instructions and the court members' determination of the credibility of witnesses:

I am going to reference some specific [instructions]. But one of the main ones I want to highlight to you, I think it's the most important instruction in this case is where the judge tells you what [*37] your duty is. It means something.

Duty. What is your duty? And it's to determine the credibility of the witnesses. That's your duty. When you go back in that deliberation room, you have to decide what does your gut tell you? What did you see on the stand? What did you see in the evidence? And you cannot throw up your hands and say, "You know what, I just don't know." You will be derelict in your duty if you do that.

...

But, ultimately, it's really about this: were [AS] and [NM] -- were they testifying truthfully or were they lying? Were they deliberately lying or were they telling the truth? What did you see?

So here's the instruction . . . you have the duty to determine the believability of the witnesses. It's a binary decision. They either are credible or they are not. It's one or the other. There is no in-between. There is no, "I just don't know." You have to make a decision. There is a lot of experience on this panel. All of you have the absolute capability to make that decision and come to a determination. But you cannot throw up your hands.

The CTC then rephrased the military judge's instructions regarding the factors the court members should consider in determining the believability [*38] of witnesses, and he proposed that the determination of whether an inconsistency was due to "an innocent mistake" or "a deliberate lie" presented a "binary choice." He then continued:

So, really, it comes down to this: because if they're not telling the truth, both [AS] and [NM] really must be pure evil. Both of them must have some type of grudge or some type of inherent terror [sic] or flaw in their character that wants to see an innocent man be dishonorably discharged after a full career in the service, be labeled as a sex offender, go to jail.

The circuit defense counsel (CDC) did not object during the CTC's argument, but directly responded to it and flatly rejected the contention that the credibility assessment of AS and NM presented a "binary choice" as "simply not the law and . . . not the facts of this case." The CDC continued, "[b]elievability is a sliding scale. It is not a binary choice. That is a false dichotomy that's put in front of you." The CDC proposed that a witness could "come to believe something had occurred that may not have ever occurred." He continued,

Neither [AS] nor [NM] have to be pure evil. The defense is not saying that. They are not. Let me make that clear. [*39] They

are not evil. They are not. That's not to say that, first of all, what they're telling you has been proven beyond a reasonable doubt or, two, that it even happened at all.

During rebuttal argument, the CTC returned to the subject of the court members' duty to determine credibility:

[Y]ou have to consider the evidence. And you must use the judge's instructions to do that. You must. Because it does come down to your duty and what those instructions say. Those instructions give you a binary choice. It is exactly not what Defense Counsel said. Is it an innocent mistake or a deliberate lie? You have to decide. Absolutely, they want you to throw up your hands and fail to make a decision. And if that's the kind of individual you are, if that's what you are inside this uniform and you're incapable of making a decision, then by all means do it. But you won't be doing your duty. You won't. You won't. You must determine their credibility. You must. It has to be one or the other. Don't abdicate.

Trial defense counsel did not object to any of the above portions of the CTC's closing argument. The military judge did not interject during the closing arguments, nor did she provide supplemental instructions [*40] in light of the CTC's arguments, nor did the Defense request such instructions.

2. Law

"We review prosecutorial misconduct and improper argument de novo and where . . . no objection is made, we review for plain error." [*United States v. Voorhees*, 79 M.J. 5, 9 \(C.A.A.F. 2019\)](#) (citing [*United States v. Andrews*, 77 M.J. 393, 398 \(C.A.A.F. 2018\)](#)). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error

results in material prejudice to a substantial right of the accused." [*United States v. Fletcher*, 62 M.J. 175, 179 \(C.A.A.F. 2005\)](#) (citation omitted). The burden of proof under a plain error review is on the appellant. See [*United States v. Sewell*, 76 M.J. 14, 18 \(C.A.A.F. 2017\)](#) (citation omitted).

"Improper argument is one facet of prosecutorial misconduct." *Id.* (citation omitted). "Prosecutorial misconduct occurs when trial counsel 'overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" [*United States v. Hornback*, 73 M.J. 155, 159 \(C.A.A.F. 2014\)](#) (quoting [*Fletcher*, 62 M.J. at 179](#)). Such conduct "can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, [for example], a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *Id.* at 160 (quoting [*United States v. Meek*, 44 M.J. 1, 5 \(C.A.A.F. 1996\)](#)).

"A prosecutorial comment must be examined in light of its context within the entire court-martial." [*United States v. Carter*, 61 M.J. 30, 33 \(C.A.A.F. 2005\)](#) (citation omitted). "[P]rosecutorial [*41] misconduct by a trial counsel will require reversal when the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone." [*Fletcher*, 62 M.J. at 184](#).

3. Analysis

On appeal, Appellant contends the CTC's arguments regarding the court members' duty to make a decision regarding the credibility of NM and AS, and to not "throw up their hands," was a misstatement of the law that undermined the Government's burden to prove

his guilt beyond a reasonable doubt. Appellant reasons that a panel that cannot decide the alleged victim's credibility "is a panel which must acquit because it is uncertain of [the accused's] guilt." In contrast, Appellant contends, the CTC argued for a "polar" standard "in which [the accused's] innocence is either proven or his guilt is proven." Accordingly, he claims, the CTC committed constitutional error that was not harmless beyond a reasonable doubt. See [*United States v. Mason*, 59 M.J. 416, 424 \(C.A.A.F. 2004\)](#) (citations omitted).

Because trial defense counsel did not object to the CTC's argument, we review the argument for plain error. We are not persuaded Appellant has carried his burden to demonstrate "plain or obvious" prosecutorial misconduct. [*42]

As an initial matter, at no point did the CTC state or imply any requirement that the accused's "innocence" must be "proven." We are confident that such a patently incorrect characterization of the burden of proof would have drawn an objection from the Defense and corrective measures from the military judge.

The CTC's characterization of a "binary" decision did not relate to whether Appellant was guilty or innocent, but to whether the alleged victims were credible or not. This argument was rooted in the military judge's uncontested instruction that the court members had a "duty to determine the believability of the witnesses," in light of all of the considerations identified in the instructions. Certainly, the CTC and the CDC disagreed as to how this instruction should be applied in the context of Appellant's trial. However, in our view, the CTC's argument in this respect did not plainly exceed the bounds of permissible advocacy. Essentially, he argued that the court members should decide whether or not AS and NM were credible. The CDC's argument—

essentially, that if the court members could not decide that AS and NM were credible, then the Government had failed to convince them beyond [*43] a reasonable doubt—was not fundamentally dissimilar. Neither characterization relieved the Government of its burden to prove Appellant's guilt beyond a reasonable doubt, in accordance with the military judge's instructions.

This is not to say we find no fault with the CTC's argument. His argument oversimplified and conflated related but distinct questions such as: Were AS and NM credible or not? Were any discrepancies in their testimony the result of an innocent mistake or a deliberate lie? Did AS or NM honestly believe something that was, in fact, either not true or unable to be determined beyond a reasonable doubt? We find the CTC's argument that AS and NM must either be telling the truth or be "pure evil" was grossly simplistic and exaggerated. The CDC addressed some of these oversimplifications in his own argument, and thereby perhaps diminished the CTC's credibility as an advocate and enhanced his own.

Similarly, we find the CTC's invocation of the court members' "duty" to decide the witnesses' credibility, although based on the military judge's instruction, to be overblown and unpersuasive. However, not every oversimplified or poorly conceived trial counsel argument amounts to [*44] prosecutorial misconduct. Although we do not indorse the CTC's argument, we do not find that it tended to shift the burden of proof or to otherwise "plainly or obviously" contravene another prosecutorial legal norm or standard, such that the military judge's failure to intervene *sua sponte* amounted to plain error.

1. Law

The [Sixth Amendment](#)¹⁵ guarantees an accused the right to effective assistance of counsel. [United States v. Gilley](#), 56 M.J. 113, 124 (C.A.A.F. 2001). In assessing the effectiveness of counsel, we apply the standard in [Strickland v. Washington](#), 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and begin with the presumption of competence announced in [United States v. Cronin](#), 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). See [Gilley](#), 56 M.J. at 124 (citation omitted). We will not second-guess reasonable strategic or tactical decisions by trial defense counsel. [United States v. Mazza](#), 67 M.J. 470, 475 (C.A.A.F. 2009) (citation omitted). We review allegations of ineffective assistance de novo. [United States v. Gooch](#), 69 M.J. 353, 362 (C.A.A.F. 2011) (citing [Mazza](#), 67 M.J. at 474).

We utilize the following three-part test to determine whether the presumption of competence has been overcome: (1) are appellant's allegations true, and if so, "is there a reasonable explanation for counsel's actions;" (2) if the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers;" and (3) if defense counsel was ineffective, is there [*45] "a reasonable probability that, absent the errors," there would have been a different result? *Id.* (alteration in original) (quoting [United States v. Polk](#), 32 M.J. 150, 153 (C.M.A. 1991)). The burden is on the appellant to demonstrate both deficient performance and prejudice. [United States v. Datavs](#), 71 M.J. 420, 424 (C.A.A.F. 2012) (citation omitted).

E. Ineffective Assistance of Counsel

¹⁵ U.S. Const. amend. VI.

2. Analysis

Appellant contends his trial defense counsel were ineffective in three areas: the failure to object to prior consistent statements of NM included in the SAFE report admitted as a prosecution exhibit; the failure to admit evidence of NM's marital infidelity; and the failure to call the Defense's expert consultant in toxicology as a witness. This court received sworn declarations from Appellant's two trial defense counsel, Major (Maj) PF and Captain (Capt) CE, responsive to Appellant's claims of ineffective assistance, which we have considered in relation to these issues. See [*Jessie*, 79 M.J. at 442-44](#) (noting the CAAF has allowed the Courts of Criminal Appeals to accept affidavits to supplement the record "when necessary for resolving claims of ineffective assistance of trial defense counsel"). We address each area in turn.

a. NM's Prior Statements in the SAFE Report

At trial, the Government called Captain (Capt) HP, a physician's assistant and the sexual assault [*46] medical forensic examiner who administered NM's SAFE on 23 June 2017. Through Capt HP, the Government introduced as Prosecution Exhibit 3 the SAFE report Capt HP prepared that day. The report included a section entitled "Patient's Description of the Assault," where Capt HP recorded NM's oral description of the sexual assault. As recorded by Capt HP, NM's brief description was largely consistent, albeit more definite in certain respects, compared to her subsequent trial testimony:

I remember waking up to different pieces of my clothing being gone. I remember him moving my hand to touch his genitalia. I slightly remember penetration. I do remember being suddenly woken up by

things coming close to my anal cavity. I remember him performing oral and I remember squirming. And then I woke up and got dressed and trying [sic] to get out. . . . I vomited prior to the assault, and then I vomited after the assault.

The Defense did not object to Prosecution Exhibit 3.

Appellant contends trial defense counsel were ineffective by failing to object to the narrative portions of Prosecution Exhibit 3 as inadmissible hearsay. Appellant argues the narrative was not admissible as a prior consistent statement [*47] under Mil. R. Evid. 801(d)(1)(B)(i) because the statements were made after NM's motive to fabricate arose—that is, her marriage to SrA TM. See [*United States v. Frost*, 79 M.J. 104, 110 \(C.A.A.F. 2019\)](#). Appellant further argues the narrative was similarly not admissible under Mil. R. Evid. 801(d)(1)(B)(ii) to rehabilitate NM's credibility "when attacked on another ground," because the fact that NM made statements consistent with "parts of her in-court testimony at a time after the sexual encounter does not rebut the [Defense's] assertion that she mis-recorded memory." See [*United States v. Finch*, 79 M.J. 389, 395 \(C.A.A.F. 2020\)](#). Appellant further contends the narrative was not admissible pursuant to the hearsay exception for statements made for medical treatment or diagnosis under Mil. R. Evid. 803(4), because NM perceived the purpose of the SAFE was evidence-gathering rather than medical treatment. Appellant argues there was no plausible reason not to object to the narrative portions of Prosecution Exhibit 3, and, had the Defense done so, there was a reasonable probability of a more favorable result because NM's credibility "was the paramount issue" and the court members could have used her prior consistent statement to bolster NM's credibility.

In their declarations, trial defense counsel

acknowledge there were potential objections to the narrative portions of Prosecution [*48] Exhibit 3, but they explain the Defense chose not to object to the SAFE report for strategic and tactical reasons. The primary reason they assert is that the report was more helpful than harmful to the Defense's theory of the case. Trial defense counsel's theory was that NM was capable of consenting, but simply could not remember portions of the night due to alcohol-induced blackouts. Therefore, they assert, evidence that NM was awake and aware of what was occurring at various points during the night tended to support their theory. Moreover, they contend events during the trial prior to the introduction of Prosecution Exhibit 3 further convinced them this was the correct strategy. In particular, they noted NM's reaction to watching the video of herself walking apparently unimpaired through the parking garage on her way to TSgt JN's apartment, and they perceived NM genuinely had no memory of doing so. To trial defense counsel, this reinforced their belief that focusing on NM's memory was the correct approach. In addition, because the Defense's theory was not that NM was being actively deceptive about the alleged sexual assault, seeking to exclude prior consistent statements was not [*49] a priority. Moreover, Capt CE explained the Defense felt it had gained credibility with the court members by being the party that introduced important evidence, including the security video and a map depicting various locations NM visited on the night of the incident, and therefore not objecting to Prosecution Exhibit 3 would continue to foster the perception that the Defense had nothing to hide.

We find there were reasonable strategic and tactical reasons why trial defense counsel did not object to the narrative portions of Prosecution Exhibit 3. We evaluate trial defense counsel's performance not by the

success of their strategy, "but rather whether counsel made . . . objectively reasonable choice[s] in strategy from the alternatives available at the [trial]." United States v. Dewrell, 55 M.J. 131, 136 (C.A.A.F. 2001) (citation omitted). Trial defense counsel could reasonably conclude that given their trial strategy, excluding NM's prior consistent statements during the SAFE was not a priority, and that additional evidence that NM was in fact awake and aware of what was happening at various points during the alleged sexual assault, in combination with other evidence, tended to support the Defense's theory that NM had problems with her memory [*50] rather than with her capacity to consent. Accordingly, Appellant has not met his burden to demonstrate deficient performance in this respect.

b. Evidence of Infidelity

Before trial, the Defense moved to introduce evidence of other alleged sexual behavior by NM pursuant to Mil. R. Evid. 412, including *inter alia* an alleged sexual encounter between NM and SSgt AP which occurred approximately four months after the charged offenses involving Appellant. NM reported the incident with SSgt AP as a sexual assault in October 2017.¹⁶ The military judge conducted a closed hearing on the motion pursuant to Mil. R. Evid. 412(c)(2) at which several witnesses testified. The testimony of multiple witnesses indicated NM did report that she was sexually assaulted by SSgt AP sometime after the incident with Appellant, but she elected not to participate in a criminal prosecution. SSgt AP

¹⁶ The trial transcript, appellate exhibits, and briefs addressing the Defense's Mil. R. Evid. 412 motion were sealed pursuant to R.C.M. 1103A. These portions of the record and briefs remain sealed, and any discussion of sealed material in this opinion is limited to that which is necessary for our analysis. See R.C.M. 1103A(b)(4).

testified at the hearing under a grant of immunity and indicated he had a consensual sexual encounter with NM in her dormitory room. NM also testified at the hearing; in the course of her testimony, the military judge sustained objections to defense questions regarding whether NM had engaged in sexual relationships outside her marriage to SrA TM. After the hearing, [*51] the Defense withdrew its request to introduce evidence of the incident between NM and SSgt AP. Accordingly, the military judge did not rule on that portion of the Defense's motion.

Appellant contends trial defense counsel were ineffective by failing to seek to rebut NM's statements to SSgt GS on the morning after the charged sexual assault by Appellant to the effect that NM was "not that stupid" because she was "a married woman." Appellant characterizes these statements as "a claim that [NM] would never engage in consensual sexual relations with [A]ppellant because she was a married woman," which opened the door to evidence of her "sexual relationship" with SSgt AP. Appellant further contends trial defense counsel were ineffective for failing to ask for reconsideration to be able to cross-examine NM regarding other sexual relationships. Appellant attributes trial defense counsel's failure to seek such rebuttal evidence after initially attempting to raise it in the Mil R. Evid. 412 hearing to a lack of "situational awareness." He asserts that, but for these errors, there was a reasonable probability of a different result because this evidence would have discredited NM, whose credibility was essential [*52] to the Government's case.

However, assuming *arguendo* the Government did open the door to such evidence, we note multiple reasonable explanations why trial defense counsel elected not to attempt to rebut NM's statements to SSgt GS with

evidence of her encounter with SSgt AP. First, although NM apparently elected not to cooperate in a criminal prosecution of SSgt AP, there is no evidence she recanted her allegation of sexual assault against him. The witnesses other than SSgt AP who testified at the Mil. R. Evid. 412 hearing about her report all indicated NM referred to the incident as a sexual assault. SSgt AP himself testified that, at the time of the hearing, he was pending an administrative discharge board based on NM's allegation of sexual assault. In their declarations, trial defense counsel note that if it was true that SSgt AP sexually assaulted NM, that fact would be of no use to Appellant's defense, and the only available evidence that it was not true was the immunized testimony of SSgt AP himself.

Trial defense counsel further explain that after the Mil. R. Evid. 412 hearing, they concluded SSgt AP "would have been a terrible [d]efense witness." To begin with, the fact that NM persisted in cooperating with the [*53] prosecution of Appellant—even after her marriage with SrA TM had ended—while declining to do so in SSgt AP's case posed an obvious problem with comparing the two situations. It underscored that NM knew she had the option of not testifying against Appellant if she did not sincerely believe he sexually assaulted her. In addition, trial defense counsel explained SSgt AP had "destroyed" his own credibility at the Mil. R. Evid. 412 hearing by providing non-credible testimony as to why he went to NM's dormitory room on the night in question, and as to NM's apparent level of intoxication earlier that evening which was contradicted by "numerous unbiased witnesses."

Appellant's contention that trial defense counsel should have sought to question NM regarding extramarital sexual relationships is also unpersuasive. Appellant has failed to

demonstrate any likelihood such questioning would disclose evidence materially helpful to the Defense. As discussed above, there is no indication NM recanted her allegation of sexual assault against SSgt AP, and no indication she would have done so on the witness stand. As for any other sexual relationships, trial defense counsel explain that despite their investigative efforts, [*54] they had no such evidence beyond "rumors and hearsay."

Finally, trial defense counsel further explain that they did not feel the Defense needed to rebut NM's comments to SSgt GS regarding being married because they considered her comments to be consistent with the Defense's theory of the case. They perceived her comments not as a flat denial that she would have ever consented, as Appellant contends, but rather as an expression of "confusion and regret." Recognizing that trial defense counsel were present in the courtroom to hear the testimony and observe the witnesses, and recognizing the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," we are inclined to credit trial defense counsel's assessment. [*Strickland*, 466 U.S. at 689](#).

Accordingly, we find Appellant has failed to demonstrate deficient performance with regard to evidence of NM's alleged infidelity.

c. Toxicology Evidence

Appellant's third allegation of ineffective assistance relates to trial defense counsel's failure to call the Defense's expert consultant in forensic toxicology, Dr. SH, to testify regarding his estimate of NM's blood alcohol concentration (BAC) at the time of the alleged sexual [*55] assault. Appellant has provided a declaration from Dr. SH dated 3 June 2020 which states, *inter alia*, that he is a board certified clinical pathologist with over 30 years

of experience in pathology, pharmacology, and toxicology. Dr. SH was present during the trial testimony and also reviewed "exhibits and [AF]OSI documents." However, Dr. SH did not review the trial transcript or "most of his notes" before preparing his declaration. To "the best of [his] recollection, refreshed only by an email that [he] sent to the Defense Counsels on the evening . . . before the last trial day and a case summary note that [he] prepared" on 12 May 2019, Dr. SH estimated NM had consumed the equivalent of six or seven "standard drinks," approximately three fluid ounces of pure alcohol. Dr. SH further estimated NM's BAC was approximately 0.06 g/dL at the time she entered TSgt JN's apartment. Dr. SH further explained:

[T]he effects of a BAC of 0.03-0.12 are mild euphoria, sociability, talkativeness, increased self-confidence, decreased inhibitions, diminished attention, judgment, and control, some sensory-motor impairment, and slowed information processing. A person's BAC must rise to the 0.09-0.25 range before deficits [*56] such as loss of critical judgment, emotional instability, impaired memory and comprehension, sensory-motor incoordination; impaired balance; or slurred speech begin to appear. In an experienced drinker like N.M. (according to her husband's testimony), the apparent defects from any BAC would likely be less.

Dr. SH further explained that NM's BAC and impairment would have decreased from the time she entered the apartment until the time of the alleged sexual assault. Appellant contends that Dr. SH's testimony would have indicated it was "extremely unlikely" NM was incapacitated at the time of the alleged offenses.

In their declarations, trial defense counsel respond with several reasons why the Defense

decided not to call Dr. SH to testify. Dr. SH's testimony did not support the Defense's theory of the case, which was that NM was significantly impaired by alcohol, to the degree that it interfered with her memory of the night's events. Trial defense counsel intended to rely on the security video, and they perceived that NM's apparently genuine reaction of surprise and lack of memory supported this theory. In addition, trial defense counsel explained that Dr. SH's assessment that NM had [*57] consumed the equivalent of only six or seven "standard drinks" was, by his own admission at the time, only a "guesstimate." NM's testimony indicated she had a minimum of 12 or 13 alcoholic drinks. Moreover, they explained that with alcohol in Korea being largely unregulated, "there is no such thing as a 'standard drink.'" On cross-examination, Dr. SH would have been forced to concede there was no way to know how much alcohol was in any soju drink and that NM's BAC could have been significantly higher than his estimate. In addition, trial defense counsel believed the Government's decision not to call its own expert in forensic toxicology to introduce some scientific evidence regarding incapacity was a "fatal flaw," and they did not want to give the Government the opportunity to draw out any potentially favorable concessions or other evidence from Dr. SH.

Applying the presumption of competence, we conclude trial defense counsel made a reasonable decision not to call Dr. SH to testify. Whether or not another attorney might have made an equally reasonable decision under the circumstances to call Dr. SH despite of the risks and drawbacks, we conclude Appellant has failed to demonstrate trial [*58] defense counsel's performance fell measurably below that expected of competent but fallible defense lawyers.

F. Military Judge's Ruling Precluding Confrontation of the Victim with Evidence from the SAFE Report

1. Additional Background

As described above, before trial the Defense moved to introduce certain evidence of other sexual behavior by NM pursuant to Mil. R. Evid. 412. Such evidence included, *inter alia*, that "[b]etween on or about 20 June 2017 and on or about 23 June 2017, NM had sexual contact with another male that was not [Appellant]," which the Defense contended was admissible under Mil. R. Evid. 412(b)(1)(A) and (C). In addition, the Defense sought to introduce evidence that "[d]uring the DNA analysis conducted in this case, a male DNA profile not belonging to [Appellant] or NM was discovered on NM's anal swabs, perineal swabs, right inner thigh swabs, and pubic mound swabs," which the Defense contended was constitutionally required to be admitted pursuant to Mil. R. Evid. 412(b)(1)(C).

In support of its motion, the Defense offered a copy of the SAFE report completed on 23 June 2017, which was later admitted into evidence as Prosecution Exhibit 3 as described above. One section of the report recorded that NM stated she had not engaged in "[o]ther [*59] non-assault sexual activity within past 5 days." The Defense also offered the USACIL report on testing of samples taken during NM's SAFE, which was also subsequently admitted as a prosecution exhibit. In addition to describing DNA evidence consistent with Appellant found on NM's cervical and vaginal swabs and underwear, as described above, the report indicated Appellant was excluded as the source of partial DNA profiles from an unknown male individual found on NM's right inner thigh, anal, and pubic mound swabs. A partial male DNA profile was also obtained from NM's perineal swab, but it "could not be

conclusively interpreted due to a lack of sufficient genetic data."

The military judge conducted a closed hearing on the motion pursuant to Mil. R. Evid. 412(c)(2) at which several witnesses testified, including NM. NM testified SrA TM traveled from Kunsan AB to Osan AB on 20 June 2017, he stayed with her throughout the following week, and that they shared a single twin bed in her dormitory room. NM further testified they did not have sexual intercourse between 20 June 2017 and her SAFE exam on 23 June 2017. SrA TM similarly testified that he traveled to Osan AB on 20 June 2017 to stay with NM, and he stayed [*60] with her the remainder of the week.

The military judge issued a written ruling in which she denied the motion with respect to evidence that "[b]etween on or about 20 June 2017 and on or about 23 June NM had sexual contact with another male." The military judge found, *inter alia*, the evidence "provide[d] an inference that NM could have had physical contact with another male," but the Defense had produced "no evidence . . . that NM had *sexual contact* with another, within the narrow window defined by [D]efense." (Emphasis added). Because the Defense "failed to present evidence, beyond speculation," the requested evidence was "therefore neither relevant, material nor favorable to the [D]efense." Additionally, the military judge ruled the proffered evidence was "a distraction as to the charged offense," and its "probative value, if any, [was] substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the members," and therefore should also be excluded under Mil. R. Evid. 403.

However, the military judge granted the Defense's motion with respect to the USACIL analysis of the unidentified male DNA found on NM's anal, perineal, right inner thigh, and

pubic mound swabs, [*61] as "relevant, material and favorable to the [D]efense" for the "narrow purpose" of NM's credibility under Mil. R. Evid. 412(b)(1)(C).

2. Law

"We review the military judge's ruling on whether to exclude evidence pursuant to M.R.E. 412 for an abuse of discretion." [*United States v. Ellerbrock*, 70 M.J. 314, 317 \(C.A.A.F. 2011\)](#) (citing [*United States v. Roberts*, 69 M.J. 23, 26 \(C.A.A.F. 2010\)](#)). The military judge's findings of fact are reviewed for clear error and her conclusions of law are reviewed de novo. *Id.* (citing [*Roberts*, 69 M.J. at 26](#)). "A military judge abuses [her] discretion when: (1) the findings of fact upon which [s]he predicates [her] ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if [her] application of the correct legal principles to the facts is clearly unreasonable." [*United States v. Ellis*, 68 M.J. 341, 344 \(C.A.A.F. 2010\)](#) (citing [*United States v. Mackie*, 66 M.J. 198, 199 \(C.A.A.F. 2008\)](#)). "For [a] ruling to be an abuse of discretion, it must be 'more than a mere difference of opinion'; rather, it must be 'arbitrary, fanciful, clearly unreasonable' or 'clearly erroneous.'" [*United States v. Collier*, 67 M.J. 347, 353 \(C.A.A.F. 2009\)](#) (quoting [*United States v. McElhaney*, 54 M.J. 120, 130 \(C.A.A.F. 2000\)](#) (additional citations omitted)).

Mil. R. Evid. 412 provides that in any proceeding involving an alleged sexual offense, evidence offered to prove the alleged victim engaged in other sexual behavior or has a sexual predisposition is generally inadmissible, with three limited exceptions. The burden is on the defense to overcome the general [*62] rule of exclusion by demonstrating an exception applies. [*United States v. Carter*, 47 M.J. 395, 396 \(C.A.A.F.](#)

[1998](#)) (citation omitted).

The first exception under Mil. R. Evid. 412 includes "evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence." Mil. R. Evid. 412(b)(1)(A). Evidence that fits this exception may nevertheless be excluded if the probative value of the evidence is outweighed by the danger of unfair prejudice to the alleged victim's privacy. Mil. R. Evid. 412(c)(3). In addition, like other evidence, evidence otherwise admissible under Mil. R. Evid. 412(b)(1)(A) may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." Mil. R. Evid. 403. Where a military judge conducts a proper balancing test under Mil. R. Evid. 403, an appellate court will not overturn the ruling absent a clear abuse of discretion. [United States v. Ediger, 68 M.J. 243, 248 \(C.A.A.F. 2010\)](#) (quoting [United States v. Ruppel, 49 M.J. 247, 251 \(C.A.A.F. 1998\)](#)).

The third exception under Mil. R. Evid. 412 provides that the evidence is admissible if its exclusion "would violate the constitutional rights of the accused." Mil. R. Evid. 412(b)(1)(C). Generally, evidence of other sexual behavior by an alleged victim is constitutionally required and "must be [*63] admitted within the ambit of [Mil. R. Evid.] 412(b)(1)(C) when [it] is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice." [Ellerbrock, 70 M.J. at 318](#) (citation omitted). Relevant evidence is evidence that has any tendency to make the existence of any fact of consequence to determining the case more probable or less probable than it would be

without the evidence. Mil. R. Evid. 401. Materiality "is a multi-factored test looking at the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to th[at] issue." *Id.* (alteration in original) (internal quotation marks and citations omitted). The dangers of unfair prejudice to be considered "include concerns about 'harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *Id.* (quoting [Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 \(1986\)](#)).

3. Analysis

The effect of the military judge's ruling was to allow the admission of the USACIL evidence that the partial DNA profile of an unidentified male, excluding Appellant, was found on certain intimate areas of NM's body; however, the Defense [*64] was not allowed to cross-examine NM regarding sexual activity with a male other than Appellant between 20 June 2017 and 23 June 2017. On appeal, Appellant asserts the military judge erred by preventing the Defense from confronting NM with the USACIL evidence which, he asserts, contradicted NM's statement recorded in the SAFE report that she had not engaged in "sexual activity" between the time of the charged offenses and undergoing the SAFE. Appellant asserts this evidence was significant because it demonstrated that either NM had a faulty memory or she made false statements during the SAFE. We conclude the military judge did not abuse her discretion.¹⁷

¹⁷ Appellant's argument appears to be based on the "constitutionally required" exception, Mil. R. Evid. 412(b)(1)(C). Although the Defense's motion initially invoked both Mil. R. Evid. 412(b)(1)(A) and (C), the contested evidence appears to

Appellant focuses on the military judge's ruling with respect to Mil. R. Evid. 403 that any probative value was substantially outweighed by the dangers of unfair prejudice, confusion of issues, and misleading the court members. He addresses several of the factors for conducting a Mil. R. Evid. 403 analysis set forth in [*United States v. Wright*, 53 M.J. 476, 483 \(C.A.A.F. 2000\)](#), specifically strength of proof of the conduct in question, availability of less prejudicial evidence, risk of distraction, amount of time required for the proof, and proximity in time to the charged offenses.¹⁸ He further contends this court should afford [*65] the military judge's ruling "minimal" deference because she did not provide a detailed analysis of Mil. R. Evid. 403. See [*United States v. Manns*, 54 M.J. 164, 166 \(C.A.A.F. 2000\)](#).

However, Appellant fails to substantially address the primary basis for the military judge's ruling, which was not Mil. R. Evid. 403; it was that the Defense failed to meet its burden to provide evidence of the sexual activity it sought to introduce under Mil. R. Evid. 412. The military judge acknowledged the presence of male DNA permitted an inference that NM had recent physical contact with a male, but it did not demonstrate "sexual activity." The totality of the evidence suggests the unidentified DNA likely belonged to NM's

husband SrA TM, with whom NM was living and sharing a bed between 20 June 2017 and 23 June 2017, although SrA TM's DNA was evidently not compared to the DNA from the swabs. We do not find the military judge's application of Mil. R. Evid. 412 to be arbitrary, fanciful, or clearly unreasonable. Without evidence of sexual activity—other than the sexual assault by Appellant—between 20 June 2017 and 23 June 2017, the proffered evidence did not contradict NM's statement recorded in the SAFE report and therefore it had essentially no relevance with respect to NM's credibility on the asserted basis.

G. Appellate [*66] Delay

1. Additional Background

Appellant's court-martial concluded on 22 March 2019. The convening authority took action on 26 June 2019, and the record of trial was docketed with this court on 10 July 2019.

The record consists of eight volumes and includes 1,036 pages of transcript and approximately 130 Prosecution, Defense, Appellate, and Court Exhibits.

Appellant is represented by military and civilian appellate defense counsel. Civilian appellate defense counsel entered his notice of appearance on 20 February 2020. The Defense filed its brief on behalf of Appellant on 4 June 2020, after securing eight enlargements of time in which to file the assignments of error. The Government filed its answer on 24 July 2020 after obtaining an enlargement of time in order to obtain declarations from trial defense counsel responsive to Appellant's assertions of ineffective assistance of counsel. The Defense submitted Appellant's reply brief on 19 August 2020. On 26 March 2021, Appellant filed with

have essentially no value in "prov[ing] that a person other than [Appellant] was the source" of the partial male DNA profiles found on NM's cervix, vagina, and underwear. Mil. R. Evid. 412(b)(1)(A).

¹⁸ We note *Wright* did not involve Mil. R. Evid. 412; it specifically addressed the application of Mil. R. Evid. 403 in the context of the introduction of evidence the accused had committed "other [uncharged] sexual offenses" under a very different rule of evidence, Mil. R. Evid. 413. [*53 M.J. at 482*](#) ("The Rule 403 balancing test should be applied 'in light of the strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible[.]'" (alteration in original) (quoting [*United States v. LeCompte*, 131 F.3d 767, 769 \(8th Cir. 1997\)](#))).

this court a demand for speedy appellate processing.

2. Law

"We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006) (citations omitted). [*67] In *Moreno*, the CAAF established a presumption of facially unreasonable delay where the Court of Criminal Appeals does not issue its decision within 18 months of docketing. Where there is such a facially unreasonable delay, we consider the four factors identified in Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), to assess whether Appellant's due process right to timely post-trial and appellate review has been violated: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." Moreno, 63 M.J. at 135 (citing United States v. Jones, 61 M.J. 80, 83 (C.A.A.F. 2005); Toohey v. United States, 60 M.J. 100, 102 (C.A.A.F. 2004) (per curiam)).

However, where there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006). In *Moreno*, the CAAF identified three interests protected by an appellant's due process right to timely post-trial and appellate review: (1) preventing oppressive incarceration; (2) minimizing anxiety and concern; and (3) avoiding impairment of the appellant's grounds for appeal and ability to present a defense at a rehearing. 63 M.J. at 138-39 (citations omitted).

3. Analysis

More than 18 months have elapsed since Appellant's [*68] case was docketed with this court; accordingly, there is a facially unreasonable delay that requires analysis of the Barker factors.

However, we find that Appellant has not demonstrated prejudice from the delay. In this case, we find no oppressive incarceration because Appellant's appeal has not resulted in relief. Similarly, where the appeal does not result in a rehearing on findings or sentence, Appellant's ability to present a defense at a rehearing is not impaired, and Appellant has not attempted to demonstrate how any grounds for appeal have been impaired. Id. at 140.

With regard to anxiety and concern, the CAAF has explained "the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Id.* In this regard, Appellant has submitted a declaration asserting that he has not been able to apply for Veterans' Administration disability benefits for service-connected medical conditions because he has not received his Department of Defense (DD) Form 214 documenting his discharge from the Air Force. Appellant has attached to his declaration [*69] a "screen shot" of what he asserts is the "message which the Veterans' Administration website displayed when [he] attempted to apply for . . . disability benefits." This attachment indicates Appellant entered an anticipated date of release from active duty of 1 July 2022. Based on that date, he received a message that he was not eligible to file for disability benefits yet, but he would be able to file a claim under the Benefits

Delivery at Discharge (BDD) program on 2 January 2022, six months before his anticipated release.

We find Appellant's declaration and its attachment are insufficient to demonstrate prejudice. First, we note that on 22 March 2019 Appellant was sentenced to confinement for 34 months, and he has not provided the court information on his expected release date. Appellant has made no showing that he would be able to obtain a DD Form 214 before the expiration of his term of confinement. Moreover, it is unclear why Appellant entered an anticipated active duty release date of 1 July 2022, or what relationship that date has with the appellate review of his convictions. Furthermore, the attached screen shot suggests an applicant can, in fact, begin the disability benefit [*70] application process before leaving active duty—or, presumably, receiving a DD Form 214—through the BDD program, although the information presented is entirely inadequate to draw any definite conclusions as to how the program would apply in Appellant's case.

Because we find Appellant has demonstrated no cognizable prejudice under [Moreno](#), there is no due process violation unless the delay is so egregious as to impact the perception of the fairness and integrity of the military justice system. Under the circumstances of this case, we find it is not. Appellant sought and received eight enlargements of time in order to file his brief with this court. The record of trial is substantial. Appellant's lengthy brief raises substantial and complex issues requiring careful review of the record and analysis, and which have resulted in a lengthy opinion of the court. On the whole, we find no violation of Appellant's due process rights.

Recognizing our authority under *Article 66, UCMJ*, we have also considered whether relief

for excessive post-trial delay is appropriate even in the absence of a due process violation. See [United States v. Tardif, 57 M.J. 219, 225 \(C.A.A.F. 2002\)](#). After considering the factors enumerated in [United States v. Gay, 74 M.J. 736, 744 \(A.F. Ct. Crim. App. 2015\)](#), *aff'd*, [75 M.J. 264 \(C.A.A.F. 2016\)](#), we conclude it is not.

III. CONCLUSION

[*71] The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. [Articles 59](#) and 66, *UCMJ*, [10 U.S.C. §§ 859](#), 866. Accordingly, the findings and sentence are **AFFIRMED**.¹⁹

End of Document

¹⁹ We note multiple errors in the court-martial order which warrant correction. As reproduced in the order, Specification 2 of Charge I erroneously alleges Appellant penetrated NM's vulva with his "mouth" rather than his "tongue" as alleged on the charge sheet; Specification 4 of Charge I erroneously includes the words "by placing AS in fear that she would be subjected to grievous bodily harm," which were not on the charge sheet; the order fails to indicate a plea or finding with respect to Charge II; and the date the sentence was adjudged is erroneously given as 3 April 2019 rather than 22 March 2019. We direct the publication of a corrected court-martial order to remedy these errors.



Caution

As of: November 18, 2022 9:11 PM Z

United States v. Causey

United States Navy-Marine Corps Court of Criminal Appeals

January 11, 2022, Argued; March 23, 2022, Decided

No. 202000228

Reporter

82 M.J. 574 *; 2022 CCA LEXIS 176 **; 2022 WL 853968

UNITED STATES, Appellee v. Isiah Anthony P. CAUSEY, Aviation Boatswain's Mate (Aircraft Handler) Airman (E-3), U.S. Navy, Appellant

Subsequent History: Petition for review filed by [United States v. Causey, 2022 CAAF LEXIS 382 \(C.A.A.F., May 23, 2022\)](#)

Motion granted by [United States v. Causey, 2022 CAAF LEXIS 390 \(C.A.A.F., May 24, 2022\)](#)

Review granted by [United States v. Causey, 2022 CAAF LEXIS 557 \(C.A.A.F., Aug. 3, 2022\)](#)

Prior History: **[**1]** Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judges: Ann K. Minami (arraignment), Kimberly J. Kelly (trial). Sentence adjudged 19 June 2020 by a general court-martial convened at Naval Base Kitsap-Bremerton, Washington, consisting of officer and enlisted members. Sentence in the Entry of Judgment: confinement for one year and a dishonorable discharge.

Case Summary

Overview

HOLDINGS: [1]-Where appellant was convicted of, inter alia, communicating indecent language to a person whom he

believed to be a child who had not attained the age of 16 years, there was no abuse of discretion in the denial of a motion for expert assistance because an expert consultant hired for the purpose of discerning the likely age of the person based on linguistics found in her texts was irrelevant to the issue before the trial court, which was not the "real" age of her, but whether appellant believed her to be a 13-year-old child; [2]-The [Sixth Amendment's](#) right to trial by an impartial jury, which now required a unanimous verdict for serious offenses tried in either state or Article III federal criminal courts, was still not applicable to courts-martial.

Outcome

Findings and sentence affirmed.

Counsel: For Appellant: Lieutenant Commander Megan P. Marinos, JAGC, USN.

For Appellee: Lieutenant John L. Flynn IV, JAGC, USN (argued) Major Clayton L. Wiggins, USMC (on brief).

Judges: Before GASTON, HOUTZ, and MYERS, Appellate Military Judges. Judge MYERS delivered the opinion of the Court, in which Senior Judge GASTON and Judge HOUTZ joined. Senior Judge GASTON filed a separate concurring opinion.

Opinion by: MYERS

Opinion

[*578] PUBLISHED OPINION OF THE COURT

MYERS, Judge:

Contrary to his pleas, Appellant was convicted by officer and enlisted members of three specifications of [Article 80](#), Uniform Code of Military Justice [UCMJ], for attempted sexual abuse by communicating indecent language to "Mackenzie," whom he believed to be a child who had not attained the age of 16 years; attempted sexual abuse by intentionally exposing his genitalia to her; and attempted wrongful **[**2]** receipt of child pornography by requesting that Mackenzie send him digital images of her exposed genitalia and other sexually explicit conduct.

Appellant asserts five assignments of error [AOEs]: (1) the military judge abused her discretion when she denied Appellant's request for expert assistance; (2) the military judge abused her discretion when she denied Appellant's request for an expert witness; (3) the trial counsel committed prosecutorial misconduct during his closing and rebuttal arguments by expressing his personal opinion of the evidence and disparaging the defense counsel's argument; (4) the trial counsel committed prosecutorial misconduct during his sentencing argument by telling the members not to consider properly admitted evidence, to consider facts not in evidence, and to give a sentence based on something other than the specific facts of the case; and (5) in light of *Ramos v. Louisiana*,¹ a military defendant has the right to a unanimous verdict in a criminal trial by court-martial. We find no prejudicial error and affirm.

¹ *Ramos v. Louisiana*, [U.S. , 140 S. Ct. 1390, 206 L. Ed. 2d 583 \(2020\)](#).

I. BACKGROUND

In February 2019, using the profile, "IsiahAnthony," Appellant sent a message on an online social network to "Mack," whose profile indicated **[**3]** the user was 18 years old. Several short messages were relayed between "Mack" and "IsiahAnthony" over the course of the next 13 days, until "Mack," also known as "Mackenzie" and "Mackigurl6," requested that Appellant use a different chat application. Appellant obliged. In these further chats, "Mackenzie" stated, "I should prob tell u. Imma little younger than my profile says."² After Mackenzie informed Appellant that she was 13 years of age, Appellant responded, "Ok yeah we can't talk I'm 22 . . . I can't risk getting in trouble sense ur a teenage and I'm 22 years old."³ Mackenzie replied, "Okk I understand," but Appellant continued the chat by stating, "Ur 13 I'm 22 anyone found out I'd go to jail," and "Ok how do ik this ain't a set up of some sort," followed by "Like ever heard of to catch a predator."⁴ Thereafter, despite Mackenzie's professed age, Appellant continued to chat with her, informing her that he was masturbating. He then requested nude photographs from her and sent her a photograph of his erect penis. He also articulated the sexual acts he wanted to engage in with the purported minor, to include ejaculating on her face and having anal sex with her.

Mackenzie was in **[**4]** fact Special Agent [SA] Sienna Echo⁵ with the Naval Criminal Investigative Service [NCIS], engaged in a proactive child exploitation investigation.

² Pros. Ex. 1 at 1.

³ *Id.*

⁴ *Id.*

⁵ All names in this opinion, other than those of Appellant, the judges, and counsel, are pseudonyms.

Approximately one week after Appellant's online conversation with Mackenzie, SA Echo interviewed Appellant, who acknowledged that he had communicated online with a 13-year-old girl named Mackenzie. He stated that due to alcohol consumption he could not recall the entirety of his online conversation with Mackenzie, but admitted that he did remember some details. During the interview, SA Echo did not inform Appellant that she was Mackenzie and maintained the pretense that Appellant had been speaking with a 13-year-old child, and at no point during the interview did Appellant claim or otherwise give any indication that he believed Mackenzie was an adult at the time of the online conversations. Appellant expressed remorse for his behavior and wrote the fictitious Mackenzie's parents a letter of apology.

[*579] II. DISCUSSION

A. Request for Expert Assistance

Appellant asserts that the military judge abused her discretion in denying Appellant's pretrial motion for expert assistance in the area of forensic linguistics. We review a military judge's ruling **[**5]** on a request for expert assistance for abuse of discretion.⁶ The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion—the challenged action must be "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous."⁷

A request for expert assistance must show a reasonable probability that the expert would be

of assistance to the defense (i.e., that the expert is necessary), and that denial of the expert assistance would result in a fundamentally unfair trial.⁸ To demonstrate necessity, the request must show (1) why the expert is needed; (2) what the expert assistance will accomplish; and (3) why the defense would be unable to gather and present the evidence that the expert assistance would be able to develop.⁹

Appellant's motion to compel the assistance of a forensic linguist was predicated on the notion that Appellant "naturally recognized his chat partner was an adult, outside of his own generation . . . based on characteristic linguistic differences that exist between all generations, and which are difficult to mimic unnoticed."¹⁰ Appellant argued that in order to explain why he believed Mackenzie was an adult at the time of the online conversations, **[**6]** he required expert assistance in linguistics to "analyze text to identify the linguistic flags that alert in-generation members to an imposter."¹¹

The military judge denied Appellant's request, concluding that it failed to show the necessity of the requested expert. She reasoned that the factual issue to be resolved at trial was the accused's state of mind while he was engaged in chats with Mackenzie, on which the expert's knowledge and opinion regarding linguistic patterns had no bearing. In support of this view, the military judge cited Appellant's affidavit, submitted in support of the motion, in which he stated that due to intoxication he had no recollection of his belief regarding Mackenzie's age at the time of the alleged

⁶ [United States v. Lloyd](#), 69 M.J. 95, 99 (C.A.A.F. 2010).

⁷ [United States v. McElhane](#), 54 M.J. 120, 130 (C.A.A.F. 2000) (quoting [United States v. Miller](#), 46 M.J. 63, 65 (C.A.A.F. 1997)).

⁸ [United States v. Freeman](#), 65 M.J. 451, 458 (C.A.A.F. 2008).

⁹ [United States v. Gonzalez](#), 39 M.J. 459, 461 (C.M.A. 1994).

¹⁰ App. Ex. IV at 1.

¹¹ *Id.* at 2.

offenses. The military judge also noted that during his online chats with Mackenzie, Appellant never expressed any belief that he was speaking with an adult. She reasoned that "[Appellant's] inability to state with any certainty his actual belief or lack thereof regarding 'Mackenzie's' age at the time of the alleged offenses and the lack of any other evidence that he believed her to be an adult significantly attenuate any possible relevance of [the expert linguist's] **[**7]** expertise and therefore any reasonable probability that his expertise will both be of assistance and is required for a fair trial."¹² She therefore concluded that "far from assisting the Defense in elucidating [Appellant's] state of mind, [the expert's] expertise creates confusion by shifting focus away from [Appellant's] state of mind, i.e., the fact at issue, to [the expert's] ability as a forensic linguist to defeat the efforts of a given writing's author to mask her identity."¹³ Finally, she found that Appellant and his defense counsel had the tools to develop this defense without the assistance of an expert.

Appellant's arguments before this Court again miss the mark. An expert consultant hired for the purpose of discerning the likely age of Mackenzie based on linguistics found in her texts was irrelevant to the issue before the trial court, which was not the "real" age of Mackenzie, but whether Appellant believed **[*580]** her to be a 13-year-old child. Appellant did not make the requisite showing of necessity at the trial court, we find the military judge's findings of fact are supported by the evidence and not clearly erroneous, and we do not find her ruling to be arbitrary, fanciful, **[**8]** clearly unreasonable, or clearly erroneous. We therefore find no abuse of discretion in her

denial of the motion for expert assistance.

B. Request for Expert Witness

Appellant asserts that the military judge also abused her discretion in denying his motion for an expert witness in the field of forensic linguistics. We review a military judge's denial of an expert witness for abuse of discretion.¹⁴

The standard for production of an expert witness is more stringent than the standard for producing an expert consultant. In seeking to compel an expert witness, the defense must show the witness is relevant and necessary.¹⁵ To meet this standard, pursuant to [United States v. Houser](#), the defense must establish the expert's qualifications, the propriety of the subject matter of the expert's expected testimony, the basis for the testimony, the legal relevance of the evidence, and the reliability of the evidence.¹⁶ It must also pass the Mil. R. Evid. 403 balancing test regarding whether the probative value of the testimony outweighs other considerations.¹⁷

Here, several months after the military judge denied its motion for an expert consultant in the field of forensic linguistics and 13 days before trial, the Defense **[**9]** moved to compel the same expert consultant as an expert witness. Other than the convening authority's written denial of its expert witness request, the Defense did not submit any additional evidence beyond what had been submitted in the earlier motion for an expert consultant. The Defense again argued its

¹⁴ [United States v. Ruth](#), 46 M.J. 1, 3 (C.A.A.F. 1997).

¹⁵ Rule for Courts-Martial [R.C.M.] 703(d)(2)(A)(i); [United States v. Rivers](#), 49 M.J. 434, 446 (C.A.A.F. 1998).

¹⁶ [United States v. Houser](#), 36 M.J. 392, 397 (C.M.A. 1993).

¹⁷ *Id.*

¹² App. Ex. XVII at 7.

¹³ *Id.*

theory that Appellant believed he was communicating with an inartful mimic, based on inherent linguistic differences between all generations, and that the expert linguist's testimony was critical to the issue of Appellant's subjective belief about Mackenzie's age at the time of his chats with her. However, in the same affidavit submitted in support of the motion for an expert consultant,¹⁸ Appellant stated that due to intoxication he had no recollection of his belief regarding Mackenzie's age at the time of the offense and that only when reviewing the chat transcript did he conclude that Mackenzie did not sound like his younger siblings, nieces, and nephews, such that he would never have believed her to be 13 years old.

The military judge denied the motion, concluding that the expert's proposed testimony was neither material nor necessary. She properly applied the factors outlined in **[**10]** [Houser](#), finding that the expert's testimony would be of minimal probative value, which was substantially outweighed by the danger of confusing the issues and misleading the members. She again determined that the question before the members was not whether the expert could determine the "true" age of Mackenzie based on linguistic patterns in the chat logs, nor whether the language used within the chats raised red flags or concerns for the expert regarding her age; rather, it was whether Appellant, a then-22-year-old Sailor with no training in linguistics, believed Mackenzie was a 13-year-old child at the time of the chats. The military judge found the expert's testimony would not assist the trier of fact in determining Appellant's state of mind at the time of the chats, since

[a]t most, he indicated he would be able to say that the closer in age one is to a

certain age group, i.e., 13-year-olds, and the more exposure one has to communications of that age group, the more likely one would be to detect (even unconsciously) someone mimicking the age group. A statement **[*581]** of the obvious does not "help the trier of fact to understand the evidence or to determine a fact in issue."¹⁹

The military judge **[**11]** further found that evidence supportive of the Defense's theory could be introduced through alternative means, such as cross-examination of SA Echo or, if he sought to introduce direct evidence regarding his state of mind, Appellant's own testimony.

We find that the military judge did not abuse her discretion in denying the motion to compel the expert witness. Appellant argues that his trial defense team needed to be able to cross-examine SA Echo regarding every word or phrase she used during her communications with Appellant, and to further show why certain language was not age-appropriate for a purported 13-year-old. But, like the military judge, we find this argument misses the point. The issue is not whether Mackenzie was in fact a 13-year-old girl (which was conceded not to be the case—she was an adult NCIS agent), but whether Appellant did or did not believe she was 13 years old at the time he communicated with her. Based on the evidence before this Court, the evidence regarding that subjective belief would not have been informed by the testimony of an expert in linguistics about how in his opinion the language used in the chats was or was not typical of the language used by an **[**12]** actual 13-year-old.

¹⁸ App. Ex. IV, Encl. F. at 1.

¹⁹ App. Ex. XXXIV at 3 (quoting Mil. R. Evid. 702(a)).

C. Trial Counsel's Comments During Closing and Rebuttal Arguments

Appellant contends that the trial counsel committed prosecutorial misconduct by using the pronoun "we" and the phrase "we know" during his closing and rebuttal arguments, disparaging the defense counsel's theme and theory, and injecting his personal views of the evidence and Appellant's guilt. We review improper argument de novo and if no objection is made, we review for plain error. The three-part test for plain error is: (1) was there error; (2) was it plain or obvious; and (3) was there material prejudice to a substantial right.²⁰ When there is an objection at trial, we test any error for material prejudice to the appellant's substantial rights.²¹ Challenged argument is reviewed not based "on words in isolation, but on the argument viewed in context" and "within the context of the entire court-martial."²²

1. Using the Pronoun "We" and the Phrase "We Know"

Appellant argues that the trial counsel's use of word, "we," and the term, "we know," constituted improper vouching. We disagree.

"Improper vouching *can* include the use of personal pronouns in connection with assertions that a witness was correct or to ****13** be believed."²³ Examples of such

improper vouching include saying, "I think it is clear, I'm telling you, and I have no doubt,"²⁴ "[w]e all know [the victim] didn't make this up," "[w]e all know [the accused] lied on the video," "[w]e know [the accused's conduct] wasn't accidental," and "[w]e know this was not the actions [sic] of an innocent man."²⁵ Our superior court has also found improper vouching where the trial counsel argued "we know that that was from an amount that's consistent with recreational use, having fun and partying with drugs" in conjunction with arguing that the drug test results were the "perfect litigation package" and that the government's expert witness was "the best possible person in the whole country to come speak to us about this."²⁶

[*582] However, "the use of personal pronouns in closing argument is not per se a due process violation," and the "key issue is not the form but the content of such statements."²⁷ "[T]he prosecutor's closing argument need not be confined to such detached exposition as would be appropriate in a lecture."²⁸ "An attorney's statements that indicate his opinion or knowledge of the case are permissible if the attorney makes it clear that the conclusions ****14** he is urging are conclusions to be drawn from the evidence."²⁹

(internal citation omitted) (emphasis added).

²⁴ *Id.*

²⁵ *United States v. Sewell*, 76 M.J. 14, 20 (C.A.A.F. 2017).

²⁶ *Fletcher*, 62 M.J. at 180.

²⁷ *United States v. Veater*, 576 Fed. Appx. 846, 853 (10th Cir. 2014) (unpublished) (internal quotation marks and citation omitted).

²⁸ *United States v. Jones*, 468 F.3d 704, 708 (10th Cir. 2006) (quoting *United States v. Isaacs*, 493 F.2d 1124, 1164 (7th Cir. 1974)).

²⁹ *United States v. Scilluffo*, No. ACM 39539, 2020 CCA LEXIS 62, *62-63 (A.F. Ct. Crim. App. March 4, 2020) (unpublished)

²⁰ *United States v. Norwood*, 81 M.J. 12, 19-20 (C.A.A.F. 2021) (quoting *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011)).

²¹ *Id.* at 19 (citing *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019)).

²² *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000) (citing *United States v. Young*, 470 U.S. 1, 16, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)) (internal quotation marks omitted).

²³ *United States v. Fletcher*, 62 M.J. 175, 180 (C.A.A.F. 2005)

Here, the trial counsel's use of pronouns was clearly directed toward urging conclusions to be drawn from the evidence:

So, members, let's talk about the investigation. We know it began as an operation, an undercover operation. Special Agent [Echo] testified about how this operation got put together³⁰

That shows that the idea for each one of those offenses that's charged originated with Airman Causey. The defense of entrapment exists only if the original suggestion and initiative to commit the offense originated with the government. Here we know it did not.³¹

So next is the sexual abuse of a child by exposing genitalia. This similar element, he had to intend to expose his genitalia, which again, we know that was not—had he taken a picture of his penis and he meant to send it to somebody else, maybe that would be an issue, but he sends it to her. And we know he intended to send it to her because he follows it up with "I bed [sic] you want to feel that in your p[***]." So we know that was a specific act that he intended and, again, that he intended it to someone under. So we know that because then he describes all the things **[**15]** that he would do with that penis were they in person.³²

So if we go to these charges, we know that we have the actual acts. We have the language. We have the picture of his genitals, which I don't have a slide for that. We have the request for child

pornography, the request that she make it and send it to him.³³

So just at large, I can't go shoot somebody and then say, "Well, I was drunk," and then everyone just says that's fine. Right? So if I have to form the specific intent, that's required mentally, which we know Airman Causey did because he was communicating clearly. There were not typos. He was specifically requesting things. There's actually no evidence, aside from him saying "I'm drunk" that there was.³⁴

So his general disposition to try and dodge accountability shows, because we know he knew exactly what was going on, he's just trying to come up with a way to avoid admitting that he knows the content of these messages. You know why we know? Because there were some things that they showed him and he said, "Yeah, that looks familiar. Yes, I do remember that."³⁵

[*583] He says, "Why didn't I just freaking look at porn? I don't f[***]ing know." But, members, we know that his browsing history shows **[**16]** he was actually looking at porn.³⁶

What is reasonable to believe is that when he says "I was trying to finish masturbating, I was trying to entice her," that he actually meant that, because we know he was masturbating. We know he wanted pictures. So you put yourself in the mind of the accused and if, at that moment, he believed he was talking to a 13-year-old girl, he's guilty.³⁷

(citing *United States v. Morris*, 568 F.2d 396, 401 (5th Cir. 1978); *United States v. Rivas*, 493 F.3d 131, 137 (3d Cir. 2007); *United States v. Beaman*, 361 F.3d 1061 (8th Cir. 2004); and *United States v. Francis*, 170 F.3d 546, 550 (6th Cir. 1999)).

³⁰ R. at 567.

³¹ R. at 570.

³² R. at 573.

³³ R. at 575.

³⁴ R. at 576.

³⁵ R. at 577-78.

³⁶ R. at 579.

³⁷ R. at 604.

We decline to expand *Fletcher*'s holding to encompass such use of pronouns, which is properly focused on drawing reasoned conclusions from the evidence in the record, as opposed to expressing personal opinions regarding the credibility of witnesses or other evidence. Therefore, while nevertheless cautioning practitioners regarding their use, we find the trial counsel's use of personal pronouns in this case was not improper.

2. Injecting Personal Views of the Evidence and Appellant's Guilt

Appellant further contends that the trial counsel made improper arguments by stating the following:

The only time that we have evidence that he was, in fact, drinking is because he's trying to come up with a reason to say "I don't remember any of this." And members, it is not compelling. So we are going to talk about how you know he's lying. **[**17]** ³⁸

So you put yourself in the mind of the accused and if, at that moment, he believed he was talking to a 13-year-old girl, he's guilty. And, members, he is, beyond all reasonable doubt.³⁹

So members, reason. Is it reasonable to think that someone who at no point says, "I thought she was 18" actually thought she was 18? Members, that's not reasonable.⁴⁰ You can have speculative doubts, but there are no reasonable doubts before you, members. There is not one reasonable doubt. It is not reasonable to believe that in the face of all the evidence against the accused, . . . never once telling

law enforcement, when questioned about whether he committed this crime, that he thought she was 18. It is not reasonable to believe that that person actually thought so. What is reasonable is to believe is that when he says "I was trying to finish masturbating, I was trying to entice her," that he actually meant that . . . ⁴¹

We find no merit in Appellant's claims that these statements constitute improper argument. The trial counsel referenced the proper legal standard for reasonable doubt and applied the facts in evidence and the reasonable inferences derived therefrom. He provided proper argument regarding why **[**18]** the evidence met the elements of the charged offenses beyond a reasonable doubt, and why that same evidence proved the lack of an affirmative defense beyond a reasonable doubt.

3. Disparaging Appellant's Theme and Theory

The Defense's theme at trial was that the online chat with Mackenzie was "one big 'con'—a series of lies."⁴² The defense counsel even suggested the court-martial itself was a "con"⁴³ and referred to the case as a "con" 14 times in his closing argument.⁴⁴ The trial counsel responded to this theme during his rebuttal argument, stating, "Members, this **[*584]** court-martial is not a con. This is a very formal proceeding. It's very serious . . . / *apologize* for a reference that what you're doing here is a con."⁴⁵ The defense counsel objected, and the military judge directed the trial counsel to move on.

⁴¹ R. at 603-04.

⁴² Appellant's Br. at 21.

⁴³ R. at 580

⁴⁴ R. at 580, 592-93, 595.

⁴⁵ R. at 595 (emphasis added).

³⁸ R. at 576.

³⁹ R. at 604.

⁴⁰ R. at 603.

Appellant asserts the trial counsel's response was improper and constitutes error. The Government concedes that the trial counsel improperly disparaged Appellant's theme during rebuttal, but argues Appellant was not prejudiced given the comment's minimal impact and the overall strength of the Government's case.⁴⁶ We find the initial statements—"Members, this court-martial is not a con. This **[**19]** is a very formal proceeding. It's very serious"—to be non-objectionable rebuttal. However, the last sentence wherein the trial counsel apologizes to the members is improper because it injects the trial counsel into the proceeding by purporting to shield the members from the defense counsel's perceived affront to the solemnity of the proceedings. Such an apology may also be viewed as an attempt to gain favor with the members by aligning the trial counsel with the members against the defense counsel, which could turn the trial into a popularity contest, rather than a means of deciding the case "solely on the basis of the evidence presented."⁴⁷ A court-martial is not an extension of trial counsel, and it was error for the trial counsel to use an apology to suggest otherwise. We therefore find the military judge properly stopped the trial counsel from making further comments of this sort.

4. Prejudice

Because we found error in the trial counsel's "apology," we test for prejudice. Material prejudice occurs where there is "a reasonable probability that, but for the error, the outcome of the proceeding would have been different."⁴⁸

In making this determination, we evaluate the improper **[**20]** argument's severity, the curative measures adopted, and the weight of the evidence supporting the conviction.⁴⁹ "[T]he third factor may so clearly favor the government that the appellant cannot demonstrate prejudice."⁵⁰ "[R]eversal is warranted only when the trial counsel's comments taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone."⁵¹

Here, "[e]ven assuming that trial counsel's misconduct was severe and the military judge's instructions were insufficient, we find the third *Fletcher* factor dispositive in this case."⁵² The evidence supporting Appellant's convictions is decidedly strong. From sending "Mackenzie," a law enforcement agent posing as a 13-year-old girl, pictures of his exposed penis, to asking for images of her "t[***], a[***], and] p[***]," to talking about masturbating while communicating with her, to expressing remorse to NCIS and Mackenzie's "parents," we cannot say that "counsel's comments taken as a whole were so damaging that we cannot be confident that the members convicted [A]ppellant on the basis of the evidence

citation omitted).

⁴⁹ *Id. at 19* (quoting *Voorhees*, 79 M.J. at 12).

⁵⁰ *Sewell*, 76 M.J. at 18; see also *United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013) (holding the same for improper argument during sentencing).

⁵¹ *Sewell*, 76 M.J. at 18.

⁵² *Id. at 19* (where victim testimony and the appellant's admissions overcame any potential prejudice by improper argument); see also *United States v. Hornback*, 73 M.J. 155, 161 (C.A.A.F. 2014) (where the testimony of two witnesses who observed the appellant smoking an illicit substance was strong enough to override the absence of a drug test and pervasive improper character argument that the appellant was a drug user).

⁴⁶ Gov't Ans. at 35.

⁴⁷ *Fletcher*, 62 M.J. at 181 (*Young*, 470 US at 18)

⁴⁸ *Norwood*, 81 M.J. at 20 (internal quotation marks and

alone."⁵³ We therefore find that the apology made by trial counsel was **[**21]** improper, but that this error was not prejudicial.

D. Trial Counsel's Comments During Sentencing Argument

Appellant asserts that the trial counsel also gave improper sentencing argument by **[*585]** suggesting that the members not consider the fact that there was no child victim, that Appellant needed to be confined for three years to ensure he received proper treatment, and that his sentence should be adjudged based on how it would appear in a news headline. He argues that the cumulative impact of this misconduct resulted in material prejudice to Appellant's substantial rights. We address each in turn and find some error, but no prejudice.

1. Argument That Appellant Should Not Receive a "Windfall" Because There Was No Actual Child Victim

Trial counsel are allowed to recommend a specific sentence and can argue a host of factors including the need for the sentence to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense.⁵⁴ Here, Appellant was convicted of *attempted* child sexual abuse. The fact that no child was actually victimized is part and parcel of the offense for which Appellant was to be sentenced. Under these circumstances, **[**22]** we hold that the trial counsel's argument that Appellant should not get a "windfall" because there was no actual victim fell within the bounds outlined in the Rules for Courts-Martial and was not

improper.

2. Argument Regarding Hypothetical Newspaper Scenario

Improper sentencing argument has been found where the trial counsel "pressured the members to consider how their fellow servicemembers would judge them and the sentence they adjudged instead of the evidence at hand."⁵⁵ "Trial counsel may properly ask for a severe sentence, but they cannot threaten the court members with the specter of contempt or ostracism if they reject their request."⁵⁶ "Arguing an inflammatory hypothetical scenario with no basis in evidence amounts to improper argument" that our superior court has repeatedly condemned.⁵⁷ However, trial counsel may argue that a sentence needs to "promote adequate deterrence of misconduct."⁵⁸

Here, the trial counsel stated:

when . . . this information, the results of today's sentencing, gets to the fleet, if we were to read E-3 from *Carl Vinson* found guilty of attempted sexual abuse of a child for attempting to receive child pornography from her by requesting that she make it, and **[**23]** that Sailor received blank as punishment, when you read that, what number in your head would you say "that seems right, that seems appropriate"? And if you wouldn't read that and say, "that seems like the right outcome," do not vote for that sentence. Don't even propose it. If you know that you would not be

⁵³ R. 360-495; Pros. Exs. 1-2, 4-7; [Norwood, 81 M.J. at 19](#).

⁵⁴ R.C.M. 1001(h), 1002(f)(3).

⁵⁵ [Norwood, 81 M.J. at 21](#).

⁵⁶ *Id.* (internal quotation marks and citation omitted).

⁵⁷ *Id.* (citing [Voorhees, 79 M.J., at 14-15](#)).

⁵⁸ R.C.M. 1002(f)(3)(D); See R.C.M. 1001(h).

comfortable reading that, that should not be a discussion for what is an appropriate sentence.⁵⁹

There was no objection to this argument. However, the military judge did subsequently issue the following general instruction:

[m]embers, [the trial counsel] touched on this, but while deterrence is one appropriate consideration, you do need to impose a sentence appropriate to the specific offenses of which the accused has been convicted, namely violations of [Article 80](#), which is attempt. Also, appropriate to this particular accused and appropriate to the specific facts of this case.⁶⁰

We find no plain error under these circumstances. The trial counsel asked the members to imagine what *they* would think of the sentence they proposed if *they* read it in the newspaper, as opposed to what *other servicemembers* would think. We further find that any implied or potential consideration of what others would think **[**24]** upon reading about the sentence the members imposed in a newspaper, as well as any concern that general-deterrence considerations would cause **[*586]** the members to disregard the specifics of the case in front of them, were cured by the military judge's appropriate, tailored instruction.

3. Argument Regarding Collateral Consequences

"Although military judges and members should not generally consider collateral consequences in assessing a sentence, this is not a bright-line rule," as sometimes "it may be appropriate for the military judge to instruct on collateral

matters."⁶¹ "For example, the availability of parole and rehabilitation programs are issues of general knowledge and concern, and as such they may be instructed upon, especially when requested by the members."⁶² However, in those situations, "the military judge should then instruct the members that although the possibility of parole exists in the military justice system, they could not consider it in arriving at an appropriate sentence for the appellant."⁶³

Here, the trial counsel gave the following argument:

Dr. [Juliet] explained how in his in-depth psychosexual analysis, he concluded, an expert in forensic psychology, that Airman Causey **[**25]** needs treatment. He needs rehabilitation. He needs treatment in impulse control. We're rewiring how he responds to certain stimulus. That takes time. He needs treatment in substance abuse and in victim impact awareness. This is basic empathy. That takes time to develop. And so we need to put Airman Causey in a place where he can receive sex offender treatment. So the Government, for that reason additionally, is requesting these 3 years of confinement, because he has not learned his . . . lesson.⁶⁴

The defense counsel objected on grounds that the argument was an improper reference to collateral consequences and that it was not based on any evidence presented. The military judge sustained the objection.

While we agree the argument was improper,

⁶¹ [United States v. McNutt](#), 62 M.J. 16, 19 (C.A.A.F. 2005) (internal quotation marks and citation omitted).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ R. at 707-08.

⁵⁹ R. at 708-09.

⁶⁰ R. at 712.

as there was no evidence regarding sex offender treatment programs or timelines, it was immediately the subject of a sustained objection, at which point the improper argument ceased. Further, as previously discussed, there was significant aggravating evidence against Appellant. The Government asked for three years' confinement and a dishonorable discharge; Appellant's trial defense counsel asked the members to sentence Appellant to only a bad-conduct **[**26]** discharge; and the members ultimately sentenced him to confinement for one year and a dishonorable discharge. Under these circumstances, we find that Appellant was not prejudiced by the improper argument.

E. The Right to Unanimous Verdicts at Courts-Martial

Finally, Appellant challenges his conviction on the grounds that [Article 52, UCMJ](#),⁶⁵ which does not require a unanimous verdict for non-capital convictions, is now facially unconstitutional in light of the Supreme Court's decision in [Ramos v. Louisiana](#).⁶⁶ We review constitutional issues de novo.⁶⁷

⁶⁵ [Article 52, UCMJ](#), provides that in a general or special courts-martial with members, the concurrence of at least three-fourths of the members present when the vote is taken is required to reach guilty findings and a sentence, except in capital cases, in which unanimity is required for both the findings and the sentence.

⁶⁶ Although [Ramos](#) was decided several months prior to the start of Appellant's trial, Appellant's trial defense counsel did not challenge the constitutionality of [Article 52, UCMJ](#). Our record does not reveal the number of votes for Appellant's conviction. See R.C.M. 922(e) (prohibiting polling the members about their voting). However, we consider the constitutionality of the three-fourths requirement because it did apply to this court martial, and we presume that only three-fourths members voted for conviction.

⁶⁷ [United States v. Ali](#), 71 M.J. 256, 265 (C.A.A.F. 2012).

[*587] The [Sixth Amendment](#) states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed" ⁶⁸ The Supreme Court has long held that the right to "trial by an impartial jury," as applied to criminal trials in Article III courts, requires a unanimous verdict in order to convict a defendant of a serious crime.⁶⁹ More recently, in [Ramos](#), the Supreme Court held that the same right, requiring a unanimous verdict, also applies via the [Fourteenth Amendment](#) to criminal trials conducted in state courts.⁷⁰

Appellant argues that under [Ramos](#), the [Sixth Amendment](#) right to unanimous verdicts now applies to courts-martial. We disagree. As **[**27]** the Supreme Court has repeatedly held, the Constitution recognizes that "the exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Article III trials need apply."⁷¹ The Court's jurisprudence in this area stands for the proposition that, while similar now in many ways to state and federal civilian criminal courts,⁷² the military justice system is unique and subject to a different degree of constitutional protection than what is afforded in civilian criminal trials.⁷³

⁶⁸ [U.S. Const. amend. VI](#) (emphasis added).

⁶⁹ [Ramos](#), [U.S. at](#) , 140 S. Ct. at 1396-97 ("In all, this Court has commented on the [Sixth Amendment's](#) unanimity requirement no fewer than 13 times over more than 120 years.") (citations omitted).

⁷⁰ [Id. at 1394](#).

⁷¹ [O'Callahan v. Parker](#), 395 U.S. 258, 261, 89 S. Ct. 1683, 23 L. Ed. 2d 291 (1969) (overruled on other grounds).

⁷² See [Ortiz v. United States](#), [U.S.](#) , 138 S. Ct. 2165, 2170, 201 L. Ed. 2d 601 (2018).

⁷³ See *Ex parte Milligan*, 71 U.S. 2, 123, 18 L. Ed. 281 (1866)

While it is well established that constitutional safeguards apply to the military "except insofar as they are made inapplicable either expressly or by necessary implication,"⁷⁴ our superior court has repeatedly found that the [Sixth Amendment](#) right to trial by an "impartial jury of the State and district wherein the crime shall have been committed" is one of the safeguards that does *not* apply to courts-martial.⁷⁵ Although there is significant case law regarding empaneling unbiased members in military courts, the law regarding the impartiality of court-martial panels generally derives from R.C.M. 912 and [Articles 25](#) and [41, UCMJ](#), not from the [Sixth Amendment](#).⁷⁶

(noting that "the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the [sixth amendment](#), to those persons who were subject to indictment or presentment in the fifth" and "[t]he discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts . . ."); [Ex parte Quirin](#), 317 U.S. 1, 40, 63 S. Ct. 2, 87 L. Ed. 3 (1942) ("[C]ases arising in the land or naval forces' . . . are expressly excepted from the [Fifth Amendment](#), and are deemed excepted by implication from the Sixth"); [Whelchel v. McDonald](#), 340 U.S. 122, 127, 71 S. Ct. 146, 95 L. Ed. 141 (1950).

⁷⁴ [United States v. Tempia](#), 16 C.M.A. 629, 37 C.M.R. 249, 254 (C.M.A. 1967).

⁷⁵ [United States v. Riesbeck](#), 77 M.J. 154, 162 (C.A.A.F. 2018) ("Courts-martial are not subject to the jury trial requirements of the [Sixth Amendment](#)"); [United States v. Easton](#), 71 M.J. 168, 175 (C.A.A.F. 2012) (same); [United States v. Wiesen](#), 57 M.J. 48, 50 (C.A.A.F. 2002) (same); [United States v. Kirkland](#), 53 M.J. 22, 24 (C.A.A.F. 2000).

⁷⁶ See [United States v. Ai](#), 49 M.J. 1, 4 (C.A.A.F. 1998) ("[A]n accused in a federal civilian criminal trial has a constitutional right to impartial jury members to determine his guilt. A servicemember similarly has, as a matter of 'fundamental fairness,' the right to impartial court members to decide his guilt. In addition, a military accused has a regulatory right to court members who appear to be impartial.") (citations omitted); [Wiesen](#), 57 M.J. at 50 (stating that issues involving who may serve on a court-martial should be viewed through the lens of [Article 25](#), not the [Sixth Amendment](#) right to trial by jury, which does not apply to courts-martial) (citations omitted). But see [United States v. Lambert](#), 55 M.J. 293, 295 (C.A.A.F. 2001) (stating "the [Sixth Amendment](#) requirement that the jury

As [Ramos](#) does [****28**] not address the military [***588**] justice system, which is not subject to the [Sixth Amendment](#) right to trial by an impartial jury, we do not view it as overturning this prior precedent. In any event, it is the prerogative of our superior court, not this one, to overturn its own precedents.⁷⁷ Therefore, we hold that the [Sixth Amendment's](#) right to trial by an impartial jury, which now requires a unanimous verdict for serious offenses tried in either state or Article III federal criminal courts, is still not applicable to courts-martial.⁷⁸

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.⁷⁹

The findings and sentence are **AFFIRMED**.

Senior Judge GASTON and Judge HOUTZ concur.

Concur by: GASTON

be impartial applies to court-martial members and covers not only the selection of individual jurors, but also their conduct during the trial proceedings and the subsequent deliberations") (citing R.C.M. 912 and 923 (1995)).

⁷⁷ See [United States v. Andrews](#), 77 M.J. 393, 399 (C.A.A.F. 2018) (quoting [United States v. Quick](#), 74 M.J. 332, 343 (C.A.A.F. 2015) (Stucky, J., dissenting)) (stating the well-settled principle of vertical *stare decisis* that "courts 'must strictly follow the decisions handed down by higher courts'"); [United States v. Davis](#), 76 M.J. 224, 228 n.2 (C.A.A.F. 2017) ("It is this Court's prerogative to overrule its own decisions.").

⁷⁸ To the extent Appellant argues that unanimous verdicts are also required at court-martial by fundamental fairness under the [Fifth](#) and [Sixth Amendments](#), that, too, has been rejected by our superior court. [United States v. Bramel](#), 32 M.J. 3 (C.M.A. 1990) (summary disposition).

⁷⁹ [Articles 59](#) & [66](#), UCMJ.

Concur

GASTON, Senior Judge (concurring):

I agree with my colleagues that the [Sixth Amendment](#) right to "trial by an impartial jury," wherein the Supreme Court has found the right to a unanimous verdict resides, does not apply to courts-martial. The Amendment's further requirement that the jury be drawn from "the State and district wherein the crime shall **[**29]** have been committed" strongly supports the Court's early observation that "the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the [S]ixth [A]mendment, to those persons who were subject to indictment or presentment in the [F]ifth,"¹ which specifically excepts "cases arising in the land or naval forces."² The Court's more recent holding in *Ramos v. Louisiana*,³ that the right to trial by an impartial jury requires a unanimous verdict for a serious offense tried in state court, does not change the [Sixth Amendment](#) jury right's settled inapplicability to the military justice system.

But as Chief Judge Crawford of the Court of Appeals for the Armed Forces [CAAF] once noted, "[t]he fact that the [Sixth Amendment](#) right to trial by jury does not apply to court-martial proceedings . . . does not require us to jettison Supreme Court precedent and good logic in assessing whether [an] appellant was tried by a fair, impartial jury of his superiors."⁴ Although a military accused does not possess this right under the [Sixth Amendment](#) per se,

CAAF has found that "the [Sixth Amendment](#) requirement that the jury be impartial applies to court-martial members and covers not only the selection of individual jurors, but also their conduct **[**30]** during the trial proceedings and the subsequent deliberations,"⁵ which include voting on the findings and sentence. CAAF has also found that "[a]s a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel."⁶ And multiple Supreme Court Justices have found that the "requirements of unanimity and impartial selection . . . complement each other in ensuring the **[*589]** fair performance of the vital functions of a criminal court jury."⁷

It is therefore worth examining why the Supreme Court regards the right to "trial by an impartial jury" as including the right to a unanimous verdict. As the Court found in *Ramos*, one reason is because when James Madison wrote the [Sixth Amendment](#) into the [Bill of Rights](#) in 1791, "[i]f the term 'trial by an impartial jury' carried any meaning at all it surely included a requirement as long and widely accepted" as a unanimous verdict, which by that time "had been required for about 400 years."⁸ Justice Story later explained that "in common cases, the law not only presumes every man innocent, until he is proven guilty; but unanimity in the verdict of the jury is indispensable."⁹ This connection

¹ *Ex parte Milligan*, 71 U.S. 2, 123, 18 L. Ed. 281 (1866).

² *U.S. Const. amend. V*.

³ *U.S.* , 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020).

⁴ *United States v. Wiesen*, 57 M.J. 48, 53 n.2 (C.A.A.F. 2002) (Crawford, C.J., dissenting).

⁵ *United States v. Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001) (citing Rules for Courts-Martial 912 and 913 (1995)).

⁶ *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001) (citation omitted).

⁷ *Ramos*, 140 S. Ct. at 1418 (Kavanaugh, J., concurring) (quoting *Johnson v. Louisiana*, 406 U. S. 356, 398, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (Stewart, J., dissenting)).

⁸ *Ramos*, 140 S. Ct. at 1396.

⁹ *Id.* (quoting 2 J. Story, Commentaries on the Constitution of

between unanimous verdicts and the presumption **[**31]** of innocence has also been viewed as implying a further connection with proof of guilt beyond a reasonable doubt, which the Court held is required by due process as "a prime instrument for reducing the risk of convictions resting on factual error."¹⁰ As Justice Kavanaugh reasoned in *Ramos*, allowing state criminal courts to use non-unanimous verdicts "sanctions the conviction at trial . . . of some defendants who might not be convicted under the proper constitutional rule [requiring unanimity]"¹¹

While the Supreme Court has recognized that "[t]he procedural protections afforded to a service member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal,"¹² the use of non-unanimous verdicts at courts-martial remains one of their "fundamental differences from the practices in the civilian courts."¹³ In fact, the military justice system, which the Court has noted is "older than the Constitution,"¹⁴ has never required unanimous verdicts in non-capital cases. Early courts-martial were generally decided by a majority vote.¹⁵ When the Uniform Code of Military Justice was enacted after complaints about the unfairness

of courts-martial during World War **[**32]** II, the vote requirement for non-capital convictions was increased to two-thirds.¹⁶ In 2016, the vote requirement was changed to three-fourths.¹⁷

Historically, the reason cited by the Supreme Court for this difference is that "[t]he discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts."¹⁸ While the legislative history is less than clear on this issue, it seems logical that requiring non-unanimous verdicts might reduce deliberation time and the occurrence of hung juries, as compared to systems requiring unanimous verdicts to convict or acquit.¹⁹ The State of Louisiana argued as much in *Burch v. Louisiana* in support of its system of allowing non-unanimous **[*590]** verdicts by six-person juries.²⁰ However, the Supreme Court rejected the argument in this context. While acknowledging that the State had "a substantial interest in reducing the time and expense associated with the administration of its system of criminal justice," the Court found the benefits that might accrue from such a system, as opposed to one requiring unanimous verdicts, were "speculative, at best," and were at the impermissible cost of threatening **[**33]** "the substance of the jury

the United States § 777, p. 248 (1833)).

¹⁰ *In re Winship*, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

¹¹ *Ramos*, 140 S. Ct. at 1417 (Kavanaugh, J., concurring).

¹² *Ortiz v. United States*, ___ U.S. ___, 138 S. Ct. 2165, 2174, 201 L. Ed. 2d 601 (2018).

¹³ *O'Callahan v. Parker*, 395 U.S. 258, 262, 89 S. Ct. 1683, 23 L. Ed. 2d 291 (1969) (overturned on other grounds).

¹⁴ *Ortiz*, ___ U.S. at ___, 138 S. Ct. at 2175 (internal quotation marks and citations omitted).

¹⁵ W. Winthrop, *Military Law and Precedents* 377 (2nd ed. 1920) (noting the concurrence of two-thirds was required only to impose a death sentence).

¹⁶ *Article 52(a)*, *UCMJ* (1950), Ch. 169, § 1, 64 Stat. 125 (repealed 1956, Ch. 1041, § 53, 70A Stat. 641); *Manual for Courts-Martial, United States* (1951 ed.) [MCM], Ch. XIII, para. 74.d.(3) at 111.

¹⁷ *Military Justice Act of 2016*, Pub. L. No. 114-328, 130 Stat. 2894 (2016) (codified at 10 U.S.C. § 852).

¹⁸ *Milligan*, 71 U.S. at 123.

¹⁹ Requiring unanimous verdicts only to convict—meaning a lack of unanimity would result in an acquittal—would not cause this problem.

²⁰ *Burch v. Louisiana*, 441 U.S. 130, 138-39, 99 S. Ct. 1623, 60 L. Ed. 2d 96 (1979).

trial guarantee."²¹

That said, in comparison with the power the States have over their criminal justice systems vis-à-vis the [Bill of Rights](#), Congress has much greater constitutional authority over the military justice system. As the Supreme Court explained in *Weiss v. United States*,

Congress, of course, is subject to the requirements of the [Due Process Clause](#) when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings. But in determining what process is due, courts must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, [U.S. Const., Art. I, § 8](#).²²

In light of this strong judicial deference, congressional enactments in the area of military justice are generally upheld unless it can be shown that "the factors militating in favor of [the asserted right] are so extraordinarily weighty as to overcome the balance struck by Congress."²³

Here, Appellant does not claim that the use of non-unanimous verdicts in the military justice system has the same racially biased origins as their use in the state systems overturned in *Ramos*, but it is worth examining their use at courts-martial **[**34]** through the same lens of equal protection. In *Ramos*, one of the things Justice Kavanaugh found troubling about the state systems' use of non-unanimous verdicts

was that they undermined the protections of *Batson v. Kentucky*.²⁴ In *Batson*, the Supreme Court held that the [Equal Protection Clause](#) prohibits racial discrimination in the exercise of peremptory challenges. To combat this, *Batson* requires that if a prima facie case is established that a party's use of a peremptory challenge discriminates against a "cognizable racial group," the party must articulate a race-neutral explanation for the challenge.²⁵ In Justice Kavanaugh's view, the use of non-unanimous verdicts undermines this *Batson* protection by "[i]n effect . . . allow[ing] backdoor and unreviewable peremptory strikes" ²⁶ He reasoned that

non-unanimous juries can make a difference in practice, especially in cases involving black defendants, victims, or jurors. . . . [N]on-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors. . . . The [other] jurors can simply ignore the views of their fellow panel members of a different race or class. **[**35]** ²⁷

As Justice Marshall succinctly put it, to "fence out a dissenting juror fences out a voice from the community, and undermines the principle on which our whole notion of the jury now rests."²⁸

²¹ *Id.*

²² [Weiss v. United States, 510 U.S. 163, 176-77, 114 S. Ct. 752, 127 L. Ed. 2d 1 \(1994\)](#) (internal quotation marks and citations omitted).

²³ *Id.* at 177 (quoting [Middendorf v. Henry, 425 U.S. 25, 44, 96 S. Ct. 1281, 47 L. Ed. 2d 556 \(1976\)](#)).

²⁴ [476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 \(1986\)](#).

²⁵ [Batson, 476 U.S. at 98](#).

²⁶ [Ramos, U.S. , 140 S. Ct. at 1418](#) (Kavanaugh, J., concurring).

²⁷ [Ramos, U.S. at , 140 S. Ct. at 1417-18](#) (Kavanaugh, J., concurring) (citations and internal quotation marks omitted).

²⁸ [Ramos, U.S. at , 140 S. Ct. at 1418](#) (Kavanaugh, J., concurring) (quoting [Johnson, 406 U.S. at 402](#) (Marshall, J., dissenting)).

Our superior court has held that, as an aspect of equal protection under [Fifth Amendment](#) due process, [*591] *Batson's* prohibition against race-based discrimination in the use of peremptory challenges "applies to courts-martial, just as it does to civilian juries."²⁹ In so deciding, in a spirit not unlike that of Chief Judge Crawford regarding the [Sixth Amendment](#) right to trial by an impartial jury, Chief Judge Everett reasoned that "even if we were not bound by *Batson*, the principle it espouses should be followed in the administration of military justice."³⁰ *Batson* has since been applied also to prohibit gender-based discrimination in the use of peremptory challenges in both civilian criminal courts³¹ and courts-martial.³² And CAAF judges have repeatedly found that the equal-protection principle *Batson* espouses has broad application to the administration of military justice.³³

Given this context, Justice Kavanaugh's concerns that the use of non-unanimous verdicts can increase the possibility of unfair or unjust verdicts and the [**36] fencing out of

views of minority jurors—which ultimately could be by race, ethnicity, or gender—appear no less applicable to the military justice system than to state criminal justice systems. These factors in favor of unanimous verdicts appear weighty in comparison with the goal of "swifter modes of trial than are furnished by the common law courts," assuming the use of non-unanimous verdicts in courts-martial achieves that goal in some measurable, non-speculative way. However, Justice Kavanaugh's concurring opinion in *Ramos* does not carry the same binding authority as other existing case precedent in this area. Therefore, I agree that we must leave to our superior courts the prerogative of determining whether these (or other) factors are so extraordinarily weighty as to overcome the balance struck by Congress in not requiring unanimous verdicts for the conviction of serious, non-capital offenses tried at courts-martial.³⁴

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²⁹ [United States v. Santiago-Davila](#), 26 M.J. 380, 390 (C.M.A. 1988).

³⁰ *Id.*

³¹ [J.E.B. v. Alabama](#), 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994).

³² [United States v. Witham](#), 47 M.J. 297 (C.A.A.F. 1997) (applying *J.E.B.* to courts-martial).

³³ See [United States v. Bess](#), 80 M.J. 1, 20 (C.A.A.F. 2020) (Ohlson, J., dissenting) ("Although *Batson* holds that the [Equal Protection Clause](#) 'forbids the prosecutor to challenge potential jurors solely on account of their race,' the constitutional scope of that opinion—if not its literal holding—extends beyond the context of peremptory challenges during voir dire.") (quoting [Batson](#), 476 U.S. at 89); [United States v. Dockery](#), 76 M.J. 91, 100 (C.A.A.F. 2017) (Sparks, J., concurring) ("[W]hen any member of a suspect class (such as a racial or ethnic group) is improperly removed from the court-martial panel, the constitutional concerns underpinning *Batson* are implicated.").

³⁴ See, e.g., [United States v. Davis](#), 76 M.J. 224, 228 n.2 (C.A.A.F. 2017) ("It is this Court's prerogative to overrule its own decisions.").

United States v. Crump

United States Air Force Court of Criminal Appeals

November 10, 2020, Decided

No. ACM 39628

Reporter

2020 CCA LEXIS 405 *; 2020 WL 6817741

UNITED STATES, Appellee v. Malik K.
CRUMP, Airman (E-2), U.S. Air Force,
Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed
by [U. S. v. Crump, 2021 CAAF LEXIS 121](#)
([C.A.A.F., Jan. 6, 2021](#))

Motion granted by [United States v. Crump,](#)
[2021 CAAF LEXIS 4 \(C.A.A.F., Jan. 7, 2021\)](#)

Review denied by [United States v. Crump,](#)
[2021 CAAF LEXIS 270 \(C.A.A.F., Mar. 25,](#)
[2021\)](#)

Prior History: Appeal from the United States
Air Force Trial Judiciary. Military Judge:
Jefferson B. Brown (motions); Matthew D.
Talcott. Approved sentence: Dishonorable
discharge, confinement for 10 years, forfeiture
of all pay and allowances, reduction to E-1,
and a reprimand. Sentence adjudged 23
September 2018 by GCM convened at Joint
Base San Antonio-Lackland, Texas.¹ [***1**].

Case Summary

¹ We use the arraignment and trial location as reflected in the authenticated record of trial. The court-martial order (CMO) states, contrary to the authenticated transcript, that arraignment occurred at Joint Base San Antonio-Fort Sam Houston, Texas. In our decretal paragraph, we order a correction to the CMO for an error in the trial court's findings but we do not order a modification to the arraignment location.

Overview

HOLDINGS: [1]-Defendant airman was properly convicted of abusive sexual contact and assault and battery in violation of [10 U.S.C.S. §§ 920, 928](#) because there was sufficient evidence he did not obtain consent from his victims, making his claim of consent unreasonable; [2]-The military judge properly denied defendant's motion of judicial recusal, R.C.M. 902, Manual Courts-Martial because, inter alia, defendant failed to overcome the presumption that a military judge is impartial and a reasonable person would not conclude impartiality could be questioned here; [3]-Evidence of uncharged sexual assaults were properly admitted, Mil. R. Evid. 413 and 403, because the military judge could reasonably find logical relevance in evidence that defendant sexually assaulted and attempted to sexually assault the other witnesses, and the military judge's ruling balanced the probative value of the witness's testimony against any countervailing interests.

Outcome

Approved findings and sentence affirmed, as modified.

Counsel: For Appellant: Captain Amanda E.
Dermady, USAF; Mark C. Bruegger, Esquire.

For Appellee: Lieutenant Colonel Joseph J.
Kubler, USAF; Lieutenant Colonel Brian C.
Mason, USAF; Major Jessica L. Delaney,
USAF; Major Anne M. Delmare, USAF; Mary

Ellen Payne, Esquire.

Judges: Before J. JOHNSON, LEWIS, and POSCH, Appellate Military Judges. Senior Judge LEWIS delivered the opinion of the court, in which Chief Judge J. JOHNSON and Senior Judge POSCH joined.

Opinion by: LEWIS

Opinion

LEWIS, Senior Judge:

A general court-martial composed of a military judge sitting alone convicted Appellant, contrary to his pleas, of three specifications of sexual assault and one specification of abusive sexual contact in violation of [Article 120, Uniform Code of Military Justice \(UCMJ\)](#), [10 U.S.C. § 920](#),^{2,3} and one specification of assault consummated by a battery in violation of [Article 128, UCMJ](#), [10 U.S.C. § 928](#).⁴ The court-martial [*2] sentenced Appellant to a dishonorable discharge, confinement for ten years, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand.

² All references to the Uniform Code of Military Justice (UCMJ), Rules for Courts-Martial (R.C.M.), and Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2016 ed.) (MCM).

³ The abusive sexual contact offense was charged as aggravated sexual contact, also a violation of [Article 120, UCMJ](#). The military judge found Appellant guilty of the "lesser included offense" of abusive sexual contact. After the presentation of evidence, trial defense counsel agreed with the military judge that abusive sexual contact was a lesser included offense of aggravated sexual contact. Additionally, the finding of guilty to this specification was by exceptions and substitutions.

⁴ Appellant initially pleaded guilty to assault consummated by a battery and the military judge found his plea provident and entered findings of guilty. This plea of guilty was later withdrawn. We describe the circumstances of that withdrawal when we assess Appellant's second assignment of error, whether the military judge erred by not recusing himself.

The convening authority approved the adjudged sentence but failed to include the reprimand of Appellant in the action as required by Rule for Courts-Martial (R.C.M.) 1107(f)(4)(G). See *a/so* R.C.M. 1003(b)(1). We take corrective action to remedy this error and do not approve the reprimand in our decretal paragraph.

Appellant raised 12 issues⁵ for our consideration: (1) whether the evidence is legally and factually sufficient; (2) whether the military judge erred by not recusing himself; (3) whether the military judge erred by admitting testimony offered pursuant to Mil. R. Evid. 413; (4) whether the military judge erred by failing to compel the production of evidence and witnesses from the investigation of the Mil. R. Evid. 413 witness's claims; (5) whether the military judge erred in excluding evidence under Mil. R. Evid. 412; (6) whether Appellant was denied effective assistance of counsel under the [Sixth Amendment](#)⁶ as alleged in three deficiencies in the performance of his trial defense counsel; (7) whether Appellant was unlawfully deprived of a panel of his peers in violation of the [Sixth Amendment](#) and [Article 25, UCMJ](#), [10 U.S.C. § 825](#) [*3]; (8) whether trial defense counsel were ineffective on additional grounds by declining to search Appellant's phone or review the Snapchat messages he exchanged with one victim; (9) whether the military judge erred by considering an unsworn victim impact statement under R.C.M. 1001A; (10) whether the mandatory dishonorable discharge is unconstitutional; (11) whether the sentence to ten years of confinement was unduly severe; and (12) whether the cumulative error doctrine requires

⁵ We have reordered and reworded the assignments of error. Appellant personally raises issues (7), (8), (9), (10), and (11) pursuant to [United States v. Grostefon, 12 M.J. 431 \(C.M.A. 1982\)](#).

⁶ [U.S. CONST. amend. VI](#).

relief. In addition, although not raised by Appellant, we consider whether he is entitled to relief for facially unreasonable appellate delay.

With respect to issues (7), (8), (9), and (11), we have carefully considered Appellant's contentions and find they do not require further discussion or warrant relief. See [*United States v. Matias*, 25 M.J. 356, 361 \(C.M.A. 1987\)](#).

Regarding issue (10), we find the assignment of error to be without merit for the reasons we announced in three prior cases: [*United States v. Rita*, M.J. , No. ACM 39614, 2020 CCA LEXIS 238, at *5-7 \(A.F. Ct. Crim. App. 17 Jul. 2020\)](#), rev. denied, No. 20-0365, 80 M.J. 363, 2020 CAAF LEXIS 571 (C.A.A.F. 15 Oct. 2020); [*United States v. Plourde*, No. ACM 39478, 2019 CCA LEXIS 488, at *45-49 \(A.F. Ct. Crim. App. 6 Dec. 2019\)](#) (unpub. op.), rev. denied, 80 M.J. 73 (C.A.A.F. 2020); and [*United States v. Yates*, No. ACM 39444, 2019 CCA LEXIS 391, at *71-73 \(A.F. Ct. Crim. App. 30 Sep. 2019\)](#) (unpub. op.), rev. denied, 80 M.J. 80 (C.A.A.F. 2020).

On the remaining issues, we find no error that materially prejudiced [*4] Appellant's substantial rights. As assertions of error without merit are not sufficient to invoke the doctrine of cumulative error, we find no relief warranted for issue (12). See [*United States v. Gray*, 51 M.J. 1, 61 \(C.A.A.F. 1999\)](#). We affirm the findings and, except for the reprimand, the approved sentence.

I. BACKGROUND

Appellant joined the Air Force in February 2017. After successfully completing basic military training, Appellant began technical training in a medical career field at Joint Base San-Antonio Fort Sam Houston, Texas. The charged offenses arose from two separate

incidents in Appellant's dormitory room on that installation. The first incident occurred in July 2017 and the second in November 2017. Each incident involved a different female Airman who lived in the same dormitory as Appellant and had visited his room. The incident in July involved Airman (Amn) MM and the incident in November involved Airman Basic (AB) EA.⁷ We address the two incidents in that order.

A. Airman MM

The military judge convicted Appellant of two offenses involving Amn MM: (1) abusive sexual contact, by causing bodily harm, when Appellant touched her hips through her clothing with an intent to gratify his sexual desire; and (2) assault consummated [*5] by a battery when he unlawfully struck her in the face with his hand. Both offenses occurred during the same visit to Appellant's room. Before describing the offenses, we address the prior interactions of Appellant and Amn MM before the day of the offenses.

1. Prior Interactions

Amn MM first met Appellant in May 2017 while hanging out at the dormitory where both lived. Later, Amn MM saw Appellant off-base when both were getting tattoos. At this point, the two exchanged phone numbers and then started texting each other and communicating over the social media application Snapchat. At first, the two were only friends, but over time they had consensual sexual intercourse—sometimes in his dormitory room and sometimes in hers.

Evidence of Amn MM's and Appellant's consensual sexual activities before the charged conduct was admitted, pursuant to

⁷ This opinion uses their grades as listed on the charge sheet. Both had been promoted by the time of their trial testimony.

Mil. R. Evid. 412, to show whether Appellant had a mistake of fact defense to the offenses. While there was general agreement that the prior sexual encounters occurred, Appellant and Amn MM disagreed on the specifics. Most notably, they disagreed about whether Appellant had been allowed to slap Amn MM on her face or on her buttocks during sexual intercourse.

Amn MM recalled [*6] Appellant weakly slapping her buttocks while they were having intercourse on two separate occasions. On the first occasion the slap was at her request. Afterwards, Amn MM joked with Appellant that he "hit like a bitch" because he hit her softly and the two laughed about it. Amn MM testified that Appellant slapped her buttocks one other time while they were having intercourse, even though she did not request it, but she was "okay" with him doing it.

Amn MM denied ever asking Appellant to hit her in the face during intercourse. Instead, she recalled a conversation with Appellant on this subject where he explained how an ex-girlfriend of his "loved for him to slap her in the face." Amn MM testified that her response to Appellant was "[w]ell that's all fine and dandy for her, but do not touch my face. I have personal issues with that; do not touch my face."

Appellant testified that he smacked Amn MM on the buttocks during intercourse but she had never asked him to do so. Instead, Appellant testified on a prior occasion Amn MM requested that he "smack her" while he was on top of her during sex and so he slapped her in the face "not very hard." According to Appellant, it was this slap that [*7] caused Amn MM to remark that he hit "like a bitch." Appellant denied having a prior conversation with Amn MM that her face was off-limits.

After the last time Amn MM and Appellant had

consensual intercourse, Amn MM started a new relationship and subsequently told Appellant she did not want to have sex with him anymore. Appellant got upset and called Amn MM "a hoe." Amn MM stopped speaking with Appellant for almost two weeks. The charged offenses occurred when Appellant attempted to reconcile with Amn MM.

2. Abusive Sexual Contact and Battery of Amn MM

On 13 July 2017, Appellant messaged and texted Amn MM, asking for her to come to his room so he could apologize to her face-to-face for the name he called her. She agreed to visit his room but also messaged Appellant that she was not going to have sex with him. Upon entering Appellant's room, Amn MM noticed Appellant's roommate was not present. The door closed behind Amn MM after she entered.⁸ Appellant, who was sitting on his bed, began apologizing. Amn MM replied "well, if that's all you have to say I'm leaving. I'm over it." At this point, Amn MM and Appellant have markedly different accounts about what happened next in Appellant's dormitory [*8] room. We begin with Amn MM's testimony and the evidence that supported her testimony.

a. Testimony of Amn MM and Supporting Evidence

After Amn MM told Appellant she was leaving, she recalled Appellant grabbing the front of her shirt and trying to pull her closer to where he was seated on the bed. She told him "no. Stop. Don't do that. Get off." Rather than stop, Appellant got up from the bed and tried to get behind Amn MM. She turned as he did and

⁸ The record of trial contains a technical training student housing gender integration policy which required "[d]oors must remain fully open when a guest is inside."

ended up with her back to his bed. With a hold of Amn MM's shirt, Appellant tried to push her backwards onto the bed multiple times. Each time, Amn MM resisted and stood back up two or three times after Appellant would push her onto the bed. During this struggle, Appellant let go of Amn MM's shirt and began trying to take off her leggings by grabbing the side of her waistband at her hip area. She kept a grip on her leggings and "was not going to let them come off."

As Amn MM resisted, Appellant said "I don't know why you're playing with me. You need to stop. . . . I told you I was sorry." Appellant flipped Amn MM over so she now faced the bed with one forearm down on it while she held up her leggings with her other hand. Appellant, now behind [*9] her, tried again to pull her leggings down with his hands at the side of her waistband. Amn MM pushed off the bed with her forearm and was able to get up, turn, and face Appellant. She then pushed Appellant with her right hand. In response, Appellant said either "[d]on't [f]ing hit me" or "[d]on't [f]ing push me" and then hit Amn MM, open handed, on the left side of her face. Amn MM felt immediate pain and told Appellant to get away from her. Appellant backed away and Amn MM left immediately to go a friend's room, Airman First Class (A1C) AP.

A1C AP was not in her room, but at the gym. A1C AP saw that she missed a call from Amn MM and then saw a text message that Amn MM really needed to speak with her. When the two met at A1C AP's room, A1C AP could see Amn MM was distraught and crying hard. A red mark on Amn MM's left cheek was visible to A1C AP. Amn MM cried so hard for the first few minutes that she could not talk, something that A1C AP had never seen from her close friend. Amn MM then disclosed how Appellant had tried to get on top of her and touch her and when she pushed him off of her, he hit her

in the face. Neither Amn MM nor A1C AP immediately reported Appellant to authorities. [*10]

When Amn MM went to school the next day, the place where Appellant hit her face showed bruising. Amn MM tried to cover it up with makeup, unsuccessfully. A prior service student noticed the injury and pulled Amn MM out of class and asked her what happened. In turn, instructors and investigators were notified. Photos of the bruising on Amn MM's face were taken two to three days after she was struck and later the following week. The photos were admitted into evidence.

b. Appellant's Pretrial Statements

On 20 September 2017, agents from the Air Force Office of Special Investigations (AFOSI) interviewed Appellant. After a proper waiver of his rights under [Article 31, UCMJ, 10 U.S.C. § 831](#), Appellant made oral and written statements. On 29 September 2017, a second interview was conducted after another rights advisement. Appellant made further oral statements and completed a second written statement. At trial, Special Agent (SA) PA, who had spent 24 years as an AFOSI special agent, testified to Appellant's pretrial statements. Both written statements were admitted into evidence as prosecution exhibits and small portions of the recorded interviews were admitted into evidence.⁹

According to Appellant's [*11] first written statement, after he apologized to Amn MM for calling her a "hoe," she started to leave and he

⁹ While three excerpts were admitted, only one is transcribed in accordance with Air Force Manual 51-203, *Records of Trial*, ¶ 12.8 (4 Sep. 2018) ("Transcribe verbatim audio or video recordings introduced at trial."). We find no prejudice to Appellant from the failure to transcribe two of the recorded interview excerpts.

reached out for her hand and pulled her in. He stated they kissed and then rolled over on his bed to where he was on top. He then wrote the following:

While kissing she moved her head away so I leaned in again to continue kissing. While kissing [Amn MM] mumbled something that I couldn't really hear. So noticing that kissing wasn't working to the point I needed I slapped her with my right hand onto her left cheek/eye.

Appellant's second written statement, clarified that when he was kissing Amn MM, she "pulled away." This was similar to an oral statement Appellant made that Amn MM had "started to squirm away a little bit." Appellant further clarified that he did not hit Amn MM because she mumbled something. He wrote, "[Amn MM] mumbled something I cannot remember. NOT in reaction to what she said I smacked her across the left side of her face."

In addition to these clarifications, Appellant provided a further written explanations for why he struck Amn MM:

[j]ust to try and get her in the mood for sex. Knowing she liked it rough I tried to turn her on that way. Doing so was [completely] [*12] wrong. [There] were multiple signs I should [have] paid more attention to. I was caught in the heat of the moment, not realizing what was happening. I am in complete fault for my actions.

...

She moved away in a manner as if she wasn't interested and wanted to stop.

SA PA also testified to another inconsistency from Appellant's oral interview. First, Appellant told SA PA two different versions of how Amn MM reacted after he hit her. Initially, Appellant said Amn MM looked up at him almost in a "seductive" manner and they started kissing

again. Subsequently, Appellant described Amn MM's reaction as "upset" or a "what are you doing[?]" look.

c. Appellant's Trial Testimony

Appellant described his apology to Amn MM and testified that it led to subsequent consensual kissing on the bed where he ended up on top of her. Appellant testified that Amn MM did not protest the kissing and laying down on the bed "at the moment." After further kissing, Appellant recalled "[s]he jerks her head—not really jerks, but moves her head to the right side, I believe." He testified they kissed again for a minute or two before "[s]he pulls away and then mumbled something." Appellant explained he took her mumbling [*13] "as, '[s]trike me,' so I hit her—I smack her across the face."

On cross-examination, Appellant admitted that Amn MM had texted him beforehand that she was not going to have sex with him and that he initially denied this fact to the AFOSI agents. Appellant testified he "never tried to pull down" Amn MM's pants. While on the bed, Appellant admitted that Amn MM squirmed but he claimed that when Amn MM moved her head away that was the same thing as her squirming away. He explained "[w]hen she moved her head, her whole body moved. It wasn't just a head in motion because it would be kind of hard to do while laying down." Appellant asserted "[s]exual gratification was not on my mind."

d. Trial Result

The military judge acquitted Appellant of aggravated sexual contact of Amn MM, but convicted him of abusive sexual contact by exceptions and substitutions. The military judge found that Appellant touched Amn MM's

hips, rather than her legs, as was charged, through her clothing with an intent to gratify his sexual desire. The military judge convicted Appellant of assault consummated by a battery of Amn MM for unlawfully striking her face with his hand, as charged.

B. AB EA

The military judge convicted [*14] Appellant, as charged, of three specifications of sexually assaulting AB EA by penetrating her vulva with his finger, tongue, and penis, without her consent. The military judge merged the three specifications for sentencing as the offenses occurred in close succession on a single visit by AB EA to Appellant's dormitory room.

We explain the interactions between AB EA and Appellant before the charged conduct before detailing their starkly different trial testimonies about what happened in Appellant's dormitory room. While explaining their prior interactions, we describe the perspective of two witnesses: (1) Appellant's then girlfriend and later wife, A1C PC,¹⁰ and (2) AB EA's roommate, Amn AG.

1. Prior Interactions

Appellant and AB EA met through mutual friends when she first arrived at technical training sometime after late July 2017. Subsequently, Appellant and AB EA shared the same "friend group" and often spent time together in a group setting. Of note, Amn MM was not a part of this friend group. AB EA and Amn MM did not know each other.

After AB EA and Appellant met, they exchanged phone numbers and communicated frequently on Snapchat. AB EA

was married and did not spend any one-on-one [*15] time with Appellant, though she did visit his room once to "pop his back"¹¹ with Appellant's roommate present. AB EA and Appellant had no prior dating relationship and had not engaged in any sexual conduct with each other.

When asked at trial, AB EA testified that she considered Appellant "[s]ome-where between an acquaintance and a friend." However, AB EA agreed that she saw him every single day and may have told AFOSI agents and the sexual assault nurse examiner (SANE) that he was a close friend. AB EA's roommate, Amn AG, described their friend group as "we were all good friends." AB EA testified that she knew Appellant and A1C PC were dating and on the date of the offense it was "possible" that she already knew they were married.

Appellant considered AB EA a close friend and testified they once had a Snapchat "streak" where they communicated on the application every day for roughly 38 to 42 days straight. Appellant trusted AB EA and on one occasion lent his car to her so Amn EA and Amn AG could go get some food. Another time, AB EA invited Appellant to Amn AG's birthday party, but Appellant's then girlfriend, A1C PC, was not invited.

A1C PC testified that Appellant and AB EA were close [*16] friends. A1C PC characterized her own relationship with AB EA as "cordial" but recalled feeling "[u]ncomfortable" when A1C PC was not invited to Amn AG's birthday party. A1C PC conceded that she was not friends with Amn AG but she did not like that only Appellant was

¹⁰ This opinion uses her grade and initials as of the trial date.

¹¹ AB EA explained that she learned how to pop someone's back as a school sports trainer and that it required "someone to lay out on their stomach with the arms on their side while I do a manipulation with my hands on their spine." AB EA also noted that it was not necessary to remove any clothing.

invited to the party because it was known that A1C PC and Appellant were dating. On 1 November 2017, A1C PC completed technical training and departed for her first assignment at an installation outside Texas.

2. Sexual Assault of AB EA

a. AB EA's Trial Testimony

On 7 November 2017, Appellant and AB EA messaged on Snapchat and she agreed to visit his room to "pop his back." AB EA arrived between 1400 and 1500 hours and saw Appellant's roommate leaving. Another female Airman that AB EA knew of, but had never spoken to, saw AB EA in the hallway.

When AB EA knocked on his door, Appellant answered wearing "underwear" but no shirt. AB EA thought it was "kind of" odd that Appellant answered the door as he did but she did not give it much thought. She explained that Appellant "is a free spirit" which she described as "nonchalant" and "kind of carefree." After AB EA entered the room Appellant shut his door telling AB EA that his music [*17] was too loud.

Soon after, Appellant began trying to convince AB EA to kiss him. AB EA told Appellant that she did not want to kiss him and turned her head away when he tried. She also told him that was not why she was there. Appellant replied that there was a "connection" between them and they did not have to fight it anymore. AB EA told Appellant that his statement about a connection between them was "false." At this point, AB EA was not concerned because she thought she could handle Appellant's attempts to kiss her.

Appellant then began to feel AB EA's vaginal area over her shorts. AB EA told him to stop

and backed away from him going further into the room. Appellant then tried to pull down her shorts with one hand but she pulled them back up. Appellant then used both hands and succeeded in pulling her shorts down leaving her underwear on. Appellant then moved her underwear to the side and began to "aggressively finger" her "hard and fast." AB EA told Appellant to stop again and that he was hurting her as he penetrated her vagina with his finger.

AB EA kept backing up and the two reached Appellant's bed where AB EA ended up on her back on the bed. While still standing, Appellant removed [*18] her underwear and continued to penetrate her vaginally with his fingers. AB EA told him to stop. Instead, Appellant pulled down his pants and while standing penetrated AB EA vaginally with his penis. Appellant told AB EA to "quit fighting it" and that he "knew that [she] wanted him." AB EA propped herself up on her arms and began to back up to where "two walls met" in a corner behind the bed. Appellant got on the bed, on his knees, and continued to penetrate her vaginally with his penis. AB EA tried to push away from the wall but Appellant continued and this threw her back into the corner of the two walls.

At some point, Appellant slowed down and told AB EA to turn over. She refused so he stopped penetrating her and tried to turn her over. He was only partially successful which left AB EA at an awkward angle on her side. When AB EA tried to turn onto her back Appellant used his forearm to press down against her shoulder area. Appellant penetrated AB EA vaginally again with his penis and she again told him to stop and that she did not want to do this. Appellant replied that she was "already doing this." This comment made AB EA mad and she "clawed" Appellant's right arm with her left [*19] hand. Appellant did not respond to being clawed.

Eventually Appellant told AB EA that he was going to grab a condom and retrieved one from the nightstand next to his bed and put it on. Appellant tried unsuccessfully to penetrate AB EA vaginally again. At one point, AB EA heard a pop noise and Appellant said "I hate condoms." Appellant then put his head between AB EA's legs and penetrated her vagina with his tongue only for a few seconds before she "crushed his head" with her legs. Appellant resumed trying to penetrate her vaginally with his penis and was again unsuccessful. He then reached for a bottle of lubricant from his nightstand. At this point, AB EA began hysterically crying and telling him to stop. According to AB EA "I guess [he] came to his senses that I was genuinely upset, so he backed off."

As AB EA searched for her clothes, Appellant went to the bathroom and flushed the condom down the toilet. Once dressed, AB EA headed for the door just as Appellant came out of the bathroom. Appellant said "[d]on't tell [A1C PC]." AB EA replied either "I won't" or "I wouldn't." AB EA headed immediately back to her room.

b. Disclosure to Amn AG and Amn KC

When AB EA returned to her room, [*20] her roommate, Amn AG, was in the shower. Amn AG heard the door to their room slam over the sound of the shower. Amn AG heard AB EA crying, described as "wailing," through the bathroom door and over the sound of the shower. Amn AG turned off the shower and quickly exited the bathroom.

A second friend, Amn KC, was also in AB EA's room when AB EA returned. Amn KC had fallen asleep on Amn AG's bed while watching Netflix. Amn KC recalled "I heard a noise, which is what woke me up, and then it was [AB EA] crying" and "trying not to look at me." Amn

KC described AB EA as "crying uncontrollably" and unable to speak. AB EA would "try to get words out, but it just made her cry harder."

Once Amn AG exited the bathroom, she saw Amn KC holding and comforting Amn EA on Amn AG's bed. Amn AG got dressed as fast as she could and joined the other two on her bed. Amn AG recalled AB EA "crying to the point where she could barely get words out" with her hands on her face. Amn AG and Amn KC "were just holding" AB EA. Amn AG recalled AB EA crying for 15 to 20 minutes where all she could say was "I can't tell you." During this time, Amn AG reassured AB EA that "it's okay, you can tell us" and AB EA eventually [*21] said Appellant "wouldn't stop" and then explained to her friends what happened.

AB EA told her friends that she "felt gross and wanted to shower." At first, Amn AG said "okay. Great idea. Like get a shower and feel better." As Amn AG started walking towards the shower she reconsidered and said "wait" and explained that if AB EA "wanted to have a decision [to report], if she went in the shower she wouldn't have as much evidence for herself to make that decision." Amn AG asked AB EA, "[C]an you trust me[?]" Can we just take a minute?" Amn AG continued, "[Y]ou don't have to decide anything right now, but can we pause on the shower and maybe go speak to the chaplain? That way you have a choice; you know, unrestricted or restricted." AB EA said, "[O]kay."

Amn KC led the three downstairs to visit the chaplain with AB EA in the middle and Amn AG walking behind AB EA. They walked in this order in case they ran into Appellant or anybody who tried to talk to AB EA. Once at the chaplain's office, Amn KC recalled AB EA "didn't really speak all that much; [s]he was still crying. And then [Amn AG] kind of told him, 'hey, my friend was just raped. We weren't really sure what to do. What's our next

step[?]" [*22] In response, the chaplain called the sexual assault response coordinator's number, handed AB EA the phone, and left the room. AB EA was connected to a victim advocate who later met AB EA at the hospital for a sexual assault forensic examination (SAFE). Amn AG drove AB EA to the hospital and Amn KC accompanied them. On the drive to the hospital, AB EA called her mother and told her what happened.

c. SAFE

On arrival at the hospital, AB EA's report was still restricted, which meant that no law enforcement agency was involved. Nurse MJ, a certified SANE who had performed about 300 examinations, obtained AB EA's consent to perform the SAFE and obtained a narrative description from AB EA. The narrative was typed, signed by Nurse MJ, and attached to her report which was admitted into evidence. Regarding what happened in Appellant's room, the narrative is largely consistent with AB EA's recollections at trial. Of note, the narrative said AB EA scratched and clawed Appellant's arm.

There are some minor differences between what Nurse MJ wrote in the narrative and AB EA's trial testimony. We mention three of them which are representative of how minor the differences were. First, Nurse MJ wrote that [*23] AB EA and Appellant "were close friends" rather than between an acquaintance and a friend. Second, in describing the oral sex Appellant performed on AB EA, Nurse MJ wrote that Appellant was "trying to give [AB EA] oral [sex], [AB EA] guess[ed] for lubrication. That didn't last very long." Nurse MJ's narrative did not mention that AB EA crushed Appellant's head after he started to perform oral sex on her. Third, regarding their positioning on the bed, Nurse MJ wrote that AB EA "hit the wall and had nowhere to go." However, Nurse MJ's narrative did not mention

that when Appellant "kept penetrating [AB EA]" it was "throwing [AB EA] back into the wall."

During the physical examination of AB EA, Nurse MJ collected a vaginal swab, fingernail scrapings, and hand swabs. Nurse MJ noted where AB EA reported pain during the examination and took photographs which were admitted into evidence. Particularly, Nurse MJ reported seeing "really bright red" blood that was "mucousy" in the cervical orifice so she "cleaned that blood out and it revealed redness¹² at the os, which is the opening." Nurse MJ could not positively say "without a shadow of a doubt" that the blood she cleaned away was not menstrual [*24] blood. However, Nurse MJ noted "a lot of tenderness in that area" and "acute pain" during swabbing.

Nurse MJ photographed and noted in her report a "2x2 cm purple bruise and abrasion" on AB EA's mid-lumbar region, "just right of the spine." Nurse MJ also photographed and noted in her report that there was "3 cm re linear scratch under [AB EA's] right scapula." AB EA related that she did not know the cause of either injury.

d. Investigation

Initially, AB EA did not want to make an unrestricted report. AB EA explained at trial that her reasons included the "close knit friend group" that she shared with Appellant and because she wanted to avoid testifying at a trial. However, the next day, 8 November

¹² An expert SANE testifying for the Defense opined, from the photos taken by Nurse MJ, that the redness in AB EA's cervix opening was indicative of a medical condition, an ectropian cervix. The Defense's expert noted that symptoms of an ectropian cervix after intercourse can be pain, a "little bit of bleeding," and a "mucous discharge." While Nurse MJ had never personally seen this medical condition in her SAFEs, she was aware of the condition and its description. Based on her examination, Nurse MJ disagreed with the opinion of the Defense's expert that AB EA's cervix was ectropian.

2017, AB EA made an unrestricted report and the sexual assault response coordinator notified AFOSI. SA PA, who was the lead investigator in the case involving Amn MM, assisted in the initial steps of Appellant's investigation involving AB EA.

SA PA interviewed AB EA's victim advocate who provided initial details of AB EA's SAFE and the narrative AB EA provided. Search authority was obtained for Appellant's dormitory room. Condoms and lubricant were seized from Appellant's nightstand next to his [*25] bed. His room was photographed and seven of those photos were later admitted into evidence. The search authorization also included a SAFE for Appellant, conducted by Nurse MJ, while the AFOSI agents waited outside the examining room.¹³

Nurse MJ collected standard specimens from Appellant which included a saliva sample, buccal swabs, and penile swabs. Nurse MJ photographed Appellant's upper right arm which had "abrasions or scratches" on it. At trial, Nurse MJ described them as "scattered scratches" which were "by the shoulder and bicep area. They're just linear, coming downward." Nurse MJ noted there was redness and inflammation on the scratches which she described as "fairly new." Nurse MJ asked Appellant where he got the scratches and he replied, "I was scratched during football."

On 9 November 2017, AFOSI agents interviewed AB EA with her victim advocate and special victims' counsel present. After this interview, AB EA agreed to call Appellant while AFOSI agents recorded the call. AB EA began the call by telling Appellant that she received a text message from A1C PC, Appellant's spouse, which was a ruse. Appellant replied,

"I'm not supposed to be talking to you right now." AB EA asked [*26] why A1C PC texted her and Appellant said, "I told her what happened. I'm under investigation. I'm not living in the dorm any more. I'm already going to go to jail for what happened. I'm not supposed to be talking to you because everything that happened shouldn't have happened." When AB EA asked what Appellant told A1C PC, he responded "I'm not supposed to be talking to you right now. I have to go before I get in more trouble." AB EA told Appellant it was okay and he replied "I'm sorry. No, I don't want to get in more trouble. I'm not trying to get in any more trouble, okay. I'm sorry. I've got to go." Appellant made no additional statements to AFOSI agents about the incident with AB EA.

The samples collected from the SAFEs of AB EA and Appellant were sent to the United States Army Criminal Investigations Laboratory (USACIL) for analysis. At trial, a forensic biologist, Ms. MC, testified to the results in four parts.

First, semen was found on AB EA's vaginal swab. Ms. MC performed additional DNA testing on the vaginal swab, found DNA, and Appellant was included on the DNA profile.¹⁴ Ms. MC's findings were "[t]he DNA profile is at least one quintillion times more likely if [Appellant] is [*27] included as a contributor than if he is not."

Second, Ms. MC conducted DNA testing on Appellant's penile swab. AB EA was included in the DNA profile. Ms. MC's findings were "[t]he DNA profile is at least one quintillion times more likely if it originated from

¹³ Nurse MJ's report also includes the written "Consent for Evidence Collection and Release" signed by Appellant.

¹⁴ Ms. MC explained that she used autosomal STR testing, the most discriminating type of testing that she can do. Autosomal testing involves looking at the short tandem repeats on the chromosomes that do not involve the X or Y chromosome. Autosomal STR testing was done on the vaginal swab and hand swabs of AB EA and the penile swab of Appellant.

[Appellant] and [AB EA] than if it originated from [Appellant] and an unknown individual."

Third, Ms. MC conducted DNA testing on AB EA's hand swabs.¹⁵ Her findings were "[t]he DNA profile from the hand swabs is at least one quintillion times more likely if it originated from [AB EA] and [Appellant] than if it originated with [AB EA] and an unknown individual."

Fourth, Ms. MC used a different method, Y STR DNA testing,¹⁶ on AB EA's fingernail scrapings. Ms. MC found a mixture of two male individuals. Ms. MC was "not able to exclude Appellant or his paternal male relatives from the major DNA profile," which contributed more DNA to the sample. Ms. MC did a statistical analysis of the major DNA profile and concluded "[t]he probability of seeing this DNA profile again in the same population group as [Appellant] . . . is one in 1852." Ms. MC reported the best statistic she could obtain for Y STR DNA testing is "[p]robably somewhere in the [*28] range of 1 in 2000."

e. Appellant's Trial Testimony and Trial Result

Appellant conceded that he penetrated AB EA's vulva with his finger but he denied being aroused sexually or sexually gratified by it. Appellant denied penetrating her vulva with his tongue, but conceded that he penetrated her vulva with his penis.

¹⁵ Also on the hand swabs of AB EA, Ms. MC found a chemical indication of blood on a presumptive test for biological fluids. Ms. MC elected not to do a confirmatory test as it was more important to conserve the swabs for the DNA testing and for subsequent testing, if needed.

¹⁶ Ms. MC explained that Y STR DNA testing involves looking at short tandem repeats on the Y chromosome and is not as discriminating as autosomal STR testing because the Y chromosome is paternally inherited.

Appellant agreed that AB EA came to his room to pop his back. He agreed he was not wearing a shirt when he answered the door, but testified he was wearing "PT shorts," not underwear. Appellant recalled that they engaged in small talk while he was laying on his bed and she was sitting on the foot of the bed. Appellant remembered inviting AB EA to "lay down" and they "started to spoon" with "no space in between [them]." A minute or two later, Appellant recalled moving her hair and kissing her neck and then placing his left hand "through the back side of her pants" in an "attempt to finger her." Appellant testified there was no protest from AB EA.

As the angle was awkward, Appellant testified that AB EA rolled onto her stomach and "[spread] her legs open a little bit . . . to show [him] that she's giving [him] access so [he] can actually finger her." Appellant recalled her moaning [*29] a little bit. Appellant described this as "still a very awkward angle" so he asked her to roll over onto her back and take off her pants, which were "some form of athletic shorts." Appellant testified that she took off her shorts and had her underwear on which he moved aside and began to "finger her again" without protest.

Appellant recalled the two kissing before he asked AB EA if she wanted him to wear a condom. He testified that she responded "I don't care." Appellant recalled getting off the bed, retrieving a condom, putting it on with two hands, and that AB EA removed her underwear and placed them on the side of the bed. After he penetrated her with his penis, Appellant testified that she reacted with "soft moans," wrapping around him, and then "squeezing the bed sheets." Appellant testified they switched positions, so he was behind her and they resumed intercourse until the condom dried out. He then got off the bed, retrieved lubrication from his nightstand

drawer, and put it on the condom. Appellant recalled AB EA now being on her back and he penetrated her with his penis and when he started to go "faster and harder" her body started to tense up and then she softly said "stop." [*30] Appellant "slowed down" because he took "stop" to mean stop going so hard. After a few more minutes, Appellant saw on AB EA's face that something was bothering her and then she told him to stop and pushed him back so he stopped immediately. Appellant asked what was wrong and her response was "[w]e shouldn't be doing this, you have a wife." Appellant went to the bathroom and flushed the condom down the toilet. On return he saw AB EA dressed and appearing "[l]ike she's in regret" and "not like angry upset, just more like, '[w]hy did I do this?'" Appellant asked if she was going to tell A1C PC, and AB EA said "No, I'm not going to tell [A1C PC]."

Appellant testified that he received a no-contact order the next day or the day after. Regarding the audio recording of the call where he said everything that happened should not have happened, Appellant testified he was referring to cheating on his wife.

On cross-examination, Appellant denied penetrating AB EA without a condom. To his knowledge, the condom did not break and he did not feel it break. Regarding the recorded phone call and the reference to going to jail, he testified he was referring to adultery because he had "heard that you can [*31] go to jail for adultery."¹⁷ In response to questioning by the

military judge, Appellant stated that he searched on Google for adultery as a crime in the military and learned "it's a possibility" that he could go to jail.

Despite Appellant's testimony, the military judge convicted him of sexually assaulting AB EA as charged.

II. DISCUSSION

A. Legal and Factual Sufficiency

1. Additional Background

a. Amn MM

Appellant raises multiple challenges regarding the sufficiency of the evidence underlying his convictions involving Amn MM. He asserts their prior sexual relationship was "violent in nature." He states that Amn MM admitted it was mutually understood that when she visited him it was for the purpose of having sex.¹⁸ He claims he "mistook her appearance at his dorm room as an indicator for sex and violent sex at that." Appellant argues that once Amn MM told him to get off her, he complied and allowed her to leave his room.

Appellant points to portions of his own testimony to support why he was mistaken that Amn MM consented to the sexual activity and the face slap. Regarding the face slap and how hard he struck Amn MM, he asserts that he responded to her prior "criticisms" that he "hit like [*32] a bitch." Appellant argues that Amn MM's clothes were not ripped or

¹⁷ Adultery is a violation of [Article 134, UCMJ, 10 U.S.C. § 934](#). The elements include (1) wrongful sexual intercourse; (2) when the military member or the other person was married; and (3) under the circumstances, the conduct is either prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. *MCM*, pt. IV, ¶ 62.b. A court-martial conviction for adultery carries a maximum confinement term of one year. *MCM*, pt. IV, ¶ 62.e.

¹⁸ Trial defense counsel asked Amn MM, "Now didn't you tell us, in your pretrial interview, when you were going up to his room it was sort of understood that coming over would mean sex, correct?" Amn MM replied, "Sort of; yes, sir."

damaged, and afterwards she only texted him about being slapped. He argues the Government called no witnesses who overheard the struggle Amn MM described. Finally, he claims that Amn MM had a "clear motive" to lie to preserve both her new relationship and her reputation once her facial injury could not be concealed.

The Government argues that the factfinder received sufficient evidence and could have found the elements of each offense were proven beyond a reasonable doubt. The Government disagrees that Appellant had an honest and reasonable mistake of fact that Amn MM consented to either offense because of their prior sexual activities and highlights the differences with their prior activities. The Government argues that Amn MM was a credible witness who never claimed that her clothing was ripped or damaged or that others overheard the encounter with Appellant. The Government counters Amn MM's alleged motive to misrepresent to preserve a relationship by noting the absence of cross-examination on this point. Regarding Amn MM's need to explain her facial bruising, the Government argues Amn MM immediately reported what [*33] happened to A1C AP before the bruising was reported to others.

b. AB EA

Appellant states that even if we believe AB EA's account of what happened, the evidence supports that he reasonably believed she consented to sexual intercourse. Appellant reminds us that AB EA entered his room willingly, did not attempt to leave, never screamed or called for help, never fought him off, and never moved or forcibly protested when he started to remove her clothes. In his view, "[w]ith perhaps one exception, [AB EA] similarly did not significantly struggle" and "admitted to simply lying on his bed" and

staying there even when he stopped to retrieve a condom, and later lubricant. Appellant claims that AB EA "merely" scratched his arm and that she testified he had no reaction to it which means it must have been insignificant. Appellant finds "most instructive" that AB EA acknowledged that Appellant was surprised to learn she was not consenting and when he saw she was "genuinely upset" he "backed off." He points to his testimony that AB EA allowed him to kiss her, exhibited signs of pleasure, and only during sex indicated that something bothered her which caused him to stop immediately. Afterwards, Appellant [*34] believed AB EA was very conflicted, like she felt as though she had made a mistake.

Separately, Appellant challenges AB EA's credibility on two grounds. First, that AB EA adamantly denied he was a close friend even though she used those exact words to Nurse MJ. Second, Appellant questions why AB EA testified at trial that on the day in question he may have only been dating A1C PC when AB EA actually knew he was married and told this fact to Nurse MJ.

The Government responds that it proved that AB EA did not consent beyond a reasonable doubt and that Appellant did not have a reasonable mistake of fact as consent. The Government concedes that Appellant denied penetrating AB EA with his tongue, but argues the remaining elements of the offenses, except consent, are not in dispute. The Government argues that AB EA was credible and the inconsistencies regarding whether Appellant was a close friend or had already married A1C PC are minor inconsistencies unrelated to the offenses. According to the Government, AB EA reported a consistent account to her roommate, to Nurse MJ, and in her trial testimony. Further, the Government recites the corroborating forensic evidence and the pretext recorded [*35] call where Appellant

admitted he was already going to jail for what happened.

2. Law

We review issues of legal and factual sufficiency de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987) (citation omitted); see also United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002) (citation omitted). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). "The term reasonable doubt, however, does not mean that the evidence must be free from conflict." United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (citing United States v. Lips, 22 M.J. 679, 684 (A.F.C.M.R. 1986)), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." Turner, 25 M.J. at 325. "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither [*36] a presumption of

innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" Wheeler, 76 M.J. at 568 (alteration in original) (quoting Washington, 57 M.J. at 399).

For the abusive sexual contact of Amn MM, a violation of Article 120, UCMJ, the Government had to prove beyond a reasonable doubt: (1) Appellant committed sexual contact upon Amn MM by touching her hips through the clothing; (2) Appellant did so by causing bodily harm to her, to wit: touching her hips through the clothing without her consent; and (3) Appellant did so with intent to gratify his sexual desire. See *Manual for Courts-Martial, United States* (2016 ed.) (MCM), pt. IV, ¶ 45.b.(8)(b). In this context, the term "sexual contact" means "any touching . . . either directly or through the clothing, [of] any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person." See MCM, pt. IV, ¶ 45.a.(g)(2)(B). "Bodily harm" means "any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact." See MCM, pt. IV, ¶ 45.a.(g)(3). "Consent" means a freely given agreement [*37] to the conduct at issue by a competent person. See MCM, pt. IV, ¶ 45.a.(g)(8)(A). An expression of lack of consent through words or conduct means there is no consent. *Id.*

For the assault consummated by a battery of Amn MM, a violation of Article 128, UCMJ, the Government had to prove two elements beyond a reasonable doubt: (1) Appellant did bodily harm to Amn MM, by striking her in the face with his hand; and (2) the bodily harm was done with unlawful force or violence. See MCM, pt. IV, ¶ 54.b.(2). "Bodily harm" means any offensive touching of another, however slight. See MCM, pt. IV, ¶ 54.c.(1)(a).

For the offenses involving AB EA, the elements of sexual assault varied among the three charged specifications. For the penetrations involving Appellant's finger and tongue, which were two separate violations of [Article 120, UCMJ](#), the elements included: (1) that at the time and place alleged, Appellant committed a sexual act, to wit: penetrating AB EA's vulva with his finger and tongue; (2) that Appellant did so by causing bodily harm, to wit: penetrating her vulva with his finger and tongue without her consent; and (3) that Appellant intended to gratify his sexual desire. See *MCM*, pt. IV, ¶ 45.b.(4)(b). [*38] For the penetration involving Appellant's penis, also a violation of [Article 120, UCMJ](#), the elements included: (1) that at the time and place alleged, Appellant committed a sexual act, to wit: penetrating AB EA's vulva with his penis; and (2) that Appellant did so by causing bodily harm, to wit: penetrating her vulva with his penis without her consent. See *MCM*, pt. IV, ¶ 45.b.(3)(b).

In this context, "sexual act" includes either (1) contact between the penis and vulva where contact involving the penis occurs upon penetration, however slight; or (2) the penetration, however slight, of the vulva of another by any part of the body with an intent to arouse or gratify the sexual desire of any person. See *MCM*, pt. IV, ¶ 45.a.(g)(1). The definitions of "bodily harm" and "consent" are the same as described above with the abusive sexual contact offense involving Amn MM.

3. Analysis

a. Amn MM

We begin with Appellant's conviction for abusive sexual contact by touching Amn MM's hips through her clothing. A reasonable factfinder could have concluded that Appellant

tried to pull Amn MM's leggings down, as she testified, despite his denials in his testimony. During this tug of war with [*39] Amn MM's leggings, a reasonable factfinder could have concluded that Appellant touched Amn MM's hips through her clothing without her consent. On the final element, whether Appellant touched Amn MM in this manner to gratify his sexual desire, a reasonable factfinder could have relied on the strong circumstantial evidence of the words and actions of Appellant to find this element satisfied. A reasonable factfinder could have discounted Appellant's testimony that "sexual gratification was not on my mind" and instead given more weight to his earlier written sworn statements to law enforcement in determining his intent. For example, those statements used wording such as "kissing wasn't working to the point / *needed*" (emphasis added), and that he was caught in the "heat of the moment."

A reasonable factfinder could also have rejected a mistake of fact defense because even if Appellant was mistaken, as he claims, such a mistake was not reasonable under the circumstances. Both Appellant and Amn MM agreed that she was not coming to his room for sex, which significantly reduced the importance of their prior dormitory meetings for consensual sex. The reason that Amn MM was not going to have sex [*40] with Appellant was because he had called her an offensive name when she decided to pursue a relationship with someone other than Appellant. While Appellant may have held out hope that his face-to-face apology would be sufficient to erase his callous name calling and permit their sexual relationship to continue, Amn MM's physical movement to leave the room after his "apology" was a blatant signal that he ignored. He recognized this exact point in his second statement to law enforcement when he wrote "Looking back I . . . should [have] just let her leave." But he did not.

The subsequent signs that a mistake would be unreasonable under the circumstances would not be difficult for a factfinder to see. A factfinder could conclude that Amn MM physically resisted Appellant and said words to him such as "no. Stop. Don't do that. Get off." Even Appellant, at varying times, acknowledged that he met physical resistance when he described Amn MM as "jerking" her head when he tried to kiss her and squirming away, though he also used more benign language elsewhere in his testimony. To resolve any lingering dispute, a reasonable factfinder could have looked to Appellant's second statement to law enforcement [*41] when he wrote there "were multiple signs I should [have] paid more attention to" and determined his repeated failures to pay attention made a mistake of fact wholly unreasonable under the circumstances.

Turning to the assault consummated by a battery, there was no dispute about how hard Appellant hit Amn MM in the face or the injury he caused. A reasonable factfinder could have found that a strike of such force was in direct response to Amn MM's rebukes of Appellant's sexual contact and her subsequent physical push of Appellant. Amn MM's testimony on this point was consistent with her immediate report to A1C AP that she pushed Appellant off of her and he hit her in the face. In deciding the weight to give Appellant's testimony to the contrary, a reasonable factfinder would have considered if it was even possible to reconcile the conflicting statements Appellant made, at various times, as to why he struck Amn MM and how she responded. A reasonable factfinder could have determined that some of Appellant's statements were less than truthful and that his credibility was highly suspect. Finally, to the extent that there was evidence regarding Amn MM's motives to misrepresent available to [*42] the finder of fact, these could have been reasonably discarded as

unimportant in light of Amn MM immediately seeking out A1C AP and disclosing what happened.

Drawing "every reasonable inference from the evidence of record in favor of the prosecution," the evidence was legally sufficient to support Appellant's conviction of abusive sexual contact and assault consummated by a battery of Amn MM beyond a reasonable doubt. [*Barner*, 56 M.J. at 134](#) (citations omitted). Moreover, having weighed the evidence in the record of trial and having made allowances for not having personally observed the witnesses as the military judge did, we are convinced of Appellant's guilt beyond a reasonable doubt. See [*Turner*, 25 M.J. at 325](#). Appellant's convictions involving Amn MM are both legally and factually sufficient.

b. AB EA

At trial, Appellant's defense had four major components: (1) AB EA consented to the penetration of her vulva by his finger; (2) the penetration with his finger was not for his sexual gratification, but hers; (3) AB EA consented to the penetration with his penis; and (4) he never penetrated her vulva with his tongue. Additionally, he presented a reasonable mistake of fact as to consent defense to the three offenses. On appeal, Appellant [*43] argues that a reasonable factfinder would have found he possessed a reasonable mistake of fact that AB EA consented to the sexual activity and acquitted him of the charged offenses.

In evaluating whether this defense was available to Appellant, a reasonable factfinder would have considered all of the relevant evidence presented. This would have included the matters not in dispute, such as AB EA entering Appellant's room willingly. However, a reasonable factfinder would have also

considered that there was no prior sexual relationship between the two of them and the agreed purpose of the visit was for AB EA to pop Appellant's back.

Appellant asserts a litany of things that AB EA did not do, such as leave, scream, call for help, fight him off, move or forcibly protest when her clothes were removed, or resist more vigorously. He also argues she stayed on the bed when he retrieved a condom and lubricant. Certainly, a reasonable factfinder would have considered all of the relevant evidence. But, Appellant ignores other evidence, available to the factfinder, which included AB EA turning her head when he attempted to kiss her, saying she was not there for this reason, denying they had a connection, [*44] pulling her shorts back up after he pulled them down, telling him to stop and that he was hurting her while he fingered her, backing away from him, resisting so Appellant would say to her "quit fighting it," pushing away from the walls, resisting turning over, telling him she did not want to do this, clawing and scratching his arm after he said she was "already doing this," crying, and when he tried to perform oral sex on her crushing his head with her legs. A reasonable factfinder could have found that a mistake of fact, if held, was unreasonable in light of AB EA's testimony.

Appellant finds "most instructive" that AB EA acknowledged that Appellant was surprised to learn she was not consenting and when he saw she was "genuinely upset" then he "backed off. This fact lends some credence that Appellant may have had an honest mistake of fact, but it does not mean such a mistake was reasonable under the circumstances. Consent requires a "freely given agreement." See *MCM*, pt. IV, ¶ 45.a.(g)(8)(A). As the United States Court of Appeals for the Armed Forces (CAAF) has

said, the "burden is on the actor to obtain consent, rather than the victim to manifest a lack of consent." [*United States v. McDonald*, 78 M.J. 376, 380 \(C.A.A.F. 2019\)](#). A reasonable [*45] factfinder could conclude that Appellant did not obtain consent from AB EA, making his claim that he honestly believed she consented to be unreasonable.

Additionally, AB EA's testimony did not stand alone; there was powerful evidence from other witnesses. Amn KC and Amn AG both testified how upset AB EA was immediately after she arrived back in her room. After wailing so loud that Amn AG could hear her in the shower and being comforted by Amn KC on the bed, eventually AB EA could utter the words "he wouldn't stop." Similarly, AB EA's narrative to Nurse MJ during the SAFE provided support as it included statements that Appellant was told "stop" and "no" multiple times as well as that AB EA tried to leave. The narrative included Appellant's statement to AB EA to "[s]top fighting it" and that AB EA "started scratching and clawing his arm." Nurse MJ observed and photographed similar "fairly new" and "scattered scratches" on Appellant's arm during his SAFE.

While Appellant relies on his testimony to support his claim of mistake of fact, a reasonable factfinder could have discounted Appellant's version that AB EA allowed him to kiss her, exhibited signs of pleasure, that he stopped immediately [*46] when something was bothering her, and that she appeared regretful afterwards. Instead, a reasonable factfinder could have believed AB EA's testimony and the evidence which supported her testimony.

Appellant challenges AB EA's credibility, as he did unsuccessfully at trial. A reasonable factfinder could conclude that whether Appellant and AB EA were "close friends" or between a "friend and acquaintance" was

unimportant to whether the offenses occurred or whether Appellant had a reasonable mistake of fact defense. In a similar fashion, whether AB EA recalled accurately to Nurse MJ whether Appellant was married or dating A1C PC had little bearing on the charged offenses or a mistake of fact defense.

Drawing "every reasonable inference from the evidence of record in favor of the prosecution," the evidence was legally sufficient to support each of Appellant's convictions of sexual assault of AB EA beyond a reasonable doubt. [*Barner*, 56 M.J. at 134](#) (citations omitted). Moreover, having weighed the evidence in the record of trial and having made allowances for not having personally observed the witnesses as the military judge did, we are convinced of Appellant's guilt beyond a reasonable doubt. See [*Turner*, 25 M.J. at 325](#). Appellant's [*47] convictions involving AB EA are both legally and factually sufficient.

B. Military Judge Recusal

1. Additional Background

Recusal was raised twice. The first time was in a defense motion filed prior to trial which the military judge denied. The second time was when the military judge *sua sponte* reconsidered his ruling after Appellant requested to withdraw his guilty plea to battery of Amn MM. We begin with the events that led to the Defense's pretrial recusal motion.

Appellant's case was originally set for trial on 4 June 2018. On 30 May 2018, Appellant and his two military defense counsel signed an offer for pretrial agreement (PTA) where *inter alia* Appellant would plead guilty to certain specifications and elect trial before military judge sitting alone in exchange for other offenses being dismissed and a cap on the

amount of confinement that could be approved by the convening authority. On 1 June 2018, Appellant and his two military defense counsel signed a stipulation of fact. In reliance on the PTA offer and stipulation, the Government canceled the travel arrangements for certain witnesses needed for a contested trial. The PTA offer and stipulation were short-lived as Appellant withdrew [*48] the offer on 3 June 2018, the day before trial.¹⁹ Given this development, also on 3 June 2018, Appellant's senior defense counsel filed a motion requesting a continuance. The Government did not oppose. The military judge who was detailed to the case, Colonel Jefferson B. Brown, granted the continuance until 18 September 2018. The senior defense counsel also moved to withdraw as Appellant expected to hire civilian defense counsel while Appellant's military defense counsel remained on the case. Judge Brown granted the Defense's motion to release the senior defense counsel. Shortly thereafter, the military judge who presided at trial was detailed and issued all subsequent rulings described in this opinion.

On 14 August 2018, Appellant's new defense team—his detailed military defense counsel and his civilian defense counsel—filed a motion for a continuance until 29 October 2018, due to a scheduling conflict with the Defense's expert psychologist consultant. The assistant trial counsel submitted the Government's response opposing the continuance and cited the earlier continuance that was granted to the Defense. For some reason, the assistant trial counsel attached Appellant's withdrawn PTA [*49] offer and stipulation of fact to his motion response when

¹⁹ The PTA and stipulation of fact in the record of trial only bear the signatures of Appellant and his military defense counsel. The Government's decision to stop some witness travel indicates support for the PTA.

it was sent to the military judge.²⁰ The assistant trial counsel also wrote in his motion response, with citation to the withdrawn stipulation of fact,

[Appellant] offered to plead guilty to sexually assaulting [AB] EA and committing aggravated sexual contact and assault consummated by [a] battery upon [Amn] MM. On 1 Jun[e] [2018], [Appellant] and Defense Counsel signed a stipulation of fact in which [Appellant] admitted that he had sex with [AB] EA and that [AB] "EA clearly told [Appellant] to stop. However, [Appellant] admits that he did not stop."

The assistant trial counsel's decision to include such details and attachments prompted the Defense to file the recusal motion. In the motion, trial defense counsel asserted that the military judge now had personal knowledge of disputed evidentiary facts concerning the proceeding which required his recusal under R.C.M. 902(b)(1). Alternatively, trial defense counsel asserted the military judge's impartiality might reasonably be questioned under R.C.M. 902(a). The Government opposed both grounds of the Defense's recusal motion. Regarding R.C.M. 902(b)(1), the Government asserted the military judge had no "personal knowledge" of [*50] the facts of the case that would require recusal under this rule. Regarding R.C.M. 902(a), the Government noted the military judge had made no statements regarding whether his impartiality would reasonably be questioned, that the law did not require his recusal, he had discretion to preside over the case, and could

"simply choose not to read the PTA offer or the stipulation of fact." As the parties did not request argument at an [Article 39\(a\), UCMJ, 10 U.S.C. § 839\(a\)](#), session, the military judge issued a ruling declining to recuse himself.²¹

At the initial [Article 39\(a\)](#), UCMJ, session, the military judge inquired whether either side wanted to question or challenge him. Civilian defense counsel questioned the military judge on whether he read the PTA and stipulation that were attached to the Government's motion response. The military judge replied that he had not read the attachments to either the defense motion or the government response. The military judge also was questioned regarding whether he had formed any unfavorable opinions about the guilt or innocence of Appellant. The military judge indicated he had not formed any such opinions. Civilian defense counsel asked whether there was anything affecting his ability [*51] to be fair and impartial to Appellant. The military judge replied, "Absolutely nothing."

Shortly thereafter, Appellant requested trial by military judge alone and a written request was marked as an appellate exhibit. The military judge granted Appellant's forum choice and Appellant initially entered a plea of guilty to battery of Amn MM. After a providence inquiry, the military judge accepted Appellant's pleas and announced findings of guilty to this charge and specification. As Appellant pleaded not guilty to the remaining charge and specifications, the Government presented its findings case. As both specifications involving Amn MM were closely intertwined, Amn MM testified, over defense objection, to the circumstances of the battery. Appellant also testified regarding the battery and stated that

²⁰ The Defense's recusal motion alleged this was a violation of Mil. R. Evid. 410 which prohibits, with limited exceptions, the admission of evidence regarding any statement made during plea discussions if the discussions did not result in a guilty plea. The Government, at trial, asserted this rule "does not apply" because the continuance motion "does not relate to the admission of evidence at trial." The military judge did not rule on the applicability of Mil. R. Evid. 410.

²¹ The issue with the Defense's expert consultant was resolved prior to trial so the military judge never ruled on this continuance request.

he took Amn MM's mumbling as "strike me" so he smacked her across the face.

After Appellant's testimony in the Defense's findings case, the military judge stated that he was "going to reopen the providence inquiry" to address whether "it would have been unreasonable" for Appellant to hit Amn MM if, at the time of the slap, he thought she said "strike me." Referencing the earlier providence [*52] inquiry, the military judge stated "I don't believe he had mentioned—and perhaps my recollection is wrong—but [according to Appellant's testimony in findings] she literally asked to be hit." After a recess, Appellant requested to withdraw his guilty plea, which the military judge granted after finding good cause existed because a legal defense existed. The military judge explained to Appellant that under Mil. R. Evid. 410 he would "put . . . out of [his] mind" everything that Appellant told him during the providence inquiry.

The military judge then *sua sponte* reconsidered the defense motion for recusal. Citing R.C.M. 902 and caselaw,²² the military judge found no reason for recusal and stated "I have no concerns about my ability to be impartial and to put that information out of my mind." The military judge asked whether either side wanted to question or challenge him. Neither party did.

On appeal, Appellant argues the military judge

²² [United States v. Dodge](#), 59 M.J. 821 (A.F. Ct. Crim. App. 2004); [United States v. Melton](#), 1 M.J. 528, 530, 51 C.M.R. 176 (A.F.C.M.R. 1975). In *Melton*, our court's predecessor noted that the military judge may perceive the providence of plea is questionable because of a lack of understanding of the legal principles and potential defenses available and thus determine the better course of action would be to change the plea to not guilty, not because of any real factual dispute, but because of a misunderstanding of the legal effect of the facts. [1 M.J. at 531](#). The *Melton* court found this showed a concern for fairness by the military judge, rather than suggesting any partiality or bias. *Id.*

abused his discretion when he did not recuse himself (1) prior to the start of trial; and (2) after the withdrawal of the guilty plea. Prior to trial, Appellant asserts that R.C.M. 902(b)(1) applies as the military judge had "prior knowledge of now-disputed evidentiary facts" and the [*53] circumstances raise "reasonable questions" about whether the military judge could serve as an impartial factfinder. After the withdrawal of the plea, Appellant argues the military judge's options were either to recuse himself or to direct trial by court members. He claims it was "impossible" for the military judge or "any jurist" to serve as a fair, impartial factfinder after hearing two completely contradictory statements under oath from Appellant, one in the providence inquiry and the other during his findings testimony. Finally, Appellant argues the military judge should have followed the Discussion to R.C.M. 910(h) which states "recusal of the military judge or disapproval of the request for trial by military judge alone will ordinarily be necessary when a plea is rejected or withdrawn after findings." The Government responds the military judge did not abuse his discretion either time he declined to recuse himself.

2. Law

We review a military judge's decision not to recuse himself for an abuse of discretion. See [United States v. Sullivan](#), 74 M.J. 448, 454 (C.A.A.F. 2015). "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles [*54] were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." [United States v. Ellis](#), 68 M.J. 341, 344 (C.A.A.F. 2010) (citing [United States v. Mackie](#), 66 M.J. 198, 199 (C.A.A.F. 2008)). "The abuse of discretion standard is a strict

one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" [United States v. McElhaney, 54 M.J. 120, 130 \(C.A.A.F. 2000\)](#) (quoting [United States v. Miller, 46 M.J. 63, 65 \(C.A.A.F. 1997\)](#); [United States v. Travers, 25 M.J. 61, 62 \(C.M.A. 1987\)](#)).

"An accused has a constitutional right to an impartial judge." [United States v. Wright, 52 M.J. 136, 140 \(C.A.A.F. 1999\)](#) (citations omitted). R.C.M. 902 governs disqualification of the military judge. R.C.M. 902(b) sets forth five specific circumstances in which a "military judge shall disqualify himself or herself." The first specific circumstance, in R.C.M. 902(b)(1), requires disqualification "[w]here the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding." R.C.M. 902(b)(1) applies the "same substantive standard" as its civilian counterpart, [28 U.S.C. § 455](#). [United States v. Quintanilla, 56 M.J. 37, 45 \(C.A.A.F. 2001\)](#). The Drafter's Analysis to R.C.M. 902(b) notes that "any interest or bias to be disqualifying must be personal, not judicial, in nature." *MCM*, App. 21, at A21-50.

In addition, R.C.M. 902(a) requires disqualification "in any proceeding in which that military judge's impartiality might reasonably be questioned." Disqualification pursuant to R.C.M. 902(a) is determined [*55] by applying an objective standard of "whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned." [Sullivan, 74 M.J. at 453](#) (citing [Hasan v. Gross, 71 M.J. 416, 418 \(C.A.A.F. 2012\)](#)).

"There is a strong presumption that a judge is impartial, and a party seeking to demonstrate

bias must overcome a high hurdle particularly when the alleged bias involves actions taken in conjunction with judicial proceedings." [Quintanilla, 56 M.J. at 44](#) (citation omitted). A military judge "should not leave [a] case 'unnecessarily.'" [Sullivan, 74 M.J. at 454](#) (quoting R.C.M. 902(d)(1), Discussion). "Of course, '[a] . . . judge has as much obligation not to . . . [disqualify] himself when there is no reason to do so as he does to . . . [disqualify] himself when the converse is true.'" [United States v. Kincheloe, 14 M.J. 40, 50 n.14 \(C.M.A. 1982\)](#) (alterations in original) (citations omitted).

"There is no *per se* rule that military judges are disqualified whenever, after accepting guilty pleas, they must later reject those pleas based on unforeseen circumstances." [United States v. Winter, 35 M.J. 93, 95 \(C.M.A. 1992\)](#). "Even more so, there is no invariable requirement that judges *sua sponte* recuse themselves in all such cases. *Id.* (citations omitted). "[E]ven though a judge is not *per se* disqualified from presiding over a bench trial after rejecting guilty pleas, the facts of [*56] a particular case may still require recusal of the military judge, especially if the judge has formed an intractable opinion as to the guilt of the accused." *Id.* (citing [United States v. Bradley, 7 M.J. 332 \(C.M.A. 1979\)](#)). A military judge's statements on the record may "make clear that he had no intractable opinion" regarding guilt or sentence. [United States v. Bray, 49 M.J. 300, 306-07 \(C.A.A.F. 1998\)](#).

"Where the military judge makes full disclosure on the record and affirmatively disclaims any impact on him, where the defense has full opportunity to *voir dire* the military judge and to present evidence on the question, and where such record demonstrates that [an] appellant obviously was not prejudiced by the military judge's not recusing himself, the concerns of R.C.M. 902(a) are fully met." [United States v.](#)

[Campos, 42 M.J. 253, 262 \(C.A.A.F. 1995\)](#) (citation omitted).

3. Analysis

a. Recusal Prior to Trial

We find no abuse of discretion when the military judge denied the Defense's recusal motion before court convened. While the military judge's ruling was no more than a summary denial, we find no error. See [United States v. Flesher, 73 M.J. 303, 312 \(C.A.A.F. 2014\)](#) (noting if the military judge fails to place his findings and analysis on the record, less deference will be accorded). Our starting point is the strong presumption that a military judge is impartial.

We can quickly dispense with the argument that recusal was [*57] required under R.C.M. 902(b)(1) because the Government's motion response discussed the PTA and stipulation briefly and these documents were attached to the motion. Receiving a filing from a party does not give a military judge "personal" knowledge of the facts, disputed or otherwise, in a case. Rather, a military judge who receives a motion response is simply performing judicial duties. Exposure to what the parties are asserting are the facts does not impute "personal" knowledge to the military judge of disputed facts. We agree with the Drafters Analysis to R.C.M. 902(b) that interest or bias is only disqualifying when it is personal, not judicial, in nature. See *MCM*, App. 21, at A21-50. Appellant has not attempted to show the military judge had knowledge of the disputed facts of this case from a source independent of his judicial duties. Accordingly his claim that R.C.M. 902(b)(1) required recusal must fail.

We also find no error under R.C.M. 902(a)

because the military judge's impartiality could not reasonably be questioned from his pretrial involvement in this case. While the military judge denied the motion before trial, at the initial [Article 39\(a\), UCMJ](#), session he was questioned by civilian defense counsel. The military judge confirmed [*58] he had not read the attachments to the defense motion or the Government's response and had not formed any unfavorable opinions about Appellant's guilt or innocence. After civilian defense counsel indicated he had no further questions, the military judge, on his own, noted the recusal motion that he had ruled upon earlier. The military judge noted that while he was aware of the PTA and stipulation of fact, he had not read them and had not discussed them with the prior military judge. In response to a follow-up question by civilian defense counsel the military judge made clear there was "absolutely nothing" that would affect the military judge's ability to be fair and impartial. Shortly thereafter, Appellant selected a forum of military judge alone.

We find the questioning and commentary at the [Article 39\(a\)](#) session qualifies as a full disclosure on the record by the military judge, even if it came after his ruling, and an affirmative disclaimer of any impact from receiving the Government's motion response. See [Campos, 42 M.J. at 262](#). The Defense had a full opportunity to voir dire the military judge and asked relevant questions that the military judge directly answered. See *id.* The military judge confirmed [*59] both sides had no additional evidence or argument on the recusal motion. Appellant had ample opportunity to present evidence on the question of recusal. Appellant was not obviously prejudiced as the military judge did not read the PTA or stipulation of fact and only read the brief commentary in the Government's actual motion, a matter which would easily been put out of the judge's mind

once he learned the case was to be partially contested. Given these circumstances, we conclude the concerns of R.C.M. 902(a) were fully met. See *id.* Objectively, in light of applicable caselaw and the strong presumption that a military judge is impartial, a reasonable person knowing all the circumstances of the military judge's pretrial involvement and his responses on the record, including that no intractable opinions on guilt or sentence were held, would not conclude that the military judge's impartiality might reasonably be questioned. See [Sullivan, 74 M.J. at 453](#).

b. Recusal after Withdrawal of Plea

First, we reject Appellant's claim that it would be impossible for any military judge to be a fair and impartial factfinder after the guilty plea to battery of Amn MM was withdrawn. This argument strikes us as the functional equivalent of [*60] a per se rule requiring recusal after a withdrawn plea which would be inconsistent with *Winter*. See [35 M.J. at 95](#).

We recognize that the facts of a particular case may still require recusal of the military judge after a guilty plea is withdrawn, especially if the judge has formed an intractable opinion as to the guilt of the accused. Here, the military judge had no intractable opinion regarding guilt. See [Bray, 49 M.J. at 306-07](#). The military judge expressed that he would not consider the providence inquiry, would put it out of his mind, and described "resetting entirely the trial with regard to that charge and its specification." The military judge provided citation to relevant caselaw on recusal and to R.C.M. 902 and briefly stated his findings and analysis. Therefore, we review his ruling on recusal after trial began for an abuse of discretion.

We find no abuse of discretion in the military

judge's decision not to recuse himself after granting Appellant's request to withdraw his plea. We note that trial defense counsel did not raise recusal after the military judge told the parties he was reopening the providence inquiry or after Appellant entered a plea of not guilty to battery of Amn MM. Instead, it was the military judge who [*61] *sua sponte* reconsidered his earlier ruling. The military judge described the caselaw he relied upon, cited the correct legal standard, and announced that he would put out of his mind the information he had heard during the providence inquiry. The military judge stated on the record that he had "no concerns" about his ability to be impartial. The military judge invited both sides to voir dire him regarding recusal or to challenge him. Both declined. We find a full disclosure, affirmative disclaimer of impact, and full opportunity for questioning existed. See [Campos, 42 M.J. at 262](#). We discern no obvious prejudice and find the concerns of R.C.M. 902(a) were fully addressed on the record. A reasonable person with knowledge of the circumstances would have come to the same conclusion the parties did at trial: the withdrawn plea did not raise reasonable grounds to question the military judge's impartiality given the applicable law.

Before us, Appellant argues that he made "completely contradictory statements" that would have led the military judge to conclude he lied under oath at some point. We see this matter differently. This case bears similarities to *Melton*, a case the military judge chose to cite when he issued his ruling. [*62] In our view, the military judge's decision to reopen the plea was to ensure Appellant understood the mistake of fact defense. Even during the providence inquiry, Appellant told the military judge that "at the very moment" he hit Amn MM he "did believe" that she had consented. This established the first element of the defense that Appellant had an honest mistake.

All that remained was whether Appellant's belief was objectively reasonable. Unsurprisingly, Appellant's testimony in findings revealed that he struggled with judging his own actions by a reasonable person standard. At varying times, Appellant judged his actions personally, but with the benefit of hindsight, rather than by an objective standard at the time of the offense. As we see it, Appellant merely had difficulty understanding one of the legal principles involved in a mistake of fact defense. Like the court in [Melton](#) we see the military judge's response to reopen the providence inquiry demonstrated concern for fairness of the proceedings rather than some negative reflection on his impartiality.

We acknowledge that the discussion accompanying R.C.M. 910(h) states that in a trial by military judge alone recusal of the military judge or [*63] disapproval of the request for trial by military judge will "ordinarily" be necessary when a plea of guilty is withdrawn after findings. However, the Discussions accompanying the Rules for Courts-Martial are supplementary materials and do not have "the force of law." See *MCM*, pt. I, ¶ 4. We find our superior court's decisions in [Sullivan](#), [Campos](#), and [Winter](#) provide the appropriate framework for analyzing recusal and we decline to apply an "ordinary" rule when the inquiry requires a case-by-case determination. We find no abuse of discretion, and indeed no error, when the military judge did not recuse himself after Appellant withdrew his plea of guilty to battery of Amn MM.

C. Mil. R. Evid. 413

1. Additional Background

Before trial, in accordance with Mil. R. Evid. 413(b) and Mil. R. Evid. 404(b), the

Government provided notice to the Defense of uncharged sexual assault offenses that Appellant allegedly committed upon a civilian, KM, prior to Appellant joining the Air Force. The notice indicated two of the offenses occurred on 24 June 2015 when Appellant, without consent, (1) attempted to penetrate KM's mouth with his penis, and (2) penetrated KM's vagina with his penis. The notice also indicated that the next day, 25 June 2015, Appellant attempted [*64] to penetrate KM's mouth with his penis without her consent and in the course of this attempt hit KM on the head and face with his hand. KM was 16 years old at the time and Appellant was 18 years old.

On 17 May 2018, Appellant's senior defense counsel, who was later released, filed a motion for appropriate relief to exclude this evidence. The Defense contended, *inter alia*, that the evidence was "highly inflammatory" and "unfairly prejudicial" as KM was under the age of 18 and the circumstances involved allegations of physical and sexual violence. The Defense asserted a distracting mini-trial involving numerous witnesses and potentially scientific and/or expert testimony would be needed and that the uncharged misconduct failed a Mil. R. Evid. 403 balancing test. The Defense requested an [Article 39\(a\)](#), UCMJ, session and requested six witnesses: KM and five members of the McKinney Police Department in Texas who investigated the allegations.

On 25 May 2018, the Government opposed the motion for appropriate relief contending *inter alia* that the evidence was admissible under Mil. R. Evid. 413 after the three threshold findings were made under [United States v. Wright](#), 53 M.J. 476, 482 (C.A.A.F. 2000), and alternatively admissible under Mil. R. Evid. 404(b) to show Appellant's plan, intent, absence of [*65] mistake, and motive with respect to the charged offenses.

A few days after the Government's motion response, the failed PTA negotiations occurred, the case was continued, and the senior military defense counsel who filed the motion for appropriate relief was released. The parties continued their preparations for trial, including which witnesses would be necessary for the Defense. While KM traveled for the trial, no McKinney Police Department officials were on the agreed-upon list of witnesses. No motion to compel witnesses or evidence was filed prior to trial, a matter we discuss in the next assignment of error.

During motion practice on the first day of trial, the military judge inquired whether the current defense team had any evidence to introduce. The Defense declined to offer evidence beyond the attachments to its motion, despite the written motion's assertions that six witnesses would testify. The Government also did not offer further evidence beyond the attachments to their motion. The parties argued their respective positions on admissibility.

The military judge issued a ruling denying the defense motion, finding the evidence admissible under Mil. R. Evid. 413²³ and later read his findings of fact [*66] and conclusions of law into the record. Accordingly, KM testified before the military judge as the last government witness.

KM²⁴ testified that she went to the same high school as Appellant for a time when he was a senior and she was a freshman. They knew each other by association and had mutual friends. They lost contact when KM went to a different school as a sophomore but

reconnected on social media in the summer of 2015. On one afternoon, Appellant and KM agreed to meet in the parking lot of a store near KM's house. When Appellant arrived driving a sport utility vehicle (SUV), KM got in and he drove them to a covered parking area in a nearby apartment complex. Appellant began pressing KM's arm in a flirtatious way. KM realized Appellant had gotten the wrong idea about their meeting so she scooted towards the door. Appellant tried touching KM's breast and she pushed his hand away. Appellant responded, "[C]ome on. Why don't you let me touch this? Why don't you want to do this?" KM pulled further away and told Appellant she did not want him to touch her on her breast. After turning her body towards the car door, KM saw Appellant rubbing his "private area" over the top of his pants. When [*67] KM looked over, Appellant grabbed her arm and tried to get KM to touch his penis. KM pulled her arm away. This continued for a few minutes until Appellant succeeded in getting KM's hand to touch his "private area" but KM kept her hand clinched in a ball. Once KM yanked her arm away, Appellant pulled down his pants exposing his erect penis which he began touching. He then attempted to get KM to directly touch his penis but KM kept her hand in a fist. Appellant then grabbed the back of KM's neck and pulled her head towards his penis, but she turned her head to the side. The side of KM's face contacted Appellant's penis but not her mouth.

KM could not remember how the two of them came to be in the backseat but she did recall Appellant touching her breasts and inner thighs and her saying that she did not want to have sex with him. Appellant replied "come on, just do it" and "[i]t will be worth it" and then took off KM's pants and inserted his penis into her vagina. KM recalled not getting up because she "froze" and then "blanked out" and felt like she "couldn't move." KM testified

²³ The military judge did not rule on whether the evidence was also admissible under Mil. R. Evid. 404(b).

²⁴ KM was married at the time of Appellant's court-martial and had a different last name. We use her initials at the time of the uncharged incidents involving Appellant.

that Appellant complained that she was not making noise and KM started muffled crying which annoyed Appellant [*68] so he stopped. KM recalled Appellant taking off a condom though she did not remember seeing him put a condom on. Afterwards, Appellant drove KM back to the store parking lot.

KM testified "[w]ithin the next few days" Appellant reached out to apologize and asked to meet again. When KM did not initially accept his apology, Appellant threatened to tell others they had sex. Appellant also told KM that she now needed to give him gas money when they met. KM agreed to meet and Appellant picked her up in the parking lot where she worked. KM thought the location would be safe because it was in the open. On arrival, Appellant asked KM to get in the SUV and she agreed because she did not want to make a scene. Appellant drove to a parking lot behind an elementary school that was near KM's house. KM testified that Appellant told her to get into the backseat, which she did, because she was afraid of him. Appellant tried to penetrate KM's mouth with his penis, but only the side of her face touched his penis. Appellant told KM to "get it over with" and to "make up for [her] not being willing to do it" before. KM teared up and did not reply. Appellant then asked her "are you deaf" and hit the side of [*69] her face near her ear with his hand. KM recalled looking at him in a "shocked way" and Appellant looked like he was "in shock as well." KM did not think Appellant meant to strike her but just got so frustrated that she would not do what he wanted that he "kind of snapped." KM testified, "[A]s soon as he had done it, [he] let go of me and opened the door and pushed me out of his car." KM unsuccessfully tried to get back in the SUV because her purse and cellphone were still inside but Appellant drove away. KM found her personal items on the road as she walked home.

KM told her best friend what happened with Appellant after the second incident. Her best friend advised KM to tell her parents and KM did. The matter was then reported to the McKinney Police Department. Appellant was never interviewed or arrested by the McKinney Police Department. He was never prosecuted for any offense involving KM.

During the investigation of the offenses involving Amn MM, AFOSI learned through background checks about the incidents with KM and interviewed KM. KM's interview was summarized in an AFOSI report which was before the military judge when he ruled on the admissibility of KM's testimony. Appellant [*70] was also questioned about the incidents with KM by AFOSI but this evidence was not provided to the military judge before he ruled.

In his trial testimony, Appellant described the two incidents where KM and he were alone in his SUV. He recalled a consensual sexual encounter with KM where he wore a condom that ended because it got hot in the SUV. He recalled them meeting the next day, or the day after, for sex. He confirmed that he asked KM for gas money because the SUV was a "gas guzzler." After KM got in the SUV, according to Appellant, KM said she was not going to give him gas money and that she did not want to have sex. Appellant admitted that he got "upset a little bit" and felt he was being "played" by KM so she could get a ride home from work. He testified that he stopped the SUV on the side of the road and asked KM to "please get out" of the SUV. When KM refused, Appellant testified that he unbuckled her seatbelt, asked her to leave again and when she did not leave he threw her personal items out of the drivers' side window. He denied any sexual acts or violence occurred with KM the second time that they were alone. In rebuttal to Appellant's trial testimony, SA PA

testified that [*71] Appellant told AFOSI that he did not spend one-on-one time with KM and that he never engaged in activity involving a condom or a car with KM. In addition to SA PA's testimony, a short audio excerpt of this AFOSI interview of Appellant was also admitted as rebuttal evidence. The audio excerpt also covered Appellant's denials of spending one-on-one time with KM and being in a car with her and a condom.

2. Law

A military judge's decision to admit evidence is reviewed for an abuse of discretion. [*United States v. Jerkins*, 77 M.J. 225, 228 \(C.A.A.F. 2018\)](#) (citing [*United States v. Erikson*, 76 M.J. 231, 234 \(C.A.A.F. 2017\)](#)).

Mil. R. Evid. 413(a) provides that "[i]n a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense. The evidence may be considered on any matter to which it is relevant." "This includes using evidence of either a prior sexual assault conviction or uncharged sexual assaults to prove that an accused has a propensity to commit sexual assault." [*United States v. Hills*, 75 M.J. 350, 354 \(C.A.A.F. 2016\)](#) (citing [*United States v. James*, 63 M.J. 217, 220-22 \(C.A.A.F. 2006\)](#)).²⁵ For purposes of Mil. R. Evid. 413, "sexual offense" means an offense punishable under the UCMJ or a crime under federal or state law involving *inter alia* conduct prohibited by [*Article 120, UCMJ*](#); conduct prohibited by [*18 U.S.C. § 109A*](#); contact, without consent, between the accused's genitals and any part of another [*72] person's body; or an attempt to engage in the conduct

described above. See Mil. R. Evid. 413(d)(1), (2), (4), (6).

In [*United States v. Wright*, 53 M.J. 476, 482 \(C.A.A.F. 2000\)](#), the CAAF explained that military judges are required to make three threshold findings before admitting evidence under Mil. R. Evid. 413: (1) the accused is charged with an offense of sexual assault; (2) the evidence proffered is evidence of his commission of another offense of sexual assault; and (3) the evidence is relevant under Mil. R. Evid. 401 and Mil. R. Evid. 402. Additionally, the military judge must apply the balancing test of Mil. R. Evid. 403 to determine whether the probative value of the proffered evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or other countervailing considerations. [*Wright*, 53 M.J. at 482](#). In *Wright*, the CAAF set forth a non-exclusive list of factors to be considered under Mil. R. Evid. 403 in the context of Mil. R. Evid. 413 evidence: the strength of the proof of the prior act of sexual assault; the probative weight of the evidence; the potential for less prejudicial evidence; distraction of the factfinder; the time needed for proof of the prior conduct; the temporal proximity of the prior conduct to the charged offense(s); the frequency of the acts; the presence or absence of intervening circumstances between the prior acts and charged offenses; [*73] and the relationship between the parties involved. [*53 M.J. at 482*](#) (citations omitted). "The importance of a careful balancing arises from the potential for undue prejudice that is inevitably present when dealing with propensity evidence." [*United States v. Solomon*, 72 M.J. 176, 181 \(C.A.A.F. 2013\)](#) (citation omitted). However, the CAAF has stated that "inherent in [Mil. R. Evid.] 413 is a general presumption in favor of admission." [*United States v. Berry*, 61 M.J. 91, 94-95 \(C.A.A.F. 2005\)](#) (citing [*Wright*, 53 M.J. at 482-83](#)).

²⁵ However, evidence of sexual offenses charged in the same case may not be used as propensity evidence under Mil. R. Evid. 413. [*Hills*, 75 M.J. at 356-57](#).

3. Analysis

Appellant contends the military judge abused his discretion by (1) incorrectly concluding that KM's allegations were "in part corroborated" by the McKinney police; (2) misevaluating the strength of proof of the incidents involving KM; (3) concluding the crimes were similar to those charged; and (4) overlooking an intervening circumstance—Appellant's Air Force enlistment. The Government disagrees that the military judge abused his discretion and describes his analysis on the record as "careful and reasoned." Regarding the fourth point—Appellant's enlistment as an intervening circumstance—the Government argues waiver as Appellant did not present this argument to the trial court.

We find the military judge did not abuse his discretion in admitting KM's testimony. The military judge's findings of fact are not clearly erroneous [*74] and we adopt them. In his ruling, which was read into the record, the military judge appropriately applied Mil. R. Evid. 413 and *Wright* to find the three initial threshold requirements were met for admissibility of KM's testimony. See [Wright, 53 M.J. at 482](#). We briefly describe the three threshold requirements, the first two of which are not in dispute.

During motion practice, trial defense counsel conceded the first two threshold requirements were met and the military judge agreed. First, Appellant was charged with multiple sexual assault offenses in violation of [Article 120, UCMJ](#). Second, the proffered evidence showed commission of other sexual offenses under the definition provided in Mil. R. Evid. 413(d). The other sexual offenses included sexual assault and attempted sexual assault of KM on or about 24 and 25 June 2015.

seriously in question. The military judge found the evidence involving KM relevant under Mil. R. Evid. 401 and 402, "if for no other purpose, for propensity purposes." Relevant evidence is evidence that has any tendency to make the existence of any fact of consequence to determining the case more probable or less probable than it would be without the evidence. Mil. R. Evid. 401. Relevance is a low threshold. [United States v. Roberts, 69 M.J. 23, 27 \(C.A.A.F. 2010\)](#). Viewed [*75] in light of Mil. R. Evid. 413's presumption in favor of admission, we find no abuse of discretion. The military judge could reasonably find the evidence that Appellant sexually assaulted and attempted to sexually assault KM had some logical relevance to the charged sexual offenses involving Amn MM and AB EA. See [Berry, 61 M.J. at 95](#) (citation omitted); [United States v. Bailey, 55 M.J. 38, 40 \(C.A.A.F. 2001\)](#).

The military judge's ruling balanced the probative value of KM's testimony against any countervailing interests under Mil. R. Evid. 403 and he specifically listed the nine factors enumerated in [Wright, 53 M.J. at 482](#), prior to ruling. The military judge did not specifically analyze one factor—the "frequency of the acts"—but this does not cause us concern as we conclude this factor also weighed in favor of admitting KM's testimony rather than supporting its exclusion. The military judge found two separate incidents occurred involving KM. Within each event, Appellant's physical and verbal efforts to engage in sexual acts with KM were persistent. Appellant did not argue this factor weighed in favor of exclusion before the trial court or us.

The military judge's ruling also analyzed two of the *Wright* factors together: "[d]istractio[n] of the factfinder"²⁶ and "time needed for proof of the

The third threshold requirement is also not

²⁶ The "distractio[n] of the factfinder" factor is concerned with a

prior act." His ruling found [*76] only one witness, KM, would testify and that it would be "difficult to imagine less time needed for proof of this." Appellant does not argue the military judge abused his discretion in his conclusion or by combining the analysis of two factors. We find no abuse of discretion as these two factors were related and particularly so in this military judge alone case.

Appellant's first challenge is to the military judge's assessment of the "strength of the proof." Appellant argues the military judge incorrectly concluded "most glaringly" that KM's allegations were in part corroborated by the McKinney police. We are not persuaded that the military judge's conclusion was clearly erroneous or clearly unreasonable.

The summary report from the McKinney Police Department shows that KM told them that on the first incident at the apartment complex Appellant discarded the condom out of the SUV's window. KM said she knew where the condom was. The summary report explains what happened when one officer drove to the scene:

Upon arrival I saw a passenger car parked as if dropping someone off at the complex. As I walked up attempting to find the condom a female walked up to me stating she was [KM]. She [*77] stated "I wanted to make sure I told you the right place." [KM] then stated they were in either one of these two parking spaces. The parking spaces were numbered 120 and 121. As I looked in the parking lot I saw a light green in color condom in parking space . . . number 120. I took photos of the area and the condom. Officer [W] collected the condom and later placed it in evidence.

During motion argument, trial defense counsel raised the "lack of corroborating evidence" and noted "we don't have the DNA off of the condom that [KM] led them to." Before us, Appellant renews this argument while also mentioning the lack of integrity of the crime scene. To be clear, the military judge only found this was "the condom allegedly used" by Appellant during the first sexual encounter with KM. He made no conclusive findings of fact that it was the actual condom used.²⁷

The word "corroborate" as used by trial defense counsel and the military judge was not defined. However, in the context of confessions and admissions, "corroborate" means independent evidence that "raises an inference of truth" and "would tend to establish the trustworthiness" of a statement. See Mil. R. Evid. 304(c)(1), (4). The military judge described the [*78] corroboration as "limited" and "as expected . . . with only two possible witnesses." The limited corroboration was one of three considerations the military judge found "strengthen[ed] the proof of the prior act." The other two considerations had no caveats: that KM reported shortly after the assault and she had no obvious motive to fabricate. We acknowledge there are certainly other possible explanations for the condom that was taken into evidence by the McKinney police. But the military judge's conclusion was only that there was limited corroboration, and this was not clearly erroneous or clearly unreasonable given the evidence that was before the military judge when he ruled.

Appellant further challenges the strength of the proof citing (1) the absence of social media messages between KM and Appellant after KM gave the McKinney police her passwords; (2) the lack of witness interviews who saw

danger that "admission of this evidence may result in a distracting mini-trial on a collateral issue." [Berry, 61 M.J. at 97](#) (citation omitted).

²⁷ Appellant testified during trial that he discarded the condom in "a little cup" in the back of the SUV. During her testimony, KM was not asked what happened to the condom.

Appellant and KM together; (3) the lack of injuries to KM or damage to her clothing; (4) the lack of results of a SAFE that KM underwent; and (5) a lack of evidence from the SUV. We see little conflict between the absence of this evidence and the military judge's conclusion that corroboration [*79] was "limited" and find no abuse of discretion.

Appellant next argues, as he did at trial, that he was not interviewed, arrested, or prosecuted. The military judge agreed and entered findings of fact to this effect that we have adopted. In analyzing this fact, the military judge described the absence of an interview as "curious in isolation" but concluded it did not necessarily diminish the strength of proof of KM's allegation. We agree based on the limited evidence that was before the military judge during motion practice. The strength of proof factor ranges from a high of conviction to a low of gossip. See [Wright, 53 M.J. at 482](#). KM's report fell between these two extremes. The military judge had very little before him on why the McKinney police took the actions they did. There are no obvious cues from the police report that KM's allegations were determined to be false, unfounded, or recanted. To be clear, trial defense counsel argued vehemently that "if you had a 16-year-old girl who would have been raped and you had evidence to corroborate that, something somehow would have been done. And at this point, they didn't even call him." In our view, the military judge had to make an independent determination [*80] on strength of proof based on the evidence before him. He did and his conclusions are not clearly erroneous or unreasonable. Other military judges may have been swayed that the absence of a civilian law enforcement interview of Appellant was a direct reflection on the merit of KM's allegations. But an abuse of discretion requires more than a mere difference of opinion.

[McElhane, 54 M.J. at 130](#).

Appellant's remaining challenge to the strength of proof is that KM's statements "contain numerous inconsistencies and counterintuitive decisions." At motion practice, Appellant argued inconsistencies including whether the SUV's doors were locked or whether Appellant demanded KM must get in the back seat. The military judge found KM's statements to the McKinney police and to AFOSI "are consistent on many details" but that inconsistencies "do exist." The Defense argued, in their written motion, that KM made a counterintuitive decision by getting in Appellant's SUV the second time. While the military judge did not address this specific argument in his ruling he concluded "[o]n balance, the strength of proof is not so low as to create a substantial risk of unfair prejudice" and that he was "not convinced the allegation [*81] is so weak it cannot be fairly considered by a fact-finder." The military judge noted that inconsistencies existed and balanced the strengths and weaknesses of the proof before ruling. We see no abuse of discretion.

Appellant's next challenge is that the charged crimes were not similar to the offenses involving KM. The military judge concluded the offenses were similar because (1) all involved acquaintance versus stranger assaults; (2) all involved force; (3) all involved victims of a similar age to Appellant.²⁸ Appellant directly challenges the last of the military judge's

²⁸ The transcript reads "[a]s opposed to assaults committed by use of drugs or alcohol or incapacitated victims, all of the offenses involved victims that are of similar age to the accused." It is possible the military judge intended to conclude that alcohol and drugs were not used to facilitate any of the assaults against KM, Amn MM, or AB EA, which made the crimes similar. The Government advances such an argument in the answer before us. Such a conclusion would be accurate from our review of the record; however, we do not rely on that similarity as the military judge did not clearly draw that conclusion.

conclusions that all victims were of a similar age to Appellant. He notes the number of class grades that separated Appellant and KM when they met and contrasts this with AB EA, Amn MM, and Appellant who were all technical school classmates. We are not persuaded by Appellant's direct challenge. The military judge found as fact that KM was 16 years old at the time of the offense and Appellant was 18 years old. The military judge's conclusion that the victims were a similar age to Appellant was not clearly erroneous or unreasonable.²⁹

Appellant raises additional grounds for why the offenses were not similar including (1) [*82] his relationship with KM was different than Amn MM and AB EA; (2) the incident with KM occurred in a vehicle parked in a public area while the others were in a dormitory room; (3) that KM was a minor and Amn MM and AB EA were adults; (4) only KM's allegations occurred more than once; and (5) only KM alleged a threat. Some of Appellant's listing of differences are obviously true. KM was (1) the only minor; (2) the only one who alleged offenses on two different days; and (3) the only one who was in a parked vehicle with Appellant. However, we need not explore all the differences raised on appeal any more than we need to explore the additional similarities argued by the Government during motion practice or in their answer. Instead, we determine whether it was clearly erroneous for the military judge to find the offenses similar on the grounds he stated despite the

differences. We find the military judge's conclusion reasonable and that no abuse of discretion exists. Of particular importance to our review is the second similarity mentioned by the military judge and unchallenged before us, that force was involved in each allegation. We find the manner in which force was reported by each [*83] victim to be significantly more important to the determination that the offenses were similar than any of the differences cited by Appellant.

Appellant's last claim is that the military judge "clearly overlooked" that Appellant enlisted in the Air Force when he assessed whether there were significant intervening circumstances. The Government argues waiver. The CAAF has made clear that the Courts of Criminal Appeals have discretion, in the exercise of their authority under *Article 66, UCMJ, 10 U.S.C. § 866*, to determine whether to apply waiver or forfeiture in a particular case, or to pierce waiver or forfeiture in order to correct a legal error. See, e.g., [*United States v. Hardy*, 77 M.J. 438, 442-43 \(C.A.A.F. 2018\)](#) (quoting [*United States v. Quiroz*, 55 M.J. 334, 338 \(C.A.A.F. 2001\)](#)); [*United States v. Chin*, 75 M.J. 220, 223 \(C.A.A.F. 2016\)](#). In this case, we use our discretion and do not apply waiver because we determine there is no legal error to correct. We note that it was the Government's written motion response that first mentioned that Appellant's decision to join the Air Force was a "possible intervening circumstance." The military judge's conclusion was simply that he was "unaware or saw no evidence of any *significant* intervening factors that changed the analysis." (Emphasis added). This conclusion was not an error, clear or otherwise, and certainly was not an [*84] abuse of discretion. Appellant did not testify on the motion. There was no evidence before the military judge about how Appellant's completion of basic military training and a portion of technical training significantly

²⁹ The military judge did not make findings of fact regarding Amn MM's or AB EA's ages. AB EA's date of birth is listed on a prosecution exhibit and we can see she is a similar age to KM. Both KM and AB EA are less than three years younger than Appellant which is sufficient to be a similar age to him. Amn MM's date of birth is redacted in the record of trial but photographs of her were admitted as prosecution exhibits. Appellant does not assert that Amn MM was not a similar age to Appellant and after reviewing the photographs we see no reason to question the military judge's conclusion that Amn MM was also a similar age to Appellant.

changed Appellant, his decision making, or his understanding of the law regarding sexual assault or consent from when he was an adult civilian interacting with KM. Thus, we determine there is no legal error for us to correct regarding this conclusion in the military judge's ruling.

In conclusion, we find the military judge properly admitted KM's testimony, after noting the presumption in favor of admission, and reciting all of the *Wright* factors and analyzing almost all of them. He did not "wholly fail to grapple" with the lack of a full civilian investigation or prosecution. Cf. [Solomon, 72 M.J. at 181](#). He considered the inconsistencies and challenges raised to KM's expected testimony and weighed them in determining the probative value and the danger of unfair prejudice. He considered whether there was less prejudicial evidence and noted that KM would testify live and could be confronted with inconsistencies or evidence that was lacking in the McKinney police summary. He found the temporal [*85] proximity to be "relatively close" as KM's accusations were about two years before the charged offenses. Considering what the military judge had before him during motion practice, his ruling and his balancing test under the *Wright* factors was not an abuse of discretion.

As it turned out, presentation of the Mil. R. Evid. 413 evidence was not unduly long or distracting. In this military judge alone trial, KM testified once in an open session of the court for 53 pages of the transcript. While the parties asked questions, the military judge had none. In contrast, Amn MM testified slightly longer, totaling 60 pages, and in both open and closed sessions during the findings portion of the trial. Part of Amn MM's testimony was as a rebuttal witness for the prosecution. Amn MM's roommate also testified as witness. AB EA testified for 90 pages in open session during

findings. Two witnesses who saw AB EA immediately after she left Appellant's room also testified. In the Defense's case, some photos of Appellant's SUV were admitted during Appellant's testimony. Overall, Appellant testified about the accusations of KM, in open session, in about 25 pages of transcript on direct examination and there was less than [*86] 10 pages of cross-examination regarding KM. The military judge asked no questions of Appellant regarding KM. While the accusations involving KM likely occupied more trial time than initially anticipated, a "distracting mini-trial on a collateral matter of low probative value" did not occur which provides some support that the military judge did not clearly err in admitting KM's testimony. Cf. [Solomon, 72 M.J. at 182](#).

D. Compel Discovery/Production of Evidence and Witnesses

1. Additional Background

Immediately after the military judge issued his ruling that KM would be permitted to testify as a Mil. R. Evid. 413 witness, he asked the parties whether they had any questions about his ruling or its effect on the case. Civilian defense counsel responded "[i]n light of the court's ruling, we . . . make an oral motion for continuance or at least if we could have a couple of days to try to gather some more evidence in the case." Civilian defense counsel indicated, *inter alia*,

We don't know about the police case file, what videotapes may exist, what video interviews may exist, whether or not she saw a SANE, forensic nurse examiner, and what statement she might have made to that individual. We don't have that report either. We don't have [*87] DNA evidence, and the officers involved in the case at

McKinney will not speak to us without subpoenas.

After more discussion, the oral motion for continuance expanded into an oral motion to compel discovery under R.C.M. 701 and production under R.C.M. 703, including telephonic witness testimony. The Defense asserted it could not effectively represent Appellant and would be "simply unprepared" to address anything KM testified to because "we have no check and we have no additional information as to what exists out there regarding this allegation. We would essentially be flying blind with regard to anything she says." The military judge addressed the timeliness of the motion, which we describe in detail below, before he recessed the court and ordered the Defense to produce a written motion before court reconvened in six hours. The Defense's written motion to compel and for a continuance was filed. It included, as attachments, the discovery requests that had been filed. The Defense called no witnesses to support the motion. The Government provided several documents to show what discovery it had provided to the Defense and both sides presented argument. The military judge denied the motion and later in the [*88] trial, after KM testified on findings, provided his essential findings of fact and conclusions of law. Neither side requested the military judge reconsider his ruling after KM testified.

Before us, Appellant raises various challenges to the military judge's ruling. In his assignments of error brief, Appellant initially claimed the military judge did not provide any rationale for his ruling and argued that we should accordingly afford his ruling less deference. While Appellant is correct that the military judge did not announce his findings of fact and conclusions of law at the same point that he ruled, we agree with the Government that the military judge made essential findings

of fact and conclusions of law and the appropriate standard of review is an abuse of discretion.

2. Law

In reviewing discovery matters, we conduct a two-step analysis: "first, we determine whether the information or evidence at issue was subject to disclosure or discovery; second, if there was nondisclosure of such information, we test the effect of that nondisclosure on [Appellant's] trial." [*United States v. Coleman*, 72 M.J. 184, 187 \(C.A.A.F. 2013\)](#) (quoting [*United States v. Roberts*, 59 M.J. 323, 325 \(C.A.A.F. 2004\)](#)). We review a military judge's decision on a request for discovery for an abuse of discretion. [*Roberts*, 59 M.J. at 326](#) (citation omitted). [*89]

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." [*Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 \(1963\)](#). The United States Supreme Court has extended *Brady*, clarifying "that the duty to disclose such evidence is applicable even though there has been no request by the accused" and includes "impeachment evidence as well as exculpatory evidence." [*Strickler v. Greene*, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 \(1999\)](#) (citation omitted); see [*United States v. Claxton*, 76 M.J. 356, 359 \(C.A.A.F. 2017\)](#) (quoting [*Strickler*, 527 U.S. at 280](#)). "A military accused also has the right to obtain favorable evidence under [*Article 46, UCMJ*, 10 U.S.C. § 846](#) . . . as implemented by R.C.M. 701-703." [*Coleman*, 72 M.J. at 186-87](#) (footnote omitted). Accordingly, [*Article 46, UCMJ*](#), and these implementing rules provide a military accused statutory discovery rights that are greater than

those afforded by the Constitution. See *id.* at 187 (citations omitted); *Roberts*, 59 M.J. at 327. In particular, R.C.M. 701(a)(2)(A) requires the Government, upon defense request, to permit the inspection of, *inter alia*, any documents "within the possession, custody, or control of military authorities, and which are material to the preparation of the defense"

"Trial counsel must exercise due diligence in discovering [favorable evidence] not only [*90] in his possession but also in the possession . . . of other 'military authorities' and make them available for inspection." *United States v. Jackson*, 59 M.J. 330, 334 (C.A.A.F. 2004) (alterations in original) (quoting *United States v. Simmons*, 38 M.J. 376, 381 (C.M.A. 1993)). "[T]he parameters of the review that must be undertaken outside the prosecutor's own files will depend in any particular case on the relationship of the other governmental entity to the prosecution and the nature of the defense discovery request." *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999). The scope of this due-diligence requirement generally is limited to (1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity closely aligned with the prosecution; and (3) other files, as designated in a defense discovery request, that involved a specific type of information within a specified entity. *Id.* (internal quotation marks and citations omitted).

The CAAF has generally agreed with "the proposition that an object held by a state law enforcement agency is ordinarily not in the possession, custody, or control of military authorities." *United States v. Stellato*, 74 M.J. 473, 484 (C.A.A.F. 2015) (citation omitted). "However, a trial counsel cannot avoid R.C.M.

701(a)(2) through the simple expedient of leaving [*91] relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial." *Id.* (internal quotation marks and citations omitted). The CAAF in *Stellato* identified a number of scenarios from Article III³⁰ courts where evidence not in the physical possession of the prosecution team is still within the possession, custody, or control of military authorities. These include when: (1) the prosecution has both knowledge and access to the object; (2) the prosecution has the legal right to obtain the evidence;³¹ (3) the evidence resides in another agency but was part of a joint investigation; and (4) the prosecution inherits a case from a local sheriff's office and the object remains in the possession of the local law enforcement. *Id.* (footnotes omitted). Additionally, pursuant to the provisions of R.C.M. 701(a)(6), "a trial counsel cannot avoid discovery obligations by remaining willfully ignorant of evidence that reasonably tends to be exculpatory, even if that evidence is in the hands of a Government witness." *Id.* at 487.

Where the defense specifically requests discoverable information that is erroneously withheld, the error is tested for harmlessness beyond a reasonable [*92] doubt. *Coleman*, 72 M.J. at 187 (citations omitted). "Failing to disclose requested material favorable to the defense is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial." *Id.* (citation omitted). "Inadvertent nondisclosure has the same impact on the fairness of the

³⁰ U.S. CONST. art. III.

³¹ See *United States v. Stein*, 488 F. Supp. 2d. 350, 362-63 (S.D.N.Y. 2007) (finding a deferred plea agreement with a corporation and the Government's admission that it had the unqualified right to demand production of evidence from the corporation gave the Government the legal right to obtain documents subject to one "limited privilege carve-out" in the deferred plea agreement).

proceedings as deliberate concealment." [*Strickler*, 527 U.S. at 288](#). However, "[m]ere speculation that some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review," [*id.* at 286](#), "[n]or . . . should such suspicion suffice to impose a duty on [defense] counsel to advance a claim for which they have no evidentiary support." *Id.*

In addition to the discovery rights described above, R.C.M. 703 provides "[e]ach party is entitled to the production of evidence which is relevant and necessary." R.C.M. 703(f)(1); [*United States v. Rodriguez*, 60 M.J. 239, 246 \(C.A.A.F. 2004\)](#). Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "is of consequence in determining the action." Mil. R. Evid. 401. "Relevant evidence is 'necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue.'" [*Rodriguez*, 60 M.J. at 246](#) (quoting R.C.M. 703(f)(1), Discussion). The moving [*93] party is required, as a threshold matter, "to show the requested material existed." *Id.*

In addition to production of evidence, "counsel for the accused . . . shall have an equal opportunity to obtain witnesses . . . in accordance with such regulations as the President may prescribe." [*Article 46, UCMJ, 10 U.S.C. § 846*](#). "The defense shall submit to the trial counsel a written list of witnesses whose production by the Government the defense requests." R.C.M. 703(c)(1). "A list of witnesses whose testimony the defense considers relevant and necessary on the merits or on an interlocutory question shall include the name, telephone number, if known, and address or location . . . and a synopsis of the expected testimony sufficient to show its relevance and necessity." R.C.M. 703(c)(2)(B).

"The military judge may set a specific date by which such lists must be submitted." R.C.M. 703(c)(2)(C). "Failure to submit the name of a witness in a timely manner shall permit denial of a motion for production of the witness, but relief from such denial may be granted for good cause shown." *Id.*

"A military judge's ruling on a request for a witness is reviewed for an abuse of discretion." [*McElhaney*, 54 M.J. at 126](#) (citation omitted). "We will not set aside a judicial denial of a witness request unless [*94] we have a definite and firm conviction that the trial court committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors." *Id.* (internal quotation marks and citation omitted).

Factors to be weighed to determine whether personal production of a witness is necessary include: the issues involved in the case and the importance of the requested witness to those issues; whether the witness is desired on the merits . . . ; whether the witness's testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness. Timeliness of the request may also be a consideration when determining whether production of a witness is necessary.

[*Id.* at 127](#) (citations omitted).

3. Analysis

The timeliness of trial defense counsel's motion was addressed by the trial court. The military judge considered the filing untimely and seriously considered denying the motion on this ground. Instead, the military judge considered the merits of the motion at the request of the trial counsel. We agree the motion was untimely filed. Two scheduling order deadlines passed without a defense

motion to compel any discovery or to produce any evidence or witness. [*95] While trial defense counsel made a feeble attempt to argue good cause existed for the untimely filing, the military judge, under his R.C.M. 701(g)(1) authority, had long before specified the timing of discovery and had imposed terms and conditions on when motions to compel were due. The late filing did not give the Government an opportunity to prepare a written response, though evidence and argument were presented. Regarding the merits, we adopt the military judge's essential findings as they are not clearly erroneous. We find no abuse of discretion as (1) the Defense did not show some of the evidence existed under [Strickler, 527 U.S. at 286](#); (2) the evidence that did exist, at least at one time,³² was not in the possession, custody, or control of military authorities; (3) the Defense failed to show, at trial, how the evidence tended to be exculpatory; and (4) the Defense failed to comply with the procedures required for production and did not demonstrate the necessity of the evidence and witnesses it requested be produced.

a. Did the Requested Evidence Exist?

The military judge's ruling addressed five pieces of evidence: (1) a SAFE report on KM; (2) written or video recordings of KM's interviews; (3) photographs related to [*96] KM's investigation; (4) physical evidence gathered in KM's investigation; and (5) DNA results from the processing of the evidence collected during KM's SAFE. We begin by noting the Defense failed to carry its initial burden that some of the evidence ever existed such that it could be discovered or produced.

Specifically, for item (2) above we see no indication in the record of trial that any of KM's interviews were recorded or transcribed. The Defense did not call KM or her parents to testify on the motion that the interviews were recorded or transcribed. The Defense offered no evidence regarding the practices and procedures of the McKinney Police Department on recording or transcribing victim interviews of minors. Similarly, we also see no indication that KM made a written statement to the McKinney police³³ or that additional written notes were taken beyond the summary provided to the Defense. The Defense failed, as a threshold matter, to show that written or video recordings of KM's interviews existed. See [Rodriguez, 60 M.J. at 246](#). Therefore, we find no abuse of discretion when the military judge denied this portion of the motion.

The Defense had good reason to believe the remaining items existed, at least [*97] at one time. For KM's SAFE report, the police summary showed \$528.00 was paid to Texas Health South for a SAFE and KM told the AFOSI agents she underwent the examination. It was a reasonable inference that a SAFE report would have been written and that it would have contained KM's narrative of what occurred as such statements generally guide a SANE during an examination. Similarly, for photographs, the police summary shows that photos were taken of a condom before it was taken into evidence and those photos were saved on a CD. Additionally, during her trial testimony KM indicated that photos were taken of her during her SAFE. As far as physical evidence, the AFOSI summary indicated that KM said her clothes were taken during the SAFE, and the condom seized from the parking lot was listed as evidence. We

³² Appellant does not assert that the Government failed to meet its affirmative obligation to preserve evidence. See [Stellato, 74 M.J. at 483](#).

³³ According to AFOSI's summary of KM's interview, she declined to make a written statement to AFOSI. An AFOSI agent took notes of KM's interview, which were provided to the Defense.

evaluate the military judge's ruling on this evidence below.

The questions of whether DNA results existed and tended to be exculpatory are more complex. The AFOSI summary of KM's interview included "[Appellant's] DNA was found on her clothes and on the swabs inside the kit." There are legitimate reasons to question the accuracy of this statement. First, the McKinney police summary does [*98] not say that a DNA sample from Appellant was ever obtained by any method. Second, the police summary says nothing about forensic testing of any portion of KM's SAFE kit and does not even list the contents of the kit. Third, the police summary says nothing about the condom being submitted for DNA or any other forensic testing. Fourth, the military judge found as fact that Appellant "was never interviewed, charged, or prosecuted" and this finding is not clearly erroneous. As there are good reasons to question whether DNA testing was even conducted, we look elsewhere in the record of trial for support for or against the existence of DNA results.

A review of Appellant's trial testimony raises further questions about whether exculpatory DNA results existed. During his testimony, Appellant denied knowing that KM had "made, or tried to make, a criminal complaint" against him. Appellant further testified that he first learned of KM's criminal complaint when he was interviewed by AFOSI. He testified "I was never informed" that he had "no idea" and the matter "was brand-new" and "shocking" to him.³⁴ If Appellant's testimony is taken at face

value, it seems unlikely that a DNA sample was knowingly [*99] obtained from him during a subject SAFE as it would be obvious that the McKinney Police Department was investigating KM's complaints. On the other hand, Appellant was never asked whether he provided a DNA sample.

During KM's trial testimony, the military judge permitted KM to answer a question about DNA testing before he ruled on a trial counsel objection to its admissibility. KM testified "I cannot 100% say what they found" and "I never spoke directly with the hospital or any of the investigators about what they found through my rape kit. I only heard through other—like through my parents what they found."³⁵ As KM's parents never testified at trial, we have no confirmation or denial from them as to their knowledge of DNA testing or results.

Before us, Appellant asserts that KM lied to AFOSI about the DNA results and "all parties knew this must be false because the McKinney Police Department never interviewed [Appellant] or obtained his DNA" so "any associated DNA would have shown that [Appellant] was not a match." We find Appellant's argument flawed. Either DNA results exist or they do not, and it is Appellant's burden to show they exist. We cannot reconcile the assertion that the McKinney [*100] police did not obtain Appellant's DNA yet somehow an unnamed forensic laboratory was able to produce exculpatory results showing Appellant was not a match. Elsewhere in this record of trial is the testimony of a forensic biologist and it is clear

³⁴ On cross-examination, Appellant admitted that he received a phone call from someone who identified themselves as a part of the McKinney Police Department who said if Appellant went and saw KM again he would be arrested. Appellant testified the individual did not give a name or badge number and did not ask him to come to the police station. At trial, Appellant expressed doubt that the caller was part of the McKinney Police Department. Regardless, this phone call sheds no light

on whether a DNA sample was obtained for comparison testing.

³⁵ After KM provided this answer the military judge asked civilian defense counsel, "[A]ny theory on why I can consider that?" Civilian defense counsel replied, "No sir. We'll move on."

to us that a DNA sample from Appellant would be necessary for DNA comparison testing. We note that Appellant has not requested we order a *Dubay*³⁶ hearing to determine additional facts and we find the development of additional facts unnecessary to resolve this assignment of error considering Appellant's initial burden on the motion.

Based on the record of trial before us, there is insufficient evidence that if DNA testing results existed that they also tended to be exculpatory. KM did not say the DNA results excluded Appellant. No one has asserted that except Appellant in his brief. The Defense had ample opportunity at the trial court and on appeal to investigate whether DNA testing was conducted. It is possible that KM was merely mistaken when she told AFOSI about the DNA results; after all, she apparently only received information about DNA results through her parents. The Defense did not attempt to call KM or her parents to testify to support [*101] its motion. KM's mother's name is specifically listed on the McKinney police summary and both parents' names are in the AFOSI agent's notes. There is no evidence that KM's parents were unwilling to share with the Defense what they recalled of KM's investigation. The Defense did not show, at trial or thereafter, that exculpatory DNA testing results involving KM and Appellant exist. We find no abuse of discretion when the military judge denied requests to compel or produce DNA results.

b. Possession, Custody, or Control of Military Authorities

The remaining evidence, which it is reasonable to conclude actually existed, at least at one time, includes the (1) SAFE report on KM; (2)

photographs related to KM's investigation; and (3) physical evidence gathered in KM's investigation, including the condom seized at the parking lot. We find no abuse of discretion when the military judge concluded this evidence was not in the possession, custody, or control of military authorities.

There is no question that the AFOSI and Prosecution did not participate in the McKinney police investigation that occurred long before Appellant enlisted in the Air Force. Additionally, the McKinney police were not closely [*102] aligned with the Prosecution. The military judge made similar conclusions that initially AFOSI "was denied access to any evidence regarding the investigations as a result of Texas state law provisions" and "[e]ventually, [AFOSI] was able to obtain" the summary of the investigation.

Appellant argues the AFOSI's initial request for information about the McKinney police investigation was defective because it did not identify that the information was requested for a criminal justice purpose. We disagree. A concern about AFOSI's request was noted in a written legal opinion from the Texas Attorney General's Office back to counsel for the City of McKinney, although it only related to a three-page document, labeled "Exhibit B," which is in the record of trial and was released to the Defense. Additionally, the opinion of the Texas Attorney General's Office says

if the city determines the requestor intends to use the [criminal history record information] for a criminal justice purpose and for purposes consistent with the [Texas] Family Code, then the city must release the submitted information that shows the type of allegation made and whether there was an arrest, information, indictment, detention, [*103] conviction, or other formal charges and their disposition.

"Exhibit B" only confirms that a condom and

³⁶ [*United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 \(C.M.A. 1967\).](#)

CD of photographs were taken into evidence, matters already known from the police summary. All "Exhibit B" adds was that the McKinney police knew who Appellant was, his identifying information, and some identifying information about KM. We find little support for Appellant's claims that a defective AFOSI request "may have proved fatal" to the Government's request for information.

Appellant also claims that there was close alignment because the McKinney police "provided the Government with exclusive access to its officers." We disagree with Appellant's characterization of the access the Government had to the McKinney police. The military judge during the motion argument asked the senior trial counsel what efforts were taken to find out why Appellant was not prosecuted for offenses involving KM. The senior trial counsel replied, "We did call some of the officers who worked on the case who all told us that they didn't remember the case." As stated above, the Defense had also made contact with at least one of the McKinney police officers but was told "they will not discuss any aspect of [*104] the case without a subpoena from the [G]overnment." We do not see a meaningful difference in access when it appears all the Government learned from their contact was the officers had no memory of Appellant's case. There is no claim by Appellant that the Prosecution learned (1) why Appellant was not interviewed, charged, or prosecuted; (2) whether KM made inconsistent statements to the officers; (3) whether they had a copy of KM's SAFE report or kit; or (4) whether they had sent evidence collected to a forensic laboratory for DNA or other testing. In our view, the parties had equal, albeit limited, access to the McKinney police investigation and those who conducted it.

We recognize that "an object held by a state

law enforcement agency is ordinarily not in the possession, custody, or control of military authorities" but "a trial counsel cannot avoid R.C.M. 701(a)(2) through the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing for trial." [*Stellato*, 74 M.J. at 484](#) (internal quotation marks and citations omitted). We see nothing in the record of trial to show that the trial counsel had access to KM's SAFE report, the condom, the CD of photographs, [*105] or any purported forensic testing results. Without having access to these materials, the trial counsel could not use them to prepare for trial. The record of trial before us shows the trial counsel had the same access as the defense counsel to these objects—none. Three of the four factors in *Stellato* require no further analysis as we see no access to the objects at any point, no joint investigation, and the prior criminal case from the McKinney police was not inherited by the Prosecution. This leaves only the second factor: "whether the prosecution has the legal right to obtain the evidence." *Id.*

At first blush, the second factor's language seems to indicate that the Government had a "legal right to the evidence" because it could subpoena a witness or witnesses to show up at trial and bring the condom, the CD of photographs, the SAFE report and related evidence, or any forensic testing results and therefore this evidence was within the "control" of the Government. However, such an interpretation is overly broad and would lead to all evidence subject to compulsory process to be within the Government's "control" regardless of where it was held and by whom. A legal "process" to obtain [*106] evidence, like a subpoena, is not the same thing as a legal "right" to such evidence. The district court case cited by the CAAF regarding the "legal right to the evidence" had a deferred prosecution agreement (DPA) which gave the

United States the "legal right to obtain evidence." See [Stein, 488 F. Supp. 2d at 363](#) ("the DPA gives the government the legal right to obtain these documents subject to the limited carve-out"); [Stellato, 74 M.J. at 492](#) (Stucky, C.J., concurring) (addressing that *Stein* concerned the legal right of the Government to obtain materials from an accused based on a DPA). In our view, the district court in [Stein](#) was not just referencing the availability of subpoena power when it described the legal right to obtain evidence. In Appellant's case, there was no deferred prosecution agreement and the trial counsel had no specified legal right to obtain the evidence from the McKinney police as they were wholly uninvolved in the investigation. The military had no jurisdiction to prosecute the offenses involving KM and it remained a local law enforcement matter even if evidence related to it was later found to be admissible as propensity evidence under Mil. R. Evid. 413. The military judge cited *Stellato* in his ruling and distinguished it. [*107] We find no abuse of discretion as the military judge's conclusion that the evidence was not in the possession, custody, or control of military authorities was not clearly unreasonable or erroneous.

c. Production of Evidence and Witnesses

Appellant raises several claims regarding the production of the evidence and witnesses beyond what has been described above. First, Appellant claims the military judge "should have rectified" an [Article 46, UCMJ](#), "unlawful inequity by ordering the Government to produce the witnesses for trial or pretrial interviews." This argument fails here for the same reasoning we described above. We see no [Article 46, UCMJ](#), inequity that should have been corrected by the military judge as the parties' access to the McKinney police was

substantially the same. Regarding pretrial interviews, the military judge rejected a request to order pretrial interviews noting "no party is entitled to compulsory pretrial interviews"—a conclusion that is not clearly erroneous or unreasonable. See [United States v. Alston, 33 M.J. 370, 373 \(C.M.A. 1991\)](#). Additionally, we see no efforts by trial counsel that attempted to impede the Defense's access to evidence or witnesses.

Second, Appellant claims the Government should have subpoenaed the [*108] requested information, citing [Tex. Gov't Code Ann. § 552.0055](#) that a subpoena duces tecum issued in compliance with a rule of criminal procedure is not a "request for information" like AFOSI's initial request. We need not delve into Texas statutes cited by the parties as Appellant fails to account for the responsibilities of the Defense prior to receiving the "benefit of compulsory process" under R.C.M. 703(a). Notably, in their written motion, Appellant conceded that he did not "specifically request the non-witness evidentiary items listed in this motion to compel" until the day of the written motion. The motion, dated 18 September 2018, was filed near the end of the second day of trial. It is clear to us that Appellant did not request the trial counsel to subpoena any evidence regarding KM's allegations prior to trial despite having knowledge that the Government sought to admit KM's testimony and the Defense had moved to exclude it. Further, according to R.C.M. 703(f)(3), Appellant "shall list the items of evidence to be produced and shall include a description of each item sufficient to show its relevance and necessity, a statement where it can be obtained, and if known, the name, address, and telephone number of the custodian of the evidence." [*109] Even after receiving six hours to compose a written motion, the Defense did not include this information and instead requested an

additional two-day continuance to "gather subpoenas for the listed witnesses and the other evidence listed." We find no abuse of discretion when the military judge determined the Defense failed to articulate a basis for "relevance and necessity" under R.C.M. 703(f)(1) and (3) and denied their request to produce evidence via subpoena.

Appellant also claims his [Sixth Amendment](#) right to confront KM was impacted by the military judge's ruling and the need to challenge KM's credibility, trustworthiness, and reliability were sufficient to show evidence and witnesses were relevant and necessary under R.C.M. 703(f)(3). We are not persuaded. Appellant has not shown, at trial or before us, what additional cross-examination questions would have been asked of KM had additional evidence or witnesses been produced. Application of R.C.M. 703 did not deny Appellant the right to compulsory process and relevant witnesses under the [Sixth Amendment](#) but "simply allow[ed] for judicial review of denial of subpoenas on relevance and materiality grounds before they are enforced by court order." See [United States v. Breeding](#), 44 M.J. 345, 355 (C.A.A.F. 1996) (Sullivan, J., concurring in the result).

Regarding the [*110] requested witnesses, the military judge found the Defense's request for production "to be nothing more than a list of every investigator" of KM's allegations. The military judge referenced the need for a synopsis of testimony under this rule and that "[n]o such synopsis has been provided." We have weighed the factors from *McElhaney* including the timeliness of the request and that the witnesses were for the merits to address a challenge to the credibility and reliability of a Mil. R. Evid. 413 witness. See [54 M.J. at 127](#). We also considered the absence of any summary of their proposed testimony before the trial court or us. We see no clear error of

judgment by the military judge as he cited the relevant factors and *McElhaney* prior to denying the request to produce witnesses.

d. Did the Evidence Tend to Be Exculpatory?

The military judge concluded the Defense had "failed to show how any of the requested evidence is actually exculpatory" and that a presumption that the evidence would be exculpatory is not the standard. The military judge determined "nothing in the summary of the investigation or in the multiple interviews of [KM] . . . demonstrated the evidence sought by [the] [D]efense would be exculpatory. This [c]ourt [*111] will not presume or guess that evidence is exculpatory." Before us, Appellant argues the military judge was incorrect when he concluded there was "nothing" exculpatory and again refers to KM's statement regarding DNA being found on her clothes and on the swabs in her SAFE kit. Appellant argues this evidence "clearly was exculpatory" and "would have negated or reduced [Appellant's] degree of guilt with respect to [KM]'s allegations."

As a threshold matter, we note that R.C.M. 701(a)(6) addresses favorable evidence that would negate or reduce the degree of guilt to a charged offense or reduce the punishment. So, to the extent Appellant referenced a concern about a "degree of guilt" with KM's allegations, his concern is misplaced as he was not ever charged with committing an offense against KM so no degree of guilt regarding KM is involved in the inquiry. Still, we conclude that impeachment evidence related to KM, as a Mil. R. Evid. 413 propensity witness, would be material to Appellant's guilt or the punishment of the charged offenses under *Brady*, *Strickler*, and *Claxton*. See [373 U.S. at 87](#); [527 U.S. at 280](#); [76 M.J. at 359](#).

But Appellant has provided us little more than speculation regarding the impeachment evidence regarding KM that was withheld from him but was [*112] known to the trial counsel or other Air Force lawyers who advised on Appellant's investigation and prosecution. As the United States Court of Military Appeals once observed, "[g]enerally, the production of [Brady] evidence is required and reversal mandated where, after trial, such information is discovered which was known to the prosecution but which was unknown to the defense." [*United States v. Lucas*, 5 M.J. 167, 171 \(C.M.A. 1978\)](#). Appellant references KM's statements to AFOSI regarding DNA being found and those statements being wrong. But the Defense was permitted to ask cross-examination questions of KM regarding why she said her DNA was found and to offer a theory of admissibility once she testified. Once KM testified that she was not 100% sure what was found and that she only heard about results through her parents and not through investigators or hospital staff, the civilian defense counsel agreed to move on rather than propose a theory of admissibility. Even if this cross-examination had been admitted, we see it adding little to KM's impeachment. KM was extensively challenged on her lack of memory, inconsistencies, the physical positions of her and Appellant, and that she never went to court in Texas to testify against Appellant. [*113] Additionally, the Defense's closing argument addressed the absence of the SAFE report, that the McKinney police did not interview Appellant, and he was not prosecuted. The Defense argued these showed "something in those items of evidence that kills her story" or "proves that it was consensual." Appellant makes similar broad pronouncements before us.

Regarding the SAFE report, we acknowledge that we often see prior inconsistent statements in the narrative provided by a victim which

differs from statements made to law enforcement, to lawyers in pretrial interviews, and in trial testimony. But Appellant did not call KM to testify on the motion and did not show what she said during her SAFE which could then be compared to what she told the McKinney police, the AFOSI, or the defense team during their pretrial interview of her. The Defense did not present evidence that KM remembered the SANE taking notes or typing verbatim what KM said. The Defense did not present any form that the hospital used to show that a narrative would have been obtained. Finally, the Defense did not present evidence of inconsistent statements to KM's best friend, whom she first reported to and whose name was in the [*114] AFOSI's summary, to show that it was more likely that inconsistent statements were made to the SANE.

Our standard of review is not whether other military judges would have ordered the Government to obtain the SAFE report or even whether it is possible that the SAFE report may contain prior inconsistent statements. Instead, it is whether the military judge abused his discretion when he concluded the Defense had failed to show how any of the requested evidence was exculpatory. We find no abuse of discretion under the circumstances of this case. We see no "recklessly cavalier approach to discovery" from the trial counsel that resulted in a "critical failure[] to produce exculpatory evidence." [*Stellato*, 74 M.J. at 482](#) (footnote omitted). We see no systematic ignoring of R.C.M. 701 discovery obligations. During the six-hour delay in the case while the Defense wrote its motion to compel, the senior trial counsel attempted to reach out to the District Attorney's Office as another avenue to seek information. With only limited time allotted the senior trial counsel did not hear back before argument on the motion and did not state later in the trial whether the District

Attorney's Office ever called back. Appellant does not [*115] claim the senior trial counsel learned of evidence from the District Attorney's Office that tended to be exculpatory. Unlike many cases, where the prosecution works closely with a local police department, this case shows an utter lack of a relationship between the trial counsel and the entity which, at least at one time, held additional evidence regarding KM's allegations against Appellant. See [Williams, 50 M.J. at 441](#).

Finally, we note that there has not been a claim that KM had any of the evidence, like a copy of the SAFE report or a copy of the CD of photographs. Therefore, we see no willful ignorance by the trial counsel of evidence that reasonably tends to be exculpatory in the hands of KM. See [Stellato, 74 M.J. at 487](#) (citations omitted). Like the military judge, we see the circumstances of this case to be vastly different than [Stellato](#) and we conclude there was no abuse of discretion by the military judge in denying the defense motion. As we determined the evidence and witnesses at issue were not subject to disclosure, discovery, or production, we do not reach the second question and test the effect of nondisclosure or a failure to produce a witness on Appellant's trial. See [Coleman, 72 M.J. at 187](#).

E. Mil. R. Evid. 412

1. Additional Background

After Appellant was [*116] permitted to withdraw his plea to battery of Amn MM, the defense counsel orally moved for a continuance citing a need to obtain evidence of Amn MM's sexual practices with other men that the Defense argued would be admissible under Mil. R. Evid. 412. The Defense cited its earlier Mil. R. Evid. 412 motion and provided

an additional email from one male Airman who would testify that his sexual experiences with Amn MM included biting, choking, and scratching.³⁷ Appellant testified in a closed session that he learned this information from the other male Airman about a week and a half before the charged incident where he slapped Amn MM in the face. Appellant also testified that he thought Amn MM might enjoy being slapped in the face "because of the previous stuff I've heard before" and because of his previous sexual history with Amn MM.

The military judge ruled the testimony of other Airmen was not constitutionally required under Mil. R. Evid. 412(b)(3) and excluded it. As described in the legal and factual sufficiency section, the military judge had already admitted evidence of the nature of prior sexual encounters between Appellant and Amn MM. See Mil. R. Evid. 412(b)(2). The military judge permitted Appellant to testify that Amn MM asked him to smack her in the face [*117] and for the Defense to cross-examine Amn MM on this point. The military judge denied the continuance request.

After the ruling, Appellant testified that Amn MM asked him to slap her before and he did so in a prior sexual encounter. He also testified that he thought slapping was "something she was into." Upon recall, Amn MM testified, as we described above, that she told Appellant before that her face was off-limits.

On appeal, Appellant asserts an abuse of discretion because the military judge erroneously determined that the evidence was "marginally relevant" and that there were

³⁷ The trial transcript, appellate exhibits, and briefs addressing this excluded evidence were sealed pursuant to R.C.M. 1103A. These portions of the record and briefs remain sealed, and any discussion of sealed material in this opinion is limited to that which is necessary for our analysis. See R.C.M. 1103A(b)(4).

disparities between the sexual acts of the other male Airman and Appellant with Amn MM. Appellant advances a theory that Amn MM's "unusual and distinctive" sexual pattern supported Appellant's testimony that Amn MM asked him to slap her in the face before and his belief that she "would enjoy a strike to the face." The Government responds that there was no error, and if there was error, it was harmless beyond a reasonable doubt. We disagree with Appellant and find no abuse of discretion.

2. Law

"We review a military judge's decision to admit or exclude evidence for an abuse of discretion." [Erikson, 76 M.J. at 234](#) (citation omitted). The [*118] application of Mil. R. Evid. 412 to proffered evidence is a legal issue that appellate courts review de novo. [United States v. Roberts, 69 M.J. 23, 27 \(C.A.A.F. 2010\)](#) (citation omitted).

Mil. R. Evid. 412 provides that, in any proceeding involving an alleged sexual offense, evidence offered to prove the alleged victim engaged in other sexual behavior or has a sexual predisposition is generally inadmissible, with three limited exceptions, the third of which is pertinent to this case. The burden is on the defense to overcome the general rule of exclusion by demonstrating an exception applies. [United States v. Carter, 47 M.J. 395, 396 \(C.A.A.F. 1998\)](#) (citation omitted).

The third exception under Mil. R. Evid. 412 provides that the evidence is admissible if its exclusion "would violate the constitutional rights of the accused." Mil. R. Evid. 412(b)(1)(C). Generally, evidence of other sexual behavior by an alleged victim "must be admitted within the ambit of [Mil. R. Evid.] 412(b)(1)(C) when [it] is relevant, material, and

the probative value of the evidence outweighs the dangers of unfair prejudice." [United States v. Ellerbrock, 70 M.J. 314, 318 \(C.A.A.F. 2011\)](#) (citation omitted).

3. Analysis

In his ruling, the military judge cited appropriate caselaw and made findings of fact. Only his ultimate conclusions are challenged on appeal. The military judge concluded the testimony of the other Airman was "marginally relevant." The military judge determined that "[t]he [*119] acts described are different, both in timing and in form from what is alleged that [Appellant] did in this case [to Amn MM]" and "[b]iting, choking, and scratching during sex are different than a smack to the face as a method of arousal." None of these conclusions are an abuse of discretion.

Relevance is a "low threshold." [Roberts, 69 M.J. at 27](#). Evidence is relevant if it has any tendency to make the existence of a fact more probable or less probable than it would be without the evidence. Mil. R. Evid. 401(a). Trial defense counsel argued Amn MM had a "crenulation towards rough sex" that would make Appellant's mistake of fact defense stronger given that Amn MM mumbled something before Appellant struck her. The evidence met the low relevance threshold as it did have a tendency to show that Appellant may have had an honest mistake of fact and the other Airman's comments may have been a source that contributed to it.

Materiality is a "multi-factored" test looking at the importance of the issue for which the evidence was offered in relation to the other issues in the case; the extent to which the issue is in dispute; and the nature of the evidence. [Ellerbrock, 70 M.J. at 318](#). The other Airman's testimony lacked materiality based on the nature of the testimony. [*120] The other

Airman was not going to testify that Amn MM's prior sexual practices included being slapped in the face, only that different sexual practices such as biting, choking, and scratching had occurred. Further, there was no indication that the other Airman would support Appellant's claims that he had slapped Amn MM before during sex and that Amn MM said "strike me" during the charged incident. Additionally, the proposed testimony did not contribute in any positive way to whether the belief that Appellant may have held was reasonable under the circumstances. It may have done the opposite as a reasonable person would not rely upon a report from another person to determine consent.

Further, as the military judge noted, there was already testimony before the court of the past sexual practices of Amn MM and Appellant which were more material. The military judge broadly described this evidence as "Amn MM enjoys or participates in aggressive sex" before stating that this conclusion was the only thing that the other Airman's testimony could offer.

Even if the evidence is relevant and material, it must be admitted only when Appellant can show that the probative value outweighs the dangers [*121] of unfair prejudice. See Mil. R. Evid. 412(c)(3). Those dangers include *inter alia* harassment or interrogation that is repetitive or only marginally relevant. [Ellerbrock, 70 M.J. at 318](#) (citation omitted). The military judge's ruling concluded that the evidence added little to what was before the court, an indication of how repetitive it was. We agree that the Airman's testimony would have been cumulative and added very little to the Defense's case. For the most part, Amn MM did not dispute the prior sexual practices she had engaged in with Appellant. The only serious dispute was whether slapping in the face was part of those prior practices or was

expressly forbidden. The other Airman's testimony did not assist on this disputed matter. We conclude this other Airman's testimony, while relevant, lacked materiality and Appellant did not show that its probative value outweighed the dangers of unfair prejudice because the evidence was harassing to Amn MM, repetitive of evidence before the court, and only marginally relevant. The evidence was not constitutionally required. Therefore, the military judge did not abuse his discretion by excluding evidence of Amn MM's sexual practices beyond those between Amn MM and Appellant.

Assuming *arguendo* [*122] that there was error in excluding the evidence, we find it harmless beyond a reasonable doubt because the verdict would not have changed if the evidence was admitted. The evidence was only marginally relevant as it did not involve slapping of the face and provided only scant support to a theory of consent to the charged battery or the abusive sexual contact. Additionally, it did not positively contribute to whether a mistake of fact—if honestly held by Appellant—would be reasonable under the circumstances. The Government's case was very strong. The Defense elected to put on a findings case regarding Amn MM which did little to weaken the Government's case as it relied largely on Appellant's contradictory versions of what happened. If admitted, the military judge would not have received a different impression of the evidence or Amn MM. Therefore, if there was error, it was harmless beyond a reasonable doubt.

F. Ineffective Assistance of Counsel

1. Additional Background

Appellate defense counsel raises three grounds for ineffective assistance of trial

defense counsel in that Appellant's counsel: (1) failed to provide evidence to support Appellant's mistake of fact as to consent defense to [*123] AB EA's allegations; (2) failed to rebut testimony of a government witness, A1C BD, to whom Appellant purportedly confessed to raping AB EA; and (3) failed to adequately prepare a sentencing witness, AJ—Appellant's mother—for her testimony.

Our court ordered Appellant's civilian defense counsel, Mr. JE, and his military defense counsel, Major (Maj) BH, to provide responsive declarations.³⁸ We have considered whether a post-trial evidentiary hearing is required to resolve any factual disputes between Appellant's and AJ's assertions and the trial defense counsel team's assertions. See [United States v. Ginn](#), 47 M.J. 236, 248 (C.A.A.F. 1997); [DuBay](#), 37 C.M.R. at 413. We find a hearing unnecessary to resolve Appellant's claims.

2. Law

The [Sixth Amendment](#) guarantees an accused the right to effective assistance of counsel. [United States v. Gilley](#), 56 M.J. 113, 124 (C.A.A.F. 2001). In assessing the effectiveness of counsel, we apply the standard set forth in [Strickland v. Washington](#), 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and begin with the presumption of competence announced in [United States v. Cronin](#), 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). See [Gilley](#), 56 M.J. at 124 (citing [United States v. Grigoruk](#), 52 M.J. 312, 315 (C.A.A.F. 2000)). We review allegations of ineffective assistance de novo. [United States v. Gooch](#), 69 M.J. 353, 362

([C.A.A.F. 2011](#)) (citing [Mazza](#), 67 M.J. at 474).

We utilize the following three-part test to determine whether the presumption of competence has been overcome:

1. Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
2. If the allegations are true, did [*124] defense counsel's level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers"?
3. If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

Id. (alterations in original) (quoting [United States v. Polk](#), 32 M.J. 150, 153 (C.M.A. 1991)). The burden is on the appellant to demonstrate both deficient performance and prejudice. [United States v. Datavs](#), 71 M.J. 420, 424 (C.A.A.F. 2012) (citation omitted).

"Defense counsel do not perform deficiently when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so." *Id.* (citing [Gooch](#), 69 M.J. at 362-63) (additional citation omitted). In reviewing the decisions and actions of trial defense counsel, this court does not second-guess strategic or tactical decisions. See [United States v. Morgan](#), 37 M.J. 407, 410 (C.M.A. 1993) (citations omitted). It is only in those limited circumstances where a purported "strategic" or "deliberate" decision is unreasonable or based on inadequate investigation that it can provide the foundation for a finding of ineffective assistance. See [United States v. Davis](#), 60 M.J. 469, 474 (C.A.A.F. 2005).

³⁸ An additional declaration was provided to the court from the defense paralegal but we do not find it necessary to consider its contents.

3. Analysis

We find each of the claims of ineffective assistance of counsel to be without merit.

a. Mistake of Fact as to Consent — AB EA

Appellant's first claim centers on a failure [*125] to elicit evidence that AB EA had a "crush" on Appellant or use such evidence to challenge AB EA. Appellant argues this was "clear error" and would have lent support to his mistake of fact as to consent defense. Appellant argues that his wife, A1C PC, was ready to testify about AB EA's "crush" on him and A1C PC provided a declaration to this effect. On appeal, Appellant also argues another friend, Amn CH, could have testified similarly to A1C PC. Finally, before us, Appellant declares that he "knew [AB EA] had a crush on [him]."

Maj BH conducted the direct examination of A1C PC and elicited that Appellant and AB EA acted as if they were close friends. On cross-examination A1C PC confirmed Appellant and AB EA were close friends. The ultimate question of whether AB EA had a "crush" on Appellant was not asked of A1C PC.

In her declaration, Maj BH explained that the defense team made a strategic decision not to ask A1C PC the ultimate question about a "crush." The Defense believed most of the flirting between AB EA and Appellant took place after A1C PC left technical training and moved to her first permanent duty assignment. This led the Defense to question whether A1C PC had sufficient [*126] personal knowledge to give an opinion about a "crush." Further, the Defense had concerns that on cross-examination A1C PC would be forced to admit that Appellant may have also had a "crush" on AB EA or at least his actions would suggest so. We conclude the defense team provided a reasonable explanation for why A1C PC was not asked the ultimate question about AB EA

having a "crush" on Appellant.

Amn CH was requested as a defense witness and traveled to the court-martial but did not testify. Amn CH provided a declaration to us that he does not know why he was never called to testify. His declaration says nothing about him telling the defense team that AB EA had a "crush" on Appellant. Maj BH's declaration shows that Amn CH was interviewed multiple times and did not relay a belief that AB EA had a "crush" on Appellant. As the defense team had no factual basis for calling Amn CH to provide an opinion about AB EA's "crush" on Appellant we find a reasonable explanation for their decision to not call him to testify on this matter.

b. Failure to Rebut Testimony of A1C BD

A1C BD knew Appellant, AB EA, and Amn CH and was in their friend group. He did not personally know Amn MM. When A1C BD testified [*127] for the Government much of his testimony involved his terribly poor recollection of three-way phone calls between Appellant, A1C BD, and Amn CH which occurred after A1C BD heard from AB EA that Appellant had "raped" her.

In his trial testimony, A1C BD was not confident and not at all sure what Appellant said on the three-way call. He testified he could not fully and accurately testify to what Appellant said. A1C BD agreed he made an earlier written statement to AFOSI when the phone call was fresher in his mind and at the time he believed his statement to AFOSI was truthful. Without objection, A1C BD read from that statement: Appellant "later on called me and [Amn CH] into a conference call and told me he raped [AB EA] straight up," and "in the conference call [Appellant] mentioned that the situation started with consent and then later on during intercourse she told him to stop, but [AB

EA] stated before the conference call that he straight up raped her with no consent at all."

On cross-examination, A1C BD explained that after he made his first written statement to AFOSI, there was another three-way phone call between him, Appellant, and Amn CH. Appellant had seen A1C BD's written statement [*128] and said, "[Y]ou lied on me. I didn't say that I raped her. We're no longer friends." After this later three-way conversation, A1C BD told one of the trial counsel that Appellant had not said that he raped AB EA, but said that he "[f]ed up." Later in cross-examination, A1C BD admitted he had "no idea" whether Appellant ever said he raped AB EA but he was certain that AB EA told him that Appellant raped her. Finally, A1C BD admitted it was possible that Appellant told him in the first three-way conversation "I f***ed up" and that A1C BD interpreted it as him admitting he raped AB EA.

Amn CH provided a declaration that he recalled a three-way phone call with A1C BD and Appellant where Appellant said "I f***ed up." Amn CH recalled asking how and Appellant answering that "he cheated on his wife," A1C PC. Amn CH denied Appellant said anything about raping AB EA.

Maj BH's declaration explains that the Defense initially expected Amn CH to testify consistent with his post-trial declaration. This is why he was on the defense witness list and was traveled for the trial at government expense. However, when the Defense interviewed him before trial, Amn CH was no longer adamant that Appellant did [*129] not confess and could not really remember what was said since it happened so long ago. According to Maj BH, Amn CH also disclosed new information to the defense team that we need not detail here that led the defense team to make the strategic decision not to call him to the stand as the risk far outweighed the benefit.

We conclude that trial defense counsel's explanation for not calling Amn CH was reasonable under the circumstances and based on proper investigation of the facts, as they could be best determined. Therefore, we do not second-guess this strategic decision. Before us, appellate defense counsel would balance the risk of having Amn CH testify differently and find it objectively unreasonable as Amn CH's testimony would have been "crucial to the Defense" and that A1C BD's testimony was "extremely harmful." Of course, the first presumption in this argument is that Amn CH would have testified consistently with his declaration to us rather than what he told Maj BH prior to trial. Even if Amn CH would have testified in that manner, we see A1C BD's testimony quite differently than appellate defense counsel. We did not rely on A1C BD's testimony in determining legal and factual sufficiency [*130] of the convictions involving AB EA because it was inconsistent and unreliable. Having successfully blunted A1C BD's testimony with effective cross-examination, the defense team's decision to decline to call Amn CH as a witness when he could have reversed what was gained during cross-examination of A1C BD was objectively reasonable.

c. Failure to Prepare AJ to Testify in Sentencing

Appellant's mother, AJ, provided a declaration to this court in which she states,

[I] never sat down with [Appellant's] attorneys to prepare for my testimony or to discuss what questions they would ask. We also never discussed what I should not say. Instead they told me that they just ask about how [Appellant] was raised. That was all the information and preparation they gave me.

Mr. JE recalled speaking with AJ on more than

one occasion prior to trial and discussing her testimony during the trial. Mr. JE noted that Maj BH dealt the most with AJ as they had developed a rapport from their frequent conversations. Mr. JE recalled discussions with Maj BH on how limited AJ's testimony would have to be to avoid opening the door to rebuttal evidence in the form of newly discovered evidence known to the Defense that [*131] had the ability to hurt Appellant's case. Mr. JE recalled AJ being prepped further during the military judge's deliberations. Mr. JE declared this lasted for "over an hour" where Maj BH and the defense paralegal "went over [AJ's] testimony in great detail." After Appellant was convicted the defense team spoke with AJ before the sentencing portion of the trial to make sure she remembered what had been discussed with her and to answer any last-minute questions. Mr. JE recalled AJ expressing disbelief with the convictions and he was concerned whether she would be able to keep her composure. Mr. JE noted AJ was the only person who could testify about Appellant's upbringing and tragic personal history and that Maj BH "went over appropriate testimony with [AJ] and was reassured this was something she could handle." Maj BH declared that AJ "assured me she could handle herself on the stand if need be." Mr. JE recalled Appellant advocating for AJ to speak on his behalf. Mr. JE explained that despite the preparation, AJ opened the door to damaging evidence and apologized afterwards.

Maj BH's declaration is consistent with Mr. JE's. Maj BH explained she did not tell AJ the exact questions she [*132] would ask as Maj BH wanted the answers to be authentic but they did discuss the general topics, including the story of AJ gaining custody of Appellant and his upbringing, and her testimony would be limited as there was new evidence that could possibly hurt her son's sentencing case. Maj BH recalled speaking to AJ four times,

twice before trial, once during findings deliberations, and then after the verdict. Maj BH was hesitant to call AJ to the stand when they met during deliberations as AJ had an outburst from the gallery while court was in session. However, AJ "assured" Maj BH that she "could handle herself on the stand if need be, but [AJ] was certain her son would be found not guilty." After the conviction, Maj BH recalled AJ expressing disbelief with the verdict and being visibly upset. Maj BH spent an hour calming AJ down and talking about the plan for her testimony the next day. Maj BH went over appropriate testimony so AJ would not impeach the verdict or open the door to damaging rebuttal evidence. Maj BH declared AJ was "fully prepped" and knew "what subjects were going to be covered and knew what things she could not say" but when "on the stand, [AJ's] emotions got the better [*133] of her and she unfortunately opened the door to evidence that was damaging" to Appellant. Maj BH also recalled AJ apologizing after her testimony because AJ "knew better" but was "overcome with anger" while she was on the stand.

The beginning of AJ's testimony was effective and powerful. According to AJ, Appellant was born addicted to crack cocaine as his biological mother was a drug user and drug dealer. His biological father was also a drug dealer. When Appellant was less than a month old, his biological mother brought him into a crack house, which re-exposed him to the drug and only after AJ's intervention was he taken to the hospital for drug treatment. AJ described the withdrawal symptoms that Appellant experienced, the medications he had to take, her efforts to comfort him, and long-term effects that Appellant, his siblings, and step-siblings suffered from the actions of his biological parents. AJ explained a harrowing process of caring for Appellant and coping with threats that Appellant's biological father made

to kill her and Appellant. Eventually, she escaped to Texas from Buffalo, New York and raised Appellant with her husband.

After AJ described some of the impact of Appellant's [*134] investigation, Maj BH asked "have you seen a change in your son since this has come about, in his demeanor or the way he acts?" AJ answered "I have. He—He's a different person. Since meeting and marrying [A1C PC], he is really a different person. So—but, I mean, he's more loving." After some additional comments about Appellant being loving to his family, AJ continued, "He's always cared about everybody, and I never could imagine him hurting anyone ever. He's never done anything—nothing like this. This is out of his character. He's never been in trouble. This is—this is just ludicrous to me. I don't understand." After a trial counsel objection that AJ was impeaching the verdict which the military judge said, "I don't think she was, but to the extent she was, I'm not considering it for that purpose." AJ, without a further question from Maj BH, added "He's never done anything ever." Maj BH continued her questioning eliciting favorable information regarding Appellant's age, his family, and that he was going to be a totally different person after this.

In rebuttal to AJ's testimony and other character statements admitted as defense exhibits, the Government admitted, over defense objection, [*135] excerpts from another AFOSI investigation of Appellant for abusive sexual contact of a third female technical training student, A1C SP. AFOSI completed this investigation of Appellant a little more than a month before trial on 16 August 2018. The excerpt contained a summary of A1C SP's victim interview about an incident with Appellant in her dormitory room in the building where she and Appellant lived. The AFOSI interview of A1C SP was conducted on

30 May 2018 and the incident occurred in late September or early October 2017. Before the Government's rebuttal evidence was offered, the Defense had requested the rules of evidence be relaxed prior to admission of the defense sentencing exhibits and the military judge granted that request as to hearsay, authentication, and foundation.

The AFOSI excerpt described an incident where Appellant kissed A1C SP and placed his hands on her breasts and buttocks over her clothing, without her consent, and grabbed her by the wrist and placed her hand on his erect penis. The excerpt indicated that A1C SP's dorm room door was open when this occurred. Based on the dates in the excerpt, the incident involving A1C SP was after the charged offenses against [*136] Amn MM, but before the charged offenses against AB EA. The incident also appeared to be about a month or less before Appellant's marriage to A1C PC.

While AJ's declaration is facially adequate to raise a lack of preparation by the trial defense counsel, the record as a whole compellingly demonstrates the improbability of those facts, so we have discounted those factual assertions and will decide the legal issue before us. See [Ginn, 47 M.J. at 248](#). First, the record of trial shows that at two points in the trial the military judge instructed the spectators to refrain from having outbursts or otherwise showing an inability to control their emotions. These instructions occurred immediately before findings were announced and the next day shortly before AJ testified. The transcript makes clear that AJ approached the witness stand from the gallery which demonstrates that she observed at least parts of the trial. We find these portions of the record lend support to the defense team's recollections of AJ having difficulty with retaining her composure in light of the verdict.

The content of AJ's testimony definitively demonstrates that she lost her composure. The question asked by Maj BH related to how Appellant [*137] had changed. AJ's answer was mostly nonresponsive and addressed how Appellant had always cared about everybody, had never done anything like this, that this was out of character, ludicrous, and something she could not understand. The words used by AJ lend credibility to the defense counsels' assertions that they had concerns about calling her as a witness given her emotional state, a matter which is not addressed in her declaration.

But the fact that the defense team had legitimate concerns about whether AJ could control her emotions on the stand that proved to be warranted does not mean that the trial defense team provided ineffective assistance of counsel. Trial defense counsel made a deliberate decision to take a calculated risk in calling AJ to testify. That decision did not work out as planned but undoubtedly AJ still provided meaningful and helpful testimony in other areas. We cannot say the decision by the Defense to call AJ was unreasonable or based on inadequate investigation. We also cannot see how more preparation of AJ would have rectified her emotional state post-verdict. The question was not particularly challenging to answer and AJ's answer was mostly nonresponsive. In [*138] his reply brief, Appellant suggests a written statement or affidavit would have been a better choice. Such a suggestion is made with the benefit of hindsight and is the type of second-guessing that we do not engage in when there is proper investigation and a reasonable strategic decision to accept a risk.

Even if AJ's declaration is accurate and the trial defense counsel failed to properly prepare her sufficiently, we find that their performance did not fall measurably below that ordinarily

expected of fallible lawyers. The defense team expected that AJ would be up to the task of providing responsive answers to the questions asked, AJ assured them that she could handle testifying, and Appellant wanted AJ to testify. AJ's declaration does not contradict any of these points. The defense counsel took a risk and it is one that we believe other defense lawyers would have taken knowing the powerful evidence about Appellant's upbringing that AJ could and did provide. We evaluate trial defense counsel's performance not by the success of their strategy, "but rather whether counsel made . . . objectively reasonable choice[s] in strategy from the alternatives available at the [trial]." See United States v. Dewrell, 55 M.J. 131, 136 (C.A.A.F. 2001) (quoting [*139] United States v. Hughes, 48 M.J. 700, 718 (A.F. Ct. Crim. App. 1998), *aff'd*, 52 M.J. 278 (C.A.A.F. 2000)). Appellant has failed to overcome the strong presumption that counsel's performance was within the wide range of reasonable professional assistance.

Finally, we address whether there was a reasonable probability that, absent the error, there would have been a different result. Appellant does not claim his counsel were ineffective by offering character statements on his behalf. Yet it is clear from the military judge's ruling that the rebuttal evidence was admitted because of AJ's testimony and portions³⁹ of the character statements. Appellant has not shown that the rebuttal evidence would have been rejected even if AJ's testimony had not gone astray. Further, when the military judge ruled on the admissibility of the excerpt regarding A1C SP, in conducting a *sua sponte* Mil. R. Evid. 403 balancing test, he noted he would only use this evidence "for the narrow purpose" to "explain

³⁹ For example, one character letter stated that Appellant "is big on respect for all human beings, but especially women."

or repel, counteract, [or] assist me in placing context" the character letters and the testimony of AJ and that he had "no concerns" that he would confuse this with the charges of which he convicted Appellant or that it was unfairly prejudicial. Appellant was convicted of serious charges involving two victims. We cannot [*140] say that there is a reasonable probability of a lower sentence if the testimony of AJ was not presented or if the Defense had only offered a written statement from AJ. Therefore, we find Appellant has failed to demonstrate either deficient performance by his counsel or prejudice. See Datavs, 71 M.J. at 424 (citation omitted).

G. Post-Trial Delay

Appellant's case was docketed with this court on 7 February 2019. Appellant filed his assignments of error brief almost a year later on 3 February 2020 after his counsel requested and was granted nine enlargements of time to file his brief. Of the nine requests by counsel, Appellant explicitly consented to the last four. The Government opposed each of Appellant's requests.

We granted one extension of time to the Government which permitted it to file an answer brief 30 days after the receipt of the declarations we ordered from Appellant's trial defense team. Appellant did not oppose this extension of time. On 20 April 2020, the Government timely filed its answer brief. Appellant timely filed his reply brief on 27 April 2020.

"We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006) (citations omitted). [*141] In *Moreno*, the CAAF established a presumption of facially unreasonable delay when a Court of Criminal

Appeals does not render a decision within 18 months of docketing. 63 M.J. at 142. Where there is such a delay, we examine the four factors set forth in Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of his right to a timely review; and (4) prejudice to the appellant. Moreno, 63 M.J. at 135 (citations omitted). "No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." Id. at 136 (citing Barker, 407 U.S. at 533).

However, where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006). In *Moreno*, the CAAF identified three types of cognizable prejudice for purposes of an Appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of the appellant's ability to present a defense at a rehearing. 63 M.J. at 138-39 (citations omitted). In this case, we find no oppressive incarceration nor impairment of the Defense [*142] at a rehearing because Appellant has not prevailed in his appeal. See id. at 140. As for anxiety and concern, the CAAF has explained "the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Id.* Appellant has articulated no such particularized anxiety in this case, and we discern none. To the contrary, Appellant explicitly consented to the last four enlargements of time, which we find is some indication that Appellant understood that

his appellate counsel required additional time to thoroughly address each assignment of error.

Where, as here, there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." [Toohey, 63 M.J. at 362](#). We do not find such egregious delays here. The record of trial includes eight volumes plus an additional appellate volume as the filings are voluminous. The proceedings took place over seven days, and the transcript is over 1,000 pages. Appellant raised a dozen [*143] issues for our consideration. Additionally, much of the appellate delay in this case is attributable to the Defense. This court is issuing its opinion within three months and one week of the *Moreno* date. Appellant has neither demanded speedy appellate review nor asserted that he is entitled to relief for appellate delay. Accordingly, we do not find the delay so egregious as to adversely affect the perceived fairness and integrity of the military justice system. *Id.*

Recognizing our authority under *Article 66(c)*, *UCMJ*, *10 U.S.C. § 866(c)*, we have also considered whether relief for excessive post-trial delay is appropriate even in the absence of a due process violation. See [United States v. Tardif, 57 M.J. 219, 225 \(C.A.A.F. 2002\)](#). After considering the factors enumerated in [United States v. Gay, 74 M.J. 736, 744 \(A.F. Ct. Crim. App. 2015\)](#), *aff'd*, [75 M.J. 264 \(C.A.A.F. 2016\)](#), we conclude it is not.

III. CONCLUSION

We affirm only so much of the sentence as provides for: a dishonorable discharge, confinement for 10 years, forfeiture of all pay and allowances, and reduction to the grade of

E-1. The approved findings and sentence, as modified, are correct in law and fact, and no further error materially prejudicial to the substantial rights of Appellant occurred. [Articles 59\(a\)](#) and [66\(c\)](#), *UCMJ*, [10 U.S.C. §§ 859\(a\)](#), [866\(c\)](#). Accordingly, the approved findings and sentence, as modified, [*144] are **AFFIRMED**.^{40, 41}

End of Document

⁴⁰ The CMO contains an error that requires correction. Specification 4 of the Charge, the abusive sexual contact offense involving Amn MM, lists one phrase of excepted words as "using lawful force" when the excepted words were "using unlawful force." We order a corrected CMO.

⁴¹ Two pages are missing from Appellant's post-trial and appellate rights advisement, a required appellate exhibit under R.C.M. 1010. Appellant does not raise a claim that the record of trial is incomplete or that he was prejudiced because pages are missing. We find the omission of these pages insubstantial and their absence does not render the record of trial incomplete. [Article 54\(c\)](#), *UCMJ*, [10 U.S.C. § 854\(c\)](#); see [United States v. Davenport, 73 M.J. 373, 376-77 \(C.A.A.F. 2014\)](#); [United States v. Lovely, 73 M.J. 658, 676 \(A.F. Ct. Crim. App. 2014\)](#).

United States v. Cruz

United States Army Court of Criminal Appeals

February 23, 2022, Decided

ARMY 20200389

Reporter

2022 CCA LEXIS 130 *; 2022 WL 563737

UNITED STATES, Appellee, v. Private E1
ABBIE S. CRUZ, United States Army,
Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed
by [United States v. Cruz, 2022 CAAF LEXIS
415 \(C.A.A.F., June 8, 2022\)](#)

Motion granted by [United States v. Cruz, 2022
CAAF LEXIS 424 \(C.A.A.F., June 10, 2022\)](#)

Review denied by [United States v. Cruz, 2022
CAAF LEXIS 564 \(C.A.A.F., Aug. 4, 2022\)](#)

Prior History: [*1] Headquarters, U.S. Army
Fires Center of Excellence and Fort Sill. Lanny
J. Acosta, Jr. and Douglas K. Watkins, Military
Judges, Colonel Tonya L. Blackwell, Staff
Judge Advocate.

Case Summary

Overview

HOLDINGS: [1]-In a case where appellant was convicted of one specification of sexual assault in violation of Unif. Code Mil. Justice art. 120, [10 U.S.C. § 920](#), the conviction was not due to be set aside because the evidence satisfied beyond a reasonable doubt that the victim's action and reactions did not constitute consent.

Outcome

The finding of guilty and sentence affirmed.

Counsel: For Appellant: Captain Nandor F.R. Kiss, JA (argued); Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Captain Alexander N. Hess, JA; Captain Nandor F.R. Kiss, JA (on brief); Colonel Michael C. Friess, JA; Jonathan F. Potter, Esquire; Captain Nandor F.R. Kiss, JA (on reply brief).

For Appellee: Lieutenant Colonel Anthony O. Pottinger, JA (argued); Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Pamela L. Jones, JA; Lieutenant Colonel Anthony O. Pottinger, JA (on brief).

Judges: Before BROOKHART, WALKER, and PENLAND, Appellate Military Judges. Senior Judge BROOKHART concurs. WALKER, Senior Judge, dissenting.

Opinion by: PENLAND

Opinion

MEMORANDUM OPINION

PENLAND, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault in violation of [Article 120](#), Uniform Code of Military Justice, [10 U.S.C. § 920](#) [UCMJ]. The military judge sentenced appellant to a

dishonorable discharge and confinement for twenty-two months. The convening authority [*2] took no action on the case, and on 3 August 2020 the military judge entered judgment.

Appellant asserts the finding of guilty for sexual assault was legally and factually insufficient, requiring that we set aside both the finding and the sentence. The issue of factual sufficiency merits discussion in this case, but no relief. The issue of legal sufficiency merits neither discussion no relief.¹

FACTS

The following initial facts are undisputed. Appellant and Private (PVT) [TEXT REDACTED BY THE COURT], a fellow recruit, met for the first time on 13 January 2020, during their initial entry into the Army at a Military Entrance Processing Station in San Diego, California. The next day, they and several other new Soldiers flew on three consecutive flights to Fort Sill, Oklahoma, to attend basic training. Appellant and PVT [TEXT REDACTED BY THE COURT] sat next to each other on the first and second of the three flights. On the second, they sat in a row of three seats. Private [TEXT REDACTED BY THE COURT] sat next to the window, and appellant sat in the middle, leaving the aisle seat empty. During the flight appellant digitally penetrated PVT [TEXT REDACTED BY THE COURT] vulva. The circumstances [*3] surrounding this sexual act are the subject of the factual sufficiency dispute.

A. Private [TEXT REDACTED BY THE

¹ We have also given full and fair consideration to the matters personally raised by appellant pursuant to [United States v. Grostefon](#) 12 M.J. 431 (C.M.A. 1982), and find them to be without merit.

COURT] Testimony

Private [TEXT REDACTED BY THE COURT] testified that she did not consent and gave appellant no reason to believe otherwise; instead, she treated appellant in the same friendly manner she displayed toward the other fellow recruits. According to PVT [TEXT REDACTED BY THE COURT], she tried to sleep on the flight by resting her head and upper body on the seatback table in front of her; however she felt appellant touching her and moving his hand underneath her leggings made of stretchable material. Private [TEXT REDACTED BY THE COURT] responded by squirming, and she and appellant sat up when a flight attendant passed by to collect trash. Private [TEXT REDACTED BY THE COURT] testified that appellant unfastened her seatbelt in order to penetrate her, despite her leaning against the closed buckle in an attempt to prevent him from doing so. She made no noises to create the impression that she was enjoying appellant's behavior, and she did not verbally resist appellant or push his hand away. Private [TEXT REDACTED BY THE COURT] testified she want[ed] to just get [*4] it over with and move on with [her] life." Private [TEXT REDACTED BY THE COURT] described to the military judge that she "felt more helpless because [they] were in a public place," and she did not "like dealing with very much attention." On the final flight, PVT [TEXT REDACTED BY THE COURT] asked another fellow recruit to sit next to her, rather than appellant. She acted toward appellant as if nothing had happened. However at some point during the trip, PVT [TEXT REDACTED BY THE COURT] went to a restroom and cried.

Private [TEXT REDACTED BY THE COURT] continued to see appellant after their arrival at Fort Sill, and he reported the sexual assault to Criminal Investigation Command (CID). She testified that, at first, she simply wanted

appellant to be moved to another training platoon. Private [TEXT REDACTED BY THE COURT] initially told CID that she had stopped appellant from putting his hand in her pants; she also initially wrote this to her boyfriend. According to PVT [TEXT REDACTED BY THE COURT] these minimized accounts stemmed from her desire to forget or not think about what appellant had done. Private [TEXT REDACTED BY THE COURT] testified on cross-examination that she thought she [*5] had given appellant the wrong impression and that his behavior was the result of a misunderstanding; however, she responded affirmatively when defense counsel asked whether she thought appellant would "get the hint that [she] didn't want this stuff to occur." She also said she "let it happen without consent"

Private [TEXT REDACTED BY THE COURT] testified on re-direct examination that she felt ashamed and that the only reason she may have given appellant the wrong impression was by being nice to him. She said, "I don't believe I gave him any other reason I was flirting with him in any way."

B. Appellant's CID Interview

In an interview that the government introduced into evidence at trial, appellant gave a version of events at odds with PVT [TEXT REDACTED BY THE COURT] testimony. He told the CID agent that he asked PVT [TEXT REDACTED BY THE COURT] to help him place his and in her pants, and that she responded by helping him unbutton them.² He said that PVT [TEXT REDACTED BY THE COURT] made sounds as if she was experiencing an orgasm while he

penetrated her. According to appellant, PVT [TEXT REDACTED BY THE COURT] looked out the window and tapped him on the hand and leg in response to his [*6] actions. He said she did nothing to indicate to him that she did no consent to his sexual act.

Appellant told the CID agent he recognized that "silence does not mean consent." However, he said that in light of PVT [TEXT REDACTED BY THE COURT] lack of resistance, he "assumed" she was enjoying his behavior. When asked whether PVT [TEXT REDACTED BY THE COURT] wanted the same thing a appellant he responded, "I'm not sure about that."

LAW AND DISCUSSION

1. Legal Standard

This court reviews questions of factual sufficiency de novo. [*United States v. Washington*, 57 M.J. 394, 399 \(C.A.A.F. 2002\)](#). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt." [*United States v. Rosario*, 76 M.J. 114, 117 \(C.A.A.F. 2017\)](#) (citations and internal quotation marks omitted). This court applies "neither a presumption of innocence nor a presumption of guilt" but "must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt. [*Washington*, 57 M.J. at 399](#). This "does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable [*7] inferences from the evidence presented." [*United States v. King*, 78 M.J. 218, 221 \(C.A.A.F. 2019\)](#). "In considering

² Though neither appellant nor PVT [TEXT REDACTED BY THE COURT] precisely addressed whether her stretchable leggings had a button closure, we infer they did not. This is an important inference, considering appellant's version of events.

the record, [this court] may weigh the evidence, judge the credibility of witness[es], and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses. Art. 66(d)(1), UCMJ. The degree of deference this court affords the trial court for having seen and heard the witnesses will typically reflect the materiality of witness credibility to the case. *United States v. Davis*, 75 M.J. 37, 546 (Army Ct. Crim. App. 2015).

2. Analysis

This is a close case, and we are convinced beyond a reasonable doubt that appellant committed the crime of which he was convicted. Though appellant urges that the evidence is insufficient to establish PVT [TEXT REDACTED BY THE COURT] lack of consent, we conclude otherwise. Some might question whether her response was consistent with how a victim would intuitively react to a sexual assault. While we acknowledge the concept of intuitive victim behavior, it is only that—a concept—and an elusive one given a victim's seemingly infinite possible reactions to a crime.

We realize the importance of applying our common sense and knowledge of the ways of the world yet we refrain from overlaying, against the weight of evidence here, our possible expectations of [*8] how a victim would react in the moment or thereafter. No one can know how a victim will react—other than knowing that the reaction will be unique to the circumstances—and in this case we can only know how PVT [TEXT REDACTED BY THE COURT] reacted. All other things being the same, another person might have punched appellant in the face and remained otherwise silent; another might have yelled profanely for him to stop; and, yet another might have reacted similarly to PVT [TEXT REDACTED BY THE COURT], remaining quiet while not

consenting, squirming and looking away while trying to block the sexual assault from her mind and subsequent memory. Put differently, we are mindful that each person is different and will respond to an assaultive event in their own way. In this case, we are satisfied beyond a reasonable doubt that PVT [TEXT REDACTED BY THE COURT] action and reactions did not constitute consent.

Appellant alternatively urges us to conclude the government's case is lacking because the evidence offers yet another fair and reasonable hypothesis other than guilt—that appellant honestly and reasonably interpreted PVT [TEXT REDACTED BY THE COURT] behavior as consent. At trial, appellant's [*9] defense counsel raised this issue — at least tacitly—by asking PVT [TEXT REDACTED BY THE COURT] whether she thought he would "get the hint that [she] didn't want this stuff to occur." Later, in closing argument, defense counsel summarized:

We are left with an undisputed sexual act that occurred on a plane. With undisputed facts, that [PVT [TEXT REDACTED BY THE COURT]] never once did anything to push this ... Soldier away or to tell him to stop. And he gave her every opportunity to do it.

These words certainly did not paint a picture of consensual sexual activity or a reasonably mistaken appellant. The law requires a mistake to be subjectively honest and objectively reasonable. Rule for Courts-Martial 916(j) ("If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances."). We are convinced beyond a reasonable doubt that appellant did not honestly believe PVT [TEXT REDACTED BY THE COURT] consented—at most, he

assumed consent. We are similarly convinced that any such assumption was unreasonable: he had met PVT [TEXT REDACTED BY THE COURT] only the day before [*10] and knew very little about her; PVT [TEXT REDACTED BY THE COURT] did not flirt with appellant before or during their travel; and, PVT [TEXT REDACTED BY THE COURT] reacted to appellant's advances by squirming and looking out the aircraft window. Finally, we note appellant deceitfully claimed that PVT [TEXT REDACTED BY THE COURT] helped him unbutton her pants - we are convinced she did no such thing. Based on these circumstances, we find the evidence factually sufficient, proving appellant's guilt beyond a reasonable doubt.

CONCLUSION

On consideration of the entire record the finding of guilty and sentence are AFFIRMED.

Senior Judge BROOKHART concurs.

Dissent by: WALKER

Dissent

WALKER, Senior Judge, dissenting;

Even after carefully reviewing the evidence and taking into consideration that the military judge personally observed the witnesses, appellant's conviction is factually insufficient. I am not convinced of appellant's guilty beyond a reasonable doubt for two reasons: (1) the implausibility that appellant digitally penetrated the victim without her cooperation; and, (2) appellant's honest and reasonable mistake of fact that the victim consented.

Affirming appellant's conviction requires this court to conclude [*11] that appellant digitally penetrated the victim on an airplane without

her active cooperation, this conclusion is inadequately supported by the evidence. Appellant and the victim were sitting next to each other on the plane with the victim setting by the window and appellant in the middle seat to the right of the victim. They were both bent over, at a 90-degree angle, resting their heads on their respective tray tables. After touching the victim's leg with his left hand and gradually moving it towards the victim's genital area, appellant then unbuckled the victim's seatbelt. The victim testified that appellant then slid his left hand inside her leggings and underwear and penetrated her vagina while she was positioned on the edge of her seat and bent over her tray table. To be convinced of appellant's guilt, I would have to conclude beyond a reasonable doubt that appellant was able to maneuver his hand inside victim's leggings and slide his hand down far enough to penetrate her vagina with a finger of his non-dominant hand without her cooperation and consent, while the victim squeezed her legs together in an attempt to stop him, in the tight confines of an airplane seat, and she was [*12] folded over her tray table at a 90-degree angle. The victim's version of events is not only implausible but it defies logic. Given the facts described by the victim, I cannot conclude beyond a reasonable doubt that appellant could digitally penetrate the victim's vagina without her active cooperation.

Furthermore, unlike the majority, I find the government's case lacking because the evidence offers another fair and reasonable hypothesis other than guilt—that appellant honestly and reasonably interpreted the victim's behavior as consent. While the victim and appellant had just met each other on their way to report to basic training, they exchanged friendly conversation, followed each other on Instagram and viewed photos of each other on that social media site. Appellant explained to law enforcement that the victim told him he

was handsome. At trial, the victim denied telling appellant he was handsome. However, the victim's testimony on this point is not credible given that she had a boyfriend at the time she met appellant thereby giving her motive to either deny or conveniently forget making such a statement, and she was less than truthful with her boyfriend about what occurred with [*13] appellant on the plane.³ After the conversation concluded, both of them decided to attempt to get some sleep and leaned forward and rested their head on their tray table. At this point, appellant put his left hand on the victim's leg and incrementally moved it up her leg towards her genital area. At one point, a flight attendant stopped to collect trash and both of them sat up and responded to the flight attendant. The victim and appellant resumed their position of leaning their head on their tray table. The victim's head was facing away from appellant towards the window and he could not see her face. Appellant again placed his hand on the victim's leg and moved it slowly up her leg towards her genital area, unbuckled her seatbelt, slid his hand inside her leggings and underwear and penetrated her vagina. Appellant's statement to law enforcement displayed an individual with an honest belief that the victim consented to his touching and penetrating the victim. I also find that it is objectively reasonable that the victim's lack of verbal or physical resistance while appellant digitally penetrated her on a public airplane, with other passengers in close proximity, and flight attendants [*14] up and down the aisle could reasonably be interpreted as consent. Given different circumstances the victim's silence and lack of overt verbal or physical reaction demonstrating

enjoyment or consent would be more definitive of lack of consent. However, under the circumstances of this case, I find that an objectively reasonable person would want any sexual activity on a public plane to remain inconspicuous so as to avoid detection from others on the plane. Therefore, I find that appellant reasonably interpreted the victim's silence, lack of physical resistance; and lack of positive verbal or physical response as consent, given the surrounding circumstance. Thus, the record leaves me with a fair and rational hypothesis other than guilt.

This court may only affirm convictions that it is convinced have been proven beyond a reasonable doubt. I am not convinced in this case and find appellant's sexual assault conviction factually insufficient.

End of Document

³ The victim testified that she wrote her boyfriend a letter a few weeks after the alleged assault and informed her boyfriend that someone tried to put his hand down her pants but she stopped him. She also admitted that she made a statement that she felt like she did her boyfriend "dirty."

United States v. Deless

United States Army Court of Criminal Appeals

November 2, 2022, Decided

ARMY MISC 20220317

Reporter

2022 CCA LEXIS 637 *

UNITED STATES, Appellant v. Master Sergeant PATRICK W. DELESS, United States Army, Appellee

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, U.S. Army Cadet Command and Fort Knox. Robert A. Cohen, Military Judge. Colonel Nathan J. Bankson, Staff Judge Advocate.

Case Summary

Overview

HOLDINGS: [1]-Military judge erred when he denied admission of uncharged sexual offense evidence under Mil. R. Evid. 403, 413, 414, and 404(b), Manual Courts-Martial, because the military judge applied incorrect legal principles when conducting the analysis on whether to admit the evidence under Mil. R. Evid. 413 and 414; [2]-The military judge's impermissible reliance on corroborating evidence, his decision to assess the victim's credibility, and his requirement that the government prove to the court that the sexual acts occurred by a preponderance of the evidence, were an abuse of discretion and a misapplication of the law.

Outcome

Decision of military judge set aside.

Counsel: For Appellant: Major Jennifer A. Sundook, JA (argued); Colonel Christopher B.

Burgess, JA; Major Dustin L. Morgan, JA; Major Karey B. Marren, JA (on brief); Colonel Christopher B. Burgess, JA; Major Jennifer A. Sundook, JA; Major Karey B. Marren, JA (on reply brief).

For Appellee: Captain Andrew R. Britt, JA (argued); Colonel Michael C. Friess, JA; Jonathan F. Potter, Esquire; Major Bryan A. Osterhage, JA; Captain Andrew R. Britt (on brief).

Judges: Before WALKER, EWING,¹ and PARKER, Appellate Military Judges. Senior Judge WALKER and Judge EWING concur.

Opinion by: PARKER

Opinion

MEMORANDUM OPINION AND ACTION ON APPEAL BY THE UNITED STATES FILED PURSUANT TO ARTICLE 62, UNIFORM CODE OF MILITARY JUSTICE

PARKER, Judge:

On appeal before this court pursuant to [Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862](#) [UCMJ], the Government asserts the military judge erred when he denied the government's motion in limine concerning the admission of evidence under Military Rule of Evidence [Mil. R. Evid.] 413, 414, and 404(b). We agree and reverse the military judge's

¹ Judge Ewing decided this case on active duty.

ruling.

I. BACKGROUND

A. *Factual Allegations and Charges*

In 2017, appellee's daughter, MD, joined the United States Army. During basic training, [*2] she had a Sexual Harassment/Assault and Prevention Program (SHARP) briefing. Sometime after the briefing, MD reported that appellee, her biological father, had sexually abused her beginning when she was around ten years old and continued abusing her into her teenage years. MD reported that her father first started sexually abusing her after marrying her mother and moving into a house together in Canton, Ohio around 2007. In statements to law enforcement, the prosecution team, and in her testimony at the motions hearing concerning Mil. R. Evid. 413, 414, and 404(b) evidence, MD stated the abuse began by her father inquiring about her knowledge of certain sexual acts. He then progressed to rubbing her legs outside the clothing and asking MD to perform "hand-jobs" and "blow-jobs" on him. She reported that her father also made her watch pornography, during which he would ask MD questions about the various sexual acts being performed. MD stated that eventually the sexual abuse progressed to appellee penetrating her vagina with his finger, tongue, and penis, and penetrating her anus with his penis. The sexual abuse was alleged to have occurred on a regular basis while MD lived in Canton, Ohio.

Less than two years [*3] after marrying, MD's parents divorced. After the divorce, MD lived primarily with her mother and would visit appellee on certain holidays and during the summer. During visitation with appellee, no sexual abuse was alleged to have occurred. During her freshman year of high school, MD's

relationship with her mother deteriorated and she began having issues at school. As a result, MD decided to move back in with her father based upon appellee's promise that he would not sexually abuse her anymore and that he could offer her a car and a new cell phone that her mother would not be able to provide. Appellee was now married and had two stepchildren living in the home with him.

Appellee's daughter reported that the sexual abuse by her father started up again shortly after she moved into the basement of his house. She described that the sexual abuse had evolved into a quid pro quo relationship, with appellee requesting she perform sexual acts in exchange for material items such as a new cell phone, tablet, and a car. MD also alleged that appellee would withhold electronics as punishment and would require her to perform sexual acts as a condition of his returning the items. MD testified at the [*4] motions hearing that her father sometimes seemed to make up rules in order to punish her so that she would have to perform sexual acts to get out of trouble. This quid pro quo relationship allegedly continued until 4 July 2015, when MD brought a male friend with her to the 4th of July party at appellee's house. She testified that when she brought up the subject of dating, appellee accused her of being more than friends with her male friend and he became very angry. According to MD, this argument eventually led to appellee locking her in her room, and then appellee forcibly raping her the next day, which was different than any sexual acts he had engaged in with her before.

The government originally preferred four charges and thirty-six specifications for sexual offenses alleged to have been perpetrated by appellee against his daughter in violation of [Articles 120](#) and 120b, UCMJ. At the time of referral, only two Article 120, UCMJ, charges

and their sole specifications remained. The Specification of Charge I alleges appellant did, on one or more occasions, at or near Canton, Ohio, between on or about 12 May 2007 and on or about 30 September 2007, rape his daughter, who at the time was under the age of twelve years old. The [*5] second remaining offense, the Specification of Charge II, alleges appellee raped his daughter by causing penetration of her vulva with his penis by using unlawful force, on one or more occasions, at or near Canton, Ohio, on or about 5 July 2015.

After dismissing thirty-four specifications prior to referral, the government sought to admit evidence of the dismissed charged offenses pursuant to Mil. R. Evid. 413, 414, and 404(b).

B. Military Rule of Evidence 413 and 414

Pursuant to Mil. R. Evid. 414, the government moved to admit testimony from MD that appellee engaged in various sexual acts with her when she was under the age of twelve, on divers occasions, to include: (1) penetration of her vulva with his penis, finger, and tongue; (2) penetration of her anus with his penis; (3) penetration of her mouth with his penis; (4) causing her to touch his penis with her hand, and; (5) touching her breast and buttocks with his hand. These sexual acts were all alleged to have occurred at or near Canton, Ohio, between on or about 12 May 2007 and on or about 30 August 2009.

Pursuant to Mil. R. Evid. 413, the government moved to admit additional testimony from MD that appellee used his parental authority to coerce her into quid pro quo sexual exchanges, on divers occasions, some of which occurred [*6] when she was over the age of twelve but under the age of sixteen. The quid pro quo sexual exchanges comprised of MD engaging in sexual acts with appellee in

exchange for money, electronics, and other privileges. Specifically, the government sought to admit evidence appellee coerced MD to engage in sexual acts involving: (1) appellee penetrating his daughter's vulva with his penis, finger, and tongue; (2) appellee penetrating his daughter's anus with his penis; (3) appellee penetrating his daughter's mouth with his penis, and; (4) appellee coercing his daughter to manually stimulate his penis. These sexual acts were all alleged to have occurred at or near Canton, Ohio, between on or about 15 November 2013 and on or about 4 July 2015.

C. Military Rule of Evidence 404(b)

The government also sought to admit the same acts of misconduct described above into evidence pursuant to Mil. R. Evid. 404(b) to show appellee's intent, motive, and plan to groom and sexually abuse his daughter, with the addition of the following acts: (1) that appellee showed his daughter pornography prior to and during sexual acts with her on divers occasions, and; (2) that appellee discussed the acts of "blow jobs" and "hand jobs" with his daughter.

*D. The Military Judge's [*7] Ruling*

The military judge denied the government's motions in limine to admit the Mil. R. Evid. 413 and Mil. R. Evid. 414 evidence discussed above. Concerning the government's motion to admit evidence pursuant to Mil. R. Evid. 404(b), the military judge granted in part and denied in part. Specifically, the military judge ruled the government would "only be permitted to introduce evidence concerning the Accused allegedly showing [his daughter] pornographic videos and engaging her in conversations about sexual acts."

II. LAW AND DISCUSSION

A. Jurisdiction

"This Court reviews issues of statutory interpretation and jurisdiction de novo." *United States v. Jacobsen*, 77 M.J. 81, 84 (C.A.A.F. 2017) (citing *United States v. Vargas*, 74 M.J. 1, 5 (C.A.A.F. 2014)). "Article 62, UCMJ, allows interlocutory government appeals under limited circumstances, including from an 'order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding.'" *Vargas*, 74 M.J. at 2 (quoting Article 62(a)(1)(B), UCMJ). Appellee argues we lack jurisdiction to consider this appeal because the evidence excluded by the military judge is not substantial proof of a material fact in the proceeding. We disagree.

The military judge's ruling excluded a wide breadth of evidence necessary to the government's theory that appellee was sexually attracted to his biological daughter, that he sought to sexualize and groom her [*8] so she would engage in sexual acts with him, and that the sexual abuse against his daughter evolved over time. The military judge, in essence, excluded the narrative by MD that formed the theory of the government's case. Additionally, we take note of the liberal construction clause contained within Article 62, UCMJ, that states "[t]he provisions of this section shall be liberally construed to effect its purposes." UCMJ art. 62(e). See *United States v. Badders*, 82 M.J. 299, 301 (C.A.A.F. 2022) (cleaned up) (Congress, through "[t]he Criminal Appeals Act . . . intended to remove all statutory barriers to Government appeals and permit whatever appeals the Constitution would permit").

B. Standard of Review

"In an Article 62, UCMJ, appeal, this Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the party which prevailed at trial." *United States v. Henry*, 81 M.J. 91, 95 (C.A.A.F. 2021) (cleaned up). Therefore, this court is "'bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous.'" *United States v. Becker*, 81 M.J. 483, 489 (C.A.A.F. 2021) (quoting *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017)).

We review a military judge's decision to suppress evidence for an abuse of discretion. *United States v. Keefauver*, 74 M.J. 230, 233 (C.A.A.F. 2015) (citations omitted). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous [*9] 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) (cleaned up). "Findings of fact are 'clearly erroneous' when the reviewing court 'is left with the definite and firm conviction that a mistake has been committed.'" *Id.* (quoting *United States v. Martin*, 56 M.J. 97, 106 (C.A.A.F. 2001)). While the military judge's findings of fact are reviewed under a clearly erroneous standard, conclusions of law are reviewed de novo. *Keefauver*, 74 M.J. at 233. A military judge abuses his discretion when he: (1) "predicates his ruling on findings of fact that are not supported by the evidence"; (2) "uses incorrect legal principles"; (3) "applies correct legal principles to the facts in a way that is clearly unreasonable"; or, (4) "fails to consider important facts." *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (citing *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010); *United States v. Solomon*, 72 M.J. 176, 180-81 (C.A.A.F. 2013)). The abuse of

discretion standard requires "more than a mere difference of opinion[;]" rather, the military judge's ruling must be "arbitrary . . . , clearly unreasonable, or clearly erroneous." [*United States v. Wicks*, 73 M.J. 93, 98 \(C.A.A.F. 2014\)](#) (cleaned up). In other words, "[w]hen judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court [*10] below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors." [*United States v. Cannon*, 74 M.J. 746, 750 \(Army Ct. Crim. App. 2015\)](#) (cleaned up).

C. Military Rule of Evidence 413 and 414

A military judge may admit evidence the accused committed any other sexual offense if relevant to any matter in a court-martial proceeding involving an Article 120, UCMJ offense. Mil. R. Evid. 413(a), (d)(1). In this case, appellee faces two specifications, rape and rape by force. By design, Mil. R. Evid. 413 "provides an exception to [Mil. R. Evid.] 404(b) and the general concept that prior convictions or uncharged misconduct are not admissible to show an accused's propensity towards bad acts or bad character." [*United States v. Upshaw*, 81 M.J. 71, 74 \(C.A.A.F. 2021\)](#).

In other words, evidence the accused committed other sexual offenses may be admissible if: (1) it is a court-martial proceeding involving a sexual offense; (2) the proffered evidence is "evidence of the accused's commission of another offense of sexual assault;" and (3) the evidence is relevant under Mil. R. Evid. 401 and 402. [*United States v. Solomon*, 72 M.J. 176, 179 \(C.A.A.F. 2013\)](#) (citing [*United States v. Berry*, 61 M.J. 91, 95 \(C.A.A.F. 2005\)](#); [*United States v. Wright*, 53 M.J. 476, 482 \(C.A.A.F. 2000\)](#)).

"Once these three findings are made, the military judge is constitutionally required to also apply a balancing test under [Mil. R. Evid.] 403." [*Solomon*, 72 M.J. at 179-80](#) (citing [*Berry*, 61 M.J. at 95](#)).

Akin to Mil. R. Evid. 413, Mil. R. Evid. 414 allows a military judge to admit evidence the accused committed any other child molestation offense if relevant to any matter in a court-martial [*11] proceeding involving child molestation. Mil. R. Evid. 414(a). The Specification of Charge I qualifies as a child molestation offense because it alleges a sexual act against a child, appellee's daughter, when she was under the age of twelve. Mil. R. Evid. 414(d).

In his written ruling and order, the military judge began his Mil. R. Evid. 413/414 analysis by framing the legal issue as:

[D]o these rules permit the Government to introduce evidence of uncharged acts of child molestation and/or sexual assault allegedly committed by the Accused for the stated purpose of bolstering the veracity of the complaining witness/alleged victim in a criminal case w[h]ere the only evidence concerning both the charged offense(s) and the uncharged misconduct is the uncorroborated (and potentially self-serving) testimony of the same alleged victim? More narrowly, can the Government properly use testimony from [appellee's daughter] concerning uncharged sexual misconduct by the Accused for the express purpose of bolstering the veracity of [appellee's daughter's] testimony concerning the charged offenses (propensity evidence) absent **any** corroborating evidence supporting either the charged and/or uncharged misconduct?

(emphasis in original). The military judge found

the [*12] "use of such propensity evidence in the case at bar would be improper." In support of his finding, the military judge determined he had to make three threshold requirements before admitting evidence under Mil. R. Evid. 413/414: (1) that the accused was charged with an offense of sexual assault/child molestation; (2) the evidence proffered is evidence of the accused's commission of another offense of sexual assault/child molestation, and; (3) the evidence is relevant under Mil. R. Evid. 401 and 402. In addition to the threshold requirements, the military judge must also conduct a balancing test pursuant to Mil. R. Evid. 403, understanding that there is a "strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible. . . ." [*United States v. LeCompte*, 131 F.3d 767, 769 \(8th Cir. 1997\)](#).

As noted correctly by the military judge, the first threshold requirement has been satisfied. The issue before us is whether the military judge applied the correct legal principles when conducting the remaining analysis on whether to admit the evidence under Mil. R. Evid. 413 and 414. We conclude he did not.

D. An Incorrect Standard of Proof

First, we find the military judge erred when he required the government to prove the uncharged sexual offenses by a preponderance of the evidence.

When analyzing the [*13] second threshold question, the military judge acknowledged that MD's testimony of the uncharged misconduct would constitute evidence of other sexual offenses and/or acts of child molestation committed by the accused. However, the military judge then noted that before such evidence could be considered, the military judge must find that this uncharged misconduct was established by sufficient

evidence that would support a determination by the factfinder that the accused committed the uncharged acts. The military judge continued his analysis, stating "[i]n this case, the Court finds that there is absolutely no evidence that corroborates any aspect of [appellee's daughter's] allegations concerning the uncharged misconduct." After acknowledging his role as a gate keeper typically does not involve assessing the credibility of the witness, the military judge concluded that the government's "acknowledged purpose of bolstering the veracity of [appellee's daughter's] testimony" now required him to "evaluate the uncharged misconduct in a manner that ensures that the factfinder does not hear evidence of uncharged misconduct that likely did not occur."² The military judge continued in his analysis, [*14] stating "[i]n this case, that responsibility necessitates the Court in evaluating the credibility of [appellee's daughter] concerning the uncharged misconduct." After noting that he considered direct testimony, cross-examination, proffered evidence of inconsistent statements, the lack of corroborating evidence, and having personally observed MD's demeanor during her testimony, the military judge found "the Government has failed to meet the required preponderance of evidence standard."

The military judge cites to [*Huddleston v. United States*, 485 U.S. 681, 685, 108 S. Ct. 1496, 99 L. Ed. 2d 771 \(1988\)](#), in support of the notion that "the Court must make a preliminary finding by a preponderance of the evidence that the 'other act' occurred." However, [*Huddleston*](#) states the opposite. [*Id.*](#)

² Contrary to the military judge's conclusion, we were unable to find any proffer by the government that the express or stated use of this evidence was to bolster MD's credibility. We note, however, this conclusion of bolstering was asserted by defense counsel in their written response to the government's motion to admit evidence under Mil R. Evid 413.

[at 682](#) ("This case presents the question whether the district court must itself make a preliminary finding that the Government has proved the 'other act' by a preponderance of the evidence before it submits the evidence to the jury. *We hold that it need not do so.*") (emphasis added).³ Additionally, [Huddleston](#) states that in determining whether there is sufficient evidence, "the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence." [*15] [Id. at 690](#). All that is required is for the court to examine the evidence and decide "*whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence.*" [Id.](#) (emphasis added). Here, the military judge improperly placed himself in the shoes of the factfinder and assessed appellee's daughter's credibility when it was not his role as "gatekeeper" to do so.

Additionally, the military judge improperly relied on the lack of "corroborating evidence" of MD's allegations to conclude there was not a preponderance of the evidence that the other sexual acts occurred, which further compounded the military judge's erroneous view of the law as corroboration goes to the weight of the evidence, and not to its admissibility under Mil. R. Evid. 413 and 414. Cf., e.g., [United States v. Rodriguez-Rivera](#), 63 M.J. 372, 383 (C.A.A.F. 2006) (explaining

that "the testimony of only one witness may be enough to meet" the government's burden of proving guilt beyond a reasonable doubt).

We therefore find the military judge's impermissible reliance on corroborating evidence, his decision to assess MD's credibility, and his requirement that government prove *to the court* that the sexual acts occurred [*16] *by a preponderance of the evidence*, to be an abuse of discretion and a misapplication of the law.

E. Relevant Evidence Under Mil. R. Evid. 401

In addition to the second threshold analysis above, the military judge must conduct a third threshold analysis under Mil. R. Evid. 401 and 402.⁴ Relevant evidence is that which "has any tendency to make a fact more or less probable than it would be without evidence; and . . . the fact is of consequence in determining the action." Mil. R. Evid. 401(a), (b). In analyzing the relevancy of the Mil. R. Evid. 413 and 414 evidence, the military judge stated the following:

The Court has evaluated the uncharged misconduct and recognizes that an argument could be made as to why evidence of the Accused committing similar uncharged misconduct in the past would have some tendency to make it more probable that the Accused committed the charged offenses. Nevertheless, the Court notes that when looking at the specific [Mil. R. Evid.] 413 and [Mil. R. Evid.] 414 uncharged misconduct evidence the Government wishes to use to bolster the testimony of [appellee's daughter] as it relates to the charged offenses, there is, at

³ We note that although [Huddleston](#) dealt with the admission of evidence offered for a proper purpose under [Federal Rule of Evidence 404\(b\)](#), the same analysis would apply to cases involving the introduction of evidence pursuant to Mil. R. Evid. 413, 414, and [404\(b\)](#). See [Solomon](#), 72 M.J. at 179; David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases* (1994) 70 *Chi.-Kent L. Rev.* 15, 19 (concluding the standard of proof for admission of uncharged offenses would be bound by the Supreme Court's decision in [Huddleston v. United States](#) and that "such offenses may properly be considered so long as a [factfinder] could reasonably conclude by a preponderance that the offenses occurred").

⁴ Pursuant to Mil. R. Evid. 402, relevant evidence is admissible if not otherwise prohibited by the United States Constitution, applicable federal statutes, Military Rules of Evidence, or the *Manual for Courts-Martial*.

least in part, a logical disconnect.

We find the military judge erred by incorrectly defining relevant evidence as that which must make [*17] a *specific charge* more probable, instead of a fact "of consequence in determining the action." Mil. R. Evid. 401(b). "Relevancy has two components: (1) probative value, the relationship between the evidence and the proposition it is offered to prove; and (2) materiality, the relationship between the proposition the evidence is offered to prove and the facts at issue in the case." [*United States v. James*, 63 M.J. 217, 221 \(C.A.A.F. 2006\)](#).

Considering the definition and components of relevancy, we find the military judge's conclusion that there is "a logical disconnect" between the Mil. R. Evid. 413 and 414 evidence as it relates to the charged offenses to be an abuse of discretion for two reasons: (1) the military judge relied on his erroneous finding of fact that the government's express purpose for moving to admit the evidence was to bolster the veracity of MD when he conducted his analysis under Mil. R. Evid. 401—when no such proffer by the government is supported by the facts in the record—which appears to have caused him to disregard the actual proffer which is to show that appellee saw his daughter as a sexual object and that the sexual acts were ongoing; and (2) the military judge's analysis was based on an erroneous definition of relevancy.

For these reasons, we agree with the Government [*18] that the military judge erred in his Mil. R. Evid. 401 analysis and that the evidence is relevant to show "the [a]ccused had a compulsion to engage in sexual acts with his daughter." (Appellant's Br. 23). See [*United States v. Hough*, 385 Fed. Appx. 535, 536 \(6th Cir. 2010\)](#) (cleaned up) ("[P]rior molestations create the logical inference the

defendant has a sexual interest in children that is strong enough to cause him to break the law."); [*Id.* at 536](#) ("Giving the evidence its maximum probative value, the other acts show a sexual interest in prepubescent girls, with a particular interest in incest, sodomy, and oral sex."); [*United States v. Sebolt*, 460 F.3d 910, 917 \(7th Cir. 2006\)](#) ("Prior instances of sexual misconduct with a child victim may establish a defendant's sexual interest in children and thereby serve as evidence of the defendant's motive to commit a charged offense involving the sexual exploitation of children."); [*United States v. Hogue*, 827 F.2d 660, 663 \(10th Cir. 1987\)](#) ("Evidence of the systematic abuse of a particular victim . . . shows that the defendant had strong feelings toward a particular individual that may have contributed to [his] formation of intent or motive.").

F. The Military Judge's Mil. R. Evid. 403 Balancing Test

In addition to addressing the three threshold requirements before evidence can be admitted under Mil. R. Evid. 413/414, the military judge must also conduct a balancing test under Mil. R. Evid. 403. While [*19] conducting his analysis under Mil. R. Evid. 403, the military judge noted "the Court must be cognizant that the exclusion of relevant evidence under [Mil. R. Evid.] 403 should be used infrequently, reflecting Congress' legislative judgment that evidence 'normally' should be admitted."⁵ Despite this recognition, the military judge concluded that Mil. R. Evid. 413 and 414 only "permits **other victims** (emphasis added) to corroborate the complainant's account via testimony about the defendant's prior sexually assaultive behavior." The military judge

⁵ See [*Solomon*, 72 M.J. at 179](#) (quoting [*Berry*, 61 M.J. at 94-95](#)) ("This court has noted that inherent in [Mil. R. Evid.] 413 is a general presumption in favor of admission.").

reiterated this point in his ruling, stating "[t]he Court fully understands that [Mil. R. Evid.] 413 and [Mil. R. Evid.] 414 were intended to permit the factfinder to consider the testimony of **other** (emphasis added) victims with respect to an Accused's past sexual/child molestation offenses." The military judge then stated he could find nothing in the legislative history that would suggest the rules "were intended to bolster the credibility of a named victim in a pending criminal case by permitting propensity inferences to be drawn from the uncharged and uncorroborated allegations made by the same named victim." The military judge then relied on these findings to conclude that any probative value gained would be substantially outweighed [*20] by the "extreme level of prejudice that would accrue to the Accused should the evidence be admitted" and that "it would be incongruous for either [Mil. R. Evid. 413 or 414] to be viewed as allowing the introduction of uncorroborated uncharged propensity evidence derived solely from the same complaining witness."

The military judge's Mil. R. Evid. 403 analysis relies upon two erroneous findings: (1) the "stated purpose" and "acknowledged purpose" of the government's motion to admit this evidence was to bolster the credibility of MD, and (2) Military Rule of Evidence 413 and 414 only permits *other victims* to corroborate a complainant's account via testimony.

First, we find the military judge's conclusion that the evidence presented by the government under Mil. R. Evid. 413 and 414 was for the purpose of bolstering MD to be a clearly erroneous finding of fact.⁶ As we noted previously, we found no evidence in the record before us that the government's "stated" or

"acknowledged" purpose for introducing this evidence was to bolster MD's credibility. The government proffered to the military judge in their written motions and during argument, that evidence "the Accused forced [his daughter] to engage in various types of sexual acts makes it more likely the Accused saw his minor [*21] daughter as a sexual object and that the Accused raped [MD] between 12 May 2007 and 30 September 2007" and that the "sexual abuse was not an isolated incident." Additionally, the government rejected the military judge's assertion that proposed purpose was merely for veracity in the following exchange:

MJ: . . . it does seem that the relevant purpose that you're proposing is (sic) used for is veracity.

ATC: No, Your Honor.

MJ: Well, that's essentially what it's for is to say: she's telling the truth as to the charge (sic) offenses. I mean, what are the purposes to prove in this particular set of facts?

ATC: Well, in this particular set of facts, Your Honor, what it proves aren't merely veracity. Right. But what it proves is that the accused actually did sexually abuse his daughter in a multiple of different ways, not just one way. And that this was an abuse that went on throughout two sets of them living together, 414 and the 413.

We don't—The government's position, we don't believe that it's merely bolstering that it's merely for veracity. But it is more than that, Your Honor. It is getting at the fact that these crimes did not occur in a vacuum, that they did not occur only one time, that [*22] this was a continuous course of conduct while she lived with him. And we think that that's more than just merely veracity. Veracity comes in ultimately on, you know, whether the fact finder finds her to be credible. The fact

⁶We note that during the Article 39(a) hearing, the military judge acknowledges on the record in one exchange with the assistant trial counsel that "bolstering is the wrong term." (R. at 182).

finder could hear all of this and ultimately determine I still don't think she's credible or it's not enough to get over a finding of beyond a reasonable doubt. The fact finder ultimately gets to determine veracity. But certainly, we don't believe that the key purpose for this evidence is bolstering her veracity, Your Honor.

(R. at 185-86).

After considering the evidence discussed above, we are "left with the definite and firm conviction that a mistake has been committed" concerning the military judge's finding that the stated, express, and acknowledged purpose of the government offering this evidence under Mil. R. Evid. 413 and 414 was for the purpose of bolstering MD's credibility. [Frost, 79 M.J. at 109](#) (citation omitted). Therefore, reliance on this finding of fact by the military judge was an abuse of discretion.

Secondly, we find the military judge's interpretation that Mil. R. Evid. 413 and 414 only permits the admission of evidence from *other victims* not named in the charge sheet to be an erroneous view of the law. **[*23]** *Id.* This court uses "well-established principles of statutory construction to construe provisions in the *Manual for Courts-Martial*." [United States v. Lewis, 65 M.J. 85, 88 \(C.A.A.F. 2007\)](#) (citations omitted). "Statutory constructions begins with a look at the plain language of a rule." *Id.* (citation omitted). "The plain language will control, unless use of the plain language would lead to an absurd result." *Id.* (citation omitted). The plain language of Mil. R. Evid. 413 provides that "the military judge may admit evidence that the accused committed *any other* sexual offense." Mil. R. Evid. 413(a). Likewise, Mil. R. Evid. 414 provides "the military judge may admit evidence that the accused committed *any other* offense of child molestation." Mil. R. Evid. 414(a). Noticeably absent from the plain language is a limitation

that the offenses must be from victims other than those named in the charge sheet.

We find the military judge's Mil. R. Evid. 403 analysis and ruling, which relied on the conclusion that the admissibility of Mil. R. Evid. 413 and 414 evidence was intended to be limited to "other victims" in this case, to be a clearly erroneous view of the law, as the plain language of the rules contain no such limitation. There is also no authority, case law or otherwise, that would support the military judge's narrow interpretation of the rules.⁷ To **[*24]** the contrary, this court has issued memorandum opinions that support the use of Mil. R. Evid. 413 evidence from uncharged sexual offenses to be used to prove up charged sexual offenses with the same victim named in the charge sheet. See [United States v. Moore, ARMY 20140875, 2017 CCA LEXIS 191, at *13 \(Army Ct. Crim. App. 23 Mar. 2017\)](#) (mem. op.), *aff'd*, 77 M.J. 198 (C.A.A.F. 2018) (noting a charge dismissed by the court could be introduced at appellant's authorized rehearing as uncharged conduct under Mil. R. Evid. 413 to prove appellant's propensity to commit the remaining offenses involving the same victim); [United States v. Moore, ARMY 20140875, 2022 CCA LEXIS 191, at *5-6 \(Army Ct. Crim. App. 7 Mar. 2022\)](#) (mem. op. on further review) (noting there was no need to disturb the military judge's Mil. R. Evid. 413 ruling that admitted evidence of prior incidents

⁷ The military judge appears to rely on [United States v. Hills, 75 M.J. 350 \(C.A.A.F. 2016\)](#), when coming to this conclusion regarding "other victims." However, his reliance on [Hills](#) is misplaced, as it is only applicable to *charged* offenses. Although the sexual acts the government seeks to admit pursuant to Mil. R. Evid. 413 and [414](#) were originally on the charge sheet, they became uncharged acts after they were dismissed from the charge sheet. See [Moore, 2017 CCA LEXIS 191, at *13; United States v. Ramirez, ARMY 20160599, 2018 CCA LEXIS 468, at *1 \(Army Ct. Crim. App. 28 Sep. 2018\)](#) (finding misconduct that was originally charged and later dismissed before the introduction of evidence on the merits was admissible under Mil. R. Evid. 413).

of appellant sexually assaulting the same victim named on the charge sheet); [*United States v. Swift*, ARMY 20100196, 2017 CCA LEXIS 580, at *4-8, 12-14 \(Army Ct. Crim. App. 29 Aug. 2017\)](#) (mem. op.) (concluding prior instances of uncharged sexual acts between appellant and his daughter who was the named victim on the charge sheet was admissible evidence under Mil. R. Evid. 414).⁸ Additionally, we are aware of no such limitation by our federal counterparts. See [*United States v. Hawpetoss*, 478 F.3d 820, 825 \(7th Cir. 2007\)](#) (where a defendant did not contest the admission of uncharged acts of sexual molestation under [*Fed. R. Evid. 414*](#) that related to the three victims named in the indictments for which he was tried, but argued evidence of his sexual molestation of other victims not named in the indictment [*25] should have been excluded).

For the reasons stated above, the military judge's Mil. R. Evid. 403 analysis was based on both an erroneous finding of fact and an erroneous view of the law, which prevented him from conducting a proper analysis under Mil. R. Evid. 403. We therefore conclude he abused his discretion when he found any probative value gained would be substantially outweighed by the "extreme level of prejudice that would accrue to the Accused should the evidence be admitted" under Mil. R. Evid. 403.

G. Military Rule of Evidence 404(b)

The Government also argues that the military judge's ruling excluding appellee's sexual acts with his daughter under Mil. R. Evid. 404(b)

was erroneous for two reasons: (1) "there is no requirement for the prior [sexual] acts to be virtually identical or substantially similar when considering uncharged acts under . . . Mil. R. Evid. 404(b)" and (2) "the military judge incorrectly applie[d] the 'portion of the MRE 403 balancing test prong of an MRE 404(b) admissibility analysis.'" We agree with the Government and find the military judge erred when he concluded that the uncharged acts of molestation and sexual abuse "fail to logically support the existence of the Accused's intent, motive or plan to sexualize and sexually abuse [his daughter] or otherwise make some fact [*26] of consequence more or less probable." We also find the military judge erred when he made the assertion that the factfinder would be unable to follow the military judge's instructions and would consider the uncharged misconduct as propensity evidence.

Missing from the military judge's analysis is a consideration of important facts, specifically: how these acts could be admitted to demonstrate that appellee had an attraction to his biological daughter and that his progression of sexual acts showed his intent and plan to groom his daughter to regularly engage in sexual acts with him. The military judge overlooked the government's proffered use of the evidence was to show appellee's motive and intent, and not propensity, as evidenced by the military judge often referring to these as almost exclusively propensity evidence. Additionally, the military judge's finding that "despite any instruction to the contrary, [the factfinder] will consider this uncharged misconduct as propensity evidence" is an erroneous view of the law for two reasons: (1) it runs directly contrary to our superior court's case law that states "[a]bsent evidence to the contrary," panels are presumed to following a military [*27] judge's instructions, and; (2) it serves to undercut the actual purpose of Mil. R. Evid. 404(b) which

⁸ See also [*United States v. Lara*, No. ACM 37861, 2013 CCA LEXIS 663, at *8 \(A.F. Ct. Crim. App. 3 July 2013\)](#) (in a case where appellant was charged with raping his wife, the court upheld the military judge's ruling that evidence appellant sexually assaulted his wife prior to him joining the Air Force was admissible under Mil. R. Evid. 413).

allows for this type of evidence. [United States v. Stewart, 71 M.J. 38, 42 \(C.A.A.F. 2012\)](#) (quoting [United States v. Taylor, 53 M.J. 195, 198 \(C.A.A.F. 2000\)](#)).

For these reasons, we find the military judge abused his discretion when excluded the uncharged acts of molestation and sexual abuse under Mil. R. Evid. 404(b).

III. CONCLUSION

For the reasons discussed above, the appeal of the United States pursuant to Article 62, UCMJ, is GRANTED and the decision of the military judge is therefore SET ASIDE. We return the record of trial to the military judge for action consistent with this opinion.

Senior Judge WALKER and Judge EWING concur.

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As of: November 18, 2022 9:14 PM Z

United States v. Essary

United States Army Court of Criminal Appeals

August 9, 2019, Decided

ARMY 20170556

Reporter

2019 CCA LEXIS 325 *; 2019 WL 3778355

UNITED STATES, Appellee v. Staff Sergeant
MICHAEL L. ESSARY JR., United States
Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by
[United States v. Essary, 2019 CAAF LEXIS
832 \(C.A.A.F., Nov. 18, 2019\)](#)

Prior History: [*1] Headquarters, Fort Bliss.
Michael S. Devine, Military Judge, Lieutenant
Colonel Larry W. Downend, Staff Judge
Advocate.

Case Summary

Overview

HOLDINGS: [1]-Military judge did not err by allowing the government to admit evidence of appellant's sexual misconduct against his former wife at his court-martial pursuant to Mil. R. Evid. 413, Manual Courts-Martial, as the military judge correctly concluded the evidence met all three Rule 413 threshold requirements -- appellant was charged with two specifications of sexual assault, appellant committed the sexual offense of forcible sodomy against his former wife, and the evidence of forcible sodomy against his former wife was relevant; [3]-Military judge properly conducted a Mil. R. Evid. 403, Manual Courts-Martial, balancing test, which included the finding that the conduct during these incidents involving the victim and appellant's former wife

was strikingly similar, making the evidence highly probative, but not unfairly prejudicial.

Outcome

The findings and sentence were affirmed.

Counsel: For Appellant: Lieutenant Colonel Tiffany D. Pond, JA; Major Julie L. Borchers, JA; Major Zachary A. Szilagyi, JA (on brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Virginia Tinsley, JA; Captain Brian Jones, JA (on brief).

Judges: Before BROOKHART, SCHASBERGER, and LEVIN, Appellate Military Judges. Judge BROOKHART and Judge SCHASBERGER concur.

Opinion by: LEVIN

Opinion

MEMORANDUM OPINION

LEVIN, Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of three specifications of adultery, in violation of [Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934](#) [UCMJ]. An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of willfully disobeying a superior commissioned officer, one

specification of sexual assault, and one specification of wrongful appropriation, in violation of [Articles 90, 120, and 121, UCMJ](#), respectively. The panel acquitted appellant of one specification of sexual assault and one specification of larceny, charged in violation of Articles [*2] [120](#) and [121, UCMJ](#).¹ The panel sentenced appellant to be discharged from the service with a dishonorable discharge, confinement for three years, forfeiture of all pay and allowances, and to be reduced to the grade of E-1. The convening authority approved the findings and sentence as adjudged.

This case comes before us for review under *Article 66, UCMJ*. Appellant raises one assignment of error which warrants discussion but no relief.² For the reasons below, we find that the military judge did not abuse his discretion in permitting the government to offer evidence of appellant's prior sexual misconduct pursuant to Military Rule of Evidence (Mil. R. Evid.) 413.

BACKGROUND

In May 2016, appellant and Staff Sergeant (SSG) RK met at Fort Leonard Wood, Missouri, after having communicated through an online dating application. During the course of their relationship, which lasted until in or about August 2016, the two engaged in consensual sexual intercourse several times. On one occasion, however, appellant anally assaulted SSG RK. While engaging in

consensual vaginal intercourse, appellant withdrew his penis and penetrated SSG RK's anus. Appellant's conduct occurred after the two soldiers had previously [*3] discussed anal sex, and SSG RK had voiced her unwillingness to engage in such an act. After appellant penetrated SSG RK's anus, SSG told him "no" several times. Appellant refused to stop and in fact became more aggressive during the assault.

During his earlier marriage to Ms. LPB, which lasted from 2003 until 2007, appellant forced Ms. LPB to engage in anal sex on numerous occasions. Notwithstanding her unwillingness to participate, expressed through tears and protestations, appellant used his strength to hold her down when she tried to push him away.

The government did not charge appellant with committing sexual misconduct against Ms. LPB. Instead, the government sought to admit the sexual misconduct against Ms. LPB at appellant's court-martial pursuant to Mil. R. Evid. 413. Over defense objection, the military judge permitted the government to elicit testimony from Ms. LPB related to appellant's anal sexual assaults of her. The military judge's Mil. R. Evid. 413 ruling is the basis for appellant's assignment of error.

LAW AND DISCUSSION

A. Uncharged Propensity Evidence

The appellant argues the military judge erred when admitting uncharged propensity evidence under Mil. R. Evid. 413. We disagree.

*1. Admissibility of Uncharged Misconduct [*4]*

Four Military Rules of Evidence generally

¹ Prior to findings, the military judge, pursuant to Rule for Courts-Martial (R.C.M.) 917, entered a finding of not guilty for one specification of wearing unauthorized insignia, charged in violation of [Article 134, UCMJ](#).

² After considering the matters personally raised by appellant pursuant to [United States v. Grostefon, 12 M.J. 431 \(C.M.A. 1982\)](#), we find they are without merit.

govern the relevance and admissibility of evidence of uncharged misconduct. First, "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Mil. R. Evid. 401. Relevant evidence is then "admissible unless any of the following provides otherwise: (1) the United States Constitution as it applies to members of the Armed Forces; (2) a federal statute applicable to trial by courts-martial; (3) these rules; or (4) this Manual." Mil. R. Evid. 402(a). "Irrelevant evidence is not admissible." Mil. R. Evid. 402(b). Next, the "military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." Mil. R. Evid. 403. Finally, while evidence "of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character," "[t]his evidence may be admissible for another purpose, such as proving motive, [*5] opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Mil. R. Evid. 404(b).

2. Mil. R. Evid. 413

Military Rule of Evidence 413 creates an exception to Mil. R. Evid. 404(b)'s general prohibition against the use of an accused's propensity to commit crimes. Specifically, Mil. R. Evid. 413 permits the military judge to admit evidence that the accused committed "one or more offenses of sexual assault" and that evidence "may be considered on any matter to which it is relevant." Mil. R. Evid. 413(a). "Inherent in [Mil. R. Evid.] 413 is a general

presumption in favor of admission." [*United States v. Berry*, 61 M.J. 91, 94-95 \(C.A.A.F. 2005\)](#) (citations omitted).

3. Mil. R. Evid. 413 Threshold Requirements

Before admitting evidence under Mil. R. Evid. 413, three initial threshold requirements must be met: "1) the accused [is] charged with an offense of sexual assault; 2) the proffered evidence [is] evidence of the accused's commission of another offense of sexual assault; and 3) the evidence [is] relevant under [Mil. R. Evid.] 401 and [Mil. R. Evid.] 402." [*United States v. Solomon*, 72 M.J. 176, 179 \(C.A.A.F. 2013\)](#) (citing [*Berry*, 61 M.J. at 95](#); [*United States v. Wright*, 53 M.J. 476, 482 \(C.A.A.F. 2000\)](#)). For the second prong, the military judge must "conclude that the members could find by a preponderance of the evidence that the offenses occurred." *Id.*

We review a military judge's decision regarding Mil. R. Evid. 413 for an abuse of discretion. [*Solomon*, 72 M.J. at 179](#). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action [*6] must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." [*United States v. White*, 69 M.J. 236, 239 \(C.A.A.F. 2010\)](#) (citations and internal quotation marks omitted).

Here, the military judge found the threshold requirements were met both on the record and in his detailed written ruling.³ Regarding the first prong, there is no question that appellant was charged with two specifications of sexual assault. Appellant has conceded as much in this appeal. With respect to the second prong, the military judge correctly determined that the panel could find, by preponderance of the

³ The military judge included his nineteen-page factual findings as Appellate Exhibit XXXVII (sealed).

evidence, that appellant committed the sexual offense of forcible sodomy against Ms. LPB. As discussed in greater detail below, Ms. LPB initially stated to law enforcement officials that the acts were consensual "as she was trying to be a good submissive wife." However, Ms. LPB further explained that she had never wanted to engage in anal sex, told appellant to stop when he sodomized her, and he became more aggressive when she tried to get him to cease. These facts taken together are sufficient for the military judge to have determined that a panel could find by a preponderance of the evidence that these sexual offenses occurred. See [Solomon, 72 M.J. at 179](#) (citing [Wright, 53 M.J. at 483](#)). As for the [*7] third prong, the military judge correctly concluded that the evidence of forcible sodomy against Ms. LPB was relevant under Mil. R. Evid. 401 and 402.

Thus, the military judge correctly concluded the evidence met all three Mil. R. Evid. 413 threshold requirements.

4. Mil. R. Evid. 403 Balancing Test and the Wright/Berry Factors

Once the evidence meets the three threshold requirements under Mil. R. Evid. 413, "the military judge is constitutionally required to also apply a balancing test under [Mil. R. Evid.] 403" to determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. [Solomon, 72 M.J. at 179-80](#) (citing [Berry, 61 M.J. at 95](#)). When conducting this balancing test, "the military judge should consider the following non-exhaustive factors:" (1) strength of proof of the prior act; (2) probative weight of the evidence; (3) potential for less prejudicial evidence; (4) distraction of the factfinder; (5) time needed for proof of the prior conduct; (6) temporal proximity; (7) frequency of the acts;

(8) presence or lack of intervening circumstances; and (9) the relationship between the parties. [Id. at 180](#) (citing [Wright, 53 M.J. at 482](#)).

If the "balancing test requires exclusion of the evidence, the presumption of admissibility [that is inherent within Mil. R. Evid. 413] is overcome." [Berry, 61 M.J. at 95](#) (citing [Wright, 53 M.J. at 482-83](#)). "When a military judge [*8] articulates his properly conducted [Mil. R. Evid.] 403 balancing test on the record, the decision will not be overturned absent a clear abuse of discretion." [Solomon, 72 M.J. at 180](#) (citing [United States v. Manns, 54 M.J. 164, 166 \(C.A.A.F. 2000\)](#)).

The military judge properly considered all of the following factors and correctly determined that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

a. Strength of Proof of the Prior Act

In his written findings addressing the first *Wright* factor, the military judge determined that:

[W]hen taken in context of the totality of her two detailed interviews with CID which were, undoubtedly quite embarrassing to participate in, it is plainly apparent that the conduct of the Accused towards Ms. [LPB] constitute[d] sexual assaults/forcible sodomy. During the anal penetration, she told the Accused to stop, cried throughout every assault, and ended up bleeding from her anus as a result of at least one assault. The former spouse . . . does not seem to have any motive to lie regarding these matters as she is not seeking divorce or custody benefits, and she was not looking to report these past offenses. She only came forward with this report when

contacted by CID agents as part of their investigation [*9] into the charged offenses in this case. Had she been bitter, vengeful, or spiteful, she could have brought these reports forward at any time in the last decade. [Ms. LPB's] testimony is detailed in both the conduct of the Accused and the dialogue between them relating to the acts. Her statements have many hallmarks of reliability including their consistency, lack of motive to fabricate, reasonable statements explaining her actions, the lack of minimization of her own conduct, and detailed admissions regarding embarrassing details of her intimate life with her former husband. All of that shared on two occasions with agents she does not know and with no apparent benefit to her for providing such information and enduring such painful memories that she would, undoubtedly, preferred not to have been called upon to relive.

For all of the reasons stated by the military judge above, we find that this factor weighed heavily in favor of admission of the evidence.

b. Probative Weight of the Evidence

In addressing the probative weight of the evidence, the military judge stated that the evidence was probative "of the accused's propensity to commit . . . the offense of forcible sodomy." He concluded [*10] this evidence was particularly strong for the following reasons: The acts involving SSG RK and Ms. LPB were remarkably similar; in both cases, the appellant was in serious romantic relationships with the victims; the acts occurred shortly after the relationships began; the forcible sodomy took place along with acts of consensual vaginal sex; and that both victims told appellant to stop, and yet he persisted. Finally, the military judge correctly

concluded that "[i]n both cases, the Accused minimized his assaultive behavior after the fact with dismissive comments to the alleged victims."

We agree with the military judge's assessment of the probative value of this evidence. The conduct during these incidents involving SSG RK and Ms. LPB was strikingly similar, making the evidence highly probative, but not unfairly prejudicial. This type of evidence is exactly what Mil. R. Evid. 413 was intended to admit.

c. Potential for Less Prejudicial Evidence; Distraction of the Factfinder; Time Needed for Proof of the Prior Conduct

Like the first two *Wright* factors above, we agree with the military judge's conclusion that there was no less prejudicial evidence available. Like the military judge, we find distraction [*11] to the factfinder and time needed to prove the prior conduct to be linked because the primary consideration for both was Ms. LPB's testimony only, which, as the judge correctly anticipated, was uncomplicated and not particularly lengthy. The military judge also noted that a limiting instruction, discussed below, would further clarify the proper use of the evidence.

This factor weighed in favor of admission of the evidence.

d. Temporal Proximity of the Prior Act; Presence or a Lack of Intervening Circumstances

Concerning these *Wright* factors, the military judge's written findings noted that the appellant, who was between 29-33 years old when married to Ms. LPB and 42 years of age at the time of his relationship with SSG RK, was well into his adult years with a presumably

fully-formed cognitive and emotional skill set. Both Ms. LPB and SSG RK were also mature adults at the time of the offenses. See [Berry, 61 M.J. at 96](#) ("Where a defendant was an adult at the time he committed the prior sexual assault, [the United States Court of Appeals for the Armed Forces] has found incidents occurring more than eight years prior to the charged incident to be relevant under [Mil. R. Evid.] 413") (citations omitted).

The military judge also [*12] found that despite the gap of time between the events, there were no intervening circumstances that would diminish the probative value of the evidence.

Again, we agree that this factor weighed in favor of admission.

e. Frequency of the Acts

The military judge found that the proffered evidence included numerous acts of sexual assaults by anal penetration of Ms. LPB over a four-year period.

This factor also weighs in favor of admission of the uncharged misconduct.

f. Relationship Between the Parties

The military judge correctly determined that the victims were similar; at the time of the offenses, SSG RK was the appellant's adult girlfriend and Ms. LPB was the appellant's wife.

This factor also weighs in favor of admission.

In total, we find that the military judge properly conducted the Mil. R. Evid. 403 balancing test and neither erred nor abused his discretion by admitting the prior uncharged sexual offenses. His measured analysis on the record and in his

written ruling was reasonable and not clearly erroneous.

B. The Military Judge's Instruction

Once evidence is admitted pursuant to Mil. R. Evid. 413, the panel members must be given appropriate instructions. [United States v. Dacosta, 63 M.J. 575, 582-83 \(Army Ct. Crim. App. 2006\)](#). In *Dacosta*, this court placed a duty on military judges to provide [*13] specific guidance to panel members. *Id.* The military judge in this case provided the following instructions:

You have heard evidence that the accused may have committed other sexual offenses, specifically sexual assault by anal sodomy of his ex-wife, Ms. [LPB]. The accused is not charged with these offenses. You may consider the evidence of these other offenses with regard to Specification 2 of Charge II, and to Specification 2 of Charge II only.

For this specification you may consider such evidence for its bearing on any matter to which it is relevant, to include its tendency, if any, to show the accused's propensity to engage in sexual offenses. However, evidence of another sexual offense on its own is not sufficient to prove the accused guilty of a charged offense. You may not convict the accused solely because you believe he committed another sexual offense or offenses, or solely because you believe the accused has a propensity to engage in sexual offenses. Bear in mind that the government has the burden of prove that the accused committed each of the elements of each charged offense.

The military judge's instructions were clear and proper. See [United States v. Rogers, 587 F. 3d 816, 822 \(7th Cir. 2009\)](#) ("Congress has said that in a criminal [*14] trial for an offense

of sexual assault, it is not improper to draw the inference that the defendant committed this sexual offense because he has the propensity to do so.").

CONCLUSION

For the reasons stated above, we find the military judge did not abuse his discretion in admitting appellant's sexual misconduct against Ms. LPB. Accordingly, the findings and sentence are correct in law and fact and are therefore AFFIRMED.

Judge BROOKHART and Judge SCHASBERGER concur.

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Caution

As of: November 18, 2022 9:13 PM Z

United States v. Garrett

United States Navy-Marine Corps Court of Criminal Appeals

March 30, 2021, Decided

No. 202000028

Reporter

2021 CCA LEXIS 135 *; 2021 WL 1197611

UNITED STATES, Appellee v. Andrew M. GARRETT, Master-at-Arms Second Class (E-5) U.S. Navy, Appellant

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF APPELLATE PROCEDURE 30.2.

Subsequent History: Petition for review filed by [United States v. Garrett, 2021 CAAF LEXIS 465, 2021 WL 2432440 \(C.A.A.F., May 18, 2021\)](#)

Motion granted by [United States v. Garrett, 2021 CAAF LEXIS 479, 2021 WL 2411316 \(C.A.A.F., May 19, 2021\)](#)

Review denied by [United States v. Garrett, 2021 CAAF LEXIS 767 \(C.A.A.F., Aug. 23, 2021\)](#)

Prior History: [*1] Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Michael D. Libretto. Sentence adjudged 25 October 2019 by a general court-martial convened at Naval Air Station Jacksonville, Florida, consisting of officer and enlisted members. Sentence in the Entry of Judgment: reduction to E-1, confinement for 2 years, forfeiture of all pay and allowances, and a dishonorable discharge.

Case Summary

Overview

HOLDINGS: [1]-Evidence was factually sufficient to support appellant's conviction of one specification of sexual assault by causing bodily harm, in violation of UCMJ art. 120, [10 U.S.C.S. § 920](#), where the victim's testimony was credible and compelling and appellant's description of the sexual act was contradicted by the DNA evidence; [2]-Instruction given by the military judge regarding consent did not render sexual assault by bodily injury, [§ 920\(b\)\(1\)\(B\)](#), multiplicitous with sexual assault upon an incapacitated person, [§ 920\(b\)\(3\)](#), as the instructions did not alter the fact that each of the two offenses in question demanded proof of an element not required by the other.

Outcome

The finding and sentence were affirmed.

Counsel: For Appellant: Robert Feldmeier, Esq., Lieutenant Clifton E. Morgan III, JAGC, USN.

For Appellee: Lieutenant Gregory A. Rustico, JAGC, USN; Lieutenant Joshua C. Fiveson, JAGC, USN.

Judges: Before HOLIFIELD, STEWART, and DEERWESTER, Appellate Military Judges. Senior Judge HOLIFIELD delivered the opinion of the Court, in which Judges STEWART and DEERWESTER joined. Judges STEWART and DEERWESTER concur.

Opinion by: HOLIFIELD

Opinion

HOLIFIELD, Senior Judge:

Appellant was convicted, contrary to his pleas, of one specification of sexual assault by causing bodily harm, in violation of [Article 120, Uniform Code of Military Justice \[UCMJ\], 10 U.S.C. § 920 \(2012\)](#).¹

Appellant asserts seven assignments of error [AOEs]: (1) that the evidence is factually insufficient to support his conviction; (2) that the military judge erred in instructing the [*2] panel that it could convict based on an uncharged theory of criminal liability; (3) that trial defense counsel [TDC] was ineffective in failing to object to improper expert opinion and for failing to move to strike the victim's testimony under Rule for Courts-Martial [R.C.M.] 914; (4) that the military judge erred in admitting a hearsay statement as a prior consistent statement; (5) that TDC was ineffective for failing to move to suppress the victim's pretext phone call with Appellant; (6) that a non-unanimous verdict violated Appellant's [Sixth Amendment](#) rights; and (7) that the evidence was factually insufficient due to the victim's motive to fabricate.² Merging the last AOE with the first and considering but summarily rejecting the fifth and sixth as being without merit,³ we address the remaining AOEs in order. After doing so, we find no prejudicial error and affirm.

¹ Appellant was acquitted of one specification of sexual assault when he knew or should have known the victim was asleep.

² Assignments of Error 5-7 are raised pursuant to [United States v. Grostefon, 12 M.J. 431 \(C.M.A. 1982\)](#).

³ See [United States v. Clifton, 35 M.J. 79, 81-82 \(C.M.A. 1992\)](#); [United States v. Matias, 25 M.J. 356, 361 \(C.M.A. 1987\)](#).

I. BACKGROUND

Appellant and the victim, Master-at-Arms Third Class (E-4) [MA3] Golf,⁴ were co-workers in the Security Department at Naval Submarine Base Kings Bay, Georgia. Throughout their close working relationship, MA3 Golf never expressed a romantic interest in Appellant. In August 2018, both attended a party at Appellant's off-base apartment, [*3] where MA3 Golf consumed several alcoholic drinks and played a game in which players attempted to catch airborne whipped cream in their mouths. After consuming an unknown amount of alcohol and whipped cream, MA3 Golf became sick, vomiting in Appellant's bathroom. As Appellant helped MA3 Golf return to the living room, he attempted to steer her into his bedroom. She very clearly refused, instead choosing to sleep on Appellant's living room couch. Later that night, MA3 Golf awoke to find Appellant penetrating her vagina with his penis. She reacted by pretending to still be asleep.

The following morning, MA3 Golf returned to her nearby apartment and then met with a friend and co-worker, MA3 Sierra. MA3 Golf told MA3 Sierra what had happened the previous night, and the latter advised her that she needed to report the incident to law enforcement.

Soon thereafter, at the local Naval Criminal Investigative Service [NCIS] field office, Special Agent [SA] Charlie directed MA3 Golf to call Appellant under the pretext of wanting to discuss the event in question. During the recorded call, Appellant consistently claimed that the sexual encounter was consensual and that MA3 Golf was a willing and active [*4] participant. Appellant later repeated this claim

⁴ All names used in this opinion, except those of Appellant, judges, and counsel, are pseudonyms.

in his own statement to NCIS. At the time SA Charlie met with MA3 Golf, he learned that texts MA3 Golf had exchanged with MA3 Sierra that morning were on MA3 Golf's phone. While SA Charlie did not seize the phone or otherwise capture the text conversation, he did direct MA3 Golf not to delete the texts. But between that day and the trial, the texts were lost.

The victim also met with a nurse, Lieutenant Commander [LCDR] Victor, who performed a sexual assault forensic examination. LCDR Victor described MA3 Golf's demeanor during their meeting as "flat . . . [meaning] blunted emotion, not making eye contact, common with people who have experienced trauma."⁵

Appellant's TC's strategy was to challenge the veracity of the victim's description of events. To this end, the Defense highlighted memory gaps and discrepancies in MA3 Golf's various statements, suggested motives to fabricate, and presented expert testimony regarding blackouts and how internal and external influences can affect memory.

Additional facts necessary to resolve the AOE's are addressed below.

II. DISCUSSION

A. The Evidence Admitted at Trial Was Factually Sufficient to Support Appellant's [*5] Conviction

1. Standard of Review

The test for factual sufficiency is whether "after weighing all the evidence in the record of trial and recognizing that we did not see or hear

the witnesses as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt." [*United States v. Rankin*, 63 M.J. 552, 557 \(N-M. Ct. Crim. App. 2006\)](#) (citing [*United States v. Turner*, 25 M.J. 324, 325 \(C.M.A. 1987\)](#) and Art. 66(c), UCMJ). In doing so, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." [*United States v. Washington*, 57 M.J. 394, 399 \(C.A.A.F. 2002\)](#).

To sustain a conviction for sexual assault by causing bodily harm, we must be convinced the Prosecution proved beyond a reasonable doubt that: (1) Appellant committed a sexual act upon MA3 Golf by causing penetration of her vulva by his penis; and (2) Appellant did so by causing bodily harm to MA3 Golf—that is, penetrating her vulva with his penis without her consent. [*UCMJ art. 120\(b\)\(1\)\(B\), \(g\)\(3\)*](#).

2. Analysis

Appellant argues that the lack of corroborating evidence, gaps in MA3 Golf's memory, the impact of both internal and external influences on her ability to fill [*6] those gaps, and potential motives for her to fabricate create reasonable doubt as to his guilt. Appellant's counsel attacked MA3 Golf's credibility throughout the trial, taking a two-pronged approach. The Defense first laid a foundation to argue that MA3 Golf had suffered an alcohol-induced blackout, unconsciously filling the gaps in her memory to accord with her expressed lack of interest in Appellant and the comments by her friend, MA3 Sierra, that she had been assaulted and needed to report the incident. At the same time, Appellant's counsel attempted to show that MA3 Golf could not

⁵ R. at 484-85.

have been experiencing a blackout, based on witnesses' testimony that she did not appear drunk at the party. Finally, they claimed that MA3 Golf's veracity was undermined by her knowledge that an unrestricted report of sexual assault might allow her to transfer duty stations, something she had months earlier expressed a desire to do.

We find these and other questions regarding MA3 Golf's credibility are completely outweighed by the facts on which both MA3 Golf and Appellant agree. First, MA3 Golf had never shown romantic interest in Appellant, including during the party that night. Second, MA3 Golf—whether [*7] due to overindulgence in alcohol, whipped cream, or both—was vomiting in Appellant's bathroom shortly before the sexual act occurred. Third, MA3 Golf made very clear to Appellant she did not want to go into his bedroom when Appellant attempted to steer her into it as they left the bathroom minutes after she was sick—a fact that evidences their respective intentions.

Additionally, MA3 Golf reported the sexual assault within hours of leaving Appellant's apartment. She initially declined an expedited transfer when offered. The depth of MA3 Golf's relationship with MA3 Sierra was neither developed at trial nor even mentioned in TDC's argument on findings. And Appellant's description of the sexual act—that he ejaculated on the floor—is contradicted by DNA evidence.

We recognize that we did not personally observe MA3 Golf testify at trial, but the record establishes that her testimony was credible and compelling. Reviewing the entire record, we find the evidence factually sufficient to prove Appellant's guilt beyond a reasonable doubt.

B. The Military Judge Did Not Err in His Instructions Regarding the Elements of Sexual Assault by Bodily Harm

1. Standard of Review

We review de novo whether a [*8] military judge properly instructed the members. [*United States v. Maxwell*, 45 M.J. 406, 424 \(C.A.A.F. 1996\)](#). A "military judge's denial of a requested instruction is reviewed for abuse of discretion." [*United States v. Carruthers*, 64 M.J. 340, 345-46 \(C.A.A.F. 2007\)](#). In reviewing this denial, we look to whether the requested instruction is correct, whether it is substantially covered by other instructions, and whether the failure to give it deprived Appellant of a defense or seriously impaired his ability to present that defense. *Id.*

2. Analysis

Appellant's TDC requested, in part, that the military judge instruct the members that:

[T]here is no allegation that MA3 [Golf] was too intoxicated to consent to sex. You are not permitted to consider whether she was too intoxicated to consent to sex. That is not an issue before you, and as a matter of law, a determination has already been made in this case that MA3 [Golf] was not too intoxicated to consent to sex.⁶

Instead, the military judge provided the following instructions relevant here to bodily harm and consent:

[For sexual assault by bodily harm], the elements are as follows:

⁶ R. at 647. Appellant's TDC conceded that the remainder of the requested instruction was covered by the main instructions. R. at 648. Also, the military judge noted TDC's concession that the Defense was on notice that capacity to consent would be raised by the evidence, and had prepared accordingly. R. at 650.

One, that . . . the accused committed a sexual act upon [MA3 Golf] by penetrating her vulva with his penis;

Two, that the accused did so by causing bodily harm to MA3 [Golf], to wit: penetrating [*9] her vulva with his penis; and

Three, that the accused did so without the consent of MA3 [Golf].

. . . .

[T]he term "bodily harm" means any offensive touching of another, however slight, including any nonconsensual sex act.

The evidence has raised the issue of whether [MA3 Golf] consented to the sexual conduct All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven each of the elements . . . beyond a reasonable doubt. . . .

"Consent" means a freely-given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. . . . Further, a sleeping, unconscious or incompetent person cannot consent.

Lack of consent may be inferred from the circumstances. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions.

A competent person [*10] is a person who possesses the physical and mental ability to consent. An incompetent person is a

person who lacks either the mental or physical ability to consent because he or she is:

One, asleep or unconscious;

Two, impaired by a drug, intoxicant or other similar substance; or

Three, suffering from a mental disease or defect, or a physical disability.

To be able to freely make an agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question and then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person.

The mere fact that MA3 [Golf] consumed alcohol does not render her incompetent and incapable of consenting. . . . You may, however, consider that MA3 [Golf] may have consumed alcohol and the amount of alcohol she may have consumed along with all other evidence relevant to the issue in determining whether MA3 [Golf] consented to the conduct at issue and whether she possessed the cognitive ability to appreciate the nature of the conduct and lacked the physical and mental ability to consent. The government has the burden of proof to establish that MA3 [Golf] did not consent [*11] and/or was incompetent to consent to the sexual conduct in question⁷

The military judge properly found the quoted portion of the TDC's proposed instruction to be an inaccurate statement of the law, citing [*United States v. Gomez, No. 201600331, 2018 CCA LEXIS 167 \(N-M. Ct. Crim. App. Apr. 4, 2018\)*](#) (unpublished). Here, as in [*Gomez*](#), we find that because the Article 120, UCMJ, definition of "bodily harm" includes "any nonconsensual sexual act," and "consent"

⁷ R. at 658-62.

means "a freely given agreement to the conduct at issue by a competent person," the offense with which Appellant was charged necessarily implicated the victim's competence. Accordingly, MA3 Golf's ability to consent was an issue squarely before the members, making the proposed instruction incorrect and unable to satisfy the first prong of the [Caruthers](#) test. The military judge's refusal to give the proposed instruction was not error.

On appeal, Appellant also claims that the instruction that the military judge did give regarding consent renders sexual assault by bodily injury ([Article 120\(b\)\(1\)\(B\)](#)) multiplicitious with sexual assault upon an incapacitated person ([Article 120\(b\)\(3\)](#)). We disagree. "A charge is multiplicitious if the proof of such charge also proves every element of another [*12] charge." R.C.M. 907(b)(3)(B). In comparing two statutes for a determination of multiplicity, we are "limited to consideration of the statutory elements of the involved crimes," rather than the pleadings and proof at trial. [United States v. Teters](#), 37 M.J. 370, 376 (C.M.A. 1993).

Sexual assault through incapacitation requires that the Government prove, inter alia, that the victim was *incapable* of consenting and that the accused knew or should have known of said incapacity. [UCMJ art. 120\(b\)\(3\)](#). Neither of these elements is required to prove sexual assault by bodily harm. For that offense, the Government must prove only (1) the commission of a sexual act and (2) that said act was done by causing bodily harm, *i.e.*, "an offensive touching of another, however slight, including any nonconsensual sexual act" [UCMJ art. 120\(g\)\(3\)](#). And, as our superior court has specifically found, proving a victim's "legal inability to consent [i]s not the equivalent of the Government bearing the affirmative responsibility to prove that [the victim] *did not, in fact consent.*" [United States v. Riggins](#), 75

[M.J. 78, 84 \(C.A.A.F. 2016\)](#) (finding on that basis that assault consummated by battery is not a lesser-included offense of sexual assault or abusive sexual contact by placing the other person in fear) (emphasis in original).

The [*13] military judge's instructions did not alter the fact that each of the two offenses in question demands proof of an element not required by the other. We therefore reject Appellant's multiplicity argument.

C. The TDC Was Not Ineffective in Failing to Object to LCDR Victor's Opinion Testimony or Failing to Move to Strike the Victim's Testimony Under Rule for Courts-Martial 914

1. Standard of Review

We review claims of ineffective assistance of counsel de novo. [United States v. Captain](#), 75 M.J. 99, 102 (C.A.A.F. 2016). To prevail on an ineffective assistance claim, Appellant bears the burden of proving that the performance of defense counsel was deficient and that Appellant was prejudiced by the error. *Id.* (citing [Strickland v. Washington](#), 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). "We need not apply the *Strickland* test in any particular order; rather, '[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.'" *Id.* (quoting [Strickland](#), 466 U.S. at 697) (alterations in original). "The test for prejudice when a conviction is challenged on the basis of actual ineffectiveness of counsel 'is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" [United States v. Scott](#), 24 M.J. 186, 189 (C.M.A. 1987) (quoting [Strickland](#), 466 U.S. at 695).

2. Analysis

Appellant first avers that his counsel [*14] was ineffective for failing to object to LCDR Victor's statement that the affect she observed in MA3 Golf—"flat," "blunted emotion, not making eye contact"—was "common with people who have experienced trauma."⁸ Appellant claims the comment was improper expert opinion, as the record shows LCDR Victor testified as a lay factual witness, not an expert. But, even assuming the testimony was improper, we fail to find prejudice. The main thrust of Appellant's defense at trial was that MA3 Golf suffered a blackout, and that internal and external influences led her to manufacture memories to fill the gaps and convince herself she had been sexually assaulted. Thus, the fact she may have been acting in a manner consistent with "people who have experienced trauma" actually fit with TDC's theory.

We next examine whether TDC was ineffective by neither requesting, once MA3 Golf testified, any prior statements of MA3 Golf, or moving to strike MA3 Golf's testimony as a remedy for the Government's presumed inability to provide the lost texts between MA3 Golf and MA3 Sierra as required by R.C.M. 914. Again, we start and end with the second prong of the [Strickland](#) test, and, again, we find no prejudice. For witnesses [*15] called by trial counsel (as was MA3 Golf), the obligations of R.C.M. 914 apply only to statements "in the possession of the United States." Assuming, arguendo, that the texts between MA3 Golf and MA3 Sierra were "statements" within the Rule, they were never in the possession of the United States. The record indicates only that SA Charlie knew of the statements; there was no evidence indicating that he read the texts or at any time possessed MA3 Golf's phone. So

Appellant points to the phone's owner, claiming: (1) MA3 Golf's participation in the pretext phone call at SA Charlie's direction made her a government agent; and (2) since MA3 Golf possessed the phone, the texts were in the possession of the United States. Appellant cites no authority for this conclusion, and we find none.⁹ Looking to the facts of this case, we find no violation of R.C.M. 914 and, therefore, no prejudice from TDC's failure to claim that there was.

As Appellant has not demonstrated a reasonable probability that, absent either of these alleged errors, the members would have had a reasonable doubt regarding his guilt, we [*16] find the claim of ineffective assistance without merit.

D. Admitting the Victim's Prior Statement Through MA3 Sierra Was Not Plain Error

1. Standard of Review

We review a military judge's admission or exclusion of evidence for an abuse of discretion. [United States v. Finch, 79 M.J. 389, 394 \(C.A.A.F. 2020\)](#). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." [United](#)

⁹ Appellant does cite [United States v. Bosier, 12 M.J. 1010 \(A.C.M.R. 1982\)](#), as authority for treating a government informer's notes as "in the possession of the United States." But we are not persuaded that *investigative notes* in that case, taken by an informer during a *seven-month relationship* with law enforcement, *during the course of the investigation* and *pertaining to the informer's role* in that investigation, are analogous to brief texts made before—and independent of—an investigation, by a victim whose sole role in the investigation was a pretext phone call with her alleged attacker. We decline to ascribe Government possession for the purposes of R.C.M. 914 under the circumstances here.

⁸ R. at 484-85.

[*States v. Lloyd*, 69 M.J. 95, 99 \(C.A.A.F. 2010\)](#) (citation and internal quotation marks omitted). "[W]here the military judge places on the record his analysis and application of the law to the facts, deference is clearly warranted." [*United States v. Flesher*, 73 M.J. 303, 312 \(C.A.A.F. 2014\)](#).

2. Analysis

Hearsay is generally not admissible. Mil. R. Evid. 802. A prior consistent statement is not hearsay if: the declarant of the statement testifies and is subject to cross-examination about the statement; the statement is consistent with the declarant's testimony; and the statement is offered either "(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying," or "(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground." Mil. R. Evid. 801(d)(1)(B). "Another ground" [*17] as used in subparagraph (ii) of the Rule, refers to attacks on credibility other than allegations of recent fabrication or improper influence or motive addressed by subparagraph (i). [*Finch*, 79 M.J. at 395](#). Charges of faulty memory are one such ground. *Id.* (citing *Manual for Courts-Martial, United States*, app. 22, Analysis of the Military Rules of Evidence at A22-61 (2016 ed.)). For a prior statement to be admissible under Military Rule of Evidence 801(d)(1)(B)(ii), its proponent must show that "the prior consistent statement [is] relevant to rehabilitate the witness's credibility on the basis on which he or she was attacked." [*Id.* at 396](#).

During its case-in-chief, the Government sought to elicit testimony from MA3 Sierra recalling what MA3 Golf told him the morning after the assault. The Government argued that the statements were admissible under Military

Rule of Evidence 801(d)(1)(B)(ii). Objecting, TDC explained that the Defense had not attacked MA3 Golf's credibility by implying she was lying. Rather, the Defense "just exposed . . . potential issues in perception and ability to recall," and that, due to MA3 Golf's blackout state, "this memory was never recorded, and that she would, essentially, be filling in the blanks for a memory that never actually occurred."¹⁰ Finding no connection between the [*18] statements to MA3 Sierra and the way in which MA3 Golf's credibility was attacked, such that the statements would not rehabilitate MA3 Golf's credibility, the military judge sustained the Defense's objection, precluding the Government from eliciting the statements.

The Defense subsequently called an expert witness, Dr. Hotel, who explained how memories are recorded and how internal and external influences, or "schema," can cause a person to fill in the gaps in memory caused by an alcohol-induced blackout. One external influence Dr. Hotel discussed was MA3 Sierra's comments to MA3 Golf, explaining how his telling her that "'you need to go to report this,' kind of inferring that this is a reportable event, and you need to go and report this as a sexual assault[,] . . . that could potentially be influencing and have an impact on how one comes to characterize or recall an event."¹¹

After Dr. Hotel testified, the assistant trial counsel [ATC] asked the military judge to revisit his earlier ruling regarding MA3 Sierra's testimony. The ATC argued that the Defense had opened the door to the statements' admission by Dr. Hotel's testimony and attack on MA3 Golf's credibility. The military judge [*19] agreed, pointing to Dr. Hotel's

¹⁰ R. at 404, 409.

¹¹ R. at 609-10.

"specific example referencing the influence that MA3 [Sierra] might have had on the memory of [MA3 Golf]."¹² He also cited the Defense "calling into question and attacking the witness' credibility on another ground, specifically lack of memory or contamination of that memory."¹³ Accordingly, the military judge changed his earlier ruling, finding MA3 Golf's statements to MA2 Sierra were admissible under Military Rule of Evidence 801(d)(1)(B)(ii).

On appeal, Appellant avers that "the allegation was one of contamination," and, since MA3 Sierra's statements to MA3 Golf occurred before she told him of the assault, any subsequent statements by MA3 Golf were "contaminated."¹⁴ Therefore, he reasons, the prior consistent statements in question are not relevant to rehabilitate MA3 Golf's credibility.

We disagree. When the Defense asked Dr. Hotel about external influences, the expert discussed how what MA3 Sierra said to MA3 Golf could have influenced how the latter came to remember the event. The reference to MA3 Sierra's potential influence, as the military judge rightly found, made the conversation's contents relevant. In fact, the military judge's ruling was ultimately supported by MA3 Sierra's testimony, [*20] which provided faint evidence for the conclusion that MA3 Sierra was somehow able to influence MA3 Golf's memory before she told him what happened. MA3 Sierra's testimony contains only a slight, vague description of his meeting with MA3 Golf. After MA3 Golf texted him and asked to meet, he picked her up. She was "quiet for a minute, just like an ominous—like, there's definitely something that needed to be said

type of feeling."¹⁵ Based on how MA3 Golf was acting, MA3 Sierra "had an idea where she was going," and stopped her before she said anything.¹⁶ The record does not indicate what was said next, or by whom. Clearly, at some point, MA3 Golf described the sexual assault, and MA3 Sierra asked her if she wanted to report the assault. But the *order* in which this conversation occurred—a key element of Appellant's claim of contamination—is missing. Thus, the details of the conversation bore directly on the utility of Dr. Hotel's opinion concerning the potential influence of MA3 Sierra's words on MA3 Golf's memory.

We also disagree with Appellant's narrow portrayal of the Defense's attack. The allegation of contamination by MA3 Sierra was simply part of a broader attack alleging that MA3 Golf [*21] had little or no accurate memories of the event. A fresh report, such as MA3 Golf describing the assault to MA3 Sierra only hours after the event, can serve to rebut such a charge and here provides additional support for our conclusion that MA3 Golf's statements to MA3 Sierra were properly admitted under Military Rule of Evidence 801(d)(1)(B)(ii).

While it would have been better had the military judge provided a more detailed explanation of his ruling, his brief comments show that he understood and correctly applied Military Rule of Evidence 801(d)(1)(B)(ii). And we see nothing in the record that indicates he abused his discretion in finding that the prior statements would rehabilitate MA3 Golf's credibility regarding alleged lack or contamination of memory. Accordingly, we find no error.

¹² R. at 630.

¹³ *Id.*

¹⁴ Appellant's Br. at 35.

¹⁵ R. at 633.

¹⁶ R. at 640-41.

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the finding and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred. [UCMJ arts. 59, 66](#). Accordingly, the finding and sentence are **AFFIRMED**.

Judges STEWART and DEERWESTER concur.

End of Document

United States v. Pasay

United States Army Court of Criminal Appeals

April 19, 2017, Decided

ARMY 20140930

Reporter

2017 CCA LEXIS 268 *

UNITED STATES, Appellee v. Sergeant
RAYMOND P. PASAY, United States Army,
Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by,
Without prejudice, Motion denied by, As moot
[United States v. Pasay, 2017 CAAF LEXIS
624 \(C.A.A.F., June 15, 2017\)](#)

Modified by, On reconsideration by [United
States v. Pasay, 2017 CCA LEXIS 590
\(A.C.C.A., Aug. 31, 2017\)](#)

Prior History: [*1] Headquarters, 1st Cavalry
Division. Rebecca K. Connally, Military Judge
(arraignment). Wade N. Faulkner, Military
Judge (trial). Lieutenant Colonel James D.
Levine, II, Acting Staff Judge Advocate
(pretrial). Colonel Alison C. Martin, Staff Judge
Advocate (recommendation). Lieutenant
Colonel Michael D. Jones, Acting Staff Judge
Advocate (addendum).

Case Summary

Overview

HOLDINGS: [1]-Although the military judge
excepted out the words "on divers occasions"
in specifications alleging that a servicemember
touched his daughter's breast "on divers
occasions" and raped his daughter "on divers
occasions," the court was not required to
dismiss either specification under the U.S.

Court of Appeals for the Armed Forces'
decision in *United States v. Walters*; [2]-The
evidence was not sufficient to affirm the
servicemember's conviction for rape, but was
sufficient to find that he committed the lesser-
included offense of sexual assault by bodily
harm; [3]-The military judge did not act as
counsel when he forwarded an email about the
case which he received while he was Chief of
Justice for III Corps before becoming a military
judge, and he was not disqualified from
hearing the case; [4]-The servicemember was
not denied effective assistance of counsel.

Outcome

The court found the servicemember not guilty
of rape but guilty of the lesser-included offense
of sexual assault by bodily harm, affirmed the
other findings, reassessed the
servicemember's sentence, and affirmed the
sentence of a dishonorable discharge,
confinement for 51 years, and reduction to E-
1.

Counsel: For Appellant: Lieutenant Colonel
Melissa R. Covolessky, JA; Major Christopher
D. Coleman, JA; Captain Joshua G.
Grubaugh, JA (on brief); Major Christopher D.
Coleman, JA; Captain Joshua G. Grubaugh,
JA (on reply brief).

For Appellee: Colonel Mark H. Sydenham, JA;
Lieutenant Colonel A.G. Courie III, JA; Major
Melissa Dasgupta Smith, JA; Captain
Christopher A. Clausen, JA (on brief).

Judges: Before MULLIGAN, FEBBO, and WOLFE Appellate Military Judges. Senior Judge MULLIGAN and Judge FEBBO concur.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION

WOLFE, Judge:

Appellant, Sergeant (SGT) Raymond Pasay, appeals his conviction for the rape and sexual abuse of his daughter, AM.¹ Of appellant's five assignments of error, three merit detailed discussion. Although we find one specification to be factually insufficient, we do not otherwise discuss appellant's claims that the remaining specifications [*2] are factually and legally insufficient.² The military judge sentenced appellant to a dishonorable discharge, confinement for fifty-one years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The military judge also credited appellant with fifty-one days of confinement credit against the term of confinement. The convening authority credited appellant with fifty-one days of confinement credit and approved as much of the adjudged sentence as provided for a dishonorable discharge, confinement for fifty-one years, and reduction to the grade of E-1.

¹ Appellant was convicted of two specifications of abusive sexual contact with a child, two specifications of aggravated sexual abuse of a child, two specifications of aggravated sexual assault of a child, indecent act, rape, and production of child pornography in violation of Articles 120 and 134, Uniform Code of Military Justice, [10 U.S.C. §§ 920, 934 \(2006 & Supp. IV; 2012\)](#) [hereinafter UCMJ].

² We do not address in depth appellant's claim that he is entitled to sentencing relief because it took 276 days to conduct post-trial processing. We find no due process violation and do not find the sentence to be inappropriate notwithstanding the time it took to prepare appellant's case for convening authority action.

We first address appellant's concerns that we have an issue under [United States v. Walters, 58 M.J. 391 \(C.A.A.F. 2003\)](#). In announcing findings for two specifications, the military judge excepted out the words "on divers occasions" without explanation. Next, we address appellant's allegation that the military judge should have disqualified himself because appellant alleges he had previously acted "as counsel" in the case. Finally, we address appellant's claim that his civilian defense counsel and detailed defense counsel provided ineffective assistance.³

DISCUSSION

A. Ambiguous Findings and United States v. Walters

Appellant was convicted of nine specifications. Two [*3] of those specifications (Specifications 2 and 12 of Charge I) alleged appellant acted "on divers occasions." For both specifications, the military judge excepted out the words "on divers occasions." That is, the military judge found appellant guilty of the offense on a single occasion and acquitted appellant of all other occasions. As the military judge did not explain his findings, this presents us on appeal with the question of whether we can determine what conduct formed the basis of appellant's guilty finding.

The reasoning behind this dilemma is well-settled and is discussed in depth in our superior court's decision in *Walters*. If the findings are ambiguous, we cannot perform our duties under *Article 66(c)*, *UCMJ*, and the specifications must be set aside with

³ The matters submitted personally by appellant pursuant to [United States v. Grostefon, 12 M.J. 431 \(C.M.A. 1982\)](#) are either duplicative of the assigned errors or do not merit individual discussion or relief.

prejudice.⁴

As an initial matter, we note Specifications 1 and 13 of Charge I were alternative charges to the conduct alleged in Specifications 2 and 12 of Charge I. The government conceded the specifications were charged in the alternative. At trial, appellant moved to dismiss the specifications as unreasonably multiplied. Rule for Courts-Martial [hereinafter [*4] R.C.M.] 906(b)(12) provides for appropriate relief when specifications are unreasonably multiplied for sentencing. R.C.M. 907 instructs on motions to dismiss. R.C.M. 917 allows for the military judge to enter a finding of not guilty based on the insufficiency of the evidence.

Here, the military judge stated his intent to enter a *not guilty* finding to solve an issue of unreasonable multiplication of charges issue—regardless of the sufficiency of the evidence. In other words, even assuming the government proved the specifications beyond a reasonable doubt, the military judge stated he would find appellant not guilty of the specifications. And, indeed, appellant was

found not guilty of Specifications 1 and 13 of Charge I. Accordingly, we cannot resolve the *Walters* issue in this case by looking to the alternative charges.

1. Forfeiture

While *Walters* was decided well-over a decade ago, we are unaware of a case that addresses whether a *Walters* issue is forfeited by the failure to raise the issue to the trial judge. In other words, when presented with ambiguous findings, must an accused raise the issue to the military judge in order to preserve the issue for appeal? If forfeiture does not apply, then appellant is under no obligation [*5] to raise the issue to the trial judge, and is in fact highly incentivized to do nothing. Put differently, is a *Walters* issue a bipartite failure of the trial counsel and the military judge, or a tripartite failure also involving the defense counsel?

Absent plain error, an accused forfeits error—even constitutional error—by failing to object at trial. See e.g. *United States v. Carpenter*, 51 M.J. 393, 396 (C.A.A.F. 1999); *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998). The plain error doctrine incentivizes parties to raise allegations of error at the trial level where it can be most easily corrected. Here, as we discuss below, appellant's claims turn on how *plain and obvious* it was that there was evidence of more than one offense.

Nonetheless, we infer from our superior court's treatment of previous cases that forfeiture is inappropriate when considering a *Walters* issue. Accordingly, we assume without deciding that forfeiture does not apply.

2. Standard of Review

On appeal, a *Walters* issue may only be resolved if the record "clearly put the accused

⁴ It is curious that the government persists in using the words "on divers occasions" in charging decisions after the Court of Appeals for the Armed Force's (CAAF) decision in *Walters*. "Divers" is an archaic way of stating "two or more." See Dep't of Army, Pam. 27-9, Legal Services: Military Judges Benchbook [hereinafter Benchbook], para. 7-25 (1 Jan. 2010) (defining "divers"). As the CAAF made clear in *United States v. Rodriguez*, the *Walters* issue is only triggered when the accused is *acquitted* of certain language by exceptions. 66 M.J. 201, 204-05 (C.A.A.F. 2008). In that case, the CAAF refused to extend *Walters* to circumstances where it may be unclear which instances formed the basis of the court-martial's findings, but where the findings did not include findings by exceptions. *Id.* If the government charged the language "one or more" instead of "two or more," the *Walters* issue would be eliminated, the amount of admissible evidence would be the same, and the accused would continue to receive notice and double jeopardy protection of the charges he is facing. To the extent that charging "one or more" presents disjunctive charging, it is a problem already present when the government charges the conduct happened on "divers" or "two or more" occasions.

and the reviewing courts on notice of what conduct served as the basis for the findings." Walters, 58 M.J. at 396. In *United States v. Ross*, our superior court made clear the standard of review is one of legal sufficiency. 68 M.J. 415, 418 (C.A.A.F. 2010) ("[T]he Government could nevertheless prevail were [*6] we to conclude that the evidence was legally insufficient to show that Appellant was guilty" of more than one offense).

Accordingly, we are required to dismiss the specification with prejudice if there is legally sufficient evidence that he committed *more than* one offense. Whereas if there is only legally sufficient evidence to support one instance, we affirm appellant's conviction.

Thus the topsy-turvy nature of this appeal and the briefs filed by the parties. The government argues there is clearly evidence appellant only committed the offense on just one occasion. Appellant, by contrast, argues there is evidence he committed multiple offenses. Alice has passed through the looking glass.

3. Specification 2 of Charge I

The government charged appellant with multiple specifications based on the location of the offense, the time of the offense, and the nature of the sexual conduct. Specification 2 of Charge I alleged that at or near Killeen, Texas, between about 1 March 2008 and 8 June 2008, appellant touched AM's breast on divers occasions. The military judge found appellant guilty only after excepting out the words "on divers occasions."

The *only* evidence regarding the touching of AM's breast [*7] in the relevant time frame in Killeen, TX was as follows:

Q. I want to take you to the hotel room, [AM]. Can you tell me did Sergeant Pasay ever touch you somewhere on your body

during the time you stayed in this hotel?

A. Yes.

Q. Please describe what happened?

A. I don't remember the general time. I remember a specific time that I can think of. I was laying on the end of the bed and they were--my mom and Sergeant Pasay . . . and I felt a hand come over and try to grope my breast.

After asking a series of questions that identified the hand as being appellant's and clarifying that her breast was grabbed under her clothing, the trial counsel continued:

Q. And [AM], was that the only time that you recall someone touching you in the hotel room?

A. I know that there were more times after that, but I can't think of any more specific times.

We find this evidence legally insufficient to support a finding that appellant touched AM's breast on more than one occasion. Had appellant been convicted of the offense as charged, we would be required as a matter of law to except out the language "on divers occasions." AM's testimony that she "knows" someone touched her on other occasions, but cannot actually [*8] testify to the other occasions because of a lack of memory, is legally insufficient to support the conclusion that appellant touched her breast more than once. No reasonable fact finder could convict appellant of touching AM's breast on more than one occasion based on this testimony.

4. Specification 12 of Charge I

In June 2012, AM had turned sixteen years old—the age of consent under the UCMJ. Accordingly, specifications that alleged appellant had sexual intercourse with AM after June of 2012 included an element of force or threats.

Specification 12 of Charge I alleged that at or near Killeen, Texas, between about 28 June 2012 and 1 September 2012, appellant raped AM by force on divers occasions. Again, the military judge excepted out the words "on divers occasions." AM's testimony on direct-examination was that during the relevant time period, appellant had raped her. However, other than the conclusory statement, she never testified about what appellant did that constituted rape. The key portions of her direct exam were as follows:

Q. And [AM], can you tell us did anything happen with you and Sergeant Pasay when you stayed with him that summer?

A. Yes.

Q. And can you tell us what happened? [*9]

A. He raped me.

...

Q. Okay, and so [AM], can you tell us where he raped you?

A. He would make up reasons why he needed to leave the house and he would make me go with him, and he would take me to his apartment in Cove.⁵

Q. And what would happen when you came to this apartment?

A. He would make me take off my clothes.

...

Q. After you took your clothes off, can you tell us what would happen?

A. He'd penetrate me.

Q. And [AM], can you tell us where he would penetrate you on your body?

A. On my vagina.

Q. And what part of his body did he use?

A. His penis.

Q. And [AM], can you tell us how many times this happened?

A. Almost every day.

On review, we find her initial direct testimony was legally insufficient to establish that appellant had raped her "almost every day." While AM's testimony is legally sufficient to establish that she had sexual intercourse with appellant multiple times during the charged time frame, there is no evidence that appellant used *force*. Force is defined as the use of a weapon, the use of physical strength or violence sufficient to overcome resistance, or inflicting physical harm sufficient to coerce or compel submission. [UCMJ, art. 120\(g\)\(5\)](#). There simply was no testimony [*10] about the key element of force.

Perhaps sensing the lack of evidence, the trial counsel returned to this topic on redirect:

Q. During that period of time when you lived with him, were there ever any times that you tried to physically resist or tell him no when he would take you to this apartment?

A. There was *one time* [emphasis added] where [M] and my brothers had went to the pool and to do laundry . . . and he brought me into their bedroom and made me lay on the floor, and he got on top of me, and he asked if he could choke me and I said no, so he put his hand around my neck and said that he wasn't going to squeeze, he just wanted to put his hand on my neck.

Q. And can you tell--Did he actually do that?

A. Yes. . . .

...

Q. When he put his hand around your neck, what did you feel?

A. I just felt scared.

Q. And did he squeeze his hand on your neck at all?

A. At that time, no.

Q. Was there anything else happening when he put his hand around your neck?

A. Yeah. He penetrated me.

⁵ Copperas Cove, Texas is next to Killeen, Texas.

Q. . . . And [AM], during the time that you lived with him in that summer, were there ever any other times that he put his hands on your neck?

A. No ma'am.

This redirect-examination provided legally sufficient evidence of [*11] only a single occasion of rape. Accordingly, we do not find the findings to be ambiguous.

5. Factual Sufficiency of Specification 12 of Charge I

The unambiguous findings allow us to conduct our review under *Article 66(c), UCMJ*. See [Walters, 58 M.J. at 395](#). We address the issue of factual sufficiency here as it directly borrows from our immediate prior discussion regarding the legal sufficiency of the evidence. Having now conducted a factual sufficiency review, we find the evidence factually insufficient to support appellant's conviction for rape. [United States v. Washington, 57 M.J. 394, 399 \(C.A.A.F. 2002\)](#).⁶

⁶With regards to the remaining specifications, giving no deference to the findings of the trial court, but recognizing that the court-martial had the ability to see and hear the evidence, we find the evidence to be factually sufficient. See [United States v. Davis, 75 M.J. 537, 546 \(Army Ct. Crim. App. 2015\)](#) ("[T]he 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."). Additionally, appellant testified in this case. In [United States v. Pleasant, 71 M.J. 709, 713 \(Army Ct. Crim. App. 2012\)](#) we stated an accused "testifies at his own peril" and adopted the logic of the United States Court of Appeals for the Eleventh Circuit:

"Most important, a statement by a defendant, if disbelieved by the jury, may be considered as substantive evidence of the defendant's guilt. By 'substantive' we mean evidence adduced for the purpose of proving a fact in issue as opposed to evidence given for the purpose of discrediting a witness (i.e., showing that he is unworthy of belief), or of corroborating his testimony. . . . when a defendant chooses to testify, he runs the risk that if disbelieved the jury might conclude

As related above, when asked if appellant ever "squeezed" her neck AM answered, "At that time, no." There are two possible interpretations to her [*12] testimony. The first is that appellant did not initially use force, violence, or inflict physical harm but did so only later during the sexual intercourse. The second, is that appellant may have squeezed her neck during a subsequent assault or not at all. Both interpretations are reasonable readings of the record. Reading the entire testimony in context, the former is the more likely given AM's later testimony that this was the only time appellant placed his hand on her neck. What is missing from the government's case, however, is the follow-up question that would have definitively answered the question beyond a reasonable doubt.

Article 66(c), UCMJ, requires us to set aside a specification when we are not personally convinced of the appellant's guilt beyond a reasonable doubt. Of course, we were not present at trial. Accordingly, this unusual appellate requirement comes with the admonition that we recognize the trial court's superior position in seeing and hearing the witnesses. *Id.* Here, even with such recognition, *Article 66(c), UCMJ*, compels us to find the evidence of rape to be factually insufficient. Accordingly, we will set aside appellant's conviction to rape in our decretal [*13] paragraph and affirm only a finding of guilty to the lesser-included offense of sexual assault by bodily harm.

B. Disqualification of the Military Judge

the opposite of his testimony is true."

[United States v. Williams, 390 F.3d. 1319, 1325 \(11th Cir. 2004\)](#) (quoting [United States v. Brown, 53 F.3d 312, 314 \(11th Cir. 1995\)](#)). An accused's testimony that the stoplight was red, if incredulous, can be considered as positive evidence the light was in fact green.

Appellant was assigned to a subordinate unit of III Corps. The military judge in this case, Lieutenant Colonel (LTC) Wade Faulkner, had served as the chief of justice (CoJ) of III Corps before becoming a military judge. Lieutenant Colonel Faulkner's time as CoJ overlapped with the time appellant's case was being investigated by Army Criminal Investigation Command (CID). Appellant now asserts LTC Faulkner had previously acted "as counsel" in the case, and was therefore disqualified from serving as the military judge.

A military judge shall disqualify himself or herself when the military judge has acted "as counsel" in the case. R.C.M. 902(b)(2). Military judges must also recuse themselves when they have "forwarded the charges in the case with a personal recommendation as to disposition." R.C.M. 902(b)(3).

Prior to arraignment, the military judge disclosed to the parties his prior duties as CoJ. He gave a somewhat detailed explanation of his duties as CoJ. With regards to appellant's case, he stated he had no recollection of ever hearing about the case, discussing the [*14] case, or otherwise being involved in the case. He further stated he did an email search and found one relevant email. Judge Faulkner further disclosed that he forwarded the email to two trial counsel. Neither party asked any questions of Judge Faulkner. Neither party challenged Judge Faulkner. Appellant elected to be tried by Judge Faulkner alone. On appeal, it is the forwarding of this email that appellant alleges constituted Judge Faulkner as having acted "as counsel."

The email's subject line was "FW: Report of Investigation Status ROI [##]". The entire contents of the email was "Report of Investigation Status ROI [##] has been approved." The status report was included as an attachment, and contained a brief summary of the investigation status. Lieutenant Colonel

Faulkner forwarded the email to two trial counsel, Captain (CPT) BG and Mrs. AF, who was a captain at the time, without comment.⁷

1. Post-trial Affidavits

The parties have supplemented the record with affidavits from LTC (ret.) Faulkner, the two trial counsel who were responsible for the case pre-preferred, and both defense counsel. We briefly summarize the affidavits from all five individuals.

*a. LTC Faulkner (Former CoJ/Military [*15] Judge)*

Lieutenant Colonel Faulkner restated his duties and responsibilities as the III Corps CoJ. He also restated that he had no memory of discussing the case or even forwarding the email in question. He further stated he kept a copy of the tracker he used as the III Corps CoJ. The investigation of SGT Pasay was not listed on the tracker. Lieutenant Colonel Faulkner stated he could not explain why it was not on the tracker.

b. CPT BG (Former Trial Counsel)

Captain BG was the trial counsel covering appellant's unit from July 2010 until March 2012. He swore he had no recollection of receiving the email in question or any having any substantive discussions with LTC Faulkner about the case. He stated trial counsel

⁷ For reference, we provide the following dates: The charges alleged appellant's offenses happened between March 2008 and September 2012. Charges were preferred in January 2013 and referred on November 2013. Appellant was arraigned in May 2014. Lieutenant Colonel Faulkner was the CoJ of III Corps from June 2011 to July 2013. The email in question was sent to LTC Faulkner on 12 September 2011 and forwarded to the trial counsel without comment six minutes after it was received.

generally opined on probable cause without discussing the issue with LTC Faulkner. He could not recall why it took two years after CID completed its investigation to prefer charges against appellant.

c. Mrs. AF (Former Trial Counsel)

Mrs. AF took over from CPT BG in April of 2012. She swore that when she took over, there was "no mention of the Pasay case. It was not on any of my slide decks. I didn't brief anyone about it. I didn't have a case file in my office." She further explained [*16] that the case had not been pursued because the Army had been unable to find AM and her mother. She stated that just before she left Fort Hood in June of 2013, because of a happenstance inquiry, she directed a paralegal to try to locate AM. Her paralegal subsequently located AM, thereby reenergizing the case and leading to appellant's subsequent prosecution and conviction. She does not recall ever briefing LTC Faulkner on this update.

d. Mr. JJ (Civilian Defense Counsel)

As appellant alleged his counsel were ineffective, Mr. JJ submitted an affidavit. Mr. JJ stated after considering the option of a panel and trial by other judges, he advised appellant that LTC Faulkner was appellant's "best option for a fair trial." He stated he specifically advised appellant that Judge Faulkner had been the CoJ "during the time the case was initially investigated, opined on, and closed out." He stated he discussed it with appellant again leading up to the trial, and appellant "expressed no concern at all."

e. Major DB (Defense counsel)

Major (MAJ) DB similarly provided an affidavit

to respond to the allegation of ineffective assistance. She stated she had explained to appellant her experience in trying [*17] "many types of cases" in front of Judge Faulkner, to include allegations of sexual assault, and that she had received positive results. She further explained to appellant her knowledge of LTC Faulkner's prior assignment as the III Corps CoJ. Major DB told appellant of the two prior cases she had where LTC Faulkner's time as a CoJ had overlapped with his judicial duties, and her assessment that LTC Faulkner was a fair and moderate judge. She specifically advised appellant that LTC Faulkner was preferable to the other two judges who would likely preside over the case at Fort Hood.

2. Waiver and Forfeiture

When a military judge has previously acted "as counsel" in the same case, R.C.M. 902(e) provides that the military judge shall not accept any waiver by the parties of the disqualification. That is, the disqualification is "unwaivable." Appellant asserts that because a waiver cannot be accepted, the fact that appellant did not object to LTC Faulkner's prior service as CoJ is of no consequence. We disagree.

Our superior court's decision in [*United States v. Jones*, 55 M.J. 317 \(C.A.A.F. 2001\)](#) is perhaps the closest case on point. In that case, a judge on the Navy-Marine Court of Criminal Appeals had previously served as the chief of the government appellate [*18] division. [*Id.* at 318](#). While the case was docketed with the court, the government appellate counsel filed routine motions on the case. *Id.* By the time all the briefs were filed, the same person who served as the head of the government appellate division during the filing of the motions was now an appellate judge deciding the case. *Id.*

Critical to the CAAF's decision in *Jones* was that the appellant had not objected to the judge. [*Id.* at 320](#). Accordingly, the court applied a plain error test. *Id.* The court found it was not plain error when the judge did not sua sponte recuse himself. [*Id.* at 321](#).

Of course, *Jones* involved the potential disqualification of an appellate judge. Here, by contrast, we address the alleged disqualification of a trial judge. While the principles and interests are the same, governing rules do not necessarily follow. However, we are confident that plain error is also the appropriate test in this case. The only authority the CAAF cited for applying the plain error test in *Jones* was [*United States v. Schreiber*, 599 F.2d 534, 536 \(3rd. Cir. 2001\)](#), a case involving the alleged disqualification of a trial judge.

Moreover, the CAAF's decision in *Jones* was consistent with the United States Supreme Court's subsequent case of [*Williams v. Pennsylvania*, 136 S. Ct. 1899, 195 L. Ed. 2d 132 \(2016\)](#). In *Williams*, the appellant specifically [*19] filed a motion asking the chief judge of the appellate court to recuse himself because of his prior service as the district attorney who had authorized seeking the death penalty in his case. Had the appellant in *Williams* done nothing, while having full knowledge of the chief judge's prior involvement in the case, it is far from clear the Supreme Court would have still held the appellant was entitled to relief.

Finally, we note that the CAAF's decision in *Jones* is consistent with the requirement of [*Article 59\(a\), UCMJ*](#). Absent structural error, which appellant does not assert applies, we cannot reverse a finding based on an error of law unless we find material prejudice to one of appellant's substantial rights. When, as the unrebutted affidavits indicate, appellant

knowingly and tactically selected to be tried by Judge Faulkner, we cannot find prejudice to appellant when he got exactly what he wanted.

3. Vertical Imputation Theory

Before addressing whether Judge Faulkner acted "as counsel," we first address an issue raised by appellant. In his brief, appellant asks us to apply the vertical imputation theory. Under this theory, the actions of subordinates acting as counsel are attributed [*20] to superiors. In other words, if any subordinate acted "as counsel" in a case then the superior would likewise be considered to have acted "as counsel." In this case, this would mean when a subordinate trial counsel offered an opinion as to probable cause, that action would be imputed to the CoJ.

However, in the only CAAF case to discuss the vertical imputation theory, the court rejected it. [*Jones* 55 M.J. at 320-21](#). Admittedly, the court's rejection was not categorical. However, the facts of *Jones* and this case are sufficiently similar that we decline appellant's invitation to blaze new appellate ground and adopt the vertical imputation theory when our superior court specifically declined to do so in *Jones*.⁸

Additionally, R.C.M. 902(a) requires a military judge to recuse himself or herself anytime the judge's "impartiality might be reasonably questioned." That is, R.C.M. 902(a) adequately

⁸ The CAAF's decision in *Jones* discussed the federal circuits' different approaches to determining judicial disqualification when a former U.S. Attorney is invested as a federal district court judge. [*55 M.J. at 319-20*](#). In cases where jurisdictions are clearly delineated by geography and where personnel are relatively stationary, the vertical imputation theory at least has the benefit of clarity. Applied to the Army, in which judge advocates are routinely reassigned every two years and often switch between government, defense, and judicial positions, the benefits are not as clear and the administrative burden may be significant.

requires recusal under circumstances where the military judge did not directly act as counsel but, because of a senior-subordinate relationship, a reasonable person might question their fairness. In light of R.C.M. 902(a), adopting the vertical imputation theory to R.C.M. 902(b) as appellant requests would have two effects.

First, it would prohibit a military judge from [*21] presiding over a case where the judge's impartiality *could not* be reasonably questioned under R.C.M. 902(a). That is, the only times R.C.M. 902(a) does not overlap with R.C.M. 902(b) is when, under the circumstances, the military judge's impartiality *is not* in question.

Second, by expanding the scope of R.C.M. 902(b), a potential disqualification that an accused could have waived under R.C.M. 902(a) would now be unwaivable. See R.C.M. 902(e). While such a reading would expand the opportunity for an appellant to claim error on appeal, it would come at the expense of banning the accused's ability to tactically waive issues at trial.

4. Did LTC Faulkner Act "As Counsel"

Based on the record on appeal, we hold that LTC Faulkner did not act as counsel in this case prior to becoming a military judge. The record on appeal establishes the only involvement by LTC Faulkner in this case as the CoJ was the forwarding of an email, without comment, six minutes after it was received.

In *Williams*, the United States Supreme Court stated that due process requires the recusal of a judge when the judge previously "made a critical decision" in the case. In that case, the "critical decision" was to authorize the government to seek the death penalty. Here,

by contrast, it is unclear that [*22] LTC Faulkner made *any* decision about this case as CoJ, let alone one that was "critical."

However, even assuming that LTC Faulkner's action in forwarding an email was sufficient for him to be acting "as counsel," we fail to find plain error. Such a conclusion is not plain and obvious. Moreover, it is hard to articulate a substantial prejudice to appellant when the un rebutted affidavits of his counsel indicate that both counsel and appellant wanted LTC Faulkner to preside as the military judge in his case. The affidavits attest that there were three military judges at Fort Hood. The tactical assessment of the defense team was that LTC Faulkner was preferable to either of the two other military judges. Additionally, appellant did not merely acquiesce in LTC Faulkner sitting as military judge—he specifically requested it. Pursuant to [Article 16\(1\)\(B\), UCMJ](#), appellant personally requested to be tried by LTC Faulkner. Appellant therefore appears to have *invited* the very error he now requests relief from on appeal.

C. Ineffective Assistance of Counsel

Appellant claims his counsel was ineffective at trial in five areas. First by failing to interview AM and her mother before appellant's court-martial. Second, by [*23] advising him to waive the *Article 32, UCMJ*, investigation. Third, by allegedly providing the government with inculpatory evidence. Fourth, by failing to introduce exculpatory evidence. Finally, by failing to adequately object to inadmissible evidence.

To establish ineffective assistance of counsel, an appellant must demonstrate both "(1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." [United States v. McIntosh, 74 M.J. 294, 295 \(C.A.A.F. 2015\)](#) (citation and internal quotation

marks omitted).

We address each allegation of deficient performance in turn. As we do not find deficient performance, we do not address prejudice.⁹

1. Interview of witnesses

Appellant's counsel did not interview AM or her mother before trial. Undoubtedly, these were the two most important witnesses for the government. However, the record of trial and the post-trial affidavits submitted by counsel make clear, the failure to interview the witnesses was not for a lack of trying. AM and her mother refused to be interviewed. As we stated in *United States v. Guardado*:

Article 46, UCMJ governs compulsory process in courts-martial and states that "[p]rocess issued in court-martial cases to compel witnesses to appear and [*24] testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue" 10 U.S.C. § 846 (2012) (emphasis added). In other words, by its own terms compulsory process is limited to producing witnesses to "appear and testify" and does not include a requirement that the witness first agree to be interviewed. Additionally, a military court cannot exercise greater

authority in this area than the "courts of the United States."

While Article 46, UCMJ, also states the "trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence" we do not believe this can serve as a basis to compel interviews. First, the language specifically limits itself to the ability to "obtain witnesses." Second, the provisions in Article 46, UCMJ, apply equally to the trial counsel, the defense counsel, and the court-martial. That is, whatever the parties' rights under the first phrase of Article 46, it is shared by the panel members. See UCMJ, art. 16, 10 U.S.C. § 816 (2012) (definition of a court-martial). While the court-martial may obtain witnesses to testify, the panel members cannot conduct [*25] pretrial interviews of witnesses.

...

The counsel, like the military judge, lack the authority to compel a civilian's cooperation in pretrial interviews. A witness may refuse to be interviewed notwithstanding a counsel's desperate pleas. Absent compulsory process, a witness maintains the free will to determine the degree to which he or she voluntarily participates in the court-martial.

75 M.J. 889, 904 (Army Ct. Crim. App. 2016) (pet. granted on other grounds by *United States v. Guardado*, No. 17-0167/AR, ARMY 20140715, 76 M.J. 165, 2017 CAAF LEXIS 267 (C.A.A.F. 3 March 2017) (order)). As we find no authority for a defense counsel to compel the cooperation of an unwilling witness to be interviewed, we cannot find counsel's performance was deficient.

2. Waiver of the Article 32 Investigation

⁹Broadly speaking, appellant does not address the prejudice prong in his brief. While appellant explains why he believes his civilian defense counsel was deficient, there is no substantial attempt to link this to a prejudicial effect at the trial. For example, while appellant alleges that his counsel should have interviewed witnesses, he does not explain to us (as is his burden) what the interviews would have accomplished, or how they may have altered the course of the trial. It may be *deficient* to not try to interview an important witness pretrial, but it is only *ineffective* if that interview would have revealed something of consequence.

Appellant next asserts his counsel were deficient when they advised him to waive the Article 32 investigation. The affidavits submitted by counsel adequately establish this advice was based on two concerns. First, counsel feared that at an Article 32 investigation appellant would face the additional charge of obstruction of justice stemming from his alleged disposal of a laptop computer. Second, counsel believed there was a very good chance AM would not be available to testify at trial. AM had been [*26] a reluctant government witness and the government had at one point been unable to locate her. If AM testified at the Article 32 hearing, because her testimony would be preserved under oath, her Article 32 testimony could be introduced in court. See Mil. R. Evid. 804(b)(1) (hearsay exception for prior testimony of an unavailable witness). Appellant's military defense counsel submitted, as an attachment to her affidavit, a memorandum for record that contemporaneously documents these concerns and the discussions with appellant. Finally, the colloquy between appellant and the military judge compellingly demonstrates that appellant's waiver was voluntary.

3. Providing Inculpatory Evidence to the Government

In the midst of trial, the defense asked for a one-hour recess so they could, in part, print a Facebook text conversation between appellant and AM. Defense counsel stated they needed to print the conversation to use "in cross-examination of [the next] witness" and to make sure "the government gets them." The defense's cross-examination of AM included getting her to admit the favorable things she had said about appellant in the conversation. As AM readily admitted the statements, the printout of the conversation [*27] was not

used for impeachment.

To briefly summarize, the Facebook conversation is a discussion about where AM and her mother should live. In general, the conversation is friendly and favorable to appellant as AM seeks appellant's advice about how to convince her mother not to move to the east coast. AM also expresses a desire to live close to appellant. However, the conversation does include the admission of appellant that "if things go bad" with AM's mom and "you guys [become] homeless," AM could live with appellant even though "i know im the last person u want to live with."

The government marked the text exchange and used it in their cross-examination of appellant. The government did not admit the evidence. Appellant now claims the government became aware of the conversation only because appellant's counsel used a prosecution printer to print out the exchange. We find no deficient performance.

4. Failure to Introduce Exculpatory Evidence

As just discussed, appellant alleged his counsel were ineffective when they allegedly gave the trial counsel a copy of the Facebook conversation. Appellant also alleges his counsel were ineffective for not introducing into evidence this same Facebook [*28] conversation. That is, appellant argues—with regards to the same piece of evidence—that his counsel were ineffective in providing it to the government because it is clearly inculpatory *and* that counsel were ineffective for not introducing the conversation because it is exculpatory. We need not further explain the illogic of this argument.

5. Evidentiary deficiencies

Appellant combs the record and lists numerous evidentiary objections or decisions by counsel he alleges constitute deficient performance. The alleged deficiencies include hearsay objections not made, prior consistent statements that were made before the defense raised the issue of recent fabrication, and similar issues. The issues defy easy summarization. However, having reviewed each issue, given the strong presumption that counsel are competent, and the requirement that our scrutiny of the performance by counsel be "highly deferential," we do not find deficient performance. [Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 \(1984\)](#). Even more clearly, we also do not find that appellant has met his burden of establishing prejudice.

We "do not assess trial defense counsel's performance through the prism of appellate hindsight and then apply our subjective view of how we think defense [*29] counsel should have conducted the trial." [United States v. Akbar, 74 M.J. 364, 386 \(C.A.A.F. 2015\)](#). Gambles may not pay out, a defense strategy may fall flat, and decisions earnestly made may look unwise once one has the benefit of knowing the verdict. To be sure, a witness's answer to a question may be hearsay. But trials are fluid events. Counsel must weigh the benefit of an objection against the risk of the opposing counsel's response and the change in the trial's trajectory. Counsel at trial are not reading a cold transcript. They see and hear the witnesses, and they can observe the effect of the testimony on the fact finder. Often, a trial has a feel to those in the courtroom that will not be adequately reflected in the transcribed record. Whether to object to testimony is not merely a matter of evidentiary rules. Objections may highlight evidence a counsel assesses is best left without emphasis. And, objections allow the opposing party to respond. There is little to be gained by

objecting to hearsay if the government's response is to lay a foundation for an exception that bolsters the weight of the evidence.

CONCLUSION

The court affirms only so much of the finding of guilty of Specification 12 of Charge I as finds the appellant:

Did, [*30] at or near Killeen, Texas, between on or about 28 June 2012 and on or about 1 September 2012, commit a sexual act upon AM, to wit: penetrating with his penis, the vulva of AM, by causing bodily harm to AM.

The remaining findings of guilty are AFFIRMED.

We are able to reassess the sentence on the basis of the error noted and do so after conducting a thorough analysis of the totality of circumstances presented by appellant's case and in accordance with the principles articulated by our superior court in [United States v. Winckelmann, 73 M.J. 11, 15-16 \(C.A.A.F. 2013\)](#) and [United States v. Sales, 22 M.J. 305 \(C.M.A. 1986\)](#). We are confident that based on the entire record and appellant's course of conduct, the military judge would have imposed a sentence of at least that which was adjudged, and accordingly we AFFIRM the sentence.

We find this reassessed sentence is not only purged of any error but is also appropriate. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by our decision, are ordered restored.

Senior Judge MULLIGAN and Judge FEBBO concur.

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Caution

As of: November 18, 2022 9:15 PM Z

United States v. Roe

United States Army Court of Criminal Appeals

April 27, 2022, Decided

ARMY 20200144

Reporter

2022 CCA LEXIS 248 *; 2022 WL 1284392

UNITED STATES, Appellee v. Private First Class AUSTIN M. ROE, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by [United States v. Roe, 2022 CAAF LEXIS 585, 2022 WL 4182553 \(C.A.A.F., Aug. 15, 2022\)](#)

Motion granted by [United States v. Roe, 2022 CAAF LEXIS 597, 2022 WL 4182400 \(C.A.A.F., Aug. 16, 2022\)](#)

Review denied by [United States v. Roe, 2022 CAAF LEXIS 770 \(C.A.A.F., Oct. 31, 2022\)](#)

Prior History: [*1] Headquarters, U.S. Combined Arms Center and Fort Leavenworth. S. Charles Neill, Military Judge. Colonel Alexander N. Pickands, Staff Judge Advocate.

Case Summary

Overview

HOLDINGS: [1]-The court-martial panel convicted appellant of the offense as charged, and not some other uncharged offense because he was on notice of the charge on the charge sheet, and so his due process claim failed under any standard of review; [2]-Appellant's conviction for sexual assault without consent in violation of Unif. Code Mil.

Justice art. 120(b)(2)(A), [10 U.S.C.S. § 920 \(2018\)](#), was both legally and factually sufficient. Appellant's DNA was found in the victim, he provided the victim alcohol, he volunteered to pull the first "watch" duty over the victim as she slept, thus putting himself in a position to be alone with her while she was vulnerable, and his "help, she's taking off her clothes," text message was read as "damage control" after the victim woke up.

Outcome

The finding of guilty and the sentence were affirmed.

Counsel: For Appellant: Captain Julia M. Farinas, JA (argued); Colonel Michael C. Freiss, JA; Lieutenant Colonel Angela D. Swilley, JA; Major Christian E. DeLuke, JA; Captain Julia M. Farinas, JA (on brief); Colonel Michael C. Freiss, JA; Lieutenant Colonel Angela D. Swilley, JA; Captain Julia M. Farinas, JA (on reply brief).

For Appellee: Captain Melissa A. Eisenberg, JA (argued); Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Brett A. Cramer, JA; Captain Samantha E. Katz, JA (on brief).

Judges: Before WALKER, EWING, and PARKER, Appellate Military Judges. Judge PARKER concurs. Senior Judge WALKER, dissenting.

Opinion by: EWING

Opinion

MEMORANDUM OPINION

EWING, Judge:

A panel with enlisted representation sitting as a general court-martial convicted appellant of sexual assault. In this court, appellant contends that: (1) the government violated his due process rights by charging him under one theory of liability for sexual assault but trying and convicting him under another theory; and (2) the government's evidence was legally and factually insufficient. [*2] We find appellant's claims to be without merit, and affirm.¹

BACKGROUND

A. The Trial Evidence

On 17 March 2019, the victim in this case was a 19-year-old junior enlisted soldier who had arrived at Fort Leavenworth, Kansas—her first duty station—less than a month prior. After an evening of drinking alcohol, first at a St. Patrick's Day party at another soldier's home and later at a barracks gathering with appellant in attendance, the victim awoke in her barracks room nude, feeling "not normal" and "groggy." When she got out of bed to go to the restroom, she was startled to find appellant in her room, and told him to leave. In the restroom the victim was again surprised to discover semen when she wiped herself. She had no memory of sex, and a few minutes later

asked a group of soldiers (including appellant) whether she had had sex with someone. Appellant responded, "not me." Laboratory testing on evidence collected from the victim the following day revealed appellant's semen inside the victim's vagina and his DNA inside her rectum.² Appellant's charges and ultimate court-martial proceeding ensued.

Evidence related to the victim's intoxication played a prominent role at appellant's [*3] court-martial. The victim had arrived at the St. Patrick's Day party between 1700 and 1800 hours; between then and approximately 2000 she reported drinking four "strong" double vodka-Jell-O shots and a Guinness. Around 2000 the victim called a friend for a ride back to the barracks along with two other party-goers; the friend/driver described the three as acting "rowdy" in the car. Back at the barracks the victim changed clothes and joined a party in Private First Class (PFC) CB's room—only a few doors down from her room—with other male soldiers including Private (PV2) [REDACTED] PFC KP, and appellant. The room had a shared common area and separate internal rooms for PFC CB and his roommate PV2 [REDACTED]

Appellant handed the victim a Mike's Hard Lemonade when she walked into the barracks party; this was the victim's last memory before waking up nude in her room. Private First Class KP, the victim's "good friend," described her as "tipsy" when she arrived, and said that initially she seemed to be enjoying herself and was dancing with a few of the soldiers. Private [REDACTED] present but not drinking, described the victim as "kind of off balance" and "giggly" when she entered the party, and later described [*4] her as "dizzy" and "grasping on the walls" while walking. Private [REDACTED] later saw

¹ Appellant elected to be sentenced by the military judge who sentenced appellant to a dishonorable discharge, confinement for twenty-eight months, and reduction to the grade of E-1. We have fully considered appellant's third assignment of error related to the requisite *mens rea* for sexual assault without consent and find it to be without merit. See [United States v. McDonald](#), 78 M.J. 376, 379 (C.A.A.F. 2019) (holding that sexual assault without consent is a general intent crime).

² The government's DNA analyst testified that the semen and DNA were "one quintillion times" more likely to have originated from appellant than an unknown contributor. A quintillion is a one with 18 zeros after it.

the victim in the common area "progressively going down towards the ground while holding onto the wall" outside of PFC KP's door, ultimately ending up on the ground. Private [REDACTED] described the victim's state later in the evening as "fatigued," "mumbling," and, finally, "unconscious."

While the victim lacked memory, barracks surveillance video provided a fair amount of detail about her movements. At 2154 hours, the video showed the victim walking somewhat unsteadily, but fully under her own power, from the party room to her room where she stayed for one minute before returning to the party room at 2155. At 2208, the video showed appellant carrying the victim on his back, accompanied by PFC CB, outside to smoke cigarettes. Appellant carried the victim back inside and back to the party room five minutes later at 2213, this time "cradling" style with her arms around appellant's neck and his arms under the back of her knees.

Back in the party room, appellant placed her in PFC KP's lap, because, appellant later explained, PFC KP was the victim's friend. Private First Class KP saw that the victim was unable to stand [*5] on her own and was having difficulty speaking, and told the other soldiers that they needed to get the victim back to her room due to her condition. Two minutes later at 2215, video captured appellant carrying the victim down the hall to her room again using the "cradling" carry.³ Private First Class KP, PV2 [REDACTED] and PFC CB also came to the victim's room. Private [REDACTED] described the victim as "in and out" of consciousness and "mumbling stuff" as the soldiers placed her in bed. The group prepared the victim's military equipment for an early morning ruck march the following day, and discussed pulling a "fire

guard" in her room to ensure that she did not "throw up in her sleep" or "choke." Appellant volunteered to take the first shift. At 2238, the video showed the other soldiers exiting the victim's room, leaving appellant and the victim alone for the next thirty-two minutes.

At 2255, video showed PV2 [REDACTED] in the hallway stopping near the victim's door. At precisely the same time, appellant texted the other soldiers and said that the victim was taking off her clothes and asked for "help." Private [REDACTED] noticed that while he had previously intentionally left the victim's door slightly open in case [*6] anyone needed to gain entry, the door was now closed and locked.

At 2310 PFC KP and PFC CB returned to the victim's room based on appellant's "help" text message. Appellant was still there, and the victim was in bed covered by a blanket. The victim looked "confused" and "horrificed," and asked the group if she had had sex with anyone. Private First Class KP heard appellant reply, "not me." Private First Class KP stayed with the victim for a period of time, after which the victim called her fiancée and stayed on the phone with him for multiple hours before falling asleep. When asked at trial to elaborate on what she meant when she asked the group whether she had had sex with anyone, the victim said she meant "[d]id I consent or did somebody have sex with me." She further testified that she did not want to have sex with appellant at any point that evening, and that she would not have and did not consent to sex with him.

The victim reported a sexual assault to her chain of command the following morning, and underwent a sexual assault examination that resulted in the DNA evidence implicating appellant.⁴

³ Private First Class KP testified that he carried the victim back to her room, but the barracks video appears to show that appellant did so.

⁴ The nurse who conducted the sexual assault exam found a small tear below the victim's vaginal opening that she testified

Appellant made a videotaped statement to the Criminal Investigation Command (CID) the next [*7] day. Appellant provided a high degree of detail about the events both before and after the small window of time when the sexual act occurred. Appellant told CID that he consumed six to seven beers and seven to eight shots of liquor over the course of the evening. He confirmed that he carried the victim to and from the smoke pit outside because she was having difficulty maintaining her balance. He further recalled that the victim was in and out of consciousness and mumbling as he carried her back into the building and as the soldiers took her to her barracks room. Appellant claimed that while all of the soldiers were still in the room the victim started removing her clothing and "wanted sex," but that he and PFC KP told her to wait until the following day when she could "consent."⁵ Once alone with the victim, appellant stated that she grabbed his face and kissed him and he kissed her back. He explained that he felt kissing the victim was wrong, so he moved across the room but then accepted the victim's invitation to join her in her bed. Appellant claimed that he then fell asleep in the victim's bed and awoke with his pants down, genitals exposed, and the victim on top of him wearing [*8] only her bra and underwear. When the victim got up and began removing her undergarments, appellant stated he then went into the common area of the barracks room and texted the other soldiers for help. Appellant claimed to have no memory of sexual intercourse with the victim.

B. The Charge and The Parties' Arguments

Appellant was charged with and convicted of a

could have been caused by "lack or participation or cooperation between the two partners," or, in the alternative, from consensual sex.

⁵ Private First Class KP did not testify about this exchange.

single specification of a violation of [Article 120\(b\)\(2\)\(A\)](#), Uniform Code of Military Justice, [10 U.S.C. § 920](#) (2018) [UCMJ], sexual assault without consent, as follows:

In that [appellant], U.S. Army, did, at or near Fort Leavenworth, on or about 17 March 2019, commit a sexual act upon [victim], by penetrating [victim's] vulva . . . with his penis, without the consent of [victim].

At trial, the government forthrightly argued that the victim's level of intoxication was relevant evidence, along with other evidence, on the question of whether the victim consented to the sexual act with appellant. In closing, the government argued:

And the judge just instructed you about what consent means. He told you that 'consent' means a freely given agreement to the conduct at issue by a competent person. He went on to tell you that a sleeping or unconscious person cannot consent. [*9] [The victim] told you she had zero interest in having sex with the accused. She never told him she was interested. She did not want to have sex with him. She would not have had sex with him. She was emphatic she did not consent to sex with the accused, and more than that, she was in no state to freely consent to sex with anyone.

The government further contended that appellant's statement to CID was not believable and therefore affirmative evidence of his guilt, based on the level of detail he could recall both before and after the sexual act, and that his 2255 text to the other soldiers was likewise an attempt to cover for his actions and "explain why the victim was naked" after she awoke. The government argued that the accused "didn't fall asleep," but rather "knew what he did."

The defense likewise addressed the interplay

between the victim's intoxication and consent by stressing in both its opening statement and closing argument that a "lack of memory does not mean lack of consent." The defense further focused on the portions of the video evidence that showed the victim walking unassisted in the hallways, using her keycard to enter her room, and similar evidence to argue that she [*10] was not so incapacitated as to not be able to provide consent.

LAW AND DISCUSSION

I. The Due Process Claim

A. Legal Principles and Standard of Review

Due process "does not permit convicting an accused of an offense with which he has not been charged." [United States v. Tunstall, 72 M.J. 191, 192 \(C.A.A.F. 2013\)](#) (cleaned up). A specification therefore must provide an accused both notice of the charge he is to defend against and shield him from double jeopardy. [United States v. Turner, 79 M.J. 401, 403 \(C.A.A.F. 2020\)](#). This due process principle of fair notice "mandates that an accused has a right to know what offense and under what legal theory he will be tried and convicted." [United States v. Riggins, 75 M.J. 78, 83 \(C.A.A.F. 2016\)](#) (cleaned up).

Appellant asserts that the government violated his due process right to fair notice by charging him with sexual assault without consent, in violation of [Article 120\(b\)\(2\)\(A\), UCMJ](#), but then effectively prosecuting and convicting him under either an [Article 120\(b\)\(2\)\(B\)](#) theory that he knew or reasonably should have known that the victim was asleep, unconscious, or otherwise unaware of the sexual act, and/or an [Article 120\(b\)\(3\)\(A\)](#) theory that the victim was incapable of consenting to the sexual act due

to impairment by any drug, intoxicant, or other similar substance. Appellant further contends that this alleged difference between the charged offense and the government's theory of [*11] the case at trial both prejudiced his ability to present a defense and created ambiguity regarding which theory the panel used to ultimately convict him. Because appellant did not present this claim to the military judge at his court-martial, we will review his claim for plain error. See, e.g., [United States v. Warner, 73 M.J. 1, 3 \(C.A.A.F. 2013\)](#) (applying plain-error review to a "fair notice" claim raised for the first time on appeal).⁶ To satisfy the plain error test, appellant must show: "(1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *Id.* (cleaned up).

B. Discussion

Appellant's due process claim turns on a single question: may the Government attempt to carry its burden of proving sexual assault "without consent" in violation of [Article 120\(b\)\(2\)\(A\)](#) by presenting, mainly but alongside other evidence, the fact of the victim's extreme intoxication at the time of the sexual act? Because we answer that question "yes," we hold that the panel in this case convicted appellant the offense *as charged*, and not some other uncharged offense.

⁶ The parties at appellant's court-martial discussed a similar issue in the context of appellant's pretrial motion to suppress evidence of underage drinking under Rule for Courts-Martial (R.C.M.) 404(b). In support of this motion, trial defense counsel argued that appellant's court-martial was a "consent case," and not an "alcohol case." While this raised the same general concept as appellant's current claim, appellant nonetheless did not present his current due process/fair notice claim to the military judge at trial, and is thus entitled only to plain error review. See, e.g., [United States v. Sweeney, 70 M.J. 296, 303 & n.16 \(C.A.A.F. 2011\)](#) (applying plain error review to claim not raised with the requisite specificity at trial).

Appellant was on notice of the charge on the charge sheet, and so his due process claim fails under any standard of review.

In so [*12] holding, we acknowledge the conceptual difference between affirmatively proving that a victim *did not consent*, and proving facts that show a victim's *legal incapacity to consent*. The Court of Appeals for the Armed Forces (CAAF) discussed this difference in *Riggins*, 75 M.J. 78 (C.A.A.F. 2016). *Riggins* analyzed the question of whether Article 128, UCMJ, assault consummated by a battery, was a lesser-included offense of the 2012 version of two Article 120, UCMJ, offenses—sexual assault and abusive sexual contact—accomplished through placing the victim in fear. *Id.* at 83. The CAAF held that because the *Article 120* offenses "did not require the government to prove a lack of consent," but *Article 128* did, *Article 128* was not a lesser-included offense of *Article 120* and that *Riggins* had therefore not received "fair notice of what offense and under what legal theory he was tried and ultimately convicted" when the military judge there found him guilty of *Article 128* offenses on an erroneous lesser-included theory. *Id.* at 80. As relevant here, *Riggins* explained that "the fact that the Government was required to prove a set of facts that resulted in [the victim's] *legal inability to consent* was not the equivalent of the Government bearing the affirmative responsibility to prove that [the victim] *did not, in fact, consent*." *Id.* at 84 (emphasis in original). [*13]

Notably, *Riggins* was analyzing a lesser-included offense question, and therefore did not squarely address the issue here: namely, whether facts tending to show a legal inability to consent would be appropriate and relevant evidence on the issue of lack of consent. *Riggins* did explain in a footnote that despite the conceptual difference of "placing another in

fear" and "without consent," that "evidence regarding whether the alleged victim . . . consented *could certainly be relevant to the fact-finder's determination* of whether the Government proved the placed-in-fear element beyond a reasonable doubt." *Riggins*, 75 M.J. at 84 & n.6 (emphasis added). Thus, *Riggins* noted *both* the difference between proving facts showing an "inability to consent" and affirmatively proving "without consent," *and* the potential for evidentiary overlap between the two concepts.

So too here, on the flip-side of the *Riggins* footnote six coin. The DNA evidence made the sexual act here essentially undisputed. Thus, as charged, appellant's trial turned on the issue of consent. There is likewise no dispute that the government's theory of the case was that the victim's high degree of intoxication at the time of the sexual act was important evidence that she [*14] did not consent. Our essential holding here is that this was one of many permissible ways for the government to attempt to prove "without consent." By way of logic, if the government proves that a victim is asleep or unconscious and therefore legally incapable of consenting at the time of a sexual act, that is strong evidence that the victim did not, in fact, consent.

We further hold that there was fair notice here notwithstanding that the government likely could have charged this case differently. On this point, the other two relevant subsections of *Article 120(b)* prohibit committing a sexual act upon another person:

[W]hen the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring[; and] . . .

[W]hen the other person is incapable of consenting to the sexual act due to . . . impairment by any drug, intoxicant, or

other similar substance, and that condition is known or reasonably should be known by [the accused].

See [Articles 120\(b\)\(2\)\(B\)](#), and [\(b\)\(3\)\(A\)](#), respectively. These two charging theories facially address situations where the victim is intoxicated at the time of the sexual act. However, their presence in [Article 120](#) does not mean that the government [*15] is foreclosed from attempting to carry the arguably heavier burden of affirmatively proving a lack of consent when intoxication is at issue. Rather, this is simply one of many situations where the government exercised its discretion to charge one of multiple potential offenses. See, e.g., [United States v. Morton](#), 69 M.J. 12, 16 (C.A.A.F. 2010) ("It is the Government's responsibility to determine what offense to bring against an accused.").⁷ We find no evidence in the legislative history or otherwise that the drafters of [Articles 120\(b\)\(2\)\(B\)](#) and [120\(b\)\(3\)\(A\)](#) meant to somehow preempt the [Article 120](#) field for cases involving alcohol. In reaching this conclusion we acknowledge the force of the contrary statutory interpretation analysis of our dissenting colleague as it relates to the disjunctive "or" between the three charging theories at issue here. See also [United States v. Weiser](#), 80 M.J. 635, 640 (C.G. Ct. Crim. App. 2020). We simply disagree that this statutory language requires the government to charge a particular theory of liability where the victim's intoxication is at issue. The fact that there is evidentiary overlap between all three theories of liability at issue here is not unusual in the criminal law.

Our sister Air Force court concluded likewise last year in a similar case. In [United States v.](#)

[Williams](#), No. ACM 39746, 2021 CCA LEXIS 109, at * 18 (A.F. Ct. Crim. App. 12 Mar. 2021) (mem. op), the government charged Williams with the 2016 [*16] version of [Article 120](#), sexual assault by bodily harm, under a "without consent" theory. Thus, as here, in [Williams](#) the government had an affirmative duty to show that the victim did not consent. [Id.](#) at *18-19. As here, the [Williams](#) victim was highly intoxicated and did not remember the sexual act, and the trial evidence focused on the victim's level of intoxication. *Id.* Like here, Williams contended that the government violated his due process right to fair notice, because, he claimed, he was "convicted under the theory that he engaged in sexual conduct with [the victim] when she was too intoxicated to consent," rather than the charged "without consent" theory. [Id.](#) at *48. The [Williams](#) court rejected this claim, explaining that it saw "no reason why" the government could not "use evidence of inability to consent" as "circumstantial evidence of the lack of actual consent." [Id.](#) at *57. The [Williams](#) court stated:

Therefore, we conclude evidence tending to show a person *could not* consent to the conduct at issue may be considered as part of the surrounding circumstances in assessing whether a person *did not* consent, and the military judge did not err in permitting trial counsel to employ this theory at Appellant's court-martial.

[Id.](#) at *57-58 [*17] (emphasis in original). We agree.⁸ Cf. [United States v. Motsenbocker](#), No. 201600285, 2017 CCA LEXIS 539 (N.M. Ct. Crim. App. 10 Aug. 2017).

⁷ Another option for the government here would have been to charge multiple [Article 120](#) offenses in the alternative based on exigencies of proof. [Morton](#), 69 M.J. at 16.

⁸ Williams petitioned the CAAF to review the Air Force court's denial of his due process claim, but the CAAF granted review only on one of Williams' other assignments of error and ultimately affirmed Williams' conviction and sentence. [United States v. Williams](#), 81 M.J. 338 (C.A.A.F. 2021); [United States v. Williams](#), 81 M.J. 450 (C.A.A.F. 2021).

Finally, this is not a case where we have to decide whether "without consent" can be proved *solely* through showing an inability to consent because of intoxication or some other reason.⁹ Rather, as detailed in the sufficiency analysis below, the government's proof included both evidence of the victim's intoxication alongside other evidence, including the appellant's own actions and words both before and after the sexual act.

A word on the panel instructions in this case. Consistent with the government's charging theory, the military judge instructed the panel that the government bore the affirmative burden of showing beyond a reasonable doubt that the sexual act was done "without the consent" of the victim. The military judge further defined "consent" as follows:

'Consent' means a freely given agreement to the conduct at issue by a competent person. An expression or lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. A current or previous dating or social or sexual relationship by itself of the manner of dress of the person involved [*18] with the accused and the conduct at issue does not constitute consent. A sleeping or unconscious person cannot consent. All the surrounding circumstances are to be considered in determining whether a person gave consent.

⁹ This seems possible notwithstanding the [Riggins](#) conceptual difference. For example, if a victim in a medically-induced coma became pregnant due to a sexual assault from a hospital orderly the victim had never met, it would seem to be a "reasonable inference," see, e.g., [United States v. Frey, 73 M.J. 245, 248 \(C.A.A.F. 2014\)](#), not only that the victim had the *legal inability* to consent because she was unconscious and in a coma, but also that she did, in fact, *not consent*. We are not called on to address this question here, because the government provided additional evidence of "without consent" above and beyond the victim's intoxication.

The military judge further instructed the panel that the evidence had raised the possibility of the affirmative defense of an honest and reasonable mistake of fact as to consent, and explained that the government retained the burden of disproving mistake of fact as to consent beyond a reasonable doubt.

At trial, the defense objected to the military judge's instruction that a "sleeping or unconscious person cannot consent," although the defense's main submission was that the evidence did not show that the victim was, in fact, asleep or unconscious during the applicable time-frame, rather than the "fair notice" claim he now presses. The military judge overruled this objection and provided the instruction, which was a verbatim quote from the UCMJ's definition of "consent" at [Article 120\(g\)\(7\)\(B\)](#) (with the omission of the words "or incompetent").

Appellant has not pressed a free-standing claim of error in this court as to any of the above instructions. Nor could he successfully do so, because [*19] the military judge's instructions were correct statements of the law. Moreover, when taken as a whole, the instructions imparted to the panel that the government retained the burden of *affirmatively proving a lack of consent* consistent with the charge in this case, and not some lesser burden. Cf, e.g., [United States v. McClour, 76 M.J. 23, 26 \(C.A.A.F. 2017\)](#) ("When taken as a whole, the instructions clearly stated the proper burden of proof and left it to the members to determine whether the Government's evidence met that burden."). This is particularly true in light of the fact that the military judge instructed the panel on the mistake of fact as to consent.¹⁰

¹⁰ We find that appellant was on fair notice of the charge against him and therefore do not find error at all, much less "plain or obvious" error. [Warner, 73 M.J. at 3](#). As such, we do

II. Sufficiency

The above holding that the government's modality of proof was appropriate in light of the charged offense does not answer the separate question of whether that proof was *legally and factually sufficient* to prove sexual assault without consent. Appellant contends that it was not. While we find the sufficiency question close, we ultimately hold that the government's evidence was both legally and factually sufficient.

This court is obligated to review the legal and factual sufficiency of each court-martial conviction and only affirm those findings of guilty that are correct [*20] in law and fact. Article 66(c), UCMJ. We review questions of legal and factual sufficiency de novo. [United States v. Rosario, 76 M.J. 114, 117 \(C.A.A.F. 2017\)](#). "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (cleaned up). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, *the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt.*" *Id.* (cleaned

not need to decide whether any arguendo error "materially prejudiced a substantial right of the accused." *Id.* Nevertheless, it bears mentioning that the relationship between the victim's intoxication and the question of consent was no secret at appellant's trial. The opening lines of trial defense counsel's opening statement to the panel was, "[l]ack of memory does not mean lack of consent. Consent does not require good judgment; and alcohol consumption does not mean inability to consent." The defense pressed this theme throughout the court-martial, thus evidencing its understanding of the importance of the intoxication issue to the question of consent. This cuts against any claim that the accused was prejudiced by a lack of notice of the government's theory of the case.

up). For factual sufficiency, this court applies "neither a presumption of innocence nor a presumption of guilt" but must "make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." [United States v. Wheeler, 76 M.J. 564, 568 \(C.A.A.F. 2017\)](#) (cleaned up). This "does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." [United States v. King, 78 M.J. 218, 221 \(C.A.A.F. 2019\)](#). "In considering the record, [this court] may weigh the evidence, judge the credibility of witness[es], and determine controverted questions of fact, [*21] recognizing that the trial court saw and heard the witnesses." Art. 66(d)(1), UCMJ. The degree of deference this court affords the trial court for having seen and heard the witnesses will typically reflect the materiality of witness credibility to the case. [United States v. Davis, 75 M.J. 537, 546 \(Army Ct. Crim. App. 2015\)](#).

We find the sufficiency question close largely due to the victim's lack of memory. However, a constellation of factors, including but not limited to the victim's level of intoxication, ultimately shows that appellant's conviction was both legally and factually sufficient. First, as previously noted, the DNA evidence essentially takes the question of whether appellant performed a sexual act with the victim off the table, and narrows the question to one of consent. Second, it is uncontroverted that the victim was highly intoxicated at the time of the sexual act. Third, it was appellant who provided the victim alcohol at the barracks party. Fourth, it was appellant who volunteered to pull the first "watch" duty over the victim as she slept, thus putting himself in a position to be alone with her while she was vulnerable. Fifth, appellant's "help, she's taking off her clothes," text message—which it stands to reason he sent after the sexual act—is

best [*22] read as a self-serving effort at "damage control" after the victim woke up. Sixth, appellant's "not me" statement when the victim was asking whether she had had sex with someone is demonstrably untrue based on the DNA evidence, and thus the most natural reading of that statement is that it was knowingly false. Seventh, having reviewed appellant's statement to CID the day after the event, we are struck by the level of detail he was able to provide about his actions both before and after the sexual act, with his memory failing only during the very tight time-frame of the sex itself. This appears to us to be a classic case of "selective memory loss." We are allowed to consider what we assess are appellant's false exculpatory statements—both in the middle of the night and the next day to CID—as substantive evidence of guilt on the [Article 120](#) offense, and we do so here. See [United States v. Quezada](#), [M.J.](#) [82](#), [54](#), [2021 CAAF LEXIS 1098](#), at *15 (C.A.A.F. [20 Dec. 2021](#)) ("A false exculpatory statement also may provide relevant circumstantial evidence, namely, evidence of a consciousness of guilt.") (citations omitted). When taken together, this evidence paints a picture of appellant knowingly taking advantage of the victim while she was highly vulnerable, and then lying about it. We therefore [*23] find both that a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," and we ourselves are likewise "convinced of appellant's guilt beyond a reasonable doubt." [Rosario](#), [76 M.J. at 117](#).

CONCLUSION

Upon consideration of the entire record, the finding of guilty and the sentence are AFFIRMED.

Judge PARKER concurs.

Dissent by: WALKER

Dissent

Senior Judge WALKER, dissenting:

While I find that the government violated appellant's due process right to fair notice, I find that the error did not materially prejudice appellant's substantial rights. Further, I find the charged offense of sexual assault without consent in violation of [Article 120\(b\)\(2\)\(A\), UCMJ](#), factually insufficient and would set aside appellant's finding of guilty and sentence.

LAW AND DISCUSSION

A. The Government Violated Appellant's Due Process Right to Fair Notice

The charged offense in this case properly alleged every element of the offense of sexual assault and adequately placed appellant on notice that he was charged under the theory of liability that he committed a sexual assault without consent, in violation of [Article 120\(b\)\(2\)\(A\), UCMJ](#). [Riggins](#), [75 M.J. at 83](#) (cleaned up). However, appellant alleges that he was tried and convicted of a distinct, and uncharged, theory of liability of sexual [*24] assault while a person is asleep, unconscious, or otherwise unaware that the sexual act is occurring, in violation of [Article 120\(b\)\(2\)\(B\), UCMJ](#), or under a theory that the victim was incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance, in violation of [Article 120\(b\)\(3\)\(A\), UCMJ](#). I agree that appellant was prosecuted under a theory of liability other than the one with which he was charged and denied his due process right to fair notice.

Determining whether the types of sexual assault outlined in [Article 120\(b\), UCMJ](#), are differing theories of liability is essential to determining whether appellant was given fair notice in this case. The statutory context, alone, dictates that [Article 120\(b\)\(2\)\(A\), 120\(b\)\(2\)\(B\), and 120\(b\)\(3\)\(A\), UCMJ](#), are separate and distinct theories of liability for the offense of sexual assault.¹¹ First, it is evident by the construct of statute that three distinct paragraphs within [Article 120\(b\), UCMJ](#), for sexual assault are differing types or categories of sexual assault based upon the construction and the context of the statute. The first paragraph, [Article 120\(b\)\(1\)](#), addresses sexual assault by inducement whether through threats, fear, fraudulent representation, or false pretenses. The second paragraph, [Article 120\(b\)\(2\)](#), addresses both sexual assault by lack of consent or [*25] sexual assault when a person cannot consent based upon a condition of being asleep, unconscious, or otherwise unaware of the sexual act occurring. The third paragraph, [Article 120\(b\)\(3\)](#), addresses sexual assault when a person is incapable of consenting due to physical impairment by a foreign substance or mental impairment. Each of these types of sexual assault are definitively different categories of sexual assault and thereby different theories of liability. [Sager, 76 M.J. at 161-62](#); see also [United States v. Weiser, 80 M.J. 635, 641 \(C.G. Ct. Crim. App. 2020\)](#).

¹¹ Whether these three types of sexual assault are distinct theories of liability is a question of statutory interpretation reviewed de novo. [Sager, 76 M.J. at 161 \(C.A.A.F. 2017\)](#). In reading these provisions, we must "interpret words and phrases used in the UCMJ by examining the ordinary meaning of the language, the context in which the language is used, and the broader statutory context." [United States v. Pease, 75 M.J. 180 \(C.A.A.F. 2016\)](#) (cleaned up). Further, we must apply "the 'surplusage' canon—that, if possible, every word and every provision is to be given effect and that no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." [Sager, 76 M.J. at 161](#).

Even more critical to appellant's assertion that he was denied his due process right to fair notice is whether the subparagraphs within [Article 120\(b\)\(2\)](#) are different theories of liability. In reviewing the language in [Article 120 \(b\)\(2\), UCMJ](#), I note that the two subparagraphs are separated by the disjunctive, "or." As the CAAF noted in *Sager*, "[i]n ordinary use the word 'or'. . . marks an alternative which generally corresponds to the word 'either.'" [Sager, 76 M.J. at 161](#) (cleaned up).¹² Statutory terms which are connected by a disjunctive should ordinarily be given separate meanings unless the overall statutory context dictates otherwise. [Id. at 161](#) (quoting [Reiter v. Sonotone Corp., 442 U.S. 330, 339, 99 S. Ct. 2326, 60 L. Ed. 2d 931 \(1979\)](#)). As the majority opinion recognizes, the charged offense requires the government to affirmatively prove the victim *did not consent*, while the [*26] latter offenses require the government to prove the victim's *legal inability to consent*. [Riggins, 75 M.J. at 85](#); see also [Weiser, 80 M.J. 635 at 641](#). Our superior court has held that even the conditions of asleep, unconscious, or otherwise unaware are in and of themselves differing theories of liability. [Sager, 76 M.J. at 162](#).

While I agree with the majority that there is evidentiary overlap between the three theories of liability at issue, I part ways with the majority in its characterization of the manner in which the government tried this case in relation to the charged offense. I find that the record as a whole demonstrates that the government's charged theory of liability, sexual assault without consent, was not the theory upon which the government prosecuted appellant at

¹² While there are structural differences in the Art 120, UCMJ, at issue in *Sager* and the Article 120, UCMJ, at issue in this case, the canons of statutory interpretation for which the dissent cites *Sager* are not impacted by the statutory changes made to [Article 120](#) which went into effect in January 2019.

trial. Rather, the government tried appellant under the theory that the victim was incapable of consenting due to impairment by a drug, intoxicant, or other similar substance. The tenor of the government's opening statement, presentation of evidence, and closing argument was that appellant took advantage of the victim while she was incapable of consenting as a result of her intoxication, and asked the panel members to infer she did not consent. Significantly, while the [*27] victim testified that she did not consent, she also admitted that she did not have any memory of sexual acts with appellant. The victim's complete lack of memory as to any sexual acts prevented her from providing any affirmative evidence as to whether or not she consented.

Given that the victim could not affirmatively tell the members she did not consent to the charged sexual acts, the trial nearly exclusively focused on the victim's apparent inability to consent. The government's opening statement and closing argument focused on the victim's condition by asserting the victim was "in and out of consciousness and falling over and mumbling her words," "passing out on the bed," "dead weight," "in her bed asleep or passed out," "[s]he's not awake," and "groggy." Testimony of soldiers who assisted the victim to her barracks room focused on her physical condition describing her as "passed out," "in and out of consciousness," "mumbling," "out of it," and "looked like she was asleep." The government began its closing argument with "[s]he was fucked up" in highlighting appellant's description to law enforcement of the victim's condition when assisting her to her barracks room. The government [*28] went on to argue that "[appellant] didn't care that she was passed out." To prove the victim's lack of consent, the government focused on: (1) witness testimony that the victim was "passed out," "unresponsive," and "mumbling;" (2)

appellant's admissions to law enforcement that the victim was "passed out;" (3) the victim appearing as "dead weight" when being carried to her barracks room because "she's out;" (4) that after the barracks party the victim "was clearly incapacitated;" (5) that the victim could not have consented to sexual intercourse because "she is unresponsive, incoherent, unable to move herself from room to room and asleep in her bed while a bunch soldiers mess with her things;" and, (6) refers to the victim as "[t]he drunk, unconscious girl."

More significantly, I also part ways with the majority in its position that the government may support its affirmative burden to prove lack of consent by solely relying upon evidence of the victim's *legal inability* to consent. I concur with the majority that the government bears the responsibility of deciding the manner, and theory of sexual assault, with which it will charge an accused. However, once the government makes that decision, [*29] it is bound by that decision. I do not agree with the majority that the government satisfies its responsibility of fair notice in charging an accused with a sexual assault without consent and then solely relying upon evidence of the victim's inability to consent at trial. A sexual assault charged by lack of consent requires affirmative proof of lack of consent beyond any evidence of a legal inability to consent. To hold otherwise renders the other theories of liability outlined in [Article 120\(b\), UCMJ](#), as merely superfluous, would eviscerate the need for any other theories of liability, and runs contrary to our superior court precedent. See [Sager, 76 M.J. 158](#). Certainly, evidence of intoxication is relevant evidence to the issue of a victim's competence to consent and whether a victim is incapable of consenting due to impairment by an intoxicant. However, the government bears the burden of providing affirmative evidence, either direct or circumstantial, of the victim's lack of consent.

Given that the case turned on the issue of consent, as the majority accurately points out, evidence of the victim's consumption of alcohol was a relevant "surrounding circumstance" as to the issue of the victim's competence to consent.¹³ However, [*30] all of the government's evidence and efforts at trial focused exclusively on the victim's legal *inability* to consent and not whether the victim did, in fact, consent. The manner in which the government focused on the victim's level of intoxication through witness testimony, video surveillance evidence, and argument rose to a level that was more than just using that evidence as a "surrounding circumstance" of whether the victim consented. It was obvious in the tenor of the government's presentation of evidence and arguments that it was prosecuting the case as one in which the victim was incapable of consenting due to impairment by a drug, intoxicant, or other similar substance. Therefore, I find that the government violated appellant's due process right to fair notice and that this error was plain and obvious given the manner in which the government prosecuted appellant.

B. Appellant Was Not Materially Prejudiced

While I find that the government violated appellant's due process right to fair notice, the inquiry does not end there. "An error in charging an offense is not subject to automatic

dismissal, even though it affects constitutional rights." [*United State v. Oliver*, 76 M.J. 271, 275 \(C.A.A.F. 2017\)](#) (quoting [*United States v. Wilkins*, 71 M.J. 410, 413 \(C.A.A.F. 2012\)](#)). Appellant must demonstrate [*31] that "under the totality of the circumstances, the Government's error . . . resulted in material prejudice to [his] substantial, constitutional right to notice." *Id.* (cleaned up).

Appellant argues he was prejudiced because the manner in which the government prosecuted him at trial denied him the opportunity to adequately prepare a defense against a sexual assault in which the victim was incapable of consenting due to impairment by a drug, intoxicant, or other similar substance. Determining whether appellant was prejudiced requires a close review of appellant's trial strategy and specifically, "how the defense channeled its efforts and what trial defense counsel focused on or highlighted" at trial. [*United States v. Treat*, 73 M.J. 331, 336 \(C.A.A.F. 2014\)](#) (cleaned up).

The manner in which the case was contested diminishes appellant's argument that he was not on notice as to what he had to defend against in regards to the victim's inability to consent due to alcohol consumption. Prior to trial, defense counsel made a motion to preclude the government from presenting evidence that appellant and the victim were unlawfully consuming alcohol as minors in violation of a policy of possessing alcohol in the barracks. Trial defense counsel was also [*32] provided appellant's CID statement in which he refers to the victim as being "fucked up" and explains that he was intoxicated that night as well. At trial, the defense's strategy was to highlight the government's inability to prove lack of consent given that the victim had no memory of any sexual intercourse, presumably due to alcohol

¹³ "'Consent' means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent." Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para 3A-44-2.d, note 5 (29 Feb. 2020) [Benchbook].

consumption. The defense theory at trial was that the victim's lack of memory did not mean she did not consent to sexual intercourse. The defense focused on the victim's competence to consent despite her alcohol consumption. At trial, the defense highlighted the victim's lack of substantial intoxication by eliciting evidence of: (1) the victim dancing with a few of the soldiers soon after arriving at the barracks party; (2) the victim's control of her motor skills in walking up and down the barracks hallway and swiping a key card to enter her barracks room in the moments just prior to the sexual intercourse; (3) the victim's ability to hold onto appellant while he carried her on his back (in and out of the building) and in his arms (on the way to her barracks room); and, (4) evidence that the victim coherently used her cell phone in the moments both before [*33] and after the short window of time in which the sexual intercourse occurred. The defense directly addressed the issue of the victim's consumption of alcohol that evening and how it impacted her mentally and physically. Given the defense's trial strategy of focusing on the victim's competence to consent despite her consumption of alcohol, I do not find that the appellant was unable to adequately prepare a defense against a sexual assault in which the victim was incapable of consenting to a sexual act due to impairment by a drug, intoxicant, or other similar substance. He was aware that the victim's alcohol consumption was a key surrounding circumstance and recognized that her competence was implicated by the relevant statutory definition. Therefore, while I find that appellant was denied fair notice of the offense with which he was prosecuted at trial, I do not find he suffered material prejudice.

C. Legal and Factual Sufficiency of Sexual Assault Conviction

Appellant also asserts that his conviction is

both legally and factually insufficient. Since I find that appellant was not prejudiced by the government's lack of fair notice, it is necessary to evaluate whether appellant's conviction [*34] is legally and factually sufficiency, as charged.

While I find that the evidence is legally sufficient as to the charged offense of sexual assault without consent, I find that it is factually insufficient. In viewing the evidence in the light most favorable to the government, I do find that a rational factfinder could have found all of the essential elements of the charged offense beyond a reasonable doubt. However, I disagree with the majority that the government satisfied its burden of proving the victim's lack of consent beyond a reasonable doubt. Specifically, I find there was no affirmative evidence of the victim's lack of consent to the sexual intercourse. The victim testified that she had absolutely no memory of any sexual intercourse with appellant. In fact, she has a lack of memory of several hours from the night of the charged offense. Despite the victim's testimony that she did not consent, such testimony is meaningless given the fact that she has no actual memory of any sexual act. The victim's testimony that she would not have consented to sexual intercourse is not evidence of lack of consent at the time of the sexual intercourse. The government is required to prove a lack [*35] of consent temporally linked to the sexual act. In this case, the victim cannot provide any affirmative evidence of her lack of consent at the moment of the sexual act. I acknowledge there is some circumstantial evidence that the victim may not have provided a freely given agreement to sexual intercourse with appellant given her level of intoxication and diminished consciousness in the moments leading up to the sexual act. However, I do not find such circumstantial evidence sufficient to satisfy the government's burden of proving lack of

consent beyond a reasonable doubt, given the over thirty-minute period in which the victim was alone with appellant and given the victim's ability to engage in coherent text messages moments before the sexual act and mere moments after the conclusion of the sexual act. Further, unlike the majority, I do not find that appellant's false exculpatory statements, both when confronted by the victim immediately after the sexual act and in his statement to CID, to be affirmative circumstantial evidence of the victim's lack of consent. However, given the DNA evidence and the self-serving and bizarre story appellant provided to CID about what occurred while [*36] he was alone with the victim, I find his statements are clear indicators of consciousness of guilt. Unfortunately, I am bound by the government's decision to charge this case as a sexual assault without consent.¹⁴ Based upon the evidence presented at trial, I am not convinced of appellant's guilt of the charged offense of sexual assault, without consent.

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¹⁴ Had the government chosen to charge this case as a sexual assault while the victim was incapable of consenting due to impairment by a drug, intoxicant, or other similar substance, in violation of [Article 120\(b\)\(3\)\(A\), UCMJ](#), I would find the evidence is legally and factually sufficient for that theory of liability.



Positive

As of: November 18, 2022 9:15 PM Z

United States v. Wilson

United States Navy-Marine Corps Court of Criminal Appeals

September 20, 2018, Decided

No. 201700098

Reporter

2018 CCA LEXIS 451 *; 2018 WL 4501041

UNITED STATES OF AMERICA, Appellee v.
JOSEPH M. WILSON, Midshipman, U.S.
Navy, Appellant

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Subsequent History: Motion granted by *United States v. Wilson*, 78 M.J. 202, 2018 CAAF LEXIS 712 (C.A.A.F., Nov. 16, 2018)

Review denied by [United States v. Wilson](#), 2019 CAAF LEXIS 134 (C.A.A.F., Feb. 12, 2019)

Prior History: [*1] Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judges: Commander Robert P. Monahan, Jr., JAGC, USN (arraignment); Captain Charles N. Purnell, JAGC, USN (trial).

Case Summary

Overview

HOLDINGS: [1]-A female cadet's testimony that a male cadet penetrated her vulva with his penis after she indicated that she no longer wanted to have sexual intercourse was sufficient to sustain the male cadet's conviction for sexual assault, in violation of UCMJ art. 120(b)(1)(B), [10 U.S.C.S. § 920\(b\)\(1\)\(B\)](#); [2]-

There was no merit to the male cadet's claim that there was a fatal variance between the charge and the findings; [3]-The military judge did not abuse his discretion when he dismissed a panel member for cause because she expressed irritation regarding a friend's false rape allegation, was friends with one of the defense witnesses, and was an instructor for another defense witness; [4]-The military judge did not err when he allowed the Government to admit evidence of sexual acts between the female cadet and the male cadet immediately before the sexual assault occurred.

Outcome

The court affirmed the findings and sentence.

Counsel: For Appellant: William E. Cassara, Esquire; Lieutenant Doug R. Ottenwess, JAGC, USN.

For Appellee: Lieutenant Allyson L. Breech, JAGC, USN; Lieutenant Megan P. Marinos, JAGC, USN.

Judges: Before WOODARD, FULTON, and JONES, Appellate Military Judges. Chief Judge WOODARD concurs. Senior Judge FULTON, dissenting.

Opinion by: JONES

Opinion

JONES, Senior Judge:

A panel of officers sitting as a general court-martial convicted the appellant, contrary to his pleas, of sexual assault, in violation of [Article 120, Uniform Code of Military Justice \(UCMJ\), 10 U.S.C. § 920 \(2012\)](#). The panel sentenced the appellant to 30 months' confinement, forfeiture of all pay and allowances, and a dismissal. The convening authority approved the adjudged sentence and, except for the dismissal, ordered it executed.

The appellant asserts four assignments of error (AOE): (1) the evidence is factually insufficient; (2) the appellant's due process right to notice was violated; (3) the military judge erred by admitting uncharged acts of sexual misconduct; and (4) the military [*2] judge abused his discretion by granting a challenge for cause of a court member. We disagree and, finding no error materially prejudicial to the substantial rights of the appellant, affirm the findings and sentence. [Arts. 59\(a\)](#) and 66(c), UCMJ.

I. BACKGROUND

The appellant and MH were midshipmen at the United States Naval Academy. On 3 and 5 June 2015, they practiced ju-jitsu together at the Academy's fieldhouse, with the appellant assuming the role of teacher. At the first session they were accompanied by MH's roommate, and nothing sexual occurred between MH and the appellant. But on 5 June 2015, the two were alone in the fieldhouse and their practice session turned sexual when the appellant began rubbing MH's vagina over her clothes. MH permitted this, but twice moved away from the appellant when he tried to remove her shorts. MH explained to the appellant that she was a victim of a past sexual assault and needed an emotional connection before she could have sex with someone. The appellant acknowledged her

concerns and stopped his sexual advances.

When the practice session ended, the two went to dinner together and then to the appellant's room to watch a science video. At some point, [*3] the appellant placed his hand on MH's leg, and then on her vagina, over her clothes. MH did not object to these actions. The appellant then placed his hands on MH's hips and guided her to a standing position. He pulled MH's pants and underwear down, pulled his own pants down, and pressed MH against the desk, with her buttocks touching the desk. The appellant then penetrated MH's vulva with his penis. MH responded by pushing the appellant off of her and pulling up her underwear and pants.

MH then reminded the appellant—in more explicit terms—of her prior sexual assault and that she did not want to have sex with him. She told him she "fe[lt] like an object" because she was not "having an intimate connection" with him.¹ MH told the appellant that she needed to feel in control to engage in sexual activity, and that having sex with him on the desk failed to give her that control. In response, the appellant suggested that if he sat on a chair and she straddled him, she would be in control. In an attempt to "remain close with him," MH agreed to engage in further sexual activity on the chair. She removed one leg from her pants and underwear and mounted the appellant, who was seated on the chair. [*4]² But as the appellant began thrusting inside of her, she felt more and more uncomfortable with the situation, and abruptly stopped the coitus by lifting herself off of the appellant. At trial, MH described how she told the appellant again that she did not want to have sex with him.

At this point my emotions were really high,

¹ Record at 459.

² *Id.* at 461.

and I told him that I didn't want to be f****d because I felt as though . . . I still wasn't getting that . . . intimate connection, and it still felt like I was just there to please him, and it was not how I wanted it to go.³

Before MH could put her pants back on, however, the two heard the appellant's roommate entering the adjoining room. As having a member of the opposite sex in the room with the door closed was prohibited in the barracks, they attempted to conceal their activity. The appellant guided MH onto his desk, which was directly underneath his elevated bed, and placed a backpack in front of her so she would not be discovered. While the appellant distracted his roommate in the bathroom, the appellant motioned for MH to climb from the desk up into his bed where she was concealed behind the privacy curtain. She was still naked from the waist down.

After [*5] a few moments, the roommate departed. The appellant then climbed into the bed, joining MH. When he did so, MH moved from lying on her stomach to lying on her back. When the appellant placed his hand on her leg, she responded by telling him "just hold me."⁴ The appellant replied "okay."⁵ She then turned onto her right side so she was facing the wall and her back was up against the appellant's chest. MH testified that the appellant held her for only a "matter of seconds"⁶ before rolling her onto her stomach and placing his weight on top of her. She testified that the appellant said nothing, but placed his knees between her legs and forcibly spread them apart. He then reached underneath MH, briefly rubbed her vagina with

his hand, and then penetrated MH's vulva with his penis. MH testified that she completely froze; she did not say or do anything in response. After a few moments, MH asked the appellant to get a condom. MH testified that she asked the appellant to get a condom because just saying no, as she had done before, was not working and she could not think of anything "that would make him care."⁷ When the appellant left to get the condom, MH testified that although she wanted to leave, [*6] she could not move. As she explained, "it was as if all of [her] limbs were against her, and they wouldn't—wouldn't let [her] leave."⁸ MH testified that when the appellant returned to the bed with the condom and once again penetrated her vulva with his penis, she clenched her fist and expressed to him, "you don't have to do this."⁹ Again, she related the appellant said nothing, but continued to penetrate her from behind until he ejaculated. The appellant was charged only with sexually assaulting MH in his bed.

Additional facts necessary to resolution of the AOE are included below.

II. DISCUSSION

A. Factual sufficiency

1. The law

The appellant asserts the sexual assault conviction is factually insufficient.¹⁰

³ *Id.*

⁴ *Id.* at 465.

⁵ *Id.*

⁶ *Id.* at 466.

⁷ *Id.* at 468.

⁸ *Id.*

⁹ *Id.* at 469.

¹⁰ Although the appellant does not challenge the legal sufficiency of the abusive sexual contact convictions, we are

Specifically, the appellant argues that the government failed to prove beyond a reasonable doubt that MH did not consent to the sexual act in the appellant's bed. Alternatively, he avers that the government failed to prove beyond a reasonable doubt that he did not honestly and reasonably believe that she had consented.

We review questions of factual sufficiency *de novo*. Art 66(c), UCMJ; [United States v. Washington](#), 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency is whether "after weighing the evidence in the record [*7] of trial and making allowances for not having personally observed the witnesses, [this court is] convinced of appellant's guilt beyond a reasonable doubt." [United States v. Rosario](#), 76 M.J. 114, 117 (C.A.A.F. 2017) (citation, internal quotation marks, and emphasis omitted). In conducting this unique appellate function, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." [Washington](#), 57 M.J. at 399. Proof beyond a reasonable doubt does not mean, however, that the evidence must be free from conflict. [United States v. Goode](#), 54 M.J. 836, 841 (N-M. Ct. Crim. App. 2001).

The appellant was charged and convicted of sexual assault in violation of [Article 120\(b\)\(1\)\(B\), UCMJ](#). To convict the appellant,

mindful that Article 66(c), UCMJ, requires this court "to conduct a *de novo* review of [both the] legal and factual sufficiency of the case." [Washington](#), 57 M.J. at 399 (citation omitted). "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [United States v. Robinson](#), 77 M.J. 294, 297-98, (C.A.A.F. 2018) (quoting [United States v. Rosario](#), 76 M.J. 114, 117 (C.A.A.F. 2017)). We find the evidence legally sufficient.

the government was required to prove the following elements:

- (1) That the accused committed a sexual act upon MH by causing penetration, however slight, of [her] vulva . . . by [his] penis;
- (2) That the accused did so by causing bodily harm to MH;¹¹ and
- (3) That the accused did so without the consent of MH.¹²

Bodily harm "means any offensive touching of another, however slight, [*8] including any nonconsensual sexual act[.]"¹³ In this case, the bodily harm alleged was "penetrating her vulva with his penis."¹⁴ "When the same physical act is alleged as both the *actus reus* and the bodily harm for the charged sexual assault, the government must prove lack of consent as an element."¹⁵ In other words, the government must prove beyond a reasonable doubt that MH did not consent to the physical act.¹⁶

The term "consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship or social or sexual relationship by itself or the manner of dress of the person involved with the

¹¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) (MCM), Part IV, ¶ 45.a.(b)(1)(B).

¹² Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at 574 (10 Sep 2014).

¹³ MCM, Part IV, ¶ 45.a.(g)(3).

¹⁴ Charge Sheet.

¹⁵ Military Judges' Benchbook at 575.

¹⁶ [United States v. Guin](#), 75 M.J. 588, 592-93 (N-M. Ct. Crim. App. 2016), rev. denied, 75 M.J. 367 (C.A.A.F. 2016).

accused in the conduct at issue shall not constitute consent.¹⁷

Lack of consent may be inferred based on the circumstances of the offense. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because [*9] of another person's actions.¹⁸

Evidence of a misunderstanding of the circumstances surrounding an offense may give rise to the defense of mistake of fact. "[I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense." RULE FOR COURTS-MARTIAL (R.C.M.) 916(j)(1), MANUAL FOR COURTS-MARTIAL (MCM), UNITED STATES (2012 ed.). The evidence triggering the mistake of fact defense must show that the accused's mistake was both honest and reasonable. [*United States v. Hibbard*, 58 M.J. 71, 72 \(C.A.A.F. 2003\)](#). Although the appellant bears the burden of raising some evidence of a mistake of fact, the burden remains on the government to prove, beyond a reasonable doubt, that there was neither consent nor an honest and reasonable mistake of fact as to consent.

2. Application of the law to the facts

We are convinced that MH did not consent to the sexual intercourse in the appellant's bed, and that the appellant was not under the

mistaken belief that she consented. It is indisputable that MH engaged in consensual sexual intercourse with the appellant twice that evening immediately prior to [*10] the charged offense; she ultimately testified that the sex on the desk and in the chair were both consensual encounters. But it is axiomatic that a woman may revoke consent to sexual intercourse at any time—even immediately after initially consenting to it.

Before 5 June 2015, the appellant and MH had had no romantic or sexual interactions. From the first sexual encounter at the fieldhouse—when MH rebuffed the appellant's repeated efforts to remove her shorts—MH put the appellant on notice that she was a victim of prior sexual abuse and that she needed an emotional connection prior to having sex with him. After abruptly stopping the sexual encounter in the chair, MH told the appellant, "I don't want to be f****d."¹⁹ Then in the bed some moments later, when the appellant touched her leg in an attempt at foreplay, MH reiterated that she did not want to have sex when she told the appellant to "just hold [her]."²⁰ The appellant verbally acknowledged this boundary set by MH when he responded "okay."²¹ But then, without any verbal or physical warning, the appellant rolled MH onto her stomach, forcefully spread her legs with his knees, rolled over onto her, and penetrated her vulva with his penis. [*11] In doing so, the appellant sexually assaulted MH because she had physically and verbally withdrawn her consent to sexual intercourse in the chair and then again verbally reiterated that lack of consent before he penetrated her vulva with his penis in the bed.

¹⁷ MCM, Part IV, ¶ 45.a.(g)(8)(A). See also Military Judges' Benchbook at 576.

¹⁸ MCM, Part IV, ¶ 45.a.(g)(8)(C). See also Military Judges' Benchbook at 576.

¹⁹ Record at 461.

²⁰ *Id.* at 465.

²¹ *Id.*

MH testified that during the assault she froze and felt helpless because all of her previous attempts to communicate her need for intimacy before engaging in sex had failed.²² But unlike the two previous sexual encounters in the room where MH could disengage from the appellant, in the small bed above the appellant's desk there was nowhere for her to escape. MH testified that when she realized that the appellant was going to have sex with her without her consent, she asked him to use a condom. We do not find that MH's request that the appellant get a condom transformed a sexual assault into a consensual sexual encounter. See [*United States v. Robinson, No. 200000681, 2003 CCA LEXIS 163 at *10, \(N.M. Ct. Crim. App. 30 Jul 2003\)*](#) (unpub. op.) (the victim's request that her assailant use a condom could not honestly and reasonably be interpreted as consent), *rev. denied*, 59 M.J. 474 (C.A.A.F. 2004). In fact, when the appellant returned to the bed, MH again manifested her lack of consent by clenching her fist and telling the appellant [*12] he did not have to do this to her. The appellant again said nothing. He did not seek clarification of MH's statement. His only response was to penetrate MH until he ejaculated. We are convinced that MH made her lack of consent to the sexual act in the appellant's bed reasonably manifest, and that she never freely agreed to the sexual act. In considering all of the surrounding circumstances, MH's expressions of lack of consent through her words and actions indicate there was no consent.

We are also convinced beyond a reasonable doubt that the appellant was not under the mistaken belief that MH consented to the sexual intercourse in the bed. The appellant knew that MH had just revoked her consent to sexual intercourse by abruptly stopping the

sex in the chair and through the conversation that followed. In the bed, she again reiterated she was not interested in sex by telling the appellant she only wanted to be held. Finally, when the appellant returned with a condom, MH told him he did not have to do this to her. The appellant ignored these three stop signs. Even if we assume that the appellant had a reasonable mistake of fact that MH consented when he first penetrated her [*13] in the bed, we find that he was not mistaken as to her lack of consent when he returned with the condom and MH again verbally expressed her lack of consent. The evidence shows the appellant chose to ignore MH's readily discernable, and multiple verbalizations of her lack of consent. Further, assuming the appellant honestly believed MH consented to his advances, we find that belief unreasonable.

Furthermore, the parties' behavior after the incident supports MH's claim that the appellant sexually assaulted her. The appellant demonstrated a consciousness of guilt in his admissions to MH in an email a few days after the incident. In responding to MH's consternation over what had occurred that night, he conceded, "You're right, I messed up."²³ Later, he met with MH face-to-face in a stairwell and agreed that what had happened should not have happened. At that meeting, MH gave the appellant a deadline to report what he had done or else she would report it. The appellant never self-reported. So, three months after the incident, MH again confronted the appellant by email regarding her feelings about what the appellant had done to her. In response, the appellant admitted that "[w]hat happened [*14] has been haunting me as well . . . but . . . I am scared to even talk about something like that."²⁴ These admissions belie

²³ Prosecution Exhibit 4 at 1-2.

²⁴ *Id.* at 2.

²² See generally *id.* at 467.

the appellant's mistake of fact claim and demonstrate his consciousness of guilt. reasonable doubt.

The government also called three of MH's classmates who testified that MH's demeanor noticeably changed after the incident and she became more quiet and withdrawn. They also testified that whereas she had been very involved in extracurricular activities, she scaled back her participation dramatically after the incident. This circumstantial evidence is consistent with MH's claim that she was sexually assaulted.

We find no persuasive motive why MH would fabricate the allegation.²⁵ It is true that being behind a closed door in a room of a member of the opposite sex and having sex with a fellow midshipman were against the Academy's rules and could have led to disciplinary action against MH. However, until MH reported the assault, there is no evidence anyone even knew she was in the appellant's room, let alone that she had engaged in sexual activity with him—to include the consensual sexual encounters in the appellant's room on the chair and desk. Accordingly, we reject the appellant's argument [*15] that that MH reported a consensual sexual encounter as a sexual assault to avoid getting into trouble.

Finally, we acknowledge there were inconsistencies in MH's testimony. But proof beyond a reasonable doubt does not mean that the evidence must be free from conflict. [*United States v. Diaz*, 61 M.J. 594, 599 \(N-M. Ct. Crim. App. 2005\)](#), *aff'd*, 64 M.J. 176 (C.A.A.F. 2006). Overall, we find the victim's testimony compelling and supported by the circumstantial evidence. After weighing all the evidence and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt beyond a

B. Due process right to notice

The appellant alleges for the first time on appeal that the government violated his due process right to notice by suggesting throughout the trial that the sex on the desk was nonconsensual. He avers this resulted in a fatal variance of the Specification of the Charge.²⁶ We disagree.

The appellant did not object at trial to lack of notice or a fatal variance. Therefore, these issues were forfeited and we review the appellant's claims for plain error. [*United States v. Finch*, 64 M.J. 118, 121 \(C.A.A.F. 2006\)](#); see also [*United States v. Ahern*, 76 M.J. 194, 197-98 \(C.A.A.F. 2017\)](#) (distinguishing forfeiture, which is reviewed for plain error, from waiver). On plain error review, an "[a]ppellant has the burden [*16] of establishing (1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights. The failure to establish any one of the prongs is fatal to a plain error claim." [*United States v. Feliciano*, 76 M.J. 237, 240 \(C.A.A.F. 2017\)](#) (internal citations omitted). Here, we find no error in the government's notice and no fatal variance.

1. Proper notice

"The due process principle of fair notice mandates that an accused has a right to know what offense and under what legal theory he will be convicted. . . ." [*United States v. Jones*, 68 M.J. 465, 468 \(C.A.A.F. 2010\)](#) (internal quotation marks and citation omitted). "[T]he

²⁵ The government also presented un rebutted evidence of MH's good character for truthfulness.

²⁶ The government had initially charged the appellant with sexual assault for penetrating MH's vulva with his finger in the bed, but the specification was later withdrawn and dismissed prior to trial. See Charge Sheet.

[Due Process Clause of the Fifth Amendment](#) also does not permit convicting an accused of an offense with which he has not been charged." [United States v. Girouard, 70 M.J. 5, 10 \(C.A.A.F. 2011\)](#).

Prior to trial, in a written response to the appellant's MILITARY RULE OF EVIDENCE (MIL. R. EVID.) 412, MCM, UNITED STATES (2012 ed.) motion, the government informed the defense that the basis for the Specification was the sex in the appellant's bed.²⁷ Although the defense never requested a bill of particulars, they sought government verification that the Specification was based only on the sex that occurred in the bed after MH said "just hold me."²⁸ On the record, the government "wholeheartedly" agreed this was accurate.²⁹

The genesis of this AOE is MH's conflicting and [*17] confusing trial testimony regarding the sex on the desk. When she first described the incident, she testified how quickly it had happened and that she did not have time to fully react until she pushed the appellant away after he penetrated her.³⁰ During cross-examination, she disagreed that she had engaged in sex with the appellant: "we didn't have sex on the desk; it was just penetrating, and then he was pushed off, ma'am."³¹ These statements could indicate that she thought the sex was nonconsensual, and this would be

consistent with her previous statement to the Naval Criminal Investigative Service.³² However, in her later testimony on re-direct examination, MH clarified that she did not initially express a lack of consent to the appellant penetrating her on the desk.³³ Finally, in re-cross examination, she described the sex on the desk as consensual, and conceded that she had told the trial counsel and others prior to trial that it was consensual.³⁴

It appears from her testimony that emotionally MH did not want the sex on the desk to occur, but she did not make her lack of consent reasonably manifest until she pushed the appellant away *after* the appellant had already penetrated her. This explains [*18] why the government and the defense agreed prior to trial that what occurred in the appellant's bed was the only basis for the Specification.

But now the defense alleges that the government impermissibly used the sexual encounter on the desk to pull a bait-and-switch with regard to what misconduct formed the basis of the Specification. We disagree. Long before the trial began, both sides had MH's NCIS statement and were aware of what her testimony would be in this regard, and at trial both sides sought to use this evidence to their advantage. The government used the episode to support their contention that the appellant was single-mindedly determined to satisfy himself sexually, regardless of how many times MH had disengaged from his earlier sexual forays. The defense—who had won a motion to get the evidence admitted—used the incident to explain that what occurred in the bed was just an extenuation of the sexual

²⁷ Appellate Exhibit (AE) XI at 3, para. n.

²⁸ Record at 58-59.

²⁹ *Id.* at 59. We agree with the government that it is unclear from the record whether the parties at this time considered the two penetrative acts in the bed as separate or as one course of conduct. Appellee's Brief of 17 Jan 2018 at 4, n. 2. Evidence at trial seemed to distinguish the "hold me" intercourse from the "condom" intercourse. Regardless, the appellant's AOE alleges lack of notice and fatal variance for what occurred on the desk, not in the bed.

³⁰ Record at 458.

³¹ *Id.* at 499.

³² *Id.* at 525.

³³ *Id.* at 560.

³⁴ *Id.* at 526.

encounters on the desk and the chair, that the appellant desisted every time MH made her lack of consent manifest, and that this event substantially contributed to the appellant's reasonable mistake of fact as to MH's consent to the sex act in the bed.

In *United States v. Fields* [*19], the appellant claimed a lack of notice when the government presented four different theories of larceny at trial. [No. 201100455, 2012 CCA LEXIS 129, at *9 \(N-M. Ct. Crim. App. 12 Apr 2012\)](#) (unpub. op.), rev. denied, 71 M.J. 380 (C.A.A.F. 2012). In *Fields*, we rejected the appellant's contention that he lacked notice on what he needed to defend against. We held that "notice was readily apparent throughout pretrial discovery and motions litigation. . . . The appellant never requested a bill of particulars nor raised any objection during or after the [g]overnment's case. In addition, he failed to object to the findings instructions and worksheet crafted by the military judge." [Id. At *10](#). So, too, here. The defense's failure to object to statements by the trial counsel, evidence regarding the sex on the desk, and the military judge's instructions—all contradict the appellant's recent contention that he was confused as to what to defend against. The government did not argue that the appellant was guilty of sexually assaulting MH on the desk. The appellant had adequate notice. We find no plain error because the appellant was not misled in any way that prohibited him from adequately preparing for trial.

2. Fatal variance

"A variance between pleadings and [*20] proof exists when evidence at trial establishes the commission of a criminal offense by the accused, but the proof does not conform strictly with the offense alleged in the charge." [United States v. Lubasky, 68 M.J. 260, 264](#)

[\(C.A.A.F. 2010\)](#) (citation omitted). A fatal variance is one "that either deprives the defendant of fair notice of the charges or exposes the defendant to the risk of double jeopardy."³⁵ Here again we find no plain error. In so concluding, we utilize the Court of Appeals for the Armed Forces' material variance test in our plain error analysis.

To prevail on a fatal variance claim, an appellant must show that the variance was (1) material and (2) that it substantially prejudiced him. [Finch, 64 M.J. at 121](#). A variance that is "material" is one that substantially changes the nature of the offense, increases the seriousness of the offense, or increases the punishment of the offense. *Id.* When applying this two-part test, our superior court has noted that even where there is a variance in fact, the critical question is one of prejudice. *Id.* In other words, (1) has the accused been misled to the extent that he has been unable adequately to prepare for trial; and (2) is the accused fully protected against another prosecution [*21] for the same offense. *Id.*

The appellant fails the first prong because he has not shown that there was a material variance. In the appellant's trial, neither the offense nor its elements changed, nor did the members find by exceptions and substitutions. Accordingly, there was no increase in the seriousness of the offense or the authorized punishment for the offense.

The government's opening statement and closing arguments, the evidence produced at trial, and the findings of the members all show that there was no variance, let alone material variance. In the trial counsel's opening statement—after reciting the facts of 5 June 2015—he told the members the appellant was charged with one specification of "sexual

³⁵ *Variance*, BLACK'S LAW DICTIONARY (10th ed. 2014).

assault by bodily harm for what occurred in the rack³⁶ that evening, after [MH] told him 'just hold me.'³⁷ On the merits, the trial counsel only used the incidences on the desk and in the chair to prove lack of consent in the appellant's bed and their surrounding circumstances to prove that any mistake of fact the appellant may have had as to MH's consent to the sexual act in the bed was not reasonable. At no point during the trial did the government attempt to prove that the appellant [*22] was guilty of a sexual assault that occurred on the desk. In fact, the government was stuck with MH's conflicting testimony regarding how she viewed the incident. In the closing arguments, the trial counsel emphasized no less than six times that what occurred in the bed was the charged offense.³⁸ The trial counsel ended his closing argument by summarizing, "The accused sexually assaulted [MH] in his rack on 5 June 2015."³⁹

Finally, we reject the appellant's contention that the verdict exposes him to double jeopardy because we cannot be sure that the members convicted him for the occurrence in his bed. In sum, we find no plain error as the appellant was on fair notice of what he had to defend against and there was no fatal variance. **C. Admission of MIL. R. EVID. 412 evidence**

The defense filed a pre-trial motion seeking to admit the sexual encounters on the desk and the chair.⁴⁰ The government did not oppose

the motion, and agreed that the interaction between the appellant and MH at the fieldhouse was also relevant. The military judge granted the motion. During trial, the government chose to elicit these prior sexual encounters during their direct examination of MH. Unsurprisingly, the defense did not object, [*23] and they also cross-examined MH on the instances. But now, on appeal, the appellant asserts that this evidence was inadmissible under MIL. R. EVID. 404(b) and 413.⁴¹ We disagree. We conclude that the military judge did not err in admitting the evidence, and even if he did, in applying the invited error doctrine, we conclude that the appellant is precluded from raising this issue on appeal.

First, we find the military judge did not err in granting the appellant's MIL. R. EVID. 412 motion. This rule provides that "evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecutions" is admissible. MIL. R. EVID. 412 (b)(1)(B). The sexual interactions between MH and the appellant at both the fieldhouse and in his room were highly relevant to show previous

response to the motion noted that the specification relating to what had occurred at the fieldhouse had been dismissed. See n. 26, *supra*. They conceded that the interaction at the fieldhouse was admissible under MIL. R. EVID. 412, and as evidence of a prior inconsistent statement by MH regarding whether the appellant had penetrated her with his fingers. Regardless, in a motions session, both sides agreed that all of the prior sexual conduct between MH and the appellant was admissible. Record at 27.

⁴¹ MIL. R. EVID. 404(b)(1) is a rule of exclusion to prevent "evidence of a crime, wrong, or other act" to be used "to prove a person's character" and "to show that on a particular occasion the person acted in accordance with the character." MIL. R. EVID. 404(b)(1). MIL. R. EVID. 413 is a rule of inclusion which allows a military judge to "admit evidence that the accused committed any other sexual offense" as defined "[u]nder the Uniform Code of Military Justice . . . federal or state law." MIL. R. EVID. 413.

³⁶ "Rack" is a common military term for "bed."

³⁷ Record at 428.

³⁸ *Id.* at 663, 665-66, 668, 671, 683-84, 687.

³⁹ *Id.* at 671.

⁴⁰ See AE V; Record at 27. It appears that at the time the defense filed their motion, they did not seek admissibility of what occurred at the fieldhouse. The government in their

consent to sexual activity between the parties and to raise the appellant's mistake of fact defense.

The appellant contends, without citing any authority, that after the military judge ruled the MIL. R. EVID. 412 evidence admissible, only the appellant held the key to introduce that evidence at trial. This is simply not the case. MIL. R. EVID. 412 is intended to protect the privacy rights of alleged victims [*24] of sexual assaults while ensuring an accused's right to a constitutionally-sound trial. The rule does not give the government or the defense the exclusive right to decide if, when, and how to present MIL. R. EVID. 412 evidence. Once the military judge ruled that all of the sexual contact between the appellant and MH was admissible, the government was free to address those matters in their direct examination of MH during their case-in-chief. We reject the appellant's contention that the government used the MIL. R. EVID. 412 ruling as license to impermissibly introduce MIL. R. EVID. 404(b) and 413 evidence. In reality, both sides wanted this evidence admitted for their own purposes, and both sides used the evidence in their theories of the case. We also reject the appellant's claim that the military judge erred when he failed to give MIL. R. EVID. 404(b) and 413 instructions to the members for the properly-admitted MIL. R. EVID. 412 evidence.

Even assuming the military judge erred, we would still decline to grant relief based on the invited error doctrine. The propriety of the invited error doctrine is a question of law we review *de novo*. [*United States v. Martin*, 75 M.J. 321, 325 \(C.A.A.F. 2016\)](#). "The invited error doctrine prevents a party from creating error and then taking advantage of a situation of his own making on appeal." *Id.* (citation [*25] and internal quotation marks omitted). Here, the appellant sought admission

of evidence of prior sexual acts between MH and himself to show consent and mistake of fact. The appellant then used this evidence at trial. It is difficult to find fault in this commonsense trial strategy. But the appellant cannot successfully win admissibility of evidence at trial and then seek to re-characterize that evidence on appeal and argue it should not have been admitted. We decline to grant relief where the appellant attempts to re-classify what was properly admitted evidence at trial into inadmissible MIL. R. EVID. 404(b) and 413 evidence on appeal.

D. Granting the government's challenge of CDR JT

The appellant avers that the military judge erred in granting the government's challenge of CDR JT for cause. We disagree.

1. The facts

During individual voir dire, CDR JT disclosed that she had a good friend, and fellow Academy graduate, who had previously been falsely accused of rape. As part of the investigation CDR JT was interviewed by the Naval Criminal Investigative Service. She felt that the accusation was a personal attack on her friend. After a lengthy trial, CDR JT's good friend's accuser admitted that she had falsely [*26] accused him of rape because she "needed someone to blame at the time, [and] he just happened to be in the wrong place at the wrong time."⁴²

CDR JT was friends with one of the defense witnesses, CDR DF. They met years ago when they were on the swim team together for two years at the Academy. The two had stayed in

⁴² Record at 211.

contact over the years, and CDR DF had assisted CDR JT navigate the application process to become an instructor at the Academy. However when asked to define their current relationship, CDR JT replied, "[j]ust a distant friend."⁴³

Another defense witness, Midshipman W, was then CDR JT's student at the Academy. When CDR JT announced to the class her planned absence due to her being detailed to the court-martial, Midshipman W approached her and said, "Ma'am, . . . I'm a witness."⁴⁴ When asked by counsel how well she knew Midshipman W, CDR JT replied, "I know his performance and I know a little bit of his personality, but just in the classroom."⁴⁵

Finally, CDR JT revealed that, prior to the court-martial, she had heard rumors from Academy instructors that a midshipman had fabricated a sexual harassment charge to justify returning late from liberty.

The government challenged CDR JT for cause, [*27] and the military judge granted it based on actual bias. The military judge gave three reasons for the grant. First, observing CDR JT's demeanor in court when she answered questions regarding her officer friend who had been falsely accused of rape, the military judge noted that CDR JT appeared in terms of her tone and her attitude irritated about the false allegation against her friend, and seemed somewhat firm and annoyed, I guess, that it had even been made, . . . I think that experience may have created some bias against sexual assault allegations on the part of [CDR JT].⁴⁶

⁴³ *Id.* at 216.

⁴⁴ *Id.* at 220.

⁴⁵ *Id.* at 218.

⁴⁶ *Id.* at 401-02.

Second, the military judge cited the relationship between CDR JT and two of the defense witnesses. The military judge found that the member's close association on the swim team with CDR DF and CDR DF's assistance with CDR JT obtaining a teaching position created actual bias. With respect to Midshipman W, the military judge felt that CDR JT's relationship with him as his teacher would have the "potential to taint [CDR JT's] evaluation of the evidence."⁴⁷

Third, the military judge was concerned with CDR JT's knowledge of rumors at the Academy that possibly implicated the appellant's case. The military judge explained [*28] that

Another very important factor . . . is that [CDR JT] was aware of a rumor concerning this case[] . . . it's something that she knows about and associates with this case, and could introduce an alternative explanation that's outside the scope of facts, and so I believe that because she was considering it as potential in this case, I don't know how we cure that taint.⁴⁸

2. Application of the law to the facts

R.C.M. 912(f)(1) states a "member shall be excused for cause whenever it appears that the member . . . [s]hould not sit . . . in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." This rule encompasses both demonstrations of actual bias and implied bias. [*United States v. Warden*, 51 M.J. 78, 81 \(C.A.A.F. 1999\)](#). "A military judge's determinations on the issue of member bias, actual or implied, are based on the totality of

⁴⁷ *Id.*

⁴⁸ *Id.* at 400-01.

the circumstances particular to a case." [United States v. Nash, 71 M.J. 83, 88 \(C.A.A.F. 2012\)](#) (citation and internal quotation marks omitted). "The burden of establishing that grounds for a challenge exist is upon the party making the challenge." R.C.M. 912(f)(3). Actual bias exists when a member's bias "is such that it will not yield to the evidence presented and the judge's instructions. Actual bias is reviewed subjectively, through the [*29] eyes of the military judge or the court members." [Warden, 51 M.J. at 81](#) (citations and internal quotation marks omitted).

Generally, military appellate courts have addressed challenges for cause when those challenges made by the accused at trial have been denied by the military judge. [United States v. James, 61 M.J. 132, 138 \(C.A.A.F. 2005\)](#). In the context of challenges brought by the accused, military judges must liberally grant challenges for cause. [Id. at 139](#). However, given the convening authority's broad power to appoint court members, the "liberal grant" policy does not apply to ruling on the government's challenges for cause. *Id.* Nevertheless, in evaluating on appeal a military judge's ruling on a government challenge for cause, it is "appropriate to recognize the military judge's superior position to evaluate the demeanor of court members. A military judge's ruling on a challenge for cause [in favor of the government] will therefore not be reversed absent a clear abuse of discretion." [Id. at 138](#).

The abuse of discretion standard calls for more than a mere difference of opinion; the challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous. [United States v. Baker, 70 M.J. 283, 287 \(C.A.A.F. 2011\)](#). Importantly, a military judge receives latitude on his factual determinations of actual bias because [*30] he personally observed the member's demeanor. [United](#)

[States v. Leonard, 63 M.J. 398, 402 \(C.A.A.F. 2006\)](#). However, "[a]n abuse of discretion has occurred 'if the military judge's findings of fact are clearly erroneous or if the decision is influenced by an erroneous view of the law.'" [United States v. Dockery, 76 M.J. 91, 96, \(C.A.A.F. 2017\)](#) (quoting [United States v. Quintanilla, 63 M.J. 29, 35 \(C.A.A.F. 2006\)](#) (citation omitted)).

Applying the abuse of discretion standard for actual bias and giving the military judge's ruling "great deference," [United States v. Miles, 58 M.J. 192, 195 \(C.A.A.F. 2003\)](#), we conclude the military judge did not err in granting the challenge for cause of CDR JT for actual bias. His ruling was not arbitrary, fanciful, clearly unreasonable, or clearly erroneous. [Baker, 70 M.J. at 287](#). We concur that there was ample evidence to support the military judge's conclusion of CDR JT's actual bias. We agree with the military judge that CDR JT's observable irritation regarding her close friend's false rape allegation is evidence of actual bias against persons alleging sexual assault. We find this alone is reason enough to remove the member from the panel. Furthermore, CDR JT's relationships with two defense witnesses, and her knowledge of rumors that the military judge felt she may confuse with the facts of the case further support her removal from the panel. We conclude the cumulative effect of CDR JT's answers [*31] and demeanor established actual bias. Under all the circumstances, allowing CDR JT to remain on the appellant's panel would have created substantial doubt as to the legality, fairness, and impartiality of the court-martial.

Even assuming, *arguendo*, there was an abuse of discretion, the appellant would need to demonstrate that he suffered actual prejudice from CDR JT's exclusion from the panel. See [United States v. Dockery, 76 M.J.](#)

[91, 97-98 \(C.A.A.F. 2017\)](#). The appellant argues that he was prejudiced because the number of persons on the panel was impermissibly reduced by the granted challenge for cause of CDR JT, and because the government failed to state a gender-neutral basis for excluding CDR JT. We summarily reject both arguments. See [United States v. Newson, 29 M.J. 17, 21 \(C.M.A. 1989\)](#) (rejecting the notion that a different mix of members would have produced more favorable results for the appellant); [United States v. Elliott, 89 F.3d 1360, 1364-65 \(8th Cir. 1996\)](#) ([Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 \(1986\)](#) applies only to peremptory challenges, not challenges for cause). The appellant fails to show any actual prejudice. This AOE is without merit.

III. CONCLUSION

The findings and the sentence as approved by the CA are affirmed.

Chief Judge WOODARD concurs.

Dissent by: FULTON

Dissent

Senior Judge FULTON, dissenting:

The record does not convince me beyond a reasonable doubt that MH did not consent to sex, or that the [*32] appellant did not reasonably think that MH consented. I would disapprove the findings.

The record shows that MH, a first class midshipman at the United States Naval Academy, was an unreliable relator of relevant facts. MH originally told NCIS that the appellant had sexually assaulted her in the fieldhouse by penetrating her vagina with his

finger. At trial, she said that the appellant touched her over her shorts while they were practicing ju-jitsu, and that she consented to this. ("[T]hat was fine for a second. I was prepared to do that . . .").¹

MH was also inconsistent about whether the sex on the desk was consensual. She acknowledged telling NCIS that the sex on the desk was nonconsensual. But she also acknowledged telling trial counsel, in the presence of two others, that the sex on the desk was consensual:

Defense counsel: And you told the group that sex on the desk was consensual.

MH: I believe so, ma'am.

DC: So you told NCIS that it was nonconsensual.

MH: Yes, ma'am.

DC: But you testified in court that it was consensual.

MH: Yes, ma'am.²

Even where MH's testimony was consistent, it tended to show ambivalence about engaging in sex with the appellant. MH was uncomfortable while having sex [*33] on the desk, so she pushed the appellant away. The two discussed her discomfort. Part of MH's discomfort stemmed from her feeling that she and the appellant were not having "an intimate connection."³ She also said that she "didn't have any control of the situation."⁴ The appellant's suggested solution was to have sex with MH on top. The appellant sat in a chair, and MH straddled the him. After having sex in this position for a while MH decided that she was still uncomfortable and got off the appellant. This sex was indisputably

¹ Record at 449.

² *Id.* at 526.

³ *Id.* at 459.

⁴ *Id.*

consensual, and the appellant stopped having sex with her when she indicated that she no longer consented.

After the appellant's roommate left, the appellant joined MH, who was already in his bed. The appellant put MH's clothes in the bed, but MH did not get dressed. Instead, she asked the appellant to hold her. MH was nude from the waist down, except for socks. The appellant held her for a while and then began to have sex with MH. MH did not express her lack of consent.

The reason MH gave for not saying no was that she had already made it clear that she did not want to have sex, but that "[a]t this point, it didn't seem like what [she] said mattered."⁵ But she [*34] had in fact expressed her lack of consent twice mid-coitus in the moments leading up to the offense. On both occasions the appellant stopped having sex with her.

The majority gives considerable weight to the fact that MH told the appellant that she wanted an emotional connection with a partner before she had sex with him—that she "didn't want to be f****d because [she] felt as though . . . [she] still wasn't getting . . . that intimate connection" ⁶ True, MH said that she wanted more from a sexual relationship than feeling "like [she] was just there to please him . . . [.]"⁷ In my view the majority's reliance on this evidence confuses what MH wanted with what she consented to: MH wanted an emotional connection with a prospective sexual partner. But she consented—at least once and perhaps twice—to sex with the appellant in the moments leading up to the alleged offense. It is not unreasonable to suppose that she

consented a second or third time while she lay naked with the appellant in his bed. Nor is it unreasonable to think that the appellant would have thought that she was consenting again, particularly since MH had proved capable of refusing sex in a way he understood.

Because [*35] the record leaves me unconvinced that MH did not consent to sex with the appellant, or that the appellant did not reasonably believe that she consented, I would find disapprove the findings. I respectfully dissent.

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⁵ *Id.* at 549.

⁶ *Id.* at 461.

⁷ *Id.*



Positive

As of: November 18, 2022 9:16 PM Z

United States v. Wood

United States Army Court of Criminal Appeals

February 27, 2018, Decided

ARMY 20160364

Reporter

2018 CCA LEXIS 112 *

UNITED STATES, Appellee v. Specialist
CHARLES W. WOOD, United States Army,
Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by
[United States v. Wood, 2018 CAAF LEXIS 219](#)
[\(C.A.A.F., May 4, 2018\)](#)

Review denied by [United States v. Wood,](#)
[2018 CAAF LEXIS 353 \(C.A.A.F., June 26,](#)
[2018\)](#)

Prior History: [*1] Headquarters, Fort Bliss.
Michael J. Hargis, Military Judge
(arraignment), Kurt J. Bohn, Military Judge
(trial), Colonel Charles C. Poché, Staff Judge
Advocate.

Case Summary

Overview

HOLDINGS: [1]-Where appellant was convicted of two specifications of sexual abuse of a child in violation of Unif. Code Mil. Justice art. 120b, [10 U.S.C.S. § 920b](#), the findings of guilty that reflected that he committed the charged misconduct on divers occasions in both specifications were legally and factually insufficient; [2]-For the charged time period, the evidence only supported the finding that he committed each specification one time; [3]-Court could reassess the sentence, as there

was no change to the penalty landscape, the gravamen of the criminal conduct remained substantially the same, appellant chose to be tried by military judge alone, and the court had experience and familiarity with this type of offense; [4]-All rights, privileges, and property of which appellant was deprived by virtue of that portion of the findings and sentence set aside were ordered restored.

Outcome

The court affirmed only so much of the findings of guilty as found that the charged misconduct occurred once and reassessed the sentence.

Counsel: For Appellant: Lieutenant Colonel Christopher D. Carrier, JA; Major Patrick J. Scudieri, JA; Captain Matthew L. Jalandoni, JA (on brief).

For Appellee: Lieutenant Colonel Eric K. Stafford, JA; Major Cormac M. Smith, JA (on brief).

Judges: Before BURTON, HAGLER, and SCHASBERGER, Appellate Military Judges. Senior Judge BURTON and Judge HAGLER concur.

Opinion by: SCHASBERGER

Opinion

MEMORANDUM OPINION

SCHASBERGER, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of sexual abuse of a child in violation of [Article 120b](#), Uniform Code of Military Justice, [10 U.S.C. § 920b \(2012 & Supp. I 2014\)](#). The military judge sentenced appellant to a dishonorable discharge, six years of confinement, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

Appellant's case is before us for review under *Article 66*, UCMJ. Appellant alleges the findings of guilty reflecting that he committed the charged misconduct on divers occasions in both specifications are legally and factually insufficient. We agree [*2] with appellant, for the charged time period, the evidence only supports the finding that appellant committed each specification of sexual abuse of a child one time.¹

¹ Appellant personally raises, in an unsworn submission pursuant to [United States v. Grostefon, 12 M.J. 431 \(C.M.A. 1982\)](#), eight allegations of error. One merits mention; appellant asserts his defense counsel were ineffective for pressuring him to elect trial by a military judge alone and failing to investigate and present evidence of AS manipulating her mother, YD, during the trial. Under the circumstances of this case, we see no need to order affidavits from counsel or a fact-finding hearing pursuant to [United States v. DuBay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 \(1967\)](#). The facts in appellant's statement—even if true—"would not result in relief." [United States v. Ginn, 47 M.J. 236, 248 \(C.A.A.F. 1997\)](#).

Regarding forum selection, appellant was twice advised of his right to a trial by members. Appellant was advised of this right during arraignment. Then, on the day of trial, with the panel members waiting in the deliberation room, appellant changed his forum selection to trial by a military judge alone. In response, the military judge again informed appellant of his rights, discussed that he would be the military judge, and asked appellant if this choice was made voluntarily. Appellant assured the military judge that it was. Under the terms of Rule for Courts-Martial 903, appellant made a knowing and voluntary election of trial by a military judge alone.

Regarding counsel's pretrial investigation and trial performance, the defense theory of the case was that AS was a bad mother and harbored a grudge against her family

BACKGROUND

On 5 September 2014, appellant attended the wedding of his sister, AS. The wedding was held in Albuquerque, New Mexico. After the wedding, appellant offered to take WH, his four-year-old nephew, back to the hotel. WH's car seat was placed in the back center seat of appellant's car and WH was secured in his car seat.

Two years later, while at a sleepover, WH was overheard telling his seven-year-old friend they should get under the cover and touch each other's privates. When asked whether he understood it was wrong for little boys to touch other little boys, WH responded, "no, it's not" because "Uncle Charlie [appellant] does it."

At trial, WH² testified as follows:

Q. . . . And can you tell the judge sitting up there did anything happen in the car ride back to the hotel with Uncle Charlie?

A. Mm-hmm. [Affirmative response.]

Q. And what happened?

A. He touched both of my privates when he was not opposed [sic] to.

Q. Okay. And what do you mean by your privates? Do you mean your penis?

A. Mm-hmm. [Affirmative response.]

Q. Okay. [*3] Did he make you touch him at all in the car?

[The witness indicated a negative response by shaking his head.]

When the trial counsel repeated the question

because they may have tried to get custody of her son. YD testified that her daughter, AS, was a liar, bad mother, and threatened her. The military judge had the opportunity to see this evidence and weigh it along with the testimony of all of the other witnesses. Even assuming deficient investigation or performance by counsel, appellant's burden to show prejudice has not been met.

² At the time of trial, WH was six years old. Although young, WH demonstrated his ability to distinguish between statements that were false and those that were true.

whether he was made to touch appellant in the car, WH again shook his head indicating a negative response.

WH also testified about what happened once they were in the hotel room.

Q. . . . So, did anything happen in the hotel room?

A. Grabbed the gooey stuff and made me touch his privates.

Q. . . . Was that Uncle Charlie?

[The witness indicated an affirmative response by nodding his head.]

During the colloquy WH described the gooey stuff as "Slimy" and described appellant's penis as "Hard." WH also described "Yellow stuff" coming out of appellant's penis and landing on the carpet. When asked if this ever happened with appellant before, WH responded, "Yes." When asked how many times, WH held up two fingers. The trial counsel continued the inquiry as follows:

Q. Okay. And do you remember where it happened before?

A. In the car.

Q. In the car. Okay. Was that in the car on the way to the hotel?

[The witness indicated an affirmative response by nodding his head.]

WH added a few more details about the incidents during cross-examination, but did not [*4] provide information about any additional times where he either touched appellant or appellant touched him.

At the conclusion of the government's case, trial counsel moved to dismiss the words "and Cedar City, Utah," and the words "between on or about 28 June 2012 and" from both specifications of The Charge. Defense counsel agreed that it was a minor change and did not oppose the motion. Further, the military judge discussed the change with appellant and appellant agreed that it was a minor change.

As a result, both specifications of The Charge were limited to misconduct on or about 5 September 2014, in Albuquerque, New Mexico.

Ultimately, the military judge found appellant guilty of both specifications of The Charge as amended (i.e., committing a lewd act on divers occasions by both touching WH and having WH touch him on 5 September 2014).

LAW AND DISCUSSION

Article 66(c), UCMJ, establishes our statutory duty to review a record of trial for legal and factual sufficiency de novo. [*United States v. Walters*, 58 M.J. 391, 395 \(C.A.A.F. 2003\)](#). Under *Article 66(c)*, UCMJ, we may affirm only those findings of guilty that we find correct in law and fact and determine should be affirmed based on the entire record. *Id.* "The test for legal sufficiency is [*5] whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [*United States v. Rosario*, 76 M.J. 114, 117 \(C.A.A.F. 2017\)](#) (quoting [*United States v. Bennett*, 72 M.J. 266, 268 \(C.A.A.F. 2013\)](#)). In resolving questions of legal sufficiency, this court is "bound to draw every reasonable inference from the record in favor of the prosecution." [*United States v. Craion*, 64 M.J. 531, 534 \(Army Ct. Crim. App. 2006\)](#) (citations omitted). The test for a factual sufficiency "is 'whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of appellant's guilt beyond a reasonable doubt.'" [*Rosario*, 76 M.J. at 117](#) (quoting [*United States v. Oliver*, 70 M.J. 64, 68 \(C.A.A.F. 2011\)](#)). In weighing factual sufficiency, we take "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 \(C.A.A.F. 2002\)](#). *Appellant*

Here, the record of trial contained ample evidence from which the military judge could find and this court found the essential elements³ of the charged offenses were proved beyond a reasonable doubt on at least one occasion (i.e., appellant touched WH's penis once and caused WH to touch his penis once). The evidence in the record, therefore, clearly establishes the legal and factual sufficiency for one incident [*6] in each specification. The remaining question is: whether the evidence supports the findings that the charged misconduct occurred more than once?⁴

A. Specification 1 — Causing WH to Touch

³ The essential elements of sexual abuse of a child are: "[1] that the accused committed sexual contact upon a child by touching or causing another person to touch, either directly or through the clothing, the genitalia . . . of any person; and [2] that the accused did so with intent . . . to arouse or gratify the sexual desire of any person." *Manual for Courts-Martial, United States* (2016 ed.), pt. IV, ¶ 45b.b.(4)(a).

⁴ The government, even after amending the specifications to a specific day and place, charged each offense as occurring "on divers occasions[.]" The term "divers occasions" means "two or more occasions." Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 7-25 (10 Sept. 2014). Therefore, to sustain a conviction for an offense "on divers occasions," we must find the misconduct happened on two or more occasions. As this court has stated before, the government's continued use of the word "divers" frequently creates appellate issues— either with ambiguous verdicts as in [*United States v. Walters*, 58 M.J. 391 \(C.A.A.F. 2003\)](#), or legal insufficiency as in this case. See [*United States v. Pasay, ARMY 20140930, 2017 CCA LEXIS 268, *3 n.4 \(Army Ct. Crim. App. 19 Apr. 2017\)*](#) (mem. op.). If the government charged offenses on "one or more" instead of "two or more" occasions, the *Walters* issue would be eliminated, the amount of admissible evidence would be the same, and the accused would continue to receive adequate notice of the charges and double jeopardy protection. *Id.* To the extent charging "one or more" presents disjunctive charging, it is a problem already present when the government charges misconduct on "divers" (i.e., two or more) occasions. *Id.*

WH clearly describes tugging on appellant's penis in the hotel room. WH is less clear about whether this was the only time. Twice when questioned by the trial counsel, WH indicated that he never touched appellant in the car. After testifying about the incident in hotel room, WH indicated that he had touched appellant previously. WH held up two fingers to indicate it had happened two times and then stated it was in the car.⁵ While there was testimony of appellant stopping at a fraternity house on the way to the hotel, there was no evidence about WH getting out of the car or appellant getting into the back seat.

When viewing the facts in the light most favorable to the government, we conclude the evidence for a finding of "on divers occasions" meets the minimal standards for legal sufficiency. However, when applying the test for factual sufficiency, we are not convinced beyond a reasonable doubt that a second touching occurred. Therefore, [*7] we find this specification is factually insufficient, and the words "on divers occasions" must be excepted.

B. Specification 2 — Appellant Touching WH

WH testified that appellant touched his "privates" in the car on the way to the hotel room. There was no other evidence introduced regarding appellant touching WH. The government conceded the record does not

⁵ After defense elicited testimony that WH at times told "tall tales" and exaggerated, and suggested his mothers manipulated WH's memory, the government introduced a prior consistent statement from WH under Military Rule of Evidence 801(d)(1)(B). This statement would also support the conclusion that appellant had WH touch his penis on more than one occasion. The statement was devoid of a time period or location so it is impossible to tell if it was within the charged timeframe, or even within a time period when appellant was subject to military jurisdiction.

show appellant committed a lewd act on WH by touching his genitals on divers occasions. After a thorough review of the record, we also cannot conclude that appellant touched WH on more than one occasion.

CONCLUSION

The court affirms only so much of the findings of guilty of Specifications 1 and 2 of The Charge as finds that:

Specification 1: In that [appellant], U.S. Army, did, at or near Albuquerque, New Mexico, on or about 5 September 2014, commit a lewd act upon [WH], a child who had not attained the age of 12 years, to wit: causing [WH] to touch [appellant's] penis.

Specification 2: In that [appellant], U.S. Army, did, at or near Albuquerque, New Mexico, on or about 5 September 2014, commit a lewd act upon [WH], a child who had not attained the age of 12 years, to wit: touching with his hand the penis of [WH].

We are able to reassess [*8] the sentence in this case, and we do so after a thorough analysis and in accordance with the principles articulated by our superior court in [United States v. Winckelmann](#), 73 M.J. 11, 15-16 (C.A.A.F. 2013), and [United States v. Sales](#), 22 M.J. 305, 307-08 (C.M.A. 1986). We must "assure that the sentence is appropriate in relation to the affirmed findings of guilty, [and] that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed." [Sales](#), 22 M.J. at 308 (quoting [United States v. Suzuki](#), 20 M.J. 248, 249 (C.M.A. 1985)). If we "can determine to [our] satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error" *Id.*

Weighing in favor of reassessment is the fact that there is no change to the penalty landscape; the gravamen of the criminal conduct remains substantially the same; appellant chose to be tried by military judge alone; and this type of offense is of the type with which we have experience and familiarity. Accordingly, we are confident that based on the entire record and appellant's conduct, the military judge sitting alone as a general court-martial would have imposed a sentence of at least a dishonorable discharge, confinement for sixty-six months, and reduction to the [*9] grade of E-1.

All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings and sentence set aside by this decision, are ordered to be restored. See UCMJ [arts. 58a\(b\)](#), [58b\(c\)](#), [75\(a\)](#).

Senior Judge BURTON and Judge HAGLER concur.

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CERTIFICATE OF SERVICE, U.S. v. MARTINEZCOLON (20210071)

I hereby 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] [REDACTED], on the 18th day of November, 2022.

[REDACTED]
DANIEL L. MANN
Senior Paralegal Specialist
Government Appellate Division
[REDACTED]
Fort Belvoir, VA 22060-5546
[REDACTED]