IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Chief Warrant Officer Three (CW3) **JASON J. GERANEN,** United States Army, Appellant	**BRIEF ON BEHALF OF APPELLEE** Docket No. ARMY 20210306 Tried at Fort Hood, Texas, on 4 January 2021, 5 March 2021, 9 April 2021, and 19–22 May 2021, before a general court-martial convened by Commander, III Corps, Fort Hood, Lieutenant Colonel Scott Z. Hughes, Military Judge, presiding.

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

Assignments of Error[1]

I. THE MILITARY JUDGE REVERSIBLY ERRED IN ALLOWING THE MEMBERS TO CONSIDER EVIDENCE THAT THE COMPLAINANT WAS A LESBIAN; THE EVIDENCE WAS INADMISSIBLE UNDER MIL. R. EVID. 412.

II. THE MILITARY JUDGE REVERSIBLY ERRED IN ALLOWING THE MEMBERS TO CONSIDER EVIDENCE THE COMPLAINANT HAD SEX WITH HER GIRLFRIEND, NEVER HAD SEX WITH A MAN, AND HER VULVA HAD NEVER BEEN

[1] The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. Should this court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

Panel No. 4

PENETRATED BY A PENIS; THE EVIDENCE WAS INADMISSIBLE UNDER MIL. R. EVID. 412.

III. THE MILITARY JUDGE REVERSIBLY ERRED IN DENYING THE DEFENSE MOTION FOR A UNANIMOUS PANEL.

Statement of the Case

On 3 November 2020, an officer panel 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 (2019) [UCMJ]. (R. at 843). The military judge sentenced appellant to confinement for eighteen months and a dismissal. (R. at 953). On 8 June 2021, the military judge entered judgment. (Judgment). On 27 May 2021, the convening authority disapproved a request for deferment of automatic forfeitures, approved a request for waiver of automatic forfeitures, and took no action on the findings or the sentence. (Action).

Statement of Facts

[redacted] and appellant worked together at Fort Hood, Texas, (R. at 377–79), and deployed together to Jalalabad, Afghanistan. (R. at 377–79). During all relevant events, [redacted] was in a long term, long-distance relationship with Ms. [redacted], who lived in another state. (R. at 462–63, 572).

On 13 March 2020, [redacted], appellant, and others went to a piano bar in Georgetown, Texas. (R. at 386). While at the piano bar, [redacted] consumed

several alcoholic beverages. (R. at 391, 700). Chief Warrant Officer 3 (CW3) [redacted], his girlfriend, and appellant took [redacted] back to CW3 [redacted] home. (R. at 395). [redacted] was "extremely intoxicated." (R. at 505). By the end of the night, [redacted] could "barely walk," (R. at 393), she fell and had to be assisted getting back to the car, (R. at 393), she did not recall the drive back to CW3 [redacted] house, (R. at 395), and once back at the house she remembered "the room was spinning." (R. at 397).

Once back at CW3 [redacted] house, [redacted] laid down on her stomach in the bottom bunk bed just after 2300. (R. at 396). When she fell asleep, she was wearing a t-shirt, jeans, underwear, socks, shoes, and a black leather jacket. (R. at 397, 439). Sometime later, appellant came into the room and climbed onto the top bed of the bunk bed. (R. at 398). Appellant asked to come down to the bottom bunk where [redacted] was lying, she answered "yes." (R. at 398, 453).

While in the same bed, appellant kissed [redacted] on her neck and lips. (R. at 399). [redacted] rolled onto her side and faced the wall because she did not want to engage in those acts with appellant. (R. at 399). At that point, she was unable to do anything other than roll away from appellant because she was "very drunk." (R. at 399–400).

After she rolled towards the wall, appellant penetrated [redacted] vagina with his penis from behind her. (R. at 400). [redacted] told appellant "no" when

he penetrated her. (R. at 401, 717–18). [redacted] believed that he stopped penetrating her initially, but the next thing she remembered was waking up on her back and appellant was still "having sex" with her. (R. at 401, 716–17). [redacted] described a "burning" pain as this was occurring. (R. at 401). She again told appellant to "stop." (R. at 402). He stopped and went back to the top bunk. (R. at 402).

After the sexual assault, [redacted] fell back asleep, and awoke around 0300. (R. at 402). [redacted] awoke wearing her underwear and a t-shirt, her pants were off, and her jacket was missing. (R. at 404). [redacted] could not find her jacket, which had the keys to the house she was staying in, and which she fell asleep wearing. (R. at 402). Eventually, [redacted] asked appellant to help find her jacket, which he did. (R. at 403). [redacted] made several trips to the bathroom because she was nauseous and vomited at least once prior to leaving CW3 [redacted] house. (R. at 403). At some point that morning, [redacted] noticed her underwear was "twisted," and stained with blood. (R. at 404). [redacted] was not menstruating at the time. (R. at 404).

Around 0800 the same morning, CW3 [redacted] woke up and drove appellant and [redacted] back to the piano bar where appellant's car was located. (R. at 406). [redacted] got in appellant's car with him. (R. at 406). [redacted] did not confront appellant or outcry to CW3 [redacted] at this time, in part, because she was

"still trying to process everything . . . that had happened." (R. at 406). Appellant drove [redacted] to an ATM and then to the house she was staying at on his way home. (R. at 407).

The following morning, [redacted] and appellant discussed the sexual assault over text message. (R. at 410; Pros. Ex. 24, 30). In the text messages, appellant corroborated that [redacted] told him to stop and that [redacted] did not kiss appellant although he had tried to kiss her. (Pros. Ex. 24, p. 3). Although appellant told [redacted] that he was "sure" they did not have sex, and that [redacted] told him to "stop" and he was "glad [he] listened," he admitted at trial that penetration possibly occurred. (Pros. Ex. 24, p. 4; R. at 716–17).

Additional facts are incorporated below.

Assignment of Error I

THE MILITARY JUDGE REVERSIBLY ERRED IN ALLOWING THE MEMBERS TO CONSIDER EVIDENCE THAT THE COMPLAINANT WAS A LESBIAN; THE EVIDENCE WAS INADMISSIBLE UNDER MIL. R. EVID. 412.

Additional Facts

No witnesses testified as to [redacted] sexual preference and no evidence was introduced that she was a "lesbian," as alleged by appellant.[2] (Appellant's Br.

[2] In fact, the only reference to the term "lesbian" that was in the evidence was redacted in accordance with the military judge's written ruling. (Pros. Ex. 24, p. 3).

12). However, several references were made by both government and defense to [redacted] relationship status with Ms. [redacted]. *Supra* at pp. 6–7. At no point, did any party object to referencing to [redacted] committed relationship with Ms. [redacted]. The government referenced appellant's knowledge of [redacted] relationship status, and the platonic nature of appellant's and [redacted] friendship, as evidence to argue [redacted] trusted appellant. (R. at 794). The defense used this same evidence to argue it gave [redacted] a motive to fabricate the sexual assault allegation. (R. at 825).

A. Defense counsel's references to [redacted] relationship status.

In his opening statement, defense counsel said "this is a case about betrayal, but its not betrayal by [appellant]. The betrayal was by [redacted]. She betrayed her partner and her lover, [Ms. [redacted]]. And then to make up for that, she betrayed [appellant] by making allegations of sexual assault." (R. at 603). During direct examination of appellant, defense counsel asked about his knowledge of [redacted] relationship with Ms. [redacted] twice. (R. at 674, 684). Defense echoed their theme of betrayal in closing argument. (R. at 814) ("[redacted] betrayed [Ms. [redacted]] but that's all that happened on 13 March 2020."). In his closing argument, defense

counsel made four additional references to this theme as a possible motive for [redacted] to fabricate that appellant had sexually assaulted her. (R. at 822–25).[3]

B. The government's references to [redacted] relationship status.

The government referenced [redacted] relationship with Ms. [redacted] in their opening. (R. at 364, 366, 368, 369, 370). At trial, Ms. [redacted] testified to her impressions of appellant and [redacted] based on her conversations with them.[4] During closing argument, the government argued that [redacted] trusted appellant, she trusted that he knew she was in a committed relationship, she also trusted that he was in a committed relationship and would not betray his spouse, and that appellant would not betray his friendship with [redacted]. (R. at 794). Finally, the government argued that this trust created a vulnerability and an opportunity for appellant. (R. at 794).

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[3] "[Ms. [redacted]] . . . was yelling at [[redacted]] on the phone." (R. at 822). "[Y]ou see [[redacted]] starting to feel the pressure from [Ms. [redacted]]." (R. at 823). "The pressure is increasing from [Ms. [redacted]] she's on leave the pressure is increasing from [Ms. [redacted]] she's got to come up with something. And so she says now she's sexually assaulted." (R. at 824). "Hypothesis number two . . . [[redacted]]'s totally fabricating an allegation of sexual assault to save a relationship with [Ms. [redacted]]." (R. at 824–25).

[4] Specifically, Ms. [redacted] testified that she spoke on the phone to [redacted] three times on the night of the sexual assault and spoke once with appellant, (R. at 366, 368, 369, 370); she corroborated that [redacted] was intoxicated both at the piano bar, in the car ride back to CW3 [redacted] house, and in the bunk bed just after the sexual assault occurred, (R. at 366, 368, 369, 370); she corroborated that appellant told Ms. [redacted] "not to worry," and that "he got [[redacted]]," (R. at 369); Ms. [redacted] was the first person [redacted] outcried to and Ms. [redacted] also confronted appellant regarding his actions over the phone. (R. at 374, 797, 827).

Standard of Review

The lack of a timely objection to evidence at trial forfeits that error in the absence of plain error. Mil. R. Evid. 103(a)(1)(A); *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014). To prevail under this standard an appellant must show "(1) there was an error; (3) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007) (citations omitted).

Law and Argument

This court has held "the existence of a romantic relationship is not 'sexual behavior' or 'predisposition' under Mil. R. Evid. 412" because these relationships do not necessarily include sexual behavior.[5] "Moreover, that a victim is in a relationship (or even married) is often part of telling the story (the res gestae) even if not amounting to an exception under Mil. R. Evid. 412(b)." *Alston*, 75 M.J. at 882. Although an accused is entitled to notice of an intent to introduce evidence under Mil. R. Evid 412, "[a]ppellant[s] lack[] standing on appeal to claim any violation of [a victim's] procedural rights under Mil. R. Evid. 412." *United States v. Carista*, 76 M.J. 511, 516 (Army Ct. Crim. App. 2017).

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[5] *United States v. Alston*, 75 M.J. 875, 882–83 (Army Ct. Crim. App. 2016) pet. denied, 76 M.J. 130 (C.A.A.F. 2017); *see also United States v. Ramos-Cruz*, ARMY 20150292, 2020 CCA LEXIS 52, *7–8 (Army Ct. Crim. App. 27 Feb. 2020) (noting that the use of the word "romantic" relationship without any reference to a sexual relationship would not, on its own, trigger Mil. R. Evid. 412).

A. There was no error because Mil. R. Evid. 412 was not triggered.

Contrary to appellant's assertions, the term "lesbian" was never used during trial and [redacted] sexual disposition was never argued by the government. (Appellant's Br. 12). In fact, no evidence was even introduced that [redacted] preferred sexual relations with women over men, merely that she had never engaged in sexual intercourse with a man.[6] Instead, the parties asserted that [redacted] was in a "committed" and "long term relationship" with Ms. [redacted]. (R. at 462–63, 695). The mere fact that [redacted] was in an exclusive relationship with Ms. [redacted] does not require the conclusion that she was a "lesbian" or that she would never have consented to sexual relations with a man. *See United States v. Fry*, ACM 38687, 2016 CCA LEXIS 72, at *14 (A.F. Ct. Crim. App. 4 Feb. 2016) ("Even if [the victim was] in an intimate relationship, there was absolutely nothing to suggest to the members that [the victim] . . . was a lesbian rather than a bi-sexual.").

Accordingly, there was no error because evidence of [redacted] romantic relationship with Ms. [redacted] was not prohibited by Mil. R. Evid. 412. *See Alston*, 75 M.J. at 883 ("[E]vidence of a relationship, even a romantic or dating relationship,

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[6] The government inadvertently introduced that [redacted] was never penetrated by a man, but defense elected to admit testimony regarding [redacted] sexual relationship with Ms. [redacted] (R. 423, 445). This issue is addressed in Assignment of Error II. *See infra* 12–26.

absent more is insufficient to create a reasonable inference of either sexual behavior or sexual predisposition that would trigger Mil. R. Evid. 412's exclusions"). Finally, appellant's additional claims fail because: (1) neither party was required to give notice under Mil. R. Evid. 412 that [redacted] and Ms. [redacted] were in a committed relationship, (Appellant's Br. 12), and (2) the military judge did not err by failing to give a limiting or curative instruction. (Appellant's Br. 18–21).

B. Even assuming arguendo there was error, it was not plain or obvious.

To determine whether an error is plain or obvious, we "look to law at the time of the appeal" to determine whether courts have been "resolute in rejecting" the same issue. *Knapp*, 73 M.J. at 37 (analyzing the second prong of the plain error framework). Even if this court finds that the military judge erred by admitting the parties' references to [redacted] committed relationship, this was not plain or obvious error because this court's precedent unequivocally holds a romantic relationship does not necessarily include sexual behavior and thus would not trigger Mil. R. Evid. 412. *Alston*, 75 M.J. 882–83. In fact, prohibiting evidence of [redacted] committed relationship could have run afoul of *United States v. Ellerbrock*, where the CAAF held that "evidence of the alleged victim's first marital affair" was "constitutionally required" to show the alleged victim's motive to fabricate. 70 M.J. 314, 315 (C.A.A.F. 2011); *see also United States v. Gaddis*, 70 M.J. 248, 256 (C.A.A.F. 2011) (citation omitted) ("A limitation on an

accused's presentation of evidence related to issues such as bias or motive to fabricate may violate an accused's right to confront witnesses.").

C. Appellant's argument mischaracterizes the evidence and directly contradicts trial defense counsel's theory and trial strategy.

Appellant argues that Mil. R. Evid. 412 applied because the evidence showed that [redacted] was "a lesbian" who "dates women" and "has serious relationships with women." (Appellant's Br. 12). However, this assertion mischaracterizes the evidence admitted at trial. No witness testified that [redacted] was a lesbian, merely that she was in a committed relationship with Ms. [redacted]. (R. at 382–83). The government did not argue that [redacted] sexuality made it less likely that she consented to sexual acts with appellant, but rather the fact that appellant knew she was in a committed relationship made her more trusting of appellant, and thus more vulnerable.[7] (R. at 794). No witness testified that [redacted] dated other women or had serious relationships with women other than Ms. [redacted]. Whether Mil. R. Evid. 412 applies to romantic relationships without reference to the sexual nature of those relationships is decided law.[8] *Alston*, 75 M.J. at 882.

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[7] *Contra United States v. Villanueva*, NMCCA 201400212, 2015 CCA LEXIS 90, *9–11 (N-M Ct. Crim. App. 19 March 2015) (finding that the military judge abused his discretion "[w]here the Government use[d] sexual orientation in a way that implie[d] the impossibility of consent," and the military judge prohibited the defense from rebutting this presumption on cross-examination).

[8] Similarly, appellant's argument that the "parties failed to comply with the rule's procedural requirements" is without merit. Both for the aforementioned reasons

Appellant now argues on appeal that this evidence was "irrelevant," "improper character evidence," and "overly prejudicial." (Appellant's Br. 15–17). However, at trial—appellant, through his counsel—made this evidence the central theory of his innocence. (R. at 814) ("[ ] betrayed [Ms.] but that's not all that happened on 13 March 2020."). "Fairness does not dictate that appellant have it both ways." *United States v. Smith*, 34 M.J. 200, 202 (C.A.A.F. 1992) (holding that even if the appellant's failure to object did not constitute waiver, appellant's "important concessions" from the witness cut against his argument that the admission of the witness's testimony was unduly prejudicial). Because there was no error, and because even if there was error it was not plain and obvious, the court need not reach the issue of prejudice.[9] Accordingly, the court should affirm the findings and sentence.

Assignment of Error II

THE MILITARY JUDGE REVERSIBLY ERRED IN ALLOWING THE MEMBERS TO CONSIDER EVIDENCE THE COMPLAINANT HAD SEX WITH HER GIRLFRIEND, NEVER HAD SEX WITH A MAN, AND HER VULVA HAD NEVER BEEN PENETRATED BY A PENIS; THE EVIDENCE WAS INADMISSIBLE UNDER MIL. R. EVID. 412.

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and because even if appellant was entitled to the procedural requirements, he was on notice of the evidence as is evident from the complete record of trial. (R. at 674); *see Carista*, 76 M.J. at 516 (holding that there is no prejudice to appellant if he was on notice of the evidence the government sought to introduce).

[9] However, the government addresses the issue of prejudice in the next assignment of error. *Infra* pp. 22–26.

Additional Facts

On 9 April 2021, the military judge held a closed Mil. R. Evid. 412 hearing based on the government's request to introduce evidence regarding [redacted] chastity. (R. at 137 (sealed)).[10] Defense responded in an email and on the record that they did not oppose the government's motion as long as they were allowed to offer evidence of other sexual acts that the alleged victim engaged in with Ms. [redacted] (R. at 137 (sealed)). Defense used strong language[11] to communicate that they did not oppose the admission of this evidence because their strategy and tactics were to cross examine the victim on this topic. (R. at 147 (sealed)). [redacted] special victim counsel proffered that his client's interests were aligned with the government in affirmatively introducing the evidence. (R. at 152 (sealed)). In a written ruling, the military judge found that the government was prohibited from

[10] This brief contains discussion of sealed material necessary for analysis and response to defense's brief. *See United States v. Yepez*, ARMY 20210236, 2023 CCA LEXIS *12, fn.2 (Army Ct. Crim. App. 11 Jan. 2023). Although the motions, orders, and transcripts remain sealed, at trial the military judge ruled that the evidence was admissible once the government inadvertently elicited the evidence during the direct of the victim. (R. at 434 (sealed)). The military judge ruled that the defense could cross-examine the victim regarding the remainder of the evidence that the military judge had previously sealed under Mil. R. Evid. 412. (R. at 434 (sealed)). For a more detailed description of the evidence, please reference the sealed materials.

[11] For a more detailed description of the statements, please reference the sealed materials.

introducing the requested evidence under Mil. R. Evid. 412. (App. Ex. LX (sealed)).

During direct examination, the government asked [redacted] why she did not want to have to tell her girlfriend, Ms. [redacted], about her encounter with appellant. (R. at 423). Captain GH responded, in part, that she "had not had sex with a man prior to this." (R. at 423). This statement was in violation of the military judge's ruling. (App. Ex. LX (sealed)). The government counsel did not ask any follow-up questions related to [redacted] response. (R. at 423). Defense did not object to [redacted] response or request that the panel be instructed to disregard the evidence. (R. at 423, 774).

After [redacted] direct was complete, defense requested a closed hearing and renewed their request to be able to cross-examine [redacted] on prior sexual encounters with Ms. [redacted]. (R. at 428 (sealed)). The government counsel clarified that they did not anticipate eliciting that response from [redacted], but that they agreed with defense that they had inadvertently opened the door. (R. at 429 (sealed)). The military judge granted defense's request to cross-examine [redacted] on this topic. (R. at 434 (sealed)).

On cross-examination, defense counsel asked [redacted] whether she "had sex with [Ms. [redacted]]," whether their relationship lasted from July 2018 through November 2020, whether the sex "included sex using a strap on," specifically "a

purple plastic penis with a harness," whether "[Ms. [redacted]] would digitally penetrate [[redacted]] with her fingers," and whether "[Ms. [redacted]] would orally penetrate [[redacted]] with her tongue." (R. at 445–46).

During an Article 39(a) session, the military judge presented both sides with the evidentiary instructions he intended to give the panel members. (R. at 774). This included an instruction under paragraph 7-14, "past sexual behavior of sex offense victim." (R. at 774); Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook (29 Feb. 2020) [Benchbook]. This instruction was directly related to the evidence of [redacted] having been penetrated by Ms. [redacted]. (App. Ex. LV, p. 8). Defense did not request any additional instructions, nor did they object to the proposed instructions. (R. at 774).

Standard of Review

Whether an appellant has waived an issue is a legal question that is reviewed de novo. *See United States v. Haynes*, 79 M.J. 17, 19 (C.A.A.F. 2019) (citing *United States v. Rosenthal*, 62 M.J. 261, 262 (C.A.A.F. 2005)).

The lack of a timely objection to evidence at trial forfeits that error in the absence of plain error. Mil. R. Evid. 103(a)(1)(A); *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014). To prevail under this standard an appellant must show "(1) there was an error; (3) it was plain or obvious; and (3) the error materially

prejudiced a substantial right." *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007) (citations omitted).

Law and Argument

The purpose of Mil. R. Evid. 412 is to "shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to [sexual offense prosecutions]."[12] Prior to the rape-shield laws, "defense lawyers were permitted great latitude in bringing out intimate details about a rape victim's life. Such evidence quite often serves no real purpose and only results in embarrassment to the rape victim and unwarranted public intrusion into her private life." *United States v. Sanchez*, 44 M.J. 174, 178 (C.A.A.F. 1996) (quoting 124 Cong. Rec. 34912 (1978)).

This court has held that Mil. R. Evid. 412 applies to evidence of a victim's chastity. *United States v. Olson*, ARMY 20190267, 2021 CCA LEXIS 160, *16 (Army Ct. Crim. App. 1 Apr. 2021). The courts have found that the procedural requirements under Mil. R. Evid. 412 apply both to the defense and government.

[12] Manual for Courts-Martial, United States, Analysis of the Military Rules of Evidence app. 22 at A22-35 (2008 ed.) [hereinafter Drafters' Analysis]; *see also United States v. Banker*, 60 M.J. 216, 219 (C.A.A.F. 2004) (noting that Mil. R. Evid. 412 was intended to encourage victim cooperation in courts-martial and to prevent embarrassment, invasion of privacy, and the infusion of sexual innuendo into the factfinding process).

United States v. Banker, 60 M.J. 216, 223 (C.A.A.F. 2004); *United States v. Carista*, 76 M.J. 511, 513 (Army Ct. Crim. App. 2017).

However, the purpose of the rule remains, "at least in part, [] to provide victims due process before discussing their sexual history in open court." *Id.* at 516. Although an accused is entitled to the same notice due to victims of an intent to introduce evidence, "[a]ppellant[s] lack[] standing on appeal to claim any violation of [a victim's] procedural rights under Mil. R. Evid. 412." *Id*.

A. Any error was resolved by the military judge's remedy.

At trial, the government inadvertently elicited that [redacted] "had not had sex with a man prior to [the sexual assault]." (R. at 423). [redacted] testified to this fact in response to government counsel asking [redacted] why she did not want to tell Ms. [redacted] about the sexual assault. (R. at 423). The military judge had previously excluded this evidence under Mil. R. Evid. 412. (App. Ex. LX (sealed)). However, prior to trial both parties indicated that they believed this evidence was relevant, and both parties articulated their reasoning for wanting the evidence admitted. (R. at 137 (sealed)).

1. Appellant waived any claim of error at trial.

Waiver is the "intentional relinquishment or abandonment of a known right." *United States v. Olano,* 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). "The first limitation on appellate authority under Rule

52(b) is that there indeed be an 'error.'" Deviation from a legal rule is 'error' unless the rule has been waived." *Id.* at 732. "While [] broad plenary authority allows this court to review issues that were waived, [this court has] held that exercising that unique power is more likely to occur only in those cases which 'have disadvantaged the accused in a manner that the CCA determines needs correction,' or a court-martial in which 'the perception of unfairness in the trial may have the actual effect of undermining good order and discipline.'" *Olson*, 2021 CCA LEXIS 160, at *10–11 (citing *United States v. Conley*, 78 M.J. 747, 752 (Army Ct. Crim. App. 2019).

Where the court finds "no evidence of impropriety, government overreach or excess, or other matter that might weigh in favor of noticing a waived issue," relief is not warranted. *Conley*, 78 M.J. at 753. This is not a case of government overreach or impropriety, but rather one in which an appellant seeks to use evidence that was central to his defense to overturn his conviction. The factors that this court contemplated in *Conley* simply do not exist in this case. *Id.*

Importantly, at issue for defense was that [redacted] reported she had blood in her underwear the morning after the sexual assault. (R. at 142 (sealed); App. Ex.

XXI, Exhibit 3). Without the admission of prior penetrative acts with Ms. [redacted], defense did not introduce any evidence of possible sources for this injury.[13]

Importantly, appellant did not object when [redacted] testified she had never been penetrated by a man, nor did he seek a curative instruction, (R. at 423), but rather asked to cross-examine [redacted] on the topic. (R. at 428 (sealed)). This was because appellant and his defense team believed their case was stronger with evidence explaining an alternative source of injury for the blood in [redacted] underwear.[14] (R. at 147 (sealed)). The military judge, as a remedy, gave appellant exactly what he asked for, and allowed defense to question [redacted] at length about being penetrated over the course of her relationship with Ms. [redacted]. [15] (R. at 445).

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[13] In fact, defense requested and was appointed an expert sexual assault nurse examiner (SANE) to rebut this very issue, but never called the expert as a witness. (App. Ex. XVIII).

[14] Appellant does not raise a claim of ineffective assistance of counsel, because the theory and tactics were a sound legal strategy. *See United States v. Wilson*, No. 201700098, 2018 CCA LEXIS 451, at *25 (N.M Ct. Crim. App. 20 Sep. 2018) ("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 recharacterize that evidence on appeal and argue it should not have been admitted.").

[15] "The invited error doctrine prevents a party from creating error and then taking advantage of a situation of his own making on appeal." *United States v. Martin*, 75 M.J. 321, 325 (C.A.A.F. 2016) (cleaned up). "The propriety of the invited error doctrine is a question of law [] reviewed de novo." *Wilson*, No. 201700098, 2018 CCA LEXIS 451, at *25; *Id*. Assuming arguendo that the military judge erred by allowing defense to cross examine [redacted] on the prior sexual acts, any such error was invited by defense counsel. *See Wilson*, 2018 CCA LEXIS 451 at *22–23

2. The instruction to the panel was appropriate.

The military judge also instructed the panel that the "evidence should be considered on the issue of whether or not the accused was the source of injury to the victim." (R. at 787). Once again, defense did not object to the military judge's proposed instructions (R. at 774), or ask for additional instructions (R. at 776), because they wanted the evidence to be considered for this purpose. (R. at 146–47 (sealed)). Had the military judge instructed the panel members to disregard the evidence that [redacted] had never been penetrated by a man, defense would not have been able to provide an alternative source of [redacted] vaginal injury.

B. Even if this court finds the military judge erred in allowing the members to consider the challenged evidence, this error was not plain and obvious.

To determine whether an error is clear or obvious, we "look to law at the time of the appeal" to determine whether courts have been "resolute in rejecting" the same issue. *Knapp*, 73 M.J. at 37. The purpose of exclusion under Mil. R. Evid. 412 is to protect the victim, which is relevant when considering the military judge's remedy. *Banker*, 60 M.J. at 219. The tension between Mil. R. Evid. 412 and an accused's rights has always been balancing the intent to "shield victims of sexual assaults from often embarrassing and degrading cross-examination,"

("During trial, the government chose to elicit these prior sexual encounters during their direct examination of MH. Unsurprisingly, the defense did not object, 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.").

Gaddis, 70 M.J. at 252, and an accused's right to put on a defense and confront his accuser. *Ellerbrock*, 70 M.J. at 318. Here, the military judge appropriately addressed those two concerns. On the one hand, limiting the government from opening the door to the victim's sexual history and lack of sexual history with men, (R. at 137 (sealed)), but on the other hand, allowing the defense to explore those potentially embarrassing and degrading questions on cross examination once the government inadvertently opened the door. (R. at 434 (sealed)).

Here, appellant did not assert any prejudice or error when the evidence was proffered by the government (R. at 137 (sealed)); nor did he assert prejudice or error when the evidence was introduced at trial. (R. at 423). Moreover, the military judge explicitly adopted the remedy requested by appellant at trial. (R. at 434 (sealed)). Thus, even if the remedy was not sufficient, any error was certainly not plain or obvious considering the ability to impeach or cross examine is the remedy that is generally proposed by other courts, to include a case appellant now relies upon.[16]

Had the military judge, sua sponte, instructed the members to disregard the evidence appellant now claims was prejudicial, appellant could claim on appeal

[16] (Appellant's Br. 16); *Villanueva,* 2015 CCA LEXIS 90 at *9 ("Where the Government uses sexual orientation in a way that implies the impossibility of consent, or a reasonable mistake of fact as to consent, *the defense must be allowed to rebut that inference*.") (emphasis added); *see also Ellerbrock*, 70 M.J. 318.

that such a remedy was an abuse of discretion. *See Ellerbrock*, 70 M.J. at 318 ("But no evidentiary rule can deny an accused of a fair trial or all opportunities for effective cross-examination."). Appellant welcomed evidence of [redacted] chastity because it allowed them to impeach her with evidence of prior penetrative acts. (R. at 445).

C. Even if the military judge's remedy was plain and obvious error, the error did not materially prejudice a substantial right of appellant.

"[T]he government bears the burden of demonstrating that the admission of erroneous evidence was harmless." *United States v. Grindstaff*, ARMY 20200315, 2022 CCA LEXIS 524, at *16 (Army Ct. Crim. App. 30 Aug. 2022) (quoting *United States v. Finch*, 79 M.J. 389, 398 (C.A.A.F. 2019)). "For preserved nonconstitutional evidentiary errors, the test for prejudice is 'whether the error had a substantial influence on the findings.'" *Id*. (quoting *Frost*, 79 M.J. at 111). When reviewing prejudice, this court balances: "(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." *Frost*, 79 M.J. at 111 (quoting *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019)).

Turning to the factors laid out in *Frost*: here, the government's case was strong. [redacted] unequivocally testified that she did not consent to any sexual advances from appellant (R. at 399, 401), and that appellant vaginally penetrated her with his penis multiple times despite her telling him "no." (R. at 400–01). The

evidence of the victim's high level of intoxication was corroborated by the victim and four independent witnesses, to include appellant. (R. at 393, 505, 543, 574, 711–12). Appellant knew how intoxicated [redacted] was, evidence by having to assist her back to the house (R. at 702–04, 707), and his characterization of her as "crazy drunk" prior to the sexual assault. (R. at 712). Appellant admitted that he had romantic feelings for [redacted] for over a year (R. at 711), he crawled into bed with her (R. at 712), tried to kiss her (R. at 714), she turned away from him when he tried to kiss her (R. at 717), he took that as a "definite no" (R. at 718), he planned to have sex with her (R. at 717), and that he possibly penetrated her vulva with his penis. (R. at 716–17).

In contrast, the defense's case was weak. In closing, defense summarized their case in three theories: 1) there was no penetration; 2) if there was penetration, it was consensual, and [redacted] lied about it to save her relationship; or 3) she blacked out and does not remember that she consented. (R. at 824–25). However, all three of defense's theories were contradicted by the testimony or contemporaneous text messages between appellant and [redacted]. (R. 400, 716–17; Pros. Ex. 24, pp. 1, 6–8).

Appellant initially admitted that the text messages he sent closer in time to the sexual assault were accurate and that he did not refute anything in the messages. (R. at 713). He agreed that he maintained in text that [redacted] never

reciprocated his advances. (R. at 719). However, on cross-examination, he equivocated and contradicted himself, stating that he was not fully forthcoming in the text messages because he was being accused of sexual assault. (R. at 719). Specifically, that he admitted he was trying to minimize his conduct so that [redacted] would not report him for sexual assault or believe that she was sexually assaulted. (R. at 719–20). Appellant admitted that his assertion on direct—the encounter was consensual—was in contradiction to his assertions in the text messages. (R. at 724). Ultimately, he agreed that [redacted] told him twice to stop. (R. at 725). Importantly, appellant corroborated that penetration "possibly" occurred, and that his intention was to have sex. (R. at 683, 717, 721).

The materiality and quality of the evidence in question—the statement that [redacted] was never penetrated by a man—does not weigh in favor of material prejudice to appellant. *Frost*, 79 M.J. at 111. Whether [redacted] was ever penetrated by a man in the past is not probative of whether she would have consented to intercourse with appellant. *Olson*, 2021 CCA LEXIS at *16. Especially considering appellant was able to cross examine [redacted] on similar penetrative acts that she engaged in with Ms. [redacted]. (R. at 445). Although appellant now asserts that the judge's ruling to allow his counsel to cross examine [redacted] on this topic was plain error, it is clear that at the time the defense believed this evidence benefited their case. (R. at 147 (sealed)). The very fact that defense

believed this evidence benefited their case, directly cuts against the materiality and quality of the evidence materially prejudicing appellant.[17] *Frost*, 79 M.J. at 111.

In *United States v. Carista*, this court found that it was error for the military judge to admit evidence of the victim's sexual behavior when proper notice was not given and good cause was not shown. 76 M.J. at 517. The court found that there was no material prejudice to appellant because, although he objected at trial, he failed to articulate any prejudice stemming from the lack of notice. *Id.* In *United States v. Garner*, this court dismissed a similar claim by an appellant in a footnote, finding that the erroneous admission of a victim's chastity had no prejudicial impact on appellant. ARMY 20180563, 2020 CCA LEXIS 44, *1 fn.2 (Army Ct. Crim. App. 19 Feb. 2020).

Here, appellant not only *purposefully* did not object (R. at 423, 774, 776), but he proposed the remedy that the military judge adopted. (R. at 428–34 (sealed)). When applying the analysis from *Carista*, there was no prejudice because: "1) appellant was well aware of the evidence from pretrial discovery, 2) appellant sought to use some of the evidence in their theory of the case, 3) even without the statements, the evidence against appellant was substantially the same,

[17] Even if this court found that appellant was materially prejudiced, it is clear that he invited any such error and waived any argument on appeal. *Wilson*, 2018 CCA LEXIS 451 at *23.

4) the military judge appeared to limit his admission of the testimony . . . .." *Carista,* 76 M.J. at 517.

Evident from the record, there was no prejudice to appellant related to notice. (App. Ex. XVIII). Second, appellant sought to use the impeachment evidence—evidence of other forms of penetration—to rebut the presumption that the blood must have come from the penetrative acts with appellant. (R. at 137, 142, 147 (sealed)). The military judge instructed the panel (without objection from appellant) that they should use the evidence for this purpose. (R. at 787). Third, the evidence against appellant was substantially the same without the evidence. For example, there is no indication, nor does appellant assert on appeal, that appellant, [redacted], or any other witness would have testified differently had the evidence not been erroneously admitted. Fourth, the military judge appropriately limited admission of the testimony. Unlike *Villanueva*, government counsel, in accordance with the military judge's ruling, did *not* argue or comment that because [redacted] had not previously been penetrated by a man, then she was *less* likely to consent to the penetrative acts with appellant. 2015 CCA LEXIS at *10; (App. Ex. LX (sealed)).

Assignment of Error III

THE MILITARY JUDGE REVERSIBLY ERRED IN DENYING THE DEFENSE MOTION FOR A UNANIMOUS PANEL.

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

A. Fifth and Sixth Amendment Rights.

Contrary to appellant's argument, (Appellant's Br. 35), *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.[18] 140 S. Ct. 1390 (2020). Furthermore, this court rejected a 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

[18] *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 (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").

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).[19] As such, appellant's claim should be denied.

B. Equal Protection.

In asserting that the judicial nature of a present-day court-martial provides an accused "virtually the same" as state and federal civilian criminal proceedings" appellant asserts accused service members and civilian defendants are similarly situated for equal protection purposes. (Appellant's Br. 38). This court rejected a substantially similar claim in *United States v. Pritchard*, 82 M.J. 686, 693 (Army Ct. Crim. App. 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.[20]

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[19] *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.

[20] 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 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.

Conclusion

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

[redacted]
ANTHONY J. SCARPATI
CPT, JA
Appellate Attorney, Government
Appellate Division

[redacted]
CYNTHIA A. HUNTER
CPT, JA
Acting Branch Chief, Government
Appellate Division

[redacted]
CHRISTOPHER B. BURGESS
COL, JA
Chief, Government
Appellate Division

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.).

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

[1] U.S. Const. amend. VI.

[2] Appellant raised this issue pursuant to *United States v. Grostefon,*

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**.

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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. 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

End of Document

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.

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.

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[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.)).

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]

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 NM[8] 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 sed[10] so I can get you a drink for not making it Saturday." Appellant and a friend, Technical

[3] U.S. Const. amend. V.

[4] U.S. Const. amend. VI.

[5] U.S. Const. amend. VIII.

[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 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.

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 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

[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."

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).

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[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.

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 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

[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.

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 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 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

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

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 "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 both offenses involving NM.

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.

E. Ineffective Assistance of Counsel

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. Cronic, 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

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[15] U.S. Const. amend. VI.

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).

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 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.

[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).

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 in-coordination; 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]

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

[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 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)*).

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 is 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 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.

United States v. Fry

United States Air Force Court of Criminal Appeals

February 4, 2016, Decided

ACM 38687

Reporter
2016 CCA LEXIS 72 *

UNITED STATES v. Master Sergeant THOMAS J. FRY, United States Air Force

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by *United States v. Fry, 2016 CAAF LEXIS 368 (C.A.A.F., May 12, 2016)*

Prior History: **[*1]** Sentence adjudged 26 June 2014 by GCM convened at Scott Air Force Base, Illinois. Military Judge: Lynn Watkins (arraignment) and Shaun Speranza. Approved Sentence: Bad-conduct discharge, confinement for 7 months, reduction to E-4, and a reprimand.

Counsel: For Appellant: Major Thomas A. Smith.

For the United States: Captain J. Ronald Steelman III; Major Mary Ellen Payne; and Gerald R. Bruce, Esquire.

Judges: Before MITCHELL, DUBRISKE, and BROWN, Appellate Military Judges.

Opinion by: BROWN

Opinion

OPINION OF THE COURT

BROWN, Judge:

At a general court-martial composed of officer members, Appellant was convicted, contrary to his pleas, of three specifications of sexual assault and one specification of abusive sexual contact, in violation of Article 120, UCMJ, *10 U.S.C. § 920*. The members sentenced Appellant to a bad-conduct discharge, confinement for seven months, reduction to E-4, and a reprimand. The convening authority approved the sentence as adjudged, except mandatory forfeitures were deferred until action and then waived for six months from the date of action for the benefit of Appellant's dependents.

On appeal, Appellant raises two issues: (1) that it was constitutionally required under Mil. R. Evid. 412(b)(1)(C) for the defense to introduce evidence that the victim **[*2]** engaged in consensual, unrelated heterosexual sexual contact two years earlier to rebut an implied impossibility of consent based on her homosexual orientation, and (2) that the staff judge advocate (SJA) incorrectly relied on evidence not admitted at trial when concluding in the staff judge advocate's recommendation (SJAR) that the evidence was legally sufficient. We disagree and affirm the findings and sentence.

Background

Appellant was a Master Sergeant and former section chief of Senior Airman (SrA) DR. In 2013, they were both reassigned to Scott Air Force Base, Illinois. In October 2013, about a month after SrA DR arrived at Scott Air Force Base, Appellant invited her to his on-base house to socialize with him and his then-pregnant wife. Appellant's son was also at the house.

During the course of the evening, the group watched a movie and ate pizza. Appellant and SrA DR drank alcohol. The pre-arranged plan was for SrA DR to sleep in the guest bedroom. Through the course of the evening, SrA DR had approximately three and a half drinks that consisted of a mix of

vodka and an energy drink. At some point, Appellant's son and wife went to their bedrooms to sleep. Appellant and SrA DR **[*3]** stayed up talking until approximately 0100 or 0130 when SrA DR realized that she was intoxicated and sleepy.

Appellant escorted SrA DR to the guest bedroom, turned off the lights, and closed the door behind him as he left. SrA DR testified that the next thing she recalled was waking up to Appellant on top of her having sex. SrA DR had her bra on, but one leg of her pants was off and her underwear was pulled down on the side. SrA DR testified that, when she awoke, she was confused and just lay there. Appellant, at some point, stopped having sex with her and rolled off her. Appellant got on top of her a second time and again began having sex with SrA DR. Afterward, Appellant placed his fingers into SrA DR's vagina. SrA DR also recalled Appellant kissing her on the lips. SrA DR testified that she never told Appellant that she wanted to engage in sexual activity with him and that she never wanted it to occur. These incidents resulted in the charges in this case.

After the incident, Appellant left the guest room. SrA DR then texted her girlfriend, Ms. MB, and told her that she woke up to Appellant having sex with her. At the time of the incident, SrA DR was in a romantic, same-sex relationship **[*4]** with Ms. MB. SrA DR collected her belongings and left Appellant's house in the middle of the night to return home.

Mil. R. Evid. 412—Admissibility of Sexual Orientation

The trial defense counsel filed a timely motion to admit evidence under Mil. R. Evid. 412. The defense specifically sought to question SrA DR about a consensual, heterosexual relationship two years prior to the charged offenses. The defense explained that the purpose of these questions would be to rebut any implication by the prosecution that SrA DR would be less likely to consent to a sexual act with a male because of her sexual orientation. On appeal, Appellant challenges the military judge's decision to suppress this evidence.

Appellant now asserts this evidence was necessary because the Government introduced SrA DR's sexual orientation into the trial in several ways. On two occasions, Ms. MB was referred to as SrA DR's girlfriend. In the opening statement, trial counsel told the members that they would hear that, immediately after the offenses, SrA DR texted "her girlfriend" about what happened. Later, during SrA DR's testimony, in response to whether she called anyone as she left Appellant's house after the attack, SrA DR said, "Yes, I had been texting **[*5]** and calling my girlfriend [Ms. MB]." There were no additional questions, comments, or discussions about the nature of SrA DR's relationship with Ms. MB, or what the term "girlfriend" meant.

In addition, the Government offered into evidence, without defense objection or request for redaction, a photograph of SrA DR's phone screen that displayed text messages between SrA DR and Ms. MB shortly after the alleged incidents. At the top of the exhibit was a concluding sentence from a prior text conversation that ended with the phrase "choice to date a woman."[1]

During SrA DR's testimony, she testified that she and Ms. MB were texting each other throughout the night and identified the exhibit as containing text messages between her and Ms. MB. There was no testimony or discussion regarding the context of the prior **[*6]** text conversation that ended with, "choice to date a woman." At the conclusion of her direct testimony, the Government provided this exhibit to the members for their review.

After the exhibit was provided to the members, the defense argued that the two references to "girlfriend" and the "choice to date a woman" text

[1] Appellant's counsel assert that, although the line was mostly blocked, it is possible to decipher the full sentence as, "He doesn't understand my choice to date a woman." From reviewing the original exhibit, this court determined that such an interpretation, while possible, was neither clear nor easily identifiable. Regardless, this is not critical to the court's resolution of this issue.

opened the door to SrA DR's sexual predisposition. This purportedly made it necessary for the defense to question SrA DR about her past sexual relationships with men so as to "rebut the presumption that . . . because she's a lesbian she would not engage in heterosexual sexual activity." The defense explained the purpose of this questioning as follows:

> The Government created a presumption by putting the evidence out there, by opening up—putting [SrA DR's] sexuality into play in this court. Her predisposition of sexuality and that comes with a presumption that if she has a girlfriend she is a lesbian. And that presumption is correct and that presumption must be rebutted at some point or this witness is improperly bolstered.

The military judge determined that questions regarding Ms. DR's prior sexual behavior with another male were inadmissible under Mil. R. Evid. 412. The military judge concluded **[*7]** that the exclusion of this evidence did not violate Appellant's constitutional rights, that any probative value was substantially outweighed by the danger of unfair prejudice, that the evidence was only marginally relevant, and that it would "infuse the fact-finding process with the sexual innuendo that [Mil. R. Evid.] 412 seeks to prevent." In reaching this conclusion, the military judge reasoned that the use of the word "girlfriend" did not have a sexual connotation as the term is often used to describe platonic, non-sexual, female friendships. As to the "choice to date a woman" portion of the text message, the military judge noted that the phrase was written by Ms. MB rather than SrA DR, and there was no context for the members to make any assumptions about what it meant.

"We review the military judge's ruling on whether to exclude evidence pursuant to [Mil. R. Evid.] 412 for an abuse of discretion. Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed de novo." *United States v. Ellerbrock, 70 M.J. 314, 317 (C.A.A.F. 2011)* (citation omitted).

Under Mil. R. Evid. 412, evidence offered by the accused to show that the alleged victim engaged in other sexual behavior is inadmissible, with three limited exceptions. The third exception states that the evidence **[*8]** is admissible if "the exclusion of [it] would violate the constitutional rights of the accused." Mil. R. Evid. 412(b)(1)(C). If there is a theory of admissibility under one of the exceptions, the military judge, before admitting the evidence, must conduct a balancing test as outlined in Mil. R. Evid. 412(c)(3) and clarified by *United States v. Gaddis, 70 M.J. 248, 250 (C.A.A.F. 2011)*.

The test is whether the evidence is "relevant, material, and [if] the probative value of the evidence outweighs the dangers of unfair prejudice." *Ellerbrock, 70 M.J. at 318*. Relevant evidence is any evidence that has "any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence." Mil. R. Evid. 401. Evidence is material if it is "of consequence to the determination of appellant's guilt." *United States v. Dorsey, 16 M.J. 1, 6 (C.M.A. 1983)* (citations and internal quotation marks omitted).

> In determining whether evidence is of consequence to the determination of appellant's guilt, we consider the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which this issue is in dispute; and the nature of the other evidence in the case pertaining to the issue.

United States v. Smith, 68 M.J. 445, 448 (C.A.A.F. 2010) (quoting *Dorsey, 16 M.J. at 6*) (internal quotation marks omitted).

If evidence is relevant and material, it must be admitted where its probative value **[*9]** outweighs the dangers of unfair prejudice. *See* Mil. R. Evid. 412(c)(3). "Those dangers include concerns about 'harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *Ellerbrock, 70 M.J. at 319* (quoting *Delaware v. Van Arsdall, 475 U.S.*

673, 679 (1986)). If the evidence survives the inquiry, a final consideration is whether the evidence in the record supports the inference on which the moving party is relying. Id.

Mil. R. Evid. 412 "is intended to protect the privacy of victims of sexual assault while at the same time protecting the constitutional right of an accused to a fair trial through his right to put on a defense." Id. at 322 (Baker, J., dissenting). This right necessarily includes the ability to cross-examine and to impeach or discredit a witness. The cross-examination, however, need not be "in whatever way, and to whatever extent, the defense might wish," and the military judge may limit the scope of such cross-examination when its relevance is outweighed by concerns of harassment, prejudice, or confusion of the issues. Ellerbrock, 70 M.J. at 318 (quoting Van Arsdall, 475 U.S. at 679) (internal quotation marks omitted). "But no evidentiary rule can deny an accused of a fair trial or all opportunities for effective cross-examination." Id.

An alleged victim's sexual orientation, **[*10]** standing alone, is not relevant under Mil. R. Evid. 412. *See* United States v. Grant, 49 M.J. 295, 297 (C.A.A.F. 1998). In certain situations, however, an alleged victim's sexual orientation could become relevant and material so that its exclusion would violate the constitutional rights of an accused. The issue before us is whether this is such a case. We conclude it is not. The military judge did not abuse his discretion in excluding this evidence under the facts and circumstances of this case.

Appellant urges this court to adopt the rationale used by the Navy-Marine Corps Court of Criminal Appeals in *United States v. Villanueva*, NMCCA 201400212 (N.M. Ct. Crim. App. 19 March 2015) (unpub. op.). There, the Navy court concluded that when the government uses sexual orientation in a way that implies the impossibility of consent, or the impossibility of reasonable mistake of fact as to consent, the defense must be allowed to rebut that inference when to do otherwise would deny an accused the ability to mount a defense. *Id.* unpub. op. at 6-7. As to this general proposition, this court does not disagree, and such a conclusion does not constitute a novel legal concept.

In *Villanueva*, a male accused was alleged to have forcibly sodomized another male military member **[*11]** victim while that member was intoxicated. *Id.* unpub. op. at 1-2. The victim testified at trial that he was not gay and that he had previously told the accused he was not gay. *Id.* unpub. op. at 3-4. After the military judge prohibited the defense from questioning the victim regarding statements that could be interpreted as having some interest in homosexuality, trial counsel repeatedly relied on the victim's assertion that he was not gay as a reason that the victim would not have consented to homosexual conduct. *Id.* Trial counsel affirmatively referenced in the opening statement that the victim was a heterosexual, and argued that the accused could not have been reasonably mistaken as to consent because the victim told the accused he was not gay. *Id.* In this situation, the Navy court concluded that contrary information about the victim's sexual orientation impacted the credibility of the witness and could have impacted whether the accused was reasonably mistaken as to consent. *Id.* unpub. op. at 6-7. Under the facts of that case, exclusion of this information impacted the defense's ability to mount a defense and rebut the inferences and arguments that the government and the victim were **[*12]** affirmatively putting forward as an issue in the trial. *Id.*

In this case, however, the Government did not use sexual orientation in such a manner. Unlike *Villanueva*, the Government's theory of the case did not rely in whole, or in part, on SrA DR's sexual orientation or the nature of the relationship between her and Ms. MB. Trial counsel never referenced SrA DR's sexual orientation nor argued that SrA DR would have been less likely to consent to the sexual activity with Appellant because of her sexual orientation or her relationship with Ms. MB. There was no proffer from the defense that SrA DR

told Appellant anything that evening about prior sexual activity that could have reasonably contributed to a reasonable mistake of fact claim as to consent.

The three isolated references that Appellant clings to are not sufficient to raise impossibility of consent based on SrA DR's sexual orientation. The military judge was correct in identifying that the term "girlfriend," as used here, is often used to signify a platonic, rather than sexually intimate, relationship. The text message that ended with "choice to date a woman" was from Ms. MB, not SrA DR, and did not contain enough context for the **[*13]** members to draw any conclusions about its meaning.

This is not a case of the Government smuggling in veiled references of a victim's sexual orientation with the hope or intent that the members would rely on it in deliberations. The Government's theory was relatively straight forward: SrA DR and Appellant were nothing more than friends in the context of a professional working relationship, SrA DR did not have any interest in engaging in sexual activity with Appellant, and SrA DR did not behave in any way toward Appellant that night that would make him reasonably believe otherwise. In short, the Government neither intentionally, nor inadvertently, used SrA DR's sexual orientation to argue that she was less likely to consent to sexual activity with Appellant.

Furthermore, regardless of the intent of the prosecution, the record does not support that the members were focused in any way on SrA DR's sexual orientation. Although the members asked several questions to SrA DR about her alcohol use, they never questioned her or Ms. MB about the nature of their relationship or what precipitated the text conversation that ended with the phrase "choice to date a woman." The three references relied **[*14]** upon by Appellant were, at most, ambiguous. If the members believed that such ambiguous statements were critical to their resolution of the case, they presumably would have included that line of questioning amongst the other questions they asked the witnesses. The members' silence speaks volumes and reinforces the military judge's conclusions that the members would be unlikely to draw such conclusions from the evidence as presented.

Even if one assumes, for the purposes of argument, that the three references were sufficient to imply that that SrA DR and Ms. MB were in an intimate relationship, it was still not an abuse of discretion for the military judge to exclude testimony about SrA DR's unrelated, heterosexual relationship two years earlier. Even if SrA DR were in an intimate relationship, there was absolutely nothing to suggest to the members that SrA DR and Ms. MB were in an exclusive relationship or that SrA DR was a lesbian rather than a bi-sexual. Admittedly, if SrA DR or Ms. MB would have testified during findings that they were in an exclusive, lesbian relationship and that, therefore, SrA DR would never have consented to sexual activity with Appellant, the analysis would **[*15]** be very different. That did not happen. Here, unlike *Villanueva*, the Government did not use the victim's sexual orientation as a sword against Appellant that he was constitutionally entitled to rebut. The military judge correctly applied the law, and it was not an abuse of discretion to exclude the evidence under Mil. R. Evid. 412.

SJAR Error

The SJAR advised the convening authority that the primary evidence in this case consisted of "witness testimony, documentary and scientific evidence, photographic evidence, and *a text message between the Accused and the victim."* (Emphasis added). The SJA then advised the convening authority that he was satisfied that the evidence used to support the conviction was legally sufficient. The SJAR was served on the defense and the defense did not object to the SJAR or raise any specific legal errors.

The prosecution never offered into evidence a text message between Appellant and the victim, as referenced in the SJAR. Consequently, such a text

message could not be a basis for the conviction. There was a text message, however, that the prosecution did use at trial—the previously described text messages from SrA DR to Ms. MB immediately following the sexual assault. It **[*16]** was this text message between SrA DR and Ms. MB, where SrA DR claimed she awoke to Appellant having sex with her, that trial counsel used at trial.

Nevertheless, Appellant suggests this reference is more than a mere typographical error, as there were also text messages between Appellant and SrA DR a week following the sexual assaults. Those text messages were included in the Article 32, UCMJ, *10 U.S.C. § 832*, report but not offered into evidence at trial. In those messages, SrA DR confronted Appellant about what happened that night. In response, Appellant claimed he had little memory of what happened that night, other than claiming that he realized afterwards that he had mistaken SrA DR for his wife. The court reviews allegations of improper completion of post-trial processing de novo. *United States v. Kho, 54 M.J. 63, 65 (C.A.A.F. 2000)*. Where consideration of the sufficiency of the trial evidence of guilt is undertaken, that consideration must be limited to the trial evidence. *United States v. Drayton, 40 M.J. 447, 451 (C.M.A. 1994)*. If defense counsel does not make a timely comment on an error or omission in the SJA's recommendation, that error is waived unless it is prejudicial under a plain error analysis. *United States v. Scalo, 60 M.J. 435, 436 (C.A.A.F. 2005)*. To avoid waiver based upon plain error, the appellant must demonstrate three things: "(1) There **[*17]** was an error; (2) it was plain or obvious, and (3) the error materially prejudiced a substantial right." *Id.* (quoting *Kho, 54 M.J. at 65*).

"Because of the highly discretionary nature of the convening authority's clemency power, the threshold for showing [post-trial] prejudice is low." *United States v. Lee, 52 M.J. 51, 53 (C.A.A.F. 1999)*. Only a colorable showing of possible prejudice is necessary. *Id.* Nevertheless, an error in the SJAR "does not result in an automatic return by the appellate court of the case to the convening authority." *United States v. Green, 44 M.J. 93, 95 (C.A.A.F. 1996)*. "Instead, an appellate court may determine if the accused has been prejudiced by testing whether the alleged error has any merit and would have led to a favorable recommendation by the SJA or corrective action by the convening authority." *Id.*

Neither in the clemency submission, nor in Appellant's assignment of errors to this court, does he attack the legal sufficiency of his conviction. Appellant's only request in clemency was a reduction in confinement to allow him to return home to his family.[2] Although the convening authority elected not to reduce Appellant's confinement, there is nothing to suggest that the text message between Appellant and SrA DR would have had any bearing on that decision. The SJAR did not recite **[*18]** the contents of that text message—or describe any of the evidence—in detail. Even if the convening authority would have affirmatively sought out the referenced email in the record of trial, it would have provided no additional basis to question the legal sufficiency of the conviction. It would also have provided no additional basis to either grant or deny Appellant's request for a reduction in confinement. Appellant, in that text message, merely repeated his claims that he had little to no recollection of what occurred that night.

Under the facts of this case, we find that Appellant forfeited this issue by failing to raise the error in clemency, and the error, regardless of whether it was plain and obvious, did not materially prejudice a substantial right of Appellant.

Promulgating Order Error

Although not raised by the parties, we note the report of result of trial memorandum attached to the SJAR is erroneous in that it incorrectly states that

[2] Automatic forfeitures were both deferred until action and waived for six months from the date of action.

Appellant pleaded not guilty to Specification 3 of the Charge. Appellant instead deferred entry of pleas prior to the military judge dismissing **[*19]** the specification as a lesser-included offense of another charged offense. This was error. *See* R.C.M. 1106(d)(3); Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 9.2.1 (6 June 2013). Additionally, the initial court-martial promulgating order (CMO) contained the same error. *See* R.C.M. 1114(c)(1); AFI 51-201, ¶ 10.8.2.2. Although we find Appellant is not entitled to additional post-trial processing given he suffered no material prejudice from the error, we direct completion of a corrected CMO to properly reflect that Appellant did not enter a plea to Specification 3 of the Charge.

Conclusion

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(a) and 66(c), UCMJ, *10 U.S.C. §§ 859(a), 866(c)*. Accordingly, the approved findings and sentence are **AFFIRMED**.

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United States v. Garner

United States Army Court of Criminal Appeals

February 19, 2020, Decided

ARMY 20180563

Reporter
2020 CCA LEXIS 44 *; 2020 WL 836601

UNITED STATES, Appellee v. Specialist EDWARD ***GARNER***, United States ***Army***, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by *United States v. **Garner**, **2020** CAAF LEXIS 185 (C.A.A.F., Mar. 25, **2020**)*

Motion denied by *United States v. **Garner**, **2020** CAAF LEXIS 378 (C.A.A.F., July 7, **2020**)*

Review denied by *United States v. **Garner**, **2020** CAAF LEXIS 363 (C.A.A.F., July 10, **2020**)*

Prior History: [*1] Headquarters, U.S. ***Army*** Combined Arms Support Command. Andrew J. Glass and Daniel G. Brookhart, Military Judges. Colonel James D. Levine II, Staff Judge Advocate.

Counsel: For Appellant: Colonel Elizabeth G. Marotta, JA; Lieutenant Colonel Tiffany D. Pond, JA; Captain Paul T. Shirk, JA; Captain Joseph C. Borland, JA (on brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Craig Schapira, JA; Captain Brian Jones, JA (on brief).

Judges: Before BURTON, RODRIGUEZ, and FLEMING, Appellate Military Judges. Senior Judge BURTON and Judge FLEMING concur.

Opinion by: RODRIGUEZ

Opinion

SUMMARY DISPOSITION

RODRIGUEZ, Judge:

Appellant, then thirty-seven years old, had sexual intercourse on multiple occasions with a fourteen-year-old girl.[1] On appeal, appellant claims the military judge abused his discretion in denying appellant's motion to suppress his statement to law enforcement because he invoked his right to counsel and his statement was involuntary. Appellant further claims his trial defense counsel were ineffective "due to their failure to call [appellant's] mental health counselor to testify to his mental state" prior to making his statement to law enforcement.[2] We disagree with both assertions **[*2]** and will briefly discuss.

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[1] A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual abuse of a child and seven specifications of sexual assault of a child over the age of twelve but under the age of sixteen, in violation of *Article 120b, Uniform Code of Military Justice, 10 U.S.C. § 920b* [UCMJ]. The military judge sentenced appellant to a dishonorable discharge, confinement for four years, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged and credited appellant with 211 days against his sentence to confinement.

[2] Appellant personally raised this claim pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*. Also pursuant to *Grostefon*, appellant argues the military judge abused his discretion by admitting Mil. R. Evid. 412 testimony without holding a closed hearing or performing a Mil. R. Evid. 403 balancing test. Specifically, the victim, MD, testified that she was a virgin before appellant had sex with her. The defense objected to this testimony. We find the military judge erred in not holding a closed Mil. R. Evid. 412 hearing regarding the admissibility of this testimony. *See United States v. Sanchez, 44 M.J. 174, 178 (C.A.A.F. 1996)* (holding Mil. R. Evid. 412 is also designed to preclude introduction of evidence of a victim's chastity). However, we find appellant was not prejudiced as result of this error.

LAW AND ANALYSIS

A. Invocation of Right to Counsel and Voluntariness

We find appellant did not invoke his *Sixth Amendment* right to counsel during his interview with law enforcement and his statement that followed was voluntary. Concerning appellant's right to counsel, we note law enforcement informed appellant of his right to speak to an attorney before, during, or after his interview with ***Army*** Criminal Investigation Command (CID). Appellant unambiguously stated that he would like to wait until after his law enforcement interview to speak to an attorney. *See Davis v. United States, 512 U.S. 452, 459, 114 S. **Ct**. 2350, 129 L. Ed. 2d 362 (1994)*. Any reasonable officer would have viewed appellant's statement as a waiver of his right to counsel, which was confirmed when appellant signed a rights waiver form. *See id.* Thus, we find this was not a ground for suppression of appellant's statement.

In regards to voluntariness, we assessed the totality of all the surrounding circumstances, including appellant's characteristics and the details of the interview, and find appellant's will was not overborne. *See United States v. Freeman, 65 M.J. 451, 453 (C.A.A.F. 2008)*. Further, appellant's statement was the "product of [his] essentially free and unconstrained choice," highlighted by his statement that he would first **[*3]** like to proceed with the interview at CID before speaking to an attorney. *See Schneckloth v. Bustamonte, 412 U.S. 218, 225-26, 93 S. **Ct**. 2041, 36 L. Ed. 2d 854 (1973)*.

B. Ineffective Assistance of Counsel

Appellant claims his trial defense counsel were ineffective for not calling his mental health counselor to testify regarding his mental state during his CID interview. We ordered affidavits from appellant's trial defense counsel to explain why they did not present such evidence. *United States v. **Garner**, **ARMY** 20189563 (**Army Ct**. **Crim**. **App**. 21 Jan. **2020**)* (order). In response to this court's order, one of appellant's trial defense counsel explained in her affidavit that:

> After a review of over 200 pages of records, we decided not to present testimony from [appellant's] mental health provider/counselor as we believed it would contradict [appellant's] feelings about his condition. Additionally, appellant made several admissions while in the mental health facility to various parties and we worried those statements would potentially be used against him by the government. . . . [W]e believed the [Mil. R. Evid. 513] privilege would not apply because. . . . [i]f we put [appellant's] mental health condition at issue, we would waive the privilege.

Appellant's trial defense counsel attached appellant's **[*4]** mental health records to their affidavits. Our review of the records confirms the trial defense counsel's assertions that appellant made incriminating statements regarding the charged offenses.

We find that appellant's trial defense counsel were not deficient. *See Wiggins v. Smith, 539 U.S. 510, 521, 123 S. **Ct**. 2527, 156 L. Ed. 2d 471 (2003)*. In fact, we find it was objectively reasonable under these circumstances for appellant's trial defense counsel not to present evidence of his mental condition prior to his interview at CID. *Id.* Presenting such evidence may have permitted the government to enter into evidence appellant's several incriminating statements he made while at the mental health facility.

CONCLUSION

On consideration of the entire record, the findings of guilty and sentence are AFFIRMED.

Senior Judge BURTON and Judge FLEMING concur.

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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.

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-

[1] Appellant was acquitted of one specification of sexual assault when he knew or should have known the victim was asleep.

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.

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 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 AOEs are addressed below.

II. Discussion

A. The Evidence Admitted at Trial Was Factually Sufficient to Support Appellant's [*5] Conviction

[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)*.

[4] All names used in this opinion, except those of Appellant, judges, and counsel, are pseudonyms.

[5] R. at 484-85.

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 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:
> 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

[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.

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 question . . . .[7]

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" 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)*) multiplicious with sexual assault upon an incapacitated person (*Article 120(b)(3)*). We disagree. "A charge is multiplicious 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

[7] R. at 658-62.

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.

[8] R. at 484-85.

[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.

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 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

[10] R. at 404, 409.

[11] R. at 609-10.

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 "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.

III. Conclusion

After careful consideration of the record and briefs of appellate counsel, we have determined that the

[12] R. at 630.

[13] *Id.*

[14] Appellant's Br. at 35.

[15] R. at 633.

[16] R. at 640-41.

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.

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United States v. Grindstaff

United States Army Court of Criminal Appeals

August 30, 2022, Decided

ARMY 20200315

Reporter
2022 CCA LEXIS 524 *; 2022 WL 4008733

UNITED STATES, Appellee v. Private First Class SHAYNE C. GRINDSTAFF, United States ***Army***, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by *United States v. Grindstaff, **2022** CAAF LEXIS 768 (C.A.A.F., Oct. 28, **2022**)*

Motion granted by *United States v. Grindstaff, **2022** CAAF LEXIS 774 (C.A.A.F., Nov. 1, **2022**)*

Motion granted by *United States v. Grindstaff, **2022** CAAF LEXIS 830 (C.A.A.F., Nov. 18, **2022**)*

Prior History: **[*1]** Headquarters, 1st Cavalry Division. Douglas K. Watkins and James P. Arguelles, Military Judges. Colonel Emily C. Schiffer, Staff Judge Advocate (pre-trial). Colonel Howard T. Matthews, Jr., Staff Judge Advocate (post trial).

Counsel: For Appellant: Captain Carol K. Rim, JA (argued); Colonel Michael C. Friess, JA; Jonathan F. Potter, Esquire; Major Joyce C. Liu, JA; Captain Carol K. Rim, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Joyce C. Liu, JA; Captain Carol K. Rim, JA (on reply brief).

For Appellee: Captain R. Tristan C. De Vega, JA (argued); Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Brett A. Cramer, JA; Captain R. Tristan C. De Vega, JA (on brief).

Judges: Before BROOKHART, WALKER, and PENLAND, Appellate Military Judges.

Opinion

MEMORANDUM OPINION

Per Curiam:

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, confinement for nine months, and reduction to the grade of E-1.

Appellant raised three assignments of **[*2]** error and we granted oral argument as to two of his claims: (i) whether appellant was denied the right to speedy trial under the *Fifth* and *Sixth Amendments of the Constitution*; and (ii) whether the military judge erred in admitting testimony of the contents of a "Snapchat" video without admission of the video.[1] For the reasons set forth below, we find no error regarding appellant's rights to speedy trial. As to the second issue, we find a series of errors

[1] As for appellant's third assigned error, dilatory post-trial processing, we agree with appellant that the government did not process his case in a timely manner. Specifically, we can find no justification for the 142-day delay between authentication of the record and docketing the case with this Court. Such a lengthy delay for what amounts to packaging and mailing the record is inexcusable. However, we find the delay does not warrant setting aside appellant's punitive discharge, and any relief with regards to confinement would have no practical effect as appellant was only sentenced to nine-months confinement. Nonetheless, we admonish the government to process cases in a timely manner.

resulting in the arguably improper admission of testimony regarding the Snapchat video, but find appellant suffered no prejudice and is entitled to no relief.[2]

BACKGROUND

A. Timeline from Offense to Trial

On 19 May 2017, appellant, [TEXT REDACTED BY THE COURT] (seventeen years old at the date of incident), and a group of friends went out for the evening near Monterey, California. They drank alcoholic beverages purchased by appellant and [TEXT REDACTED BY THE COURT] consumed a portion of a "large, very intoxicating" alcoholic drink and some malt liquor. At least one witness, CB, saw [TEXT REDACTED BY THE COURT] and appellant kissing and acting flirtatiously. At some point in the evening, [TEXT REDACTED BY THE COURT] began to feel sick and walked towards the vehicle so she could **[*3]** vomit privately. Appellant followed her to the car and witnesses saw them together in an apparently romantic stance. He made advances towards [TEXT REDACTED BY THE COURT] despite indications that she had recently vomited. When the party returned to the vehicle to go home, [TEXT REDACTED BY THE COURT] and appellant sat alone in the back seat. [TEXT REDACTED BY THE COURT] still felt sick and, at least once, asked to stop the car so she could vomit again. Both witnesses in the front seat observed appellant and [TEXT REDACTED BY THE COURT] kissing and appellant remove some of [TEXT REDACTED BY THE COURT] clothing in order to perform oral sex on her. DB, appellant's friend, took a Snapchat video from the front passenger seat, which he narrated, "my [appellant] is out here raping a bitch" or words to that effect, and forwarded the video to at least one other witness, HF. The group stopped at a beach and exited the vehicle, where appellant presumed he would have sexual intercourse with [TEXT REDACTED BY THE COURT]. She declined and requested they take her home, which they did. [TEXT REDACTED BY THE COURT]s trial testimony was substantially similar to these accounts, but she indicated that **[*4]** she was heavily intoxicated during the incident, falling in and out of sleep, and felt afraid when appellant laid her down, removed parts of her clothing, and sexually assaulted her. She denied that she ever consented to the sexual contact.

The next day, [TEXT REDACTED BY THE COURT] reported that appellant sexually assaulted her during the car ride and civilian authorities initiated an investigation. The case was transferred to the U.S. ***Army***'s investigative jurisdiction in January 2019, and the charge and its specification were subsequently preferred on 7 May 2019. Appellant was arraigned on 19 June 2019. Both parties initially agreed to an ***August*** 2019 trial date, although appellant quickly amended his request and sought a trial date no earlier than October 2019. In September 2019, the government moved for the first of four continuances, based primarily on the delays related to the forensic testing, and appellant did not object. Trial was therefore continued until February 2020.

Appellant complains, and we agree, that the government was less than diligent in its initial investigation. They did not process potentially material DNA evidence until ***August*** 2019—well after preferral—and only **[*5]** at the request of trial defense counsel. This delay was the first in a series of delays that lasted from approximately October 2019 through February 2020, as the parties waited for the completion of forensic DNA testing and analysis. The government approved a defense expert consultant in DNA analysis in ***August*** 2019 but did not follow through and award the contract until several months later in January 2020. Additional issues, primarily involving witness

[2] We have also fully and fairly considered the matters personally submitted by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, and find they warrant neither discussion nor relief.

availability for both parties, further impeded the road to trial.

On 10 February 2020, appellant filed his first motion to dismiss for speedy trial violations, or alternatively to abate the proceedings, due to alleged failures of the government to produce two material witnesses. The military judge abated the proceedings for thirty days.[3] On 16 March 2020, appellant renewed his motion to dismiss for speedy trial violations and the government again sought a continuance in response. On 24 April 2020, appellant formally demanded speedy trial, but trial was again continued and ultimately commenced on 12 June 2020. Although there is a certain amount of unjustifiable delay—and the government concedes responsibility for at least six months of **[*6]** it—the remainder was caused by the unavailability of essential witnesses, appellant's own requests for delays due to defense witnesses' availability, and the novel travel restrictions associated with COVID-19, which impeded regular court operations beginning in March 2020.

B. Trial Testimony About a Snapchat Video

The government presented testimony about the contents of a Snapchat video of appellant sexually assaulting the victim, without admitting a copy of the video. The substance of the Snapchat video was first raised in the government's opening statement, promising HF would testify about what she saw in the video. Specifically, the government proffered that HF would testify that the video showed appellant attempting to kiss and remove [TEXT REDACTED BY THE COURT]s clothing, who was visibly limp and non-responsive. HF also heard a voice saying, "[a]re you raping her?" Appellant countered this proffer in his own opening statement, claiming the victim's motive to fabricate manifested when she learned of the video the morning after the assault.

Four witnesses testified at trial about the Snapchat video. On direct examination, the victim testified she only woke up during the assault because **[*7]** she saw the flash of a camera and heard a guy yelling about someone being raped in his backseat, but she denied ever seeing the Snapchat video. Appellant did not object to this testimony. Instead, his defense counsel cross-examined the victim on her knowledge of the video's existence, attempting to demonstrate a motive to fabricate, i.e., her fear that the video might be released to her boyfriend or mother.

HF testified as a government witness and stated she received the Snapchat video from DP. Appellant objected to this testimony, citing the best evidence rule and authentication (presumably Mil. R. Evid. 1002 and Rule for Courts-Martial (R.C.M.) 901, respectively), both of which were overruled. However, the military judge asked trial counsel, "do you want to lay a foundation that the video doesn't exist anymore?" The government proceeded to ask HF, a lay witness, how Snapchat works. The government then asked HF what she observed in the videos, and HF responded:

> I observed that [[TEXT REDACTED BY THE COURT] was highly intoxicated and her eyes were closed towards — at the end, the last video of it ended on her eyes closed, her body was limp/weak and she was across [appellant's] lap and he was unzipping her jacket and using his teeth to remove **[*8]** her right bra strap.

When the government asked whether anyone in the video was saying anything, appellant objected based upon hearsay. The government then asserted that it had laid the foundation for Mil. R. Evid. 803(1), present tense [sic] impression. The military judge heard argument on the issue and overruled the objections. Noting that the evidence (of DP's verbal statement) was "obviously powerful evidence" the military judge allowed trial counsel to elicit the statement in order to determine whether

[3] As is common, on 14 February 2020, appellant reached his expiration of term of service (ETS) date while pending trial. His identification card was deactivated and pay stopped for approximately two weeks. However, there is no evidence of record to indicate he suffered harm as a result.

a proper foundation was laid for its admission. The military judge stated that "it's a judge alone trial, it's not like I have to — the bell has already been rung, right. Just presume that, I, as the court can un-ring the bell and not consider that fact if it is not admissible." After multiple attempts to refresh or recall the statement, HF testified that she heard DP say, "what are you doing? Are you raping her?" Appellant did not renew his objections and the military judge allowed the statement as a non-specific present sense impression exception. Mil. R. Evid. 803(1).

Civilian law enforcement was notified of the potential Snapchat video the day after the assault. Officer JA testified that he attempted to locate the video **[*9]** through various witnesses and asked Snapchat if they could pull it from their records; but Snapchat did not provide the video. Officer JA did not obtain a subpoena for Snapchat, but he did execute a search warrant for DP's phone and was unable to recover the video. The U.S. government apparently never tried to subpoena Snapchat records.

DP testified as a witness for appellant and admitted that he made the video and uttered the statements indicating that appellant was raping [TEXT REDACTED BY THE COURT] When pressed as to the meaning of his statements in the video, DP explained that he did not mean that he had observed a rape, rather the phrase reminded him of certain song lyrics.

LAW AND DISCUSSION

A. Speedy Trial

We review appellant's constitutional claims of speedy trial violations de novo. *See* United States v. Hendrix, 77 M.J. 454, 456 (C.A.A.F. 2018); United States v. Mizgala, 61 M.J. 122, 127 (C.A.A.F 2005); United States v. Wilder, 75 M.J. 135, 138 (C.A.A.F. 2016). In conducting our review of a well litigated speedy trial issue, we give substantial deference to the military judge's findings of fact, reversing only if they are clearly erroneous. *See* Mizgala, 61 M.J. at 127. Our "framework to determine whether the Government proceeded with reasonable diligence includes balancing the following four factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether **[*10]** the appellant made a demand for speedy trial; and (4) prejudice to the appellant." United States v. Wilson, 72 M.J. 347, 351 (C.A.A.F. 2013) (citing Mizgala, 61 M.J. at 129) (quoting Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)) (hereinafter "the Barker factors").

For reasons set forth below in greater detail, we find no speedy trial violation. However, we first dispense with appellant's due process claims pursuant to the Fifth Amendment. Ordinarily, we would adhere to the principle that when constitutional rights are at issue, an appellate court applies a presumption against finding waiver. *See* United States v. Blackburn, 80 M.J. 205, 209 (C.A.A.F. 2020). However, the Due Process Clause under the Fifth Amendment has a limited role in protecting speedy trial rights. *See, e.g.*, United States v. Lovasco, 431 U.S. 783, 789, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977). To prevail on such a claim, appellant would need to prove that the pretrial delays caused substantial prejudice to his rights to a fair trial and that the delay was an intentional device to gain tactical advantage over him. *See* United States v. Marion, 404 U.S. 307, 324, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971). However, there is simply no evidence of record to support a finding of a Fifth Amendment due process violation, and we see no colorable argument in support of such a claim. Appellant did not—either at trial or on appeal—raise this argument nor did he present any evidence that the delays between date of incident, preferral, and ultimately trial, violated "those `fundamental conceptions of justice which lie at the base of our civil **[*11]** and political institutions,' . . . and which define 'the community's sense of fair play and decency.'" Lovasco, 431 U.S. at 790 (citations omitted). There is no evidence before this court that any delay was due to an

intentional tactical strategy, nor is there evidence of actual prejudice. As such, there is every reason to presume that any potential claim of a *Fifth Amendment* violation was not supported by the evidence. Moreover, appellant raised multiple speedy trial claims leading up to his trial, each focused on Art. 10, UCMJ, R.C.M. 707, and the *Sixth Amendment*. Because there was no basis in fact for the newly raised due process claim, any possible failure to raise the claim—at or prior to trial—was an "intentional relinquishment or abandonment of a known right." *United States v. Sweeney, 70 M.J. 296, 303 (C.A.A.F. 2011)*.

The Barker Factors

Length of delay. Because the government concedes responsibility for at least 181 days of post-preferral delay, we conclude there is delay sufficient to trigger a full analysis of the remaining *Barker* factors. *See, e.g., United States v. Cossio, 64 M.J. 254, 257 (C.A.A.F. 2007)*.

Reasons for the delay. In this case, there are a variety of reasons that resulted in delay, and "different weights should be assigned to different reasons." *Barker, 407 U.S. at 531*. We first address delays caused by the defense. Charges were preferred on 7 May 2019 and referred on 3 June **[*12]** 2019. On 5 June 2019, the defense submitted its electronic docket request and did not object to the government's requested earliest trial date of 5 ***August*** 2019, with both parties presenting various dates in conflict. On 12 June 2019, defense counsel amended this request and asked for additional delay through ***30*** September 2019, citing witness availability concerns.

Some intervening circumstances raise concern and warrant discussion. On 14 ***August*** 2019, the defense identified material evidence that had not been properly investigated or submitted to appropriate agencies for forensic examination. This caused delay resulting, at least in part, in the government's first request for continuance, which was granted as unopposed. In ***August***, the government authorized a defense DNA expert, but failed to execute a contract and allow the expert to start work until January 2020. We presume, based on a lack of information in the evidence, that these delays were the result of negligence, not untoward pretrial tactics. Negligent delay certainly weighs against the government, although the overlap of delay with the aforementioned defense requests does neutralize some of its impact on appellant's pretrial **[*13]** rights. *See*, e.g., *United States v. Cooley, 75 M.J. 247, 260 (C.A.A.F. 2016)* (citing *Barker, 407 U.S. at 531*). Unfortunately, in March of 2020, the novel coronavirus brought the country and its operations, including judicial processes, to a virtual standstill. Various witness issues, refusals to travel, departmental policies precluding travel, and overall force health protection concerns impeded the ability to assemble this court-martial. Under the circumstances, not all of the delay is attributable to government error or ineptitude.

Appellant's demand for speedy trial. An appellant's "assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the [appellant] is deprived of the right." *Wilson, 72 M.J. at 353* (citation omitted) (omission in original). Between 10 February 2020 and 21 April 2020, appellant repeatedly brought his speedy trial concerns to the attention of the court. Although trial defense counsel acquiesced to initial government requests for delay, from February through April, appellant was persistent in repeated demands for speedy trial, clearly alleging constitutional violations. This factor weighs heavily in appellant's favor.

Prejudice. "Prejudice, of course, should be assessed in the light of the interests of defendants **[*14]** which the speedy trial right was designed to protect." *Mizgala, 61 M.J. at 129* (citation omitted). The U.S. Supreme Court identified three discrete protected interests in *Barker*, two of which are applicable here: to minimize anxiety and concern; and to limit the possibility that the defendant will be impaired in his ability to pursue and prepare a

defense. *Barker, 407 U.S. at 532*. Appellant contends that he was prejudiced by the February 2020 expiration of his ETS date and subsequent two-week period that he was in a no-pay status and unable to eat at the DFAC. However, there is simply no record evidence to demonstrate that he was in fact harmed by this oversight, or that any arguable harm was caused by speedy trial violations. While the lack of pay may have caused Appellant an unexpected level of anxiety, the "conditions were not unique to his case." *United States v. Danylo, 73 M.J. 183, 188 (C.A.A.F. 2014)*. Appellant has not argued that the totality of delays in any way impeded his ability to investigate and assert a defense, other than general allusions to witnesses' minor lapses in memory. With little to no evidence of actual prejudice, this factor favors the Government.[4]

Balancing these factors, we conclude that Appellant was not denied his rights to a speedy trial. We join the military **[*15]** judge in admonishing the government for its apparently negligent pretrial investigation. However, that delay of four months was relatively minimal when we consider the totality of the circumstances — encapsulating October 2019 (following a defense request for delay to accommodate witnesses) until approximately February 2020. Four months to remediate a deficient investigation is not unreasonable. It is inarguably true that a more diligent approach may have avoided the unforeseeable impacts of the novel coronavirus pandemic, but we cannot speculate to any degree of certainty that there was a causal link between the government's period of negligent processing and the ensuing months of delay in this case. There were ongoing witness issues—many deemed "material" by the defense—that required additional time and resources to secure their availability. In short, this could have been done better, but it was not so deficient a performance to violate Appellant's constitutional right to a speedy trial. The standard used to evaluate the Government's progress is not perfection, but reasonable diligence. *See Cooley, 75 M.J. at 259*. In weighing the *Barker* factors, we find no unreasonable delay.

B. Improper Consideration of Unavailable ***[*16]*** *Digital Evidence*

We review a military judge's decision to admit evidence for an abuse of discretion. *United States v. Finch, 79 M.J. 389, 394 (C.A.A.F. 2020)* (citing *United States v. Frost, 79 M.J. 104, 109 (C.A.A.F. 2019)*). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Kelly, 72 M.J. 237, 242 (C.A.A.F. 2013)*. Appellant objected to HF's testimony regarding the video on best evidence and authentication grounds. However, he did not object to [TEXT REDACTED BY THE COURT] earlier testimony regarding the substance of the video, instead questioning her about it to establish a possible motive to fabricate the assault. The lack of a timely objection to evidence at trial forfeits that error in the absence of plain error. Mil. R. Evid. 103(a)(1)(A); *United States v. Knapp, 73 M.J. 33, 36 (C.A.A.F. 2014)*. To prevail under this standard, an appellant must show "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *United States v. Erickson, 65 M.J. 221, 223 (C.A.A.F. 2007)* (citations omitted).

The question of the admission of secondary evidence of the Snapchat video is of greater concern. The government did not secure or seek to preserve digital evidence, i.e., DP's video **[*17]** of the sexual assault wherein he seemed to narrate the offense, stating "my [appellant] is out here raping a

[4] At oral argument, this Court was particularly interested in whether appellant endured any tangible deprivations, such as malnourishment, as a result of losing access to his assigned installation and its services. The parties did not know, and, in any event, appellant did not carry his burden to prove any.

bitch." The evidence was discussed substantively in both counsels' opening statements, twice in the government's case-in-chief—through [TEXT REDACTED BY THE COURT] and HF's direct testimony, and appellant's own cross-examination—and appellant's direct examination of DP. We determine that there was a complex web of errors surrounding the Snapchat testimony, and we discuss each error in turn.

1. Discovery

Rule for Courts-Martial 701(a)(2)(A)(ii) requires disclosure of any documents and other tangible objects that the government intends to use in the case-in-chief at trial. The government has an affirmative duty to seek out material evidence, including evidence in the possession of third parties. There is no evidence the government sought to do so in this case, though counsel's opening statements clearly indicate the government's intent to use the Snapchat video in its case-in-chief. The circumstances surrounding the video here demonstrate an apparent and fundamental misunderstanding of the government's obligations to secure material evidence. Rule for Courts-Martial 703A states the requirements to seek a warrant or order **[*18]** for wire or electronic communications. This rule, effective 2019, incorporates the parameters of the *Stored Communications Act* ["SCA"], *18 U.S.C. §§ 2701-2712*, which governs digital evidence, e-discovery, and access thereto. Military courts-martial are courts of competent jurisdiction, for purposes of the SCA, via R.C.M. 703A (2019); Article 46(d)(3), UCMJ; *18 U.S.C. § 2703*. Yet, neither party nor the trial court sought to exercise this subpoena power and secure the original video evidence. However, there is no evidence that the Snapchat video, or even secondary evidence summarizing it, was concealed or withheld from appellant. There is likewise no evidence that the video testimony was subject to a motion in limine, suppression, or motion to compel the original video. While that in no way obviates the government's affirmative disclosure obligations, the defense's apparent decision not to pursue appropriate remedies does lead us to conclude that the discovery violations were waived.

Whether appellant affirmatively waived the opportunity to object to potential discovery violations is a question of law that we review de novo. *See generally United States v. Davis, 79 M.J. 329, 331 (C.A.A.F 2020)*. "[W]aiver is the intentional relinquishment or abandonment of a known right." *Id.* "[W]e cannot review waived issues at all because a valid waiver **[*19]** leaves no error for us to correct on appeal." *Id.* (internal citations omitted).

Appellant had multiple pretrial opportunities to litigate potential discovery lapses. We recognize R.C.M. 703A was a newly enacted rule, effective 2019. However, it did little more than codify best practices in seeking digital evidence from third parties (long contemplated in R.C.M. 701). Once trial began, trial defense counsel passed on multiple opportunities to object to the loss of the Snapchat video, or testimony regarding its substance. Instead, defense counsel raised the issue of the video in his/her own opening statement and did not object to the government's questioning of [TEXT REDACTED BY THE COURT] about its existence. [TEXT REDACTED BY THE COURT] did not personally see the video, but—without objection from the defense—she testified she was made aware of its substance and corroborated the video by stating she saw the camera flash and heard DB's original out of court statement "are you raping her?" On cross-examination, the defense asked about [TEXT REDACTED BY THE COURT]s knowledge of the video, establishing that she was made aware of a possible video when she woke up the morning after the assault, laying groundwork **[*20]** for a possible motive to fabricate. A trial defense counsel's decisions regarding evidence and witness testimony is a tactical and strategic matter, which we are reluctant to question on appeal. *See*, e.g., *United States v. Akbar, 74 M.J. 364, 379 (C.A.A.F 2014)*.

2. Best Evidence

We first note that the video was made simultaneously with the assault and that [TEXT REDACTED BY THE COURT] reported the incident to her mother and civilian law enforcement, Officer JA, within 24 hours. The parties do not dispute that Officer JA was made well aware of the existence of the video, originally recorded on DP's cell phone. He tried to contact possible witnesses who may have received the Snapchat video and accepted as true that it was no longer in their possession. Officer JA did execute a search warrant for DP's phone but the video was ultimately not recovered. Finally, and most importantly, Officer JA contacted Snapchat via telephone and asked if it would be possible to recover the video. Officer JA testified he was "unable" to obtain the video from Snapchat. Once the investigation was transferred to military jurisdiction, no party attempted to secure or subpoena the digital evidence from any party or from Snapchat.

After both parties discussed the video **[*21]** in their opening statements, the victim was questioned and cross-examined regarding her knowledge of the video. The government then elicited testimony from HF, to describe the Snapchat video. Appellant objected to HF's testimony about the video, citing the best evidence rule and authentication (presumably Mil. R. Evid. 1002 and R.C.M. 901, respectively). The military judge did not determine whether the video was in fact available through normal avenues, such as subpoena powers. Instead, he allowed the prosecution to lay a foundation for a "video [that] doesn't exist anymore." HF thus testified as a lay witness describing the Snapchat operations. The parties accepted as true that the original video was deleted from DP's phone due to operation of the Snapchat ***app***, and the loss was not attributable to the video's proponent, i.e., the prosecution. Appellant did not renew his objections after HF laid the foundation, and the military judge allowed HF's testimony as evidence of a present sense impression. Mil. R. Evid. 803(1).

While the government was certainly negligent in not pursuing a subpoena or compulsory judicial process, there was a substantial lapse in time between the date of the incident and transfer of jurisdiction to the military, **[*22]** making it apparent that all parties believed the video itself was unrecoverable. Despite this apparent belief regarding the video's availability, Mil. R. Evid. 1002 states "[a]n original . . . recording . . . is required in order to prove its content" unless an exception applies. In this case, Mil. R. Evid. 1004 could have provided the requisite exception. The two applicable options required the government to either show the original was "lost or destroyed" or the original could not be "obtained by any available judicial process." Mil. R. Evid. 1004(a)-(b). We determine neither exception applied, and therefore it was an abuse of discretion to allow testimony regarding the contents of the video.

The first exception requires the government to show "[a]ll the originals are lost or destroyed, and not by the proponent acting in bad faith." Mil. R. Evid. 1004(a). In this case, the facts support the conclusion that the original video contained on DP's phone was deleted because of the nature of the Snapchat application. However, this does not mean all "originals" were lost or destroyed, as the government never made a valid attempt to obtain the video directly from Snapchat. The closest testimony came from Officer JA, who testified he "also attempted to contact Snapchat to **[*23]** see if [he] could pull it from their records which [he] was unable to do." However, the reason Officer JA could not retrieve the video from Snapchat is unknown. It could be because all originals were destroyed, which would satisfy Mil. R. Evid. 1004(a). It could be because Officer JA needed a subpoena to obtain the video, in which case the government would not have satisfied the rule.

As we do not know whether all originals were lost or destroyed, we turn to Mil. R. Evid. 1004(b), which allows other evidence of the content of a

recording when an original cannot be obtained by any available judicial process. We easily dismiss this exception, as the government never attempted to obtain the video via subpoena or other judicial process.

Accordingly, as the evidence does not support finding either exception applicable to this case, we find it was an abuse of discretion to allow HF to testify as to the contents of the video. However, as outlined below, we find no prejudice, primarily because testimony about the contents of the video was cumulative to [TEXT REDACTED BY THE COURT]s testimony about the assault and DP's eye witness testimony.

3. Prejudice

We hold appellant did not suffer material prejudice to a substantial right because **[*24]** of HF's testimony. "[T]he government bears the burden of demonstrating that the admission of erroneous evidence was harmless." *Finch, 79 M.J. at 398*. "'For preserved nonconstitutional evidentiary errors, the test for prejudice is 'whether the error had a substantial influence on the findings.'" *Id.* (quoting *Frost, 79 M.J. at 111*). When reviewing prejudice, this court balances: "(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." *Frost, 79 M.J. at 111* (quoting *United States v. Kohlbek, 78 M.J. 326, 334 (C.A.A.F. 2019)*).

As the military judge noted HF's testimony was "powerful" evidence. The substance of the video was relevant in light of [TEXT REDACTED BY THE COURT]s testimony and appellant's attempts to characterize the video as evidence of [TEXT REDACTED BY THE COURT]s motive to fabricate an assault. However, even without testimony as to the contents of the video the government's case was strong. Both [TEXT REDACTED BY THE COURT] and DP provided direct testimony about appellant's actions and statements while in the back of the vehicle with [TEXT REDACTED BY THE COURT] On balance, the defense case was not nearly as strong. The defense asserted that [TEXT REDACTED BY THE COURT] **[*25]** consented to the sexual acts with appellant and she fabricated the allegations upon learning of the video in order to protect her relationship with her boyfriend. However, [TEXT REDACTED BY THE COURT] reported the assault to her boyfriend before even knowing the exact contents of the video thereby diluting the defense's assertion of a motive to fabricate. The video was not material evidence to the government's case given the victim testified about her recollection of the assault, the DNA evidence, and DP's eye witness testimony. Accordingly, we find no prejudice in the admission of HF's testimony regarding the snapchat video.

CONCLUSION

After careful consideration of the record, and the briefs and arguments of appellate counsel, we have determined that the approved findings and sentence are correct in law and fact and that no error materially prejudicial to appellant's substantial rights occurred. Arts. 59 and 66, UCMJ. The findings and sentence are thus AFFIRMED.

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United States v. Olson

United States Army Court of Criminal Appeals

April 1, 2021, Decided

ARMY 20190267

Reporter
2021 CCA LEXIS 160 *; 2021 WL 1235923

UNITED STATES, Appellee v. Specialist ALEC J. OLSON, United States ***Army***, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by *United States v. Olson, **2021** CAAF LEXIS 536, **2021** WL 2323771 (C.A.A.F., May 27, **2021**)*

Motion granted by *United States v. Olson, **2021** CAAF LEXIS 495 (C.A.A.F., June **1**, **2021**)*

Review denied by *United States v. Olson, **2021** CAAF LEXIS 749 (C.A.A.F., Aug. 12, **2021**)*

Prior History: [*1] Headquarters, I Corps. Jennifer B. Green and James P. Arguelles, Military Judges, Colonel Oren H. McKnelly, Staff Judge Advocate.

Counsel: For Appellant: Captain Thomas J. Travers, JA; William E. Cassara, Esquire (on brief and reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Craig J. Schapira, JA; Captain Christopher K. Wills, JA (on brief).

Judges: Before KRIMBILL,***1***[1] BROOKHART, and WALKER, Appellate Military Judges. Chief Judge (IMA) KRIMBILL and Senior Judge BROOKHART concur.

Opinion by: WALKER

[1] Chief Judge (IMA) Krimbill decided this case while on active duty.

Opinion

MEMORANDUM OPINION

WALKER, Judge:

While we hold that the military judge erroneously admitted evidence of the victim's virginity, evidence of a sexually transmitted disease that both the victim and appellant were diagnosed with subsequent to the victim's sexual assault, and evidence implicating the results of appellant's polygraph examination, we find that each piece of evidence, taken individually, did not substantially influence the findings. We also hold that the cumulative impact of the erroneously admitted evidence did not deny appellant a fair trial, and affirm.[2]

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications **[*2]** of rape, one specification of assault consummated by battery, and one specification of making a false official statement, in violation of *Articles 120*, *128*, and *107*, Uniform Code of Military Justice, *10 U.S.C. §§ 920*, *928*,

[2] Appellant also raised the following additional assignments of error: (***1***) the military judge erred in admitting prior consistent statements made by the victim; (2) the military judge erred in admitting testimony as to the victim's character for truthfulness; (3) the military judge erred in allowing a government expert to testify about matters outside the scope of her expertise during redirect examination; and (4) ineffective assistance of counsel. We find these assignments of error lack merit and do not warrant discussion. We have also given full and fair review of the matter appellant personally submitted pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, and find it is worthy of neither discussion nor relief.

and *907 (2016)* [UCMJ].[3] The military judge sentenced appellant to a dishonorable discharge, confinement for eight years, total forfeiture of pay and allowances, and reduction to the grade of E-***1***.

The case is before the court for review pursuant to *Article 66, UCMJ*.

I. BACKGROUND

A. Events Leading to the Charges

On the evening of 13 January 2018, Specialist (SPC) [TEXT REDACTED BY THE COURT], her good friend Private First Class (PFC) [TEXT REDACTED BY THE COURT], and SPC [TEXT REDACTED BY THE COURT] spent the evening frequenting a hookah lounge and then returned to SPC [TEXT REDACTED BY THE COURT] barracks room to watch movies. Both SPC [TEXT REDACTED BY THE COURT] and PFC [TEXT REDACTED BY THE COURT] consumed alcohol while at the hookah lounge. Private First Class [TEXT REDACTED BY THE COURT] left the barracks room around midnight while SPC [TEXT REDACTED BY THE COURT] remained for a while longer. At approximately 0100, SPC [TEXT REDACTED BY THE COURT] walked SPC [TEXT REDACTED BY THE COURT] **[*3]** down to the parking lot to catch a ride back to her own barracks.

While walking back to her barracks room, a boisterous group of people who "looked like they had been drinking" caught SPC [TEXT REDACTED BY THE COURT] attention. In particular, SPC [TEXT REDACTED BY THE COURT] noticed a tall white male—later determined to be appellant—wearing a "red and frayed" hat who had broken off from the group and was "swaying a lot." Specialist [TEXT REDACTED BY THE COURT] witnessed this individual, whom she had never met, "lurch forward." Fearing that this person would fall over if left unassisted, SPC [TEXT REDACTED BY THE COURT] decided to assist the male back to his barracks room. Specialist [TEXT REDACTED BY THE COURT] testified that the male told her the location of his barracks room but did not recall whether any other conversation occurred during the walk to the barracks room. Upon reaching the barracks room, SPC [TEXT REDACTED BY THE COURT] obtained the person's barracks card key and assisted him all the way into the room "to make sure he actually got to his room." Once inside the room, SPC [TEXT REDACTED BY THE COURT] noticed "Christmas lights hanging over the sink" in the common area **[*4]** of the room and an "X-box, and a black and gold flag" in the bedroom area.

Upon laying the male onto the bed, the next thing SPC [TEXT REDACTED BY THE COURT] recalled was her "hair getting pulled" so hard it was painful. She fell onto the bed on her back. Specialist [TEXT REDACTED BY THE COURT] described a hand "traveling up her chest" and the male getting on top of her. She testified that this person's body felt "heavy" on top of her and she believed that he pulled down her "joggers," at which point she experienced pain in her genital area. Specialist [TEXT REDACTED BY THE COURT] testified that she was still being pulled by her hair while being vaginally penetrated. She verbally resisted by telling the person "no" and attempted to push the male off of her but was unsuccessful in doing so. She did not recall how the assault ended.

Specialist [TEXT REDACTED BY THE COURT] next memory was being outside sitting on a bench upset and crying. Having received a text message from SPC [TEXT REDACTED BY THE COURT] which stated "help," SPC [TEXT REDACTED BY

[3] The military judge initially found appellant guilty of one specification of sexual assault (Specification 3 of Charge I), in violation of *Article 120*, UCMJ. After announcement of findings, the military judge dismissed this specification on the basis that it was a lesser-included offense of the rape specification for which she had found appellant guilty.

THE COURT] and SPC [TEXT REDACTED BY THE COURT] went searching for her. Upon locating SPC [TEXT REDACTED BY THE COURT] on a bench near her own **[*5]** barracks building, SPC [TEXT REDACTED BY THE COURT] assisted SPC [TEXT REDACTED BY THE COURT] back to her barracks room. Specialist [TEXT REDACTED BY THE COURT] did not immediately report the sexual assault to law enforcement because she "believed that [she] could just move on."

B. Reporting the Assault and the Law Enforcement Investigation

A few weeks after the sexual assault, SPC [TEXT REDACTED BY THE COURT] sought medical treatment for painful sores that started on her mouth and subsequently appeared on her genitals. She was diagnosed with having the herpes simplex virus (HSV). Specialist [TEXT REDACTED BY THE COURT] "panicked" after learning of her diagnosis and contacted her father. When she informed her father that she had contracted HSV as a result of being "raped," he told SPC [TEXT REDACTED BY THE COURT] that either she was going to report the rape or he was going to do so. She then reported the rape to her chain of command who informed law enforcement.

Specialist [TEXT REDACTED BY THE COURT] was never able to identify her assailant. She was unable to identify him in a photo line-up and did not know his name. During the investigation, appellant was identified as a potential suspect **[*6]** based upon SPC [TEXT REDACTED BY THE COURT] description of the general location of the barracks room where the assault occurred. In July 2018, law enforcement questioned appellant about the night of the sexual assault. Appellant stated he could not recall what he had been doing that night but he "may have been camping or hanging with friends." Appellant denied he knew SPC [TEXT REDACTED BY THE COURT] and denied having any sexual encounters in January. Appellant consented to a search of his barracks room in which law enforcement located an X-box, a black and gold flag, and Christmas lights in his roommate's bedroom.[4] Law enforcement also obtained key card entry logs from appellant's barracks building. The key entry log confirmed that on the morning of 14 January 2018, appellant's key card unlocked the front courtyard room door at approximately 0131 and opened his barracks room door at 0134. The investigation also revealed that appellant called SPC [TEXT REDACTED BY THE COURT] on her cell phone between 0200 and 0230 on the morning of the sexual assault. Oddly, SPC [TEXT REDACTED BY THE COURT] testified that she did not believe that she had exchanged phone numbers with the male she assisted **[*7]** the night of the assault and that she could not recall whether they exchanged personal information such as names, ranks, or units of assignment.

C. Appellant's Polygraph Examination and Admissions

In August 2018, approximately one month after appellant's initial law enforcement interview, appellant was questioned again by ***Army*** Criminal Investigation Command (CID) Special Agent (SA) [TEXT REDACTED BY THE COURT] During this interview, appellant waived his *Article 31(b), UCMJ*, rights and agreed to submit to a polygraph examination. Upon completion of the polygraph, SA [TEXT REDACTED BY THE COURT] told appellant that he "didn't do so hot on the test." After being informed of the results of polygraph, appellant made several incriminating verbal statements and provided a written sworn statement.

During appellant's post-polygraph interview, which was video recorded, his explanation of what

[4] Specialist [TEXT REDACTED BY THE COURT] described Christmas lights in the kitchen of the barracks room in which she was sexually assaulted. When asked about the location of the Christmas lights, appellant told law enforcement that the lights had been moved from the kitchen to his roommate's bedroom "a few weeks after Christmas."

occurred when he sexually assaulted SPC [TEXT REDACTED BY THE COURT] was largely consistent with her description of events and he was able to provide additional details. Appellant admitted he met SPC [TEXT REDACTED BY THE COURT] at the "smoke pit" outside his barracks the night of the assault and the two of **[*8]** them chatted briefly, even discussing SPC [TEXT REDACTED BY THE COURT] tattoo on her arm. At some point, appellant explained, the two of them ended up "making out." When appellant expressed his desire to go to his barrack's room, SPC [TEXT REDACTED BY THE COURT] offered to assist him to his room because he was severely intoxicated. He admitted that once inside his barracks room he kissed SPC [TEXT REDACTED BY THE COURT], pulled her onto the bed and undressed her. He explained that he digitally penetrated her and attempted vaginal penetration with his penis but had difficulty getting a full erection. Appellant described how he then flipped SPC [TEXT REDACTED BY THE COURT] over so she was face down on the bed, as he stood behind her, and was able to penetrate her slightly. Appellant explained that SPC [TEXT REDACTED BY THE COURT] slapped his hand and said "no, I don't want to," which he said took thirty seconds to "register," at which point he stopped. He *says* he recalled stopping that thinking "no this isn't right." Specialist [TEXT REDACTED BY THE COURT] left the room immediately thereafter. Appellant explained that he lied about not knowing SPC [TEXT REDACTED BY THE COURT] or having **[*9]** sexually assaulted her in his initial CID interview because he felt terrible about his actions and he was scared of the consequences.

II. LAW AND DISCUSSION

A. Unreasonable Multiplication of Charges

For the first time on appeal, appellant asserts that his conviction of both rape by penile penetration and rape by digital penetration is an unreasonable multiplication of charges (UMC), as well as his conviction for rape by unlawful force and assault consummated by a battery. Acknowledging that he waived his claim for UMC by not raising the issue prior to the entry of pleas, appellant requests that this court exercise its broad plenary authority under *Article 66, UCMJ*, and notice this assignment of error. *See United States v. Conley, 78 M.J. 747, 750-52 (**Army Ct. Crim. App.** 2019)*. We decline appellant's invitation to exercise our broad *Article 66, UCMJ*, authority and review his waived UMC claim.

Failure to raise objections based upon defects in the charges and specifications is waived if not raised prior to the entry of pleas. Rule for Courts-Martial (R.C.M.) 905(b)(2), (e) (2016); *see United States v. Hardy, 77 M.J. 438, 440 (C.A.A.F. 2018)*. In *Hardy*, our Superior Court held that the plain language of R.C.M. 905(b)(2) and (e) dictated that an appellant waived his claim of UMC because he failed to raise the issue before pleading guilty. *Id. at 440-42*. As appellant acknowledges, he failed to **[*10]** raise a UMC claim prior to entry of pleas and therefore, he waived this issue.

Irrespective of having waived any UMC objection, appellant argues that this court should exercise our unique authority under *Article 66, UCMJ*, because the referral of his court-martial charges on 17 October 2018 occurred between our Superior Court's decision in *Hardy* in June 2018, holding that failure to raise UMC prior to pleas resulted in waiver, and a change in the language of R.C.M. 905(e), effective a few months later on ***1*** January 2019, stating that failure to raise the objection prior to entry of pleas results in forfeiture of the issue unless affirmatively waived. *See* R.C.M. 905(e) (2019). Simply stated, appellant asserts that he should not be constrained by the standard of waiver that was in effect at the time his case was referred since that standard changed only a few months after referral of his case to a more favorable standard of forfeiture. We find appellant's argument unpersuasive and determine that his case is not one

in which we should exercise our unique authority.

While our broad plenary authority allows this court to review issues that were waived, we have held that exercising that unique power is more likely to **[*11]** occur only in those cases which "have disadvantaged the accused in a manner that the CCA determines needs correction," or a court-martial in which "the perception of unfairness in the trial may have the actual effect of *undermining* good order and discipline." *Conley, 78 M.J. at 752*. As the government correctly identifies, none of the unique military circumstances highlighted in *Conley* are present in appellant's case. *Id. at 751-52* (recognizing factors such as being tried in a remote location without the ease of access to familial support, misuse of broad command authority, and uniquely military offenses).

Having reviewed the entire record, we find the circumstances in this case do not call out for relief under our *Article 66, UCMJ*, authority. Appellant was tried in the United States, there was no evidence of impropriety, no evidence of government overreach or excess, and his offenses were not uniquely military offenses. Rather, appellant asks this court to exercise our plenary authority merely because the referral of his court-martial charges occurred just prior to a change in the language of R.C.M. 905. The language of R.C.M. 905(b)(2) and (e), and our Superior Court's interpretation of that language, was clear at the time of appellant's court-martial. **[*12]** Appellant could have easily raised the issue of UMC at trial but failed to do so. Finding none of the *Conley* factors applicable to appellant's case, we decline to exercise our unique authority to notice this issue.

B. Improper Admission of Evidence Regarding the Victim's Virginity

We next address appellant's claim that the military judge erred in admitting testimony of the victim's virginity at the time of the sexual assault, in order to improperly bolster the victim's credibility, in violation of Military Rule of Evidence (Mil. R. Evid.) 412. We find that the military judge abused her discretion in admitting evidence of the victim's virginity because the evidence was prohibited by Mil. R. Evid. 412 and any probative value the evidence contributed was substantially outweighed by its danger for unfair prejudice under Mil. R. Evid. 403.

A decision to admit evidence is reviewed for an abuse of discretion.[5] *United States v. McCollum, 58 M.J. 323, 335 (C.A.A.F. 2003)* (citations omitted). We review a military judge's findings of fact under a clearly erroneous standard and her conclusions of law de novo. *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)*).

Military Rule of Evidence 412(a) prohibits "evidence offered to prove that any alleged victim engaged in other sexual behavior," and "evidence offered to prove any alleged victim's sexual predisposition," **[*13]** unless the evidence falls within the strictly prescribed exceptions outlined in Mil. R. Evid. 412(b). As a rule of exclusion, the proponent bears the burden of demonstrating why the general prohibitions of Mil. R. Evid. 412(a) should be lifted. *United States v. Banker, 60 M.J. 216, 222 (C.A.A.F. 2004)* (citing *United States v. Moulton, 47 M.J. 227, 228 (C.A.A.F. 1997)*). Military Rule of Evidence 412(c)(3) also requires the military judge to conduct a Mil. R. Evid. 403 analysis. *See Ellerbrock, 70 M.J. at 320* (noting that a Mil. R. Evid. 403 balancing test is the "final step" in deciding whether evidence under Mil. R. Evid. 412 should be admitted); *United States v. Gaddis, 70 M.J. 248, 256 (C.A.A.F. 2011)* ("If after application of [Mil R. Evid. 403] factors the military judge determines that the probative value of the proffered evidence outweighs the danger of

[5] The military judge erroneously stated on the record that the defense had withdrawn its objection to evidence pertaining to the victim's virginity. However, the defense never withdrew its objection to this evidence. As such, we disagree with the government that appellant forfeited this issue and that the issue should instead be reviewed under a plain error standard.

unfair prejudice, it is admissible[.]").

During the government's case-in-chief, when asked how she felt emotionally after the sexual assault, SPC [TEXT REDACTED BY THE COURT] testified that she felt "disgusted" because she felt like she allowed it to happen since she was unable to push the perpetrator off of her or stop the assault. She also testified, over defense objection, she felt disgusted because "I did not want to lose my virginity like that." In response to the defense objection that the victim's testimony was inadmissible under Mil. R. Evid. 412, the government argued that the absence of sexual activity is not Mil. R. Evid. 412 evidence. When the military judge inquired as to whether the **[*14]** defense wanted to be heard further, the defense declined to provide any further argument. The military judge then overruled the defense objection "given that the defense has withdrawn it." Two other witnesses testified about the victim's prior consistent statements that she told them she was "no longer a virgin" and she had been raped. Additionally, in closing argument the government stated "it is unreasonable to believe she would have consented, given the evidence in this case. They are strangers, in fact, she's a virgin. You heard how she described it. 'I'm not a virgin anymore. This isn't how I wanted to lose my virginity.'" The government further argued that the victim "never had symptoms of herpes before 18 January 2018" and that she "developed those symptoms after her first and only sexual encounter."

The military judge abused her discretion in allowing the admission of evidence of the victim's virginity in contravention of Mil. R. Evid. 412(a), which prohibits evidence regarding a victim's sexual predisposition. Military Rule of Evidence 412 is designed to protect a victim from humiliating and embarrassing questions and to "preclude introduction of evidence as to the victim's reputation for chastity or evidence of specific **[*15]** sexual acts" unless required by the limited prescribed exceptions. *United States v. Sanchez, 44 M.J. 174, 178 (C.A.A.F. 1996)*. We do not agree with the government's argument that the victim's virginity is not evidence of sexual predisposition. The choice *not* to engage in sexual intercourse is as much a sexual predisposition as someone who has particular sexual proclivities. *See United States v. Bird, 372 F.3d 989, 995 (8th Cir. 2004)* ("[T]estimony of the prosecuting witness's virginity is inadmissible under *Federal Rule of Evidence 412*."). Moreover, by its plain text, Mil. R. Evid. 412 applies equally to the government as it does to an accused. Consequently, if an accused is prohibited from presenting evidence of a victim's lack of chastity to prove consent, it stands to reason that the government should not be able to assert the victim's chastity, in and of itself, as a means to prove lack of consent. *See Bird, 372 F.3d at 995* (citation omitted) ("If the defendant in such a case is prohibited from playing on the potential prejudices of a jury by introducing evidence of the alleged victim's promiscuity, the government should also be forbidden to play on potential prejudices by introducing evidence of the alleged victim's chastity.").

We respectfully disagree with the cases of our sister service courts in which they concluded that the victim's virginity was not **[*16]** evidence of sexual predisposition under Mil. R. Evid. 412 and thereby admissible. *See United States v. Price, 2014 CCA LEXIS 256, *6* (A.F. ***Ct***. ***Crim***. ***App***. 22 ***Apr.*** 2014) (per curiam), pet. denied, *73 M.J. 483 (C.A.A.F. 2014)* (holding that the military judge did not abuse his discretion in allowing the minor victim to answer a panel member question, without any Mil. R. Evid. 412 objection by the defense, as to whether the sexual assault was her first sexual experience because "the absence of sexual behavior did not qualify "as a matter of sexual behavior subject to the requirements of Mil. R. Evid. 412" and because the issue of the victim's virginity was relevant to her description of the sexual assault); *United States v. White, 62 M.J. 639 (N.M. **Ct. Crim. App**. 2006)*, pet. denied, *64 M.J. 225 (C.A.A.F. 2006)* (holding that the military judge did not abuse his discretion in admitting evidence that appellant had taken the victim's virginity as aggravation

evidence during presentencing because it was not used to prove the victim had a sexual predisposition and the military judge allowed the defense wide latitude in cross-examining the victim on the issue of her virginity thereby eliminating any prejudice to appellant's substantial rights).[6]

Even if the victim's virginity is not evidence of sexual predisposition prohibited by Mil. R. Evid. 412, it was not relevant evidence under Mil. R. Evid. 401 and 402. The victim's **[*17]** virginity did not make any fact of consequence in this case more or less probable.[7] *See* *Bird, 372 F.3d at 995* ("We note first that evidence of the prosecuting witness's virginity was irrelevant to the case."). We are not persuaded by the government's argument that the victim's virginity was relevant to the issue of the identity of her perpetrator. There is no dispute the victim was unable to identify her perpetrator. Thus, we recognize that the government had the burden to prove not only that SPCIE was sexually assaulted but also by whom. The government asserts that the victim's virginity was relevant to identity because she was diagnosed with HSV a few weeks after the assault and her lack of prior sexual intercourse was relevant in proving that she contracted herpes from her perpetrator since it was her only sexual intercourse experience. We disagree. Even if the victim's contraction of HSV was relevant to the issue of identity, which we address later in this opinion, it could be linked to the victim's perpetrator by merely having the victim testify she had neither experienced any symptoms nor been diagnosed with the condition prior to the sexual assault. The fact that she was actually a virgin at the **[*18]** time she was assaulted is not relevant to her having contracted a sexually transmitted disease that could have been transmitted by sexual contact not involving actual intercourse, as testified to by medical professionals during the trial.[8]

Even assuming evidence of the victim's virginity was not barred by Mil. R. Evid. 412 and had some logical relevance under Mil. R. Evid. 401, it still should have been excluded on the basis of legal relevance under Mil. R. Evid. 403 because whatever probative value it had was substantially outweighed by the danger of unfair prejudice. Here, the military judge did not conduct the required Mil. R. Evid. 403 analysis prior to admitting this evidence because she erroneously concluded that the defense withdrew its objection. Therefore, we are unable to afford the deference we would normally afford to a military judge who articulates on the record a proper Mil. R. Evid. 403 balancing. *See* *United States v. Flesher, 73 M.J. 303, 312 (C.A.A.F. 2014)*; *United States v. Benton, 54 M.J. 717, 725 (**Army Ct. Crim. App.** 2001)*. Evidence of the victim's virginity was unduly prejudicial based on how it was elicited and how it was leveraged by trial counsel. The government elicited evidence of the victim's virginity by inquiring about her emotional state after the assault, which did not relate to any fact of consequence on the merits of the case. The government then took that **[*19]** irrelevant evidence and used it as a means of bolstering the victim's credibility as to her testimony that she did not consent. Trial counsel did so by arguing that it was unreasonable that she would have consented since she was a virgin and that she must have contracted herpes from appellant because the sexual assault was her "first and only sexual encounter." The victim's status as a virgin is no more relevant to consent than the sexual

[6] While we disagree with the general holding in *United States v. White* that the victim's virginity was not evidence of sexual predisposition, we leave for another day the issue of whether evidence of a victim's virginity may be relevant aggravation evidence under R.C.M. 1001(b)(4) despite it being evidence of sexual predisposition under Mil. R. Evid. 412.

[7] Although not argued by the parties, testimony that the victim lost her virginity as a result of appellant's assault might have been evidence of the element of penetration; however, in this case the victim testified as to penetration and appellant admitted as much in his sworn statement. Accordingly, the evidence would have been cumulative for that purpose if it were otherwise admissible.

[8] The victim testified that she experienced lesions on her genitals a few weeks after the sexual assault and was diagnosed with HSV. Both the doctor who diagnosed the victim with HSV and the doctor who diagnosed appellant with oral herpes virus testified that oral herpes can be spread to the genitals through oral sex.

orientation with which a person identifies is relevant to consent. *United States v. Grant, 49 M.J. 295, 297 (C.A.A.F. 1998)* (holding that the victim's sexual orientation as a homosexual was inadmissible because it was irrelevant as to the issue of consent).

Given the importance of the victim's credibility to the case and the government's leveraging of her virginity to bolster the victim's credibility, we find that the probative value of this evidence was substantially outweighed by its prejudicial effect. However, given the totality of evidence adduced at trial, the overall prejudice of this evidence was minimal. Even though the victim could not identify the perpetrator and there was no physical evidence linking appellant to the victim's sexual assault, she was able to identify the general location of the **[*20]** room and general time the assault occurred, which was consistent with the key card logs for appellant's barracks room. While the defense attacked the victim's credibility, given that she could not recall many details of her encounter with her perpetrator or the assault itself, a government expert testified about the impact of trauma on memory. The primary evidence of appellant's guilt was the incriminating statements he made in his lengthy video-recorded interview and written statement to law enforcement. The defense strategy of attacking the voluntariness of appellant's admissions to law enforcement was unpersuasive, given the details he provided about the assault and his demeanor during the interview. Finally, appellant was tried by a military judge who is presumed to give evidence the proper consideration and weight. *See United States v. Key, 55 M.J. 537, 539 (A.F. **Ct. Crim. App.** 2001)* (citations omitted) ("In the absence of evidence to the contrary, we conclude that the military judge gave appropriate weight to the evidence."). Considering evidence of the victim's virginity in the context of the entire trial, we find that the evidence did not substantially influence the findings.

C. Admission of Evidence of Sexually Transmitted Disease

Appellant **[*21]** asserts that the military judge erred in admitting: (***1***) testimony from the victim that she was diagnosed with the HSV a few weeks after she was sexually assaulted; and (2) evidence that appellant was diagnosed with herpes simplex virus-***1*** (HSV-***1***) in October 2018, several months after the sexual assault. Specifically, appellant argues that because medical providers never identified the specific type of herpes virus with which the victim was diagnosed, her diagnosis could not be linked to appellant and therefore any testimony about the victim and appellant's diagnosis was neither logically nor legally relevant.[9] We agree that the military judge erroneously admitted evidence of both the victim and appellant's diagnosis of the herpes simplex virus.

We review a military judge's decision to admit evidence for abuse of discretion. *United States v. Frost, 79 M.J. 104, 109 (C.A.A.F. 2019)*. "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Kelly, 72 M.J. 237, 242 (C.A.A.F. 2013)* (quoting *United States v. Miller, 66 M.J. 306, 307 (C.A.A.F. 2008))*. Findings of fact are "clearly erroneous" when the reviewing **[*22]** court "is left with the definite and firm conviction that a mistake has been committed." *United States v. Martin, 56 M.J. 97, 106 (C.A.A.F. 2001)*.

The admissibility of evidence is dependent upon the evidence being both logically relevant (Mil. R. Evid 401 and 402) and legally relevant (Mil. R.

[9] Appellant also asserts that the victim's testimony concerning her own medical diagnosis was plain error because such testimony was improper hearsay evidence. Because we find this evidence was neither logically nor legally relevant evidence under Mil. R. Evid. 401, 402 and 403, we need not address whether the victim's testimony was improper hearsay evidence.

Evid. 403). *United States v. Bailey, 55 M.J. 38, 40 (C.A.A.F. 2001)* (citations omitted). Relevant evidence is that which has "any tendency" to make a fact that is "of consequence in determining the action" more or less probable than it would be without the evidence. Mil. R. Evid. 401(a)—(b). We recognize that the standard of whether evidence is relevant is a low threshold. *United States v. White, 69 M.J. 236, 239 (C.A.A.F. 2010)* (citing *United States v. Reece, 25 M.J. 93, 95 (C.M.A. 1987)*). Even if relevant, the military judge may exclude evidence if its probative value is substantially outweighed by the danger of "unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." Mil. R. Evid. 403. The term "unfair prejudice" in the context of Mil. R. Evid. 403 "speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *United States v. Collier, 67 M.J. 347, 354 (C.A.A.F. 2009)* (quoting *Old Chief v. United States, 519 U.S. 172, 180, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997)*). Military Rule of Evidence 403 addresses "prejudice to the integrity of the trial process, not prejudice to a particular party or witness." *Id.*

During the victim's direct examination, the government attempted to elicit testimony **[*23]** that she was diagnosed with HSV a few weeks after being sexually assaulted. The defense objected to any evidence of the victim's sexually transmitted infection (STI) as irrelevant under Mil. R. Evid. 401 and 403. The defense argued that evidence of the victim's STI could not be linked to appellant since there were two types of the HSV and medical professionals never identified from which type of herpes the victim suffered, nor could the government present evidence of how and when the victim contracted HSV. As such, the defense asserted any such evidence of the victim's STI was irrelevant, misleading, and unduly prejudicial. The government argued that evidence of the victim's diagnosis of HSV, coupled with evidence that appellant had been diagnosed with HSV months after the sexual assault, was relevant to the government's burden to prove penetration. The government conceded that it could not specifically link the victim's HSV to appellant, other than she was diagnosed with it after the sexual assault, but that this deficiency went to the weight to be given the evidence and not its admissibility.

Over defense objection, the military judge ruled that this evidence was circumstantial evidence relevant as to **[*24]** identity of the person who sexually assaulted the victim, since she could not identify the person, and relevant to the government's burden to prove penetration. The military judge further ruled that the probative value of this evidence was not substantially outweighed by any unfair prejudice, undue delay, or confusing the issues in the case.

Later on during the government's presentation of evidence, a medical provider testified that appellant had come to her clinic, in October 2018, requesting to be tested for the HSV because he had been accused of infecting someone back in January. The medical provider testified that appellant did not report experiencing any symptoms of HSV but was ultimately diagnosed with having HSV-***1***. On cross-examination the medical provider testified that there are two types of the HSV, and that HSV-***1*** is the oral type of the HSV, but that HSV-***1*** can spread to the genitals if there is oral contact with the genitals.[10]

Evidence of the victim's diagnosis with HSV and

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[10] The defense called the emergency room doctor who diagnosed the victim with HSV during its case-in-chief. The doctor testified that the victim was diagnosed with herpes based solely on an external visual genital exam and no tests were administered to determine from which strain of HSV she suffered. He also testified that HSV-***1*** can be passed to the genitals through oral-to-genital contact, once HSV-***1*** has spread to the genitals it can be spread from genital-to-genital contact, and an individual can only spread HSV when "shedding" the virus. We will not consider this testimony in determining the relevancy of such evidence, as the defense likely made the strategic decision to call this witness after the military judge denied the defense objection regarding the admission of any testimony concerning the victim and appellant's diagnoses with HSV during the government's case-in-chief.

appellant's diagnosis with HSV-***1*** was neither logically nor legally relevant under the facts of this case. We do not find that such evidence was relevant to the issue of identity or penetration. After experiencing **[*25]** oral lesions and subsequently genitals lesions, the victim received a general diagnosis of HSV in February 2018, a few weeks after being sexually assaulted. An asymptomatic appellant was diagnosed with oral HSV-***1*** several months later in October 2018. Medical professionals testified that a person can spread oral HSV-***1*** to another individual's genitals if they engage in oral sex and a person is only contagious if they are "shedding" the virus. No testimony was offered as to when an asymptomatic person may be actively shedding the virus such that he or she could spread the virus.

Given this evidence, we do not find any testimony pertaining to HSV logically relevant. First, as a foundational issue for this evidence, there was no testimony as to the general time period between exposure and exhibiting of symptoms of the HSV that would link the victim's diagnosis directly with her perpetrator in order to make this evidence relevant to the issue of identity. Most significantly, there was no evidence of the type of HSV with which the victim suffered in order to link her to appellant. Further, the only evidence of appellant engaging in oral sex with the victim during the alleged assault such that **[*26]** he could have spread HSV-***1*** from his mouth to her genitals was an off-handed comment appellant made during his hours-long post-polygraph interview that he engaged in oral sex with the victim, which she never reported. Lastly, appellant was asymptomatic and there was insufficient evidence as to when an asymptomatic individual is "shedding" such that he or she could spread the virus to another individual. Given the nature of the evidence on this issue, we do not find it was logically relevant to the issue of identity or penetration.

We also find the evidence of the victim and appellant being diagnosed with HSV is not legally relevant under Mil. R. Evid. 403, as it was misleading and unduly prejudicial. "In reviewing challenges to evidence based on [Mil. R. Evid.] 403, [this court] must give 'the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.'" *United States v. Finch, 78 M.J. 781, 792 (**Army Ct. Crim. App**. 2019)* (quoting *United States v. Cox, 871 F.3d 479, 486 (6th Cir. 2017)*). Even giving evidence of HSV its maximum probative force, which was minimal given the evidence provided at trial, this evidence was substantially outweighed by its prejudicial effect. However, we do not find this evidence was so prejudicial that it had a substantial influence on the findings.

Irrespective of the fact that the **[*27]** government argued that the HSV supported evidence of both penetration and identity, the strongest evidence of each of those issues was appellant's admissions to law enforcement. While appellant's admissions required corroboration, the government more than met that requirement irrespective of the erroneously admitted HSV evidence. *See United States v. Jones, 78 M.J. 37, 42 (C.A.A.F. 2018)* (citing Mil. R. Evid. 304(c)(4)). The government satisfied its burden of corroborating appellant's statement as to identity through both the victim's testimony about items she recalled from appellant's barracks room, as well as through her recollection of assisting appellant to his room and opening the door with his card key. Further, appellant's identity was corroborated by the victim's testimony that the sexual assault occurred by appellant pulling her by her hair, that the assault occurred on appellant's bed, and that she hit his hand at some point to get him to stop, all of which were details appellant included in his statement to law enforcement. While appellant was unable to independently recall the victim's name, he was able to accurately describe a tattoo on the arm of the female who assisted him to his barrack's room, which went to issue of identity. Moreover, appellant's **[*28]** admissions as to penetration were also corroborated by the victim's testimony that appellant penetrated her vulva. Finally, the military judge specifically stated that the HSV evidence was only circumstantial evidence in support of identity

and penetration and was "not equivalent to DNA or fingerprint evidence," indicating she would give the evidence the appropriate weight it was due. While we find that the probative value of the HSV evidence was substantially outweighed by its prejudicial effect, the overall prejudice of the HSV evidence, in the context of the entire case, was limited and did not influence the findings.

D. Admission of Appellant's Polygraph Results

Appellant asserts that the military judge abused her discretion in allowing the government to elicit testimony from SA [TEXT REDACTED BY THE COURT] pertaining to the results of appellant's polygraph examination based on our Superior Court's decision in *United States v. Kohlbek, 78 M.J. 326 (C.A.A.F. 2019)*.[11] We agree that the military erred in admitting testimony implicating the results of appellant's polygraph examination.

We review a military judge's decision to exclude evidence for an abuse of discretion. *Kohlbek, 78 M.J. at 333* (citing *United States v. Jasper, 72 M.J. 276, 279 (C.A.A.F. 2013))*. "A military judge abuses his discretion if his findings **[*29]** of fact are clearly erroneous or his conclusions of law are incorrect." *Id.* (quoting *United States v. Olson, 74 M.J. 132, 134 (C.A.A.F. 2015))*.

Military Rule of Evidence 707(a) provides, "[n]otwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence." Holding that the concerns about the scientific unreliability of a polygraph examination was the clear target of the rule, *Kohlbek* addressed only the third category of evidence concerning "any reference to an offer to take, failure to take, or taking of a polygraph examination." *Id. at 331-32*. In *Kohlbek*, our Superior Court determined that despite the expansive proscriptive language, the third portion of the rule does not categorically prohibit the admission of evidence regarding "the facts and circumstances surrounding a polygraph examination to explain the reason or motivation for a confession." *Id. at 332*. *Kohlbek* does not mandate the admission of this third category of polygraph evidence, but rather leaves it to military judges to "exercise their discretion in deciding whether to admit evidence regarding the facts and circumstances surrounding a polygraph **[*30]** examination to explain the reason or motivation for a confession." *Id.*

Prior to trial, the government filed a written motion in limine requesting the admission of appellant's polygraph examination results, under certain circumstances. The government did not seek to admit the polygraph results during its case-in-chief, but rather, in response to the defense challenging the voluntariness of appellant's post-polygraph admissions. Specifically, in the event the defense argued that the length of appellant's interview unduly influenced his incriminating statements, the government asserted that information concerning the administering of a polygraph examination was relevant to explain the length of the interview. Further, if the defense challenged SA [TEXT REDACTED BY THE COURT] lack of neutrality during appellant's interview, the government argued for the admissibility of the polygraph results indicating deception as an explanation for SA [TEXT REDACTED BY THE COURT] disbelief of appellant's denials that he sexually assaulted SPC [TEXT REDACTED BY THE COURT] The government acknowledged that the polygraph results could not be used by the fact-finder to assess appellant's credibility but could **[*31]** be used in assessing the voluntariness of appellant's confession.

The defense objected to the admission of any evidence that appellant underwent a polygraph examination and the admission of any evidence of

[11] All of the litigation in this case concerning the admission of polygraph evidence occurred after 25 February 2019, the date *Kohlbek* was decided.

the results of the polygraph examination.

In a written pretrial ruling, the military judge concluded that the government could elicit testimony concerning the time it took SA [TEXT REDACTED BY THE COURT] to conduct the polygraph examination if the defense challenged the length of appellant's interview.[12] Having conducted the requisite Mil. R. Evid. 403 balancing test, the military judge also ruled that the government could only elicit testimony that SA [TEXT REDACTED BY THE COURT] informed appellant that the polygraph indicated he was being deceptive in the event: (***1***) the defense asserted that SA [TEXT REDACTED BY THE COURT] was predisposed to believe appellant's guilt prior to the interview; or (2) if the defense asserted that SA [TEXT REDACTED BY THE COURT] has no basis to disbelieve appellant during the post-polygraph interview. The military judge further ruled that a defense challenge to the interview methods of SA [TEXT REDACTED BY THE COURT], questions about SA [TEXT REDACTED BY THE COURT] refusal **[*32]** to accept appellant's exculpatory answers, and questions about SA [TEXT REDACTED BY THE COURT] playing into appellant's sense of duty were not grounds for admitting the polygraph results. Finally, the ruling dictated that the specific polygraph results were not admissible, but rather only testimony that SA [TEXT REDACTED BY THE COURT] informed appellant that the polygraph examination indicated he was being deceptive.

At trial, SA [TEXT REDACTED BY THE COURT] testified about his interview of appellant and some of the admissions appellant made during the interview. The government specifically elicited testimony from SA [TEXT REDACTED BY THE COURT] that, during the initial portion of the interview, appellant continued to deny that he knew SPC [TEXT REDACTED BY THE COURT] and denied that he sexually assaulted her. Without eliciting testimony about the polygraph examination, and that appellant was informed of the results during the course of the interview, the government elicited testimony that appellant changed his story during the course of the interview and made subsequent incriminating statements.

During cross-examination, the defense challenged SA [TEXT REDACTED BY THE COURT] about his **[*33]** "judgmental" questioning of appellant and also challenged SA [TEXT REDACTED BY THE COURT] bias against appellant due to SA [TEXT REDACTED BY THE COURT] firm belief in the credibility of the victim's statement to law enforcement. Defense also cross-examined SA [TEXT REDACTED BY THE COURT] at length about: (***1***) his refusal to accept any of appellant's denials that he sexually assaulted SPC [TEXT REDACTED BY THE COURT]; (2) his refusal to accept appellant's lack of memory about the night of assault despite appellant having been very intoxicated that night, coupled with the fact that appellant was being asked to recall details that occurred six months prior to the interview; and (3) his being disappointed in appellant that he sexually assaulted SPC [TEXT REDACTED BY THE COURT] as he did not believe the sexual assault was within appellant's character.

Prior to redirect examination of SA [TEXT REDACTED BY THE COURT], the government requested permission to elicit testimony from SA [TEXT REDACTED BY THE COURT] that appellant changed his explanation of what occurred with SPC [TEXT REDACTED BY THE COURT] after appellant was informed of the results of the polygraph. The government asserted that **[*34]** the defense's cross-examination of SA [TEXT REDACTED BY THE COURT] created the inference that appellant only changed his story as a result of SA [TEXT REDACTED BY THE COURT] judgmental questioning. The government argued that the fact that appellant changed his story only after being informed of the results of the

[12] The military judge who conducted the *Article 39(a), UCMJ*, session on this motion and issued the rulings for this motion was different than the military judge who presided over the trial.

polygraph was relevant to rebut the inaccurate inference defense elicited during cross-examination. Over defense objection, the military judge found that the defense cross-examination had suggested there was a specific reason why appellant changed his story and, as a result, ruled that the government would be permitted to question SA [TEXT REDACTED BY THE COURT] about the reasons why he disbelieved appellant. However, the military judge made clear that the government could not elicit testimony about actual test results of the polygraph. The government then asked SA [TEXT REDACTED BY THE COURT] the following questions:

> Q: Did [appellant] express surprise or disbelief when you informed him of the results of the test?
> A: He did not.
> Q: Did he make any faces or throw up his hands, 'I can't believe it' or anything like that?
> A: He did not.
>
> Q: Now I want to be clear, even after you informed **[*35]** him the results of the test, you didn't tell him, did you, that he must have raped [SPC [TEXT REDACTED BY THE COURT]]?
> A: I did not say that.
> Q: Did you tell him that you still did not know what happened in that room?
> A: I made it clear to him that I didn't know for sure what happened in that room, but I could not believe at this point what his explanation was, that he didn't know her and that sex did not occur.

Neither Mil. R. Evid. 707 nor *Kohlbek* permitted this line of testimony, specifically questions and answers clearly implying that appellant failed the polygraph examination. While the government's questions did not specifically elicit the polygraph examination results, they certainly did so by implication. Furthermore, the government elicited testimony from SA [TEXT REDACTED BY THE COURT] that he no longer believed appellant after reviewing the polygraph results, thereby creating the inference that in SA [TEXT REDACTED BY THE COURT] opinion, the polygraph results were reliable. This type of evidence is contrary to both Mil. R. Evid. 707 and *Kohlbek*, which clearly prohibit evidence of the results of the polygraph examination and the opinions of the polygraph examiner. We find the admission of such evidence at trial **[*36]** even more troubling given that the government was the proponent of the evidence, over defense objection. *Cf. United States v. Sharp, **ARMY** 20190149, 2020 CCA LEXIS 310* (***Army*** ***Ct***. ***Crim***. ***App***. 10 Sep. 2020) (mem. op.) (finding no error in the erroneous admission of polygraph evidence in part because the appellant affirmatively waived the issue by acquiescing in the admission of the polygraph evidence for strategic reasons). We find that the military judge abused her discretion and erred in allowing the government to elicit testimony regarding appellant's polygraph results and the polygraph examiner's opinion about appellant's credibility based upon the polygraph results.

E. Prejudice

We must now determine whether the military judge's erroneous admission of evidence of the victim's virginity, erroneous admission of evidence of the victim and appellant's diagnosis with HSV, and erroneous admission of polygraph evidence prejudiced appellant.

The "findings 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." *UCMJ art. 59(a)*. The government bears the burden of demonstrating that the error from the erroneous admission of evidence is harmless. **[*37]** *Frost, 79 M.J. at 111*. "For [preserved] nonconstitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings." *Id.* (quoting *Kohlbek, 78 M.J. at 334*). We review de novo the prejudicial effect of an erroneous evidentiary ruling. *Kohlbek, 78 M.J. at 334*. We do so by

considering: (***1***) the strength of the government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. *Id.*

The government's case was strong, focused primarily on the victim's testimony and appellant's admissions. While there was no forensic evidence or physical evidence of the sexual assault, the victim's testimony and appellant's admissions to law enforcement were significant, particularly so in that they largely corroborated each other. While the victim had some difficulty recalling certain details from the night of the assault and from immediately after the assault,[13] she was clear about the location of the sexual assault, items from inside the barracks room where it occurred, and that she was penetrated non-consensually. Law enforcement located items in appellant's bedroom that matched the victim's description of the items she recalled in the room **[*38]** and obtained key entry logs of appellant's barracks room consistent with the victim's timeline of the sexual assault. The government also presented testimony about the victim's melancholy demeanor immediately following the assault and her prior consistent statements about being raped. Lastly, appellant's devastating admissions to law enforcement in both the lengthy video-recorded statement and his written statement—including an admission of his prior dishonesty—corroborated many of the key details of the victim's description of what occurred leading up to the sexual assault and details of the assault itself, with some differences.[14] Predictably, the government effectively assailed appellant with his own words.

On the other hand, the defense's case was weak. The defense's theory of the case was that the victim was not credible and appellant's admissions to law enforcement were involuntary and also significantly differed from the victim's account of the sexual assault.[15] The defense attacked the victim's credibility by highlighting her inability to recall significant details about the assault, her inability to identify her perpetrator, and the fact that she only reported a sexual assault **[*39]** because her father forced her to do so. The defense attacked the voluntariness and credibility of appellant's admissions to law enforcement by attacking the agent's interview techniques, the agent's refusal to accept appellant's inability to recall what occurred on the night of the assault when he was severely intoxicated, and the factual differences between the victim's testimony about the assault and appellant's admission to law enforcement. While the defense challenged appellant's statement to law enforcement, these challenges fell flat. The defense had no credible explanation for appellant's damning admissions, which he further reduced to writing, reviewed, and swore under oath were true. Appellant's own words both severely undercut the defense's case and enhanced the government's case. *See Arizona v. Fulminante, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)* ("A confession is like no other evidence.").

Addressing materiality and quality, we find that the heart of this case came down to the identity of the victim's perpetrator and lack of consent. While evidence of the victim's virginity was used to bolster her credibility, we do not find it played a decisive role in assessing her overall credibility. Witnesses who interacted with the victim

[13] The victim could not recall whether she had any conversation with her perpetrator on the way to his barracks room, whether she told her perpetrator her name, or whether they exchanged telephone numbers. Yet, appellant called her soon after the alleged sexual assault. She also did not recall how the assault ended or how she ended up on a bench outside after the assault.

[14] There were some substantive differences between the victim and appellant's account of their interaction and the sexual assault: (***1***) appellant insisted he and the victim "made out" before entering his barracks room; (2) appellant admitted he digitally penetrated the victim which she never disclosed to law enforcement; and (3) appellant stated he was initially on top of the victim and could not penetrate her at which point he turned her around and penetrated her from behind.

[15] While defense counsel argued at trial that appellant's "so-called confession" was "unreliable" because it was obtained through SA [TEXT REDACTED BY THE COURT] use of suggestive and improper tactics, the record contains no pretrial motion to suppress.

immediately **[*40]** after the sexual assault testified about her demeanor after the assault and testified as to her character for truthfulness. An expert in memory and trauma testified for the government to assist in explaining the gaps in the victim's memory from the night of assault. Evidence that both the victim and appellant were diagnosed with herpes only circumstantially supported identifying appellant as the person who sexually assaulted the victim and was minimally significant in comparison to appellant's own admissions that the victim assisted him to his room that night and he then sexually assaulted her. Additionally, the military judge acknowledged that the herpes evidence was only circumstantial evidence, not akin to forensic evidence, and that she would give the evidence appropriate weight. Lastly, testimony regarding appellant's polygraph results was elicited for purposes of providing context of why SA [TEXT REDACTED BY THE COURT] refused to accept appellant's initial explanation of events. Importantly, at no time did trial counsel or the military judge suggest that the results of appellant's polygraph, or SA [TEXT REDACTED BY THE COURT] opinion about the polygraph, ought to be credited **[*41]** as the truth. To that point, appellant acknowledged in both the video recording of his law enforcement interview and his written statement that he was untruthful to law enforcement in denying that he knew the victim or had sexual intercourse with her. Additionally, the military judge had before her key portions of the video recording of appellant's interview with which to determine for herself the credibility of appellant's admissions to law enforcement, irrespective of the three questions about informing appellant of the polygraph results.

Putting aside the erroneously admitted evidence, the military judge, sitting as trier of fact, properly considered SPC [TEXT REDACTED BY THE COURT] credible testimony about the nonconsensual sexual assault, appellant's admissions about nonconsensual penile and digital penetration, and the peripheral corroborative evidence discussed above. For these reasons, we conclude the materiality and the quality of the erroneously admitted evidence was, on balance, inconsequential compared to the properly admitted evidence.

Under all of the facts and circumstances of this case, we are convinced that the military judge would have rendered the same verdict had **[*42]** she not erroneously admitted evidence of the victim's virginity, evidence of the diagnoses of both the victim and appellant with the HSV, and testimony implicating the results of appellant's polygraph examination. Accordingly, the government has met its burden to demonstrate that the evidence admitted through the military judge's erroneous rulings did not substantially influence the findings.

Given the number of errors in this case, we must also consider the cumulative effect of the erroneously admitted evidence. "[A] number of errors, no one perhaps sufficient to merit reversal, in combination [may] necessitate the disapproval of a finding." *United States v. Pope, 69 M.J. 328, 335 (C.A.A.F. 2011)* (quoting *United States v. Banks, 36 M.J. 150, 170-71 (C.M.A. 1992)*). We review the cumulative effect of plain and preserved errors de novo. *Id.* We reverse only if we find that the cumulative errors denied appellant a fair trial. *Id.* In this case there was strong evidence of appellant's guilt and none of the errors related to improperly admitted evidence materially prejudiced appellant's substantial rights. As previously discussed, the strength of the government's case was based upon appellant's devastating admissions to law enforcement, the victim's testimony about the assault, the victim's subsequent **[*43]** demeanor and immediate disclosure to multiple friends. Under the circumstances of this case, we find appellant was not denied a fair trial. *See United States v. Dollente, 45 M.J. 234, 242 (C.A.A.F. 1996)* ("[C]ourts are far less likely to find cumulative error ... when a record contains overwhelming evidence of a defendant's guilt.").

III. CONCLUSION

The findings of guilty are AFFIRMED. The sentence is AFFIRMED.

Chief Judge (IMA) KRIMBILL and Senior Judge BROOKHART concur.

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United States v. Ramos-Cruz

United States Army Court of Criminal Appeals

February 27, 2020, Decided

ARMY 20150292

Reporter
2020 CCA LEXIS 52 *

UNITED STATES, Appellee v. Sergeant ERIC A. RAMOS-CRUZ, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, Fort Drum S. Charles Neill and Teresa L. Raymond, Military Judges. Colonel Patrick D. Pflaum, Staff Judge Advocate.

United States v. Ramos-Cruz, 2017 CCA LEXIS 759 (A.C.C.A., Dec. 11, 2017)

Counsel: For Appellant: Lieutenant Colonel Tiffany D. Pond, JA; Major Kyle C. Sprague, JA; Captain Alexander N. Hess, JA (on brief and reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Dustin B. Myrie, JA; Captain Thomas J. Darmofal, JA (on brief).

Judges: Before SALUSSOLIA, FLEMING, and WALKER, Appellate Military Judges. Judge SALUSSOLIA and Judge WALKER concur.

Opinion by: FLEMING

Opinion

MEMORANDUM OPINION ON FURTHER REVIEW

FLEMING, Judge:

We find the military judge did not err denying the defense motion to elicit the "romantic" nature of the victim's relationship with another soldier. We also find the military judge's ruling to admit appellant's entire 127-page Correctional Treatment File (CTF) from the United States Disciplinary Barracks (USDB) as a government rebuttal exhibit during the pre-sentencing phase did not prejudice appellant. The case's lengthy procedural history follows.

At appellant's first court-martial in 2015, a military judge sitting as a general court-martial convicted appellant, in accordance with his pleas, of six specifications **[*2]** of assault in violation of *Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928* [UCMJ]. The military judge convicted appellant, contrary to his pleas, of one specification of cruelty and maltreatment, three specifications of abusive sexual contact, one specification of forcible sodomy, and one specification of assault consummated by a battery, in violation of *Articles 93*, *120*, *125*, and *128*, UCMJ. The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for twelve years, and reduction to the grade of E-1. In January 2017, this court summarily affirmed the findings of guilty and sentence from appellant's first court-martial. *United States v. Ramos-Cruz*, ARMY 20150292 (Army Ct. Crim. App. 30 Jan. 2017).

In July 2017, the Court of Appeals for the Armed Forces (CAAF) set aside our decision and remanded the case to this court for a new review under *Article 66, UCMJ*, in light of *United States v. Hills, 75 M.J. 350 (C.A.A.F. 2016)*, and *United States v. Hukill, 76 M.J. 219 (C.A.A.F. 2017)*. *See United States v. Ramos-Cruz, 76 M.J. 442 (C.A.A.F. 2017)*.

On this remand, in December 2017, we set aside

the findings of guilty as to two of the three specifications of abusive sexual contact and one specification of forcible sodomy in light of our superior court's decisions in *Hills* and *Hukill*. *See* *United States v. Ramos-Cruz, ARMY 20150292, 2017 CCA LEXIS 759, at *6* (Army Ct. Crim. App. 11 Dec. **[*3]** 2017). We affirmed the remaining findings of guilty, set aside the sentence, and authorized a findings rehearing on the three set aside specifications and a sentence rehearing. *Id.*

At appellant's rehearing court-martial, in June 2018, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of forcible sodomy, in violation of *Article 125*, UCMJ. The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for ten years, and reduction to the grade of E-1.

Appellant's case is again before us for our *Article 66, UCMJ* review. Appellant asserts four assignments of error and one matter pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*. Two assignments of error merit discussion and none merit relief.[1]

BACKGROUND

At his rehearing court-martial, appellant was again convicted of forcibly sodomizing Private E-2 (PV2) AG in early March 2014.[2] As there were no witnesses to the sodomization, beyond appellant and PV2 AG, the defense trial strategy centered on attacking PV2 AG's credibility.

In late March 2014, PV2 AG spoke to Army Criminal Investigation Command (CID) agents regarding appellant's forcible sodomization. In early May 2014, PV2 **[*4]** AG, who was separated from her spouse but not yet divorced, was investigated by CID agents for engaging in an alleged adulterous relationship with a fellow soldier, Specialist (SPC) T. At the rehearing trial, defense counsel desired to cross-examine PV2 AG regarding her alleged adulterous relationship with SPC T and whether she lied to CID regarding the affair. Appellant now asserts the military judge erred by failing to allow the defense to ask PV2 AG whether she lied to CID about having a "romantic" relationship with SPC T. The military judge did, however, allow the defense to ask PV2 AG whether she lied to CID regarding a relationship with SPC T.

During the pre-sentencing phase, the government moved to admit into evidence, as a self-authenticating document, appellant's entire CTF detailing his behavior while incarcerated at the USDB. The CTF contained positive and negative information regarding appellant's behavior during his incarceration. The defense objected to the admission of the entire CTF on multiple grounds. The military judge initially denied the admission of the CTF ruling the government failed to provide the defense with a reasonable written notice of the intent to offer **[*5]** the exhibit. After the defense's pre-sentencing case, however, the government moved to admit appellant's entire CTF as rebuttal evidence to negate the testimony by appellant and his sister regarding his positive behavioral changes while incarcerated in the USDB.

Specifically, appellant's sister testified "[appellant] has changed a lot from before he got confined . . . . [Y]ou can see he's more mellow, he reacts different, he talks different, he's just all around different. He realizes that there's consequences to actions, and he knows that he should do better and that he would do better." During his unsworn statement, appellant outlined the positive behavioral skills he acquired during his incarceration stating "that's the way I've been doing it for the last three and half years now [in the USDB], it's on my word, . . . I don't want to be

[1] We have given full and fair consideration to appellant's other assignments of error and the one matter submitted pursuant to *Grostefon* and find they merit neither discussion nor relief.

[2] After appellant's first court-martial in 2015, PV2 AG departed the Army and changed her name to Mrs. AV. This opinion will refer to her as PV2 AG, her name at the time of the offense.

anything like I was in the past." The military judge ruled to admit the entire CTF as rebuttal evidence stating the exhibit was "simply rebuttal evidence that [appellant] has changed or not changed [in the USDB], that was the door that was opened [by defense]; [that he] changed during incarceration, both by his unsworn statement and [his sister's] **[*6]** testimony."

LAW AND DISCUSSION

Military Rules of Evidence 412 and 403 Rulings

This court reviews a military judge's ruling to exclude evidence under Military Rule of Evidence (Mil. R. Evid.) 412 for an abuse of discretion. *United States v. Collier, 67 M.J. 347, 353 (C.A.A.F. 2009)*; *United States v. Roberts, 69 M.J. 23, 26 (C.A.A.F. 2010)*. We review a military judge's findings of fact under a clearly erroneous standard and her conclusions of law de novo. *United States v. Ellerbrock, 70 M.J. 314, 317 (C.A.A.F. 2011)*.

Evidence of an alleged victim's other sexual behavior or sexual predisposition is generally inadmissible in a sex offense case unless an exception applies. Mil. R. Evid. 412(a). "Evidence of a relationship, even a romantic or dating relationship, *absent more*, is insufficient to create a reasonable inference of either sexual behavior or sexual predisposition that would trigger Mil. R. Evid. 412's exclusions." *United States v. Alston, 75 M.J. 875, 883 (Army Ct. Crim. App. 2016)* (emphasis added). Evidence is admissible if its exclusion would violate appellant's constitutional rights. Mil. R. Evid. 412(b)(1)(C). Before admitting evidence as constitutionally required under Mil. R. Evid. 412(b)(1)(C), the military judge must apply Mil. R. Evid. 403. *United States v. Gaddis, 70 M.J. 248, 256 (C.A.A.F. 2011)*. Military R. of Evid. 403 states a "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."

The narrow issue before **[*7]** this court is whether the military judge erred by denying the defense request to use the one-word adjective, "romantic," to describe PV2 AG and SPC T's relationship. Two potential questions exist. First, did the military judge err by finding Mil. R. Evid. 412 was triggered? Second, if Mil. R. Evid. 412 was triggered, did the military judge err in her Mil. R. Evid. 403 analysis?

As to the first question, appellant argues the military judge applied Mil. R. Evid. 412 too broadly. At first blush the military judge's application of Mil. R. Evid. 412 could appear erroneous, but we find to the contrary upon a closer review of the defense counsel's asserted purpose for using the word "romantic."

At the beginning of the Mil. R. Evid. 412 motion hearing, defense counsel specifically stated they did not seek to insinuate or delve into any details as to the sexual nature, if any, of PV2 AG and SPC T's relationship. Defense counsel stated "we are not trying to talk about the sex in any way, shape, or form . . . ." If defense counsel had maintained this non-sex stance, the military judge's denial of the use of the word "romantic" would likely have been an erroneous application of Mil. R. Evid. 412. In the middle of the motion hearing, however, defense counsel asserted the word "romantic" was relevant to establish **[*8]** that PV2 AG lied to CID to protect herself against an adultery charge.

We pause to recognize that the offense of adultery requires as an element of proof that "sexual intercourse" occurred between two people. *See Article 134* ¶ 62.b.(1), UCMJ. Defense counsel highlighted the sexual undertones surrounding their desired use of the word "romantic" by arguing that the probative value of the word "romantic" was to show PV2 AG "would potentially get in trouble" for the relationship with SPC T because "it was sexual in nature, [and] that's our position."

Although the defense attempted to avoid triggering Mil. R. Evid. 412, counsel's proffered theory of the relevance of the word "romantic" was to prove PV2 AG engaged in other sexual behavior—sexual intercourse with SPC T amounting to adultery. The defense request to use the word "romantic" was a veiled attempt to infer something "*more*" than a mere dating relationship. *Alston, 75 M.J. at 883* (emphasis added). Under this scenario, the military judge did not err in finding Mil. R. Evid. 412 was triggered.

As to the second question, we note the importance of Mil. R. Evid. 401 and 402 as the first steps in the equation in deciding if evidence is admissible. A military judge must first determine if the proffered evidence is **[*9]** relevant prior to its admission and the application of any balancing test under Mil. R. Evid. 403. *See generally* Mil. R. Evid. 401-403. "Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence." Mil. R. Evid. 401. Military R. Evid. 402 clearly directs "[i]rrelevant evidence is not admissible."

The military judge found the relevance of defense counsel's desired cross-examination was to attack PV2 AG's lack of credibility and her "willingness to lie or not lie [to CID] about something of significant value."[3] Under this context, the military judge found the word "romantic" was not relevant and failed the Mil. R. Evid. 403 balancing test. The military judge allowed defense cross-examination of PV2 AG regarding her relationship with SPC T as follows:

> Q: [PV2 AG], in May 2014 you were investigated by CID, correct?
> A. Yes, Ma'am.
> Q. And that was regarding [SPC T]?
> A. Yes, Ma'am.
> Q. You understood it was important to tell the truth?
> A. Yes, Ma'am.
> Q. They asked you about your relationship with [SPC T]?
> A. Yes, Ma'am.
> Q. You initially lied about it, didn't you?
> A. Yes, Ma'am.
> Q. Because you thought you would get in trouble?
> A. Yes, Ma'am.

Although the military judge provided a bare-bones statement that she excluded the word "romantic" **[*10]** under Mil. R. Evid. 403, her ruling more clearly appears as an exclusion of irrelevant evidence under Mil. R. Evid. 402. After conducting our own de novo review, we find the probative value of the one-word adjective "romantic," without reference to "sex in any way, shape, or form" as agreed to by the defense, is low to non-existent, and is substantially outweighed by balancing the factors articulated in Mil. R. Evid. 403. Ultimately, we need not determine if the military judge excluded the word "romantic" under Mil. R. Evid. 402 or 403 because even if she, or this court, has erred in analyzing Mil. R. Evid. 412, 401, 402, or 403, the "damaging potential" of the defense cross-examination of PV2 AG was fully realized and we find any error harmless beyond a reasonable doubt. *Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)* (the Court holding "that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other *Confrontation Clause* errors, is subject to . . .harmless-error analysis," assuming that "the damaging potential of the cross-examination [was] fully realized.").

Private E-2 AG conceded during cross-examination that she lied to CID agents because she did not want to get in trouble because of her relationship with SPC T. Defense counsel then utilized PV2 AG's cross-examination admission to argue in **[*11]** their closing that she "lied to CID about her relationship with SPC T. She's lying to you today about what's happened here [with appellant.]" If PV2 AG was willing to lie to CID agents in May

[3] We concur with the military judge that the defense did not establish as a ground for admission that PV2 AG possessed a motive to fabricate about a "romantic" relationship with SPC T in order to protect her marriage.

2014 to avoid potential prosecution for her relationship with SPC T perhaps she lied to CID agents in March 2014, and to everyone else onward, that her sexual acts with appellant were non-consensual and did not constitute adultery. Even without qualifying PV2 AG's relationship with SPC T as romantic, we find the "damaging potential" of the defense cross-examination was fully realized. Any error by the military judge in denying the word "romantic" was harmless beyond a reasonable doubt. *See Id.*

Appellant's CTF

A military judge's decision to admit pre-sentencing evidence is reviewed for an abuse of discretion. *United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000)*. If the military judge abused her discretion by admitting the evidence, we must determine whether the admission of the document substantially influenced the adjudged sentence. *United States v. Barker, 77 M.J. 377, 384 (C.A.A.F. 2018)* (quoting *United States v. Sanders, 67 M.J. 344, 346 (C.A.A.F. 2009))*. To evaluate an evidentiary error for harmlessness, a court must consider the following four factors: "(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of **[*12]** the evidence in question; and (4) the quality of the evidence in question." *United States v. Bowen, 76 M.J. 83, 89 (C.A.A.F. 2017)* (internal quotation marks omitted) (quoting *United States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999))*.

Appellant argues the military judge erred under Mil. R. Evid. 902(11), amid a myriad of other grounds, by admitting appellant's entire CTF as government rebuttal evidence. *See* Mil. R. Evid. 902(11) (outlining the procedures to self-authenticate a certified domestic record of a regularly conducted activity and mandating that before trial unless good cause is found by the military judge at a later time, "the proponent [of evidence] must give an adverse party reasonable written notice of the intent to offer the record."). We could attempt to wax poetic about the nuances of Mil. R. Evid. 902(11), along with multiple other rules of evidence, regarding the military judge's decision to admit appellant's entire CTF. Such discussion would be superfluous, however, because we assume, without deciding, that the military judge erred, but find such error did not substantially influence appellant's sentence.

The military judge stated immediately after announcing appellant's sentence that the CTF "*had no impact* on the court's deliberation on a sentence." (emphasis added). We question if any clearer indicia that appellant's sentence was not **[*13]** substantially influenced could exist beyond the sentencing authority affirmatively stating the exhibit "had no impact." We need not wonder nor debate whether any alleged error had a "substantial influence" on appellant's sentence.

Our superior court has recognized "it is highly relevant when analyzing the effect of error on the sentence that the case was tried before a military judge who is presumed to know the law." *Barker, 77 M.J. at 384 (C.A.A.F. 2018)* (citations omitted) (holding the erroneous admission of victim impact statements during the pre-sentencing phase did not prejudice appellant's sentence). In *Barker*, the court noted the significance of the military judge "specifically stat[ing] on the record" that he did not give any weight to evidence that did not directly relate to or arise from appellant's crimes contained in victim impact statements which were later deemed erroneously admitted. *Id.* at FN 11; *See also United States v Bridges, 66 M.J. 246, 248 (C.A.A.F. 2008)* (finding no prejudice to appellant's sentence, even in the absence of an affirmative statement from the military judge, when there was "no indication that the military judge gave significant weight to the [prison] violations noted in the [erroneously admitted] letter from the [prison] official").

Under **[*14]** the unique facts of this case, where our court can discern with certainty the exact weight, or lack thereof, the military judge

prescribed to an erroneously admitted pre-sentencing exhibit, we question if applying the four *Kerr* factors is necessary. Even if we apply the four *Kerr* factors, however, we arrive at the same conclusion. Appellant was not prejudiced.

We have reviewed the erroneously admitted CTF in its entirety. The exhibit balances between outlining USDB infractions by appellant, which are mostly minor in nature, and providing defense favorable evidence of appellant's positive behavior during some of his incarceration. The overall probative weight of the CTF for the government is not high. Even if the military judge had failed to state that the CTF "had no impact," we find the exhibit possessed low materiality.

Appellant pleaded guilty to six specifications of assault against one victim. He was convicted, contrary to his pleas and among other offenses, of an abusive sexual contact involving a second victim and a forcible sodomization involving a third victim. We are convinced, after reviewing the government and defense case, that appellant would have received at least the **[*15]** same sentence despite any alleged error that may have occurred in admitting his entire CTF.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Judge SALUSSOLIA and Judge WALKER concur.

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United States v. Villanueva

United States Navy-Marine Corps Court of Criminal Appeals

March 19, 2015, Decided

NMCCA 201400212

Reporter
2015 CCA LEXIS 90 *

UNITED STATES OF AMERICA v. JIM D. VILLANUEVA, SHIP'S SERVICEMAN SECOND CLASS (E-5), U.S. NAVY

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.

Prior History: [*1] GENERAL COURT-MARTIAL. Sentence Adjudged: 14 February 2014. Military Judge: CAPT B.L. Payton-O'Brien, JAGC, USN. Convening Authority: Commander, Naval Medical Center, San Diego, CA.

United States v. Villanueva, 2015 CCA LEXIS 24 (N-M.C.C.A., Jan. 29, 2015)

Counsel: For Appellant: LT Jessica L. Ford, JAGC, USN.

For Appellee: LT Ian D. MacLean, JAGC, USN; Capt Matthew Harris, USMC.

Judges: Before J.R. MCFARLANE, M.C. HOLIFIELD, K.J. BRUBAKER, Appellate Military Judges. Senior Judge MCFARLANE and Judge BRUBAKER concur.

Opinion by: M.C. HOLIFIELD

Opinion

OPINION OF THE COURT

HOLIFIELD, Judge:

A panel of members with enlisted representation sitting as a general court-martial convicted the appellant, contrary to his pleas, of forcible sodomy in violation of Article 125, Uniform Code of Military Justice, *10 U.S.C. §925*.[1] The members sentenced the appellant to one year of confinement and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged.[2]

The appellant raises four assignments of error (AOE):

(1) that the evidence is legally and factually insufficient to support his conviction;
(2) that the military judge erred in excluding evidence under MILITARY RULE OF EVIDENCE 412, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.);
(3) that the CA was subject to unlawful command influence in his decision to refer the charges to court-martial; and
(4) that the military judge improperly denied a challenge for cause against a member.

After careful consideration of the record of trial, the

[1] The appellant was acquitted of a second specification of forcible sodomy involving a different alleged victim on an occasion several years earlier.

[2] On 29 January 2015, the court released an opinion in which we set aside the findings and sentence and returned the record of trial to the Judge Advocate General for remand to an appropriate CA with a rehearing **[*2]** authorized. By Order dated 27 February 2015, the court determined that it would *sua sponte* reconsider its 29 January 2015 opinion. The court's 29 January 2015 opinion is hereby withdrawn and replaced with this opinion, reaching the same conclusion but clarifying the reasoning supporting it.

appellant's AOEs, and the submissions of the parties, we find merit in the appellant's second AOE. We address the remedy in our decretal paragraph. This corrective action moots the appellant's fourth AOE. The remaining assignments of error raised by the appellant merit neither relief nor further analysis. *United States v. Clifton, 35 M.J. 79, 81 (C.M.A. 1992)* (citing *United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987)*.

Background

The appellant and the complaining witness, Hospitalman (HN) P, both males, **[*3]** were stationed at Naval Station, Guantanamo Bay in late 2011. The appellant expressed a romantic interest in HN P to a mutual friend, Missile Technician Second Class (MT2) W, who responded by informing the appellant that HN P was not homosexual. During a separate conversation, MT2 W told HN P of the appellant's interest. HN P indicated he did not share the interest, but was willing to meet the appellant, as the appellant was well-known for his extravagant parties. Approximately one week later, HN P was invited to join the appellant and Master-at-Arms Second Class (MA2) R at their table in the chow hall. During this initial conversation with the appellant and MA2 R, HN P described things he had done while drunk, including placing his penis in another man's hand during a penis measuring contest.

Later that night, the appellant, HN P, MA2 R and a group of others met for a barbecue at a block of trailers used as barracks. Shortly thereafter, they proceeded to an on-base bar, where they consumed various alcoholic beverages until the bar closed. HN P then invited the group back to his trailer to continue drinking. At the time they arrived at the trailer, HN P had consumed less than one drink **[*4]** per hour throughout the evening. He would have at least five more drinks in the next 90 minutes.

While outside HN P's trailer, the appellant and HN P conversed with each other as the others in the party slowly departed. HN P's last memory of the party involves taking off his shirt to show the appellant his tattoos. His next recollection is a brief moment of lucidity when he realized the appellant was attempting to anally penetrate him as he lay in his trailer. Although he recalls being in pain, he does not remember saying anything. He also has a brief memory of the appellant fully penetrating him and kissing him on the lips. HN P remembers nothing else until he awoke alone the following morning, naked and in pain. He initiated the reporting process later that day.

During the alleged assault, HN P's trailer-mate, Sergeant (Sgt) B, heard what he described as "sexual noises" coming from HN P's room.[3] Record at 883. Among these noises, Sgt B testified that he heard HN P say, "Oh, baby, that feels good." *Id*. at 892.

At trial, the Government commented on HN P's purported heterosexuality in both its opening statement and closing argument. **[*5]** In response to the prosecution's questioning, HN P testified that he was not homosexual. He also testified that MT2 W had informed the appellant of HN P's aversion to homosexual activity. The military judge, finding some evidence in support a mistake-of-fact defense, provided the relevant instruction to the members. The appellant, however, was precluded from using the "penis measuring contest" statement to challenge HN P's claimed heterosexuality, either to impeach HN P's testimony or to challenge the Government's argument that HN P's known heterosexuality rendered any mistaken belief of consent unreasonable.

Exclusion of Evidence under MIL. R. EVID. 412

Prior to trial, the appellant's trial defense counsel filed a motion to admit evidence of the statement HN P made to the appellant and MA2 R at lunch the day before the alleged assault. The defense argued that HN P's statement concerning his

[3] The trailers consisted of two rooms joined by a common bathroom.

placing his penis in another man's hand was constitutionally required, in that it showed a motive to fabricate, impeached HN P's testimony that he was not gay, and was relevant to the appellant's mistake of fact as to consent. The military judge, in a brief e-mail to counsel, issued the following ruling: **[*6]** "The defense MAY ask ONE QUESTION of [HN P] as to confirm his sexual orientation, under MRE 608(c) to demonstrate bias, prejudice or motive to misrepresent. . . . Pursuant to MRE 412(c), the defense MAY NOT inquire as to [HN P's] prior act with another male in which he exposed his penis in some sort of 'penis measuring' contest." Appellate Exhibit XXXV. No additional findings of fact or conclusions of law are included in the record.

We review the military judge's ruling on whether to exclude evidence pursuant to MIL. R. EVID. 412 for an abuse of discretion. *United States v. Roberts, 69 M.J. 23, 26 (C.A.A.F. 2010)*. We review the findings of fact under a clearly erroneous standard and the conclusions of law *de novo*. *Id*. The abuse of discretion standard "recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." *United States v. Freeman, 65 M.J. 451, 453 (C.A.A.F. 2008)* (citations and internal quotation marks omitted).

Under MIL. R. EVID. 412, evidence offered by the accused to show that the alleged victim engaged in other sexual behavior is inadmissible, with three limited exceptions. The third exception states that the evidence is admissible if "the exclusion of [it] would violate the constitutional rights of the accused." MIL. R. EVID. 412(b)(1)(C). If there is a theory of **[*7]** admissibility under one of the exceptions, the military judge, before admitting the evidence, must conduct a balancing test as outlined in MIL. R. EVID. 412(c)(3) and clarified by *United States v. Gaddis, 70 M.J. 248, 250 (C.A.A.F. 2011)*.

The test is whether the evidence is "relevant, material, and [if] 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). Relevant evidence is any evidence that has "any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence." MIL. R. EVID. 401. Evidence is material if it is "of consequence to the determination of appellant's guilt[.]" *United States v. Dorsey, 16 M.J. 1, 6 (C.M.A. 1983)* (citations and internal quotation marks omitted).

> In determining whether evidence is of consequence to the determination of appellant's guilt, we consider the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which this issue is in dispute; and the nature of the other evidence in the case pertaining to the issue.

United States v. Smith, 68 M.J. 445, 448 (C.A.A.F. 2010) (citation and internal quotation marks omitted).

If evidence is relevant and material, it must be admitted where its probative value outweighs the dangers of unfair prejudice. *See* MIL. R. EVID. 412(c)(3). "Those dangers **[*8]** include concerns about 'harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *Ellerbrock, 70 M.J. at 319* (quoting *Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)*. If the evidence survives the inquiry, a final consideration is whether the evidence in the record supports the inference on which the moving party is relying. *Id*.

MIL. R. EVID. 412 "is intended to protect the privacy of victims of sexual assault while at the same time protecting the constitutional right of an accused to a fair trial through his right to put on a defense." *Id. at 322* (Baker, J., dissenting). This right necessarily includes the ability to cross-examine and to impeach or discredit a witness. The cross-examination, however, need not be "'in whatever way, and to whatever extent, the defense

might wish[,]'" and the military judge may limit the scope of such cross-examination when its relevance is outweighed by concerns of harassment, prejudice, or confusion of the issues. *Id. at 318* (quoting *Van Arsdall, 475 U.S. at 679*) (additional citation omitted). "But no evidentiary rule can deny an accused of a fair trial or all opportunities for effective cross-examination." *Id*. (citation omitted).

Applying the above test to the facts of this case, we find the **[*9]** military judge erred in excluding the statement.

Mistake of Fact as to Consent

An alleged victim's sexual orientation, standing alone, is not relevant under MIL. R. EVID. 412. *See United States v. Grant, 49 M.J. 295, 297 (C.A.A.F. 1998)*. In the present case, however, the Government made it relevant. The Government elicited from HN P testimony that he was not homosexual, presented evidence that the appellant had been told that HN P "doesn't swing that way," Record at 799, successfully argued for the exclusion of all evidence that suggested otherwise, and then sought the benefit of the resulting incomplete picture by arguing that the appellant's knowledge of HN P's sexual orientation did not support that the appellant "was reasonably mistaken somehow," *id*. at 1051. In effect, the Government used HN P's sexual orientation as a sword, then sought to hide behind MIL. R. EVID. 412's shield when the appellant attempted to question the Government's case. Where the Government uses sexual orientation in a way that implies the impossibility of consent, or a reasonable mistake of fact as to consent, the defense must be allowed to rebut that inference. To do otherwise denies the appellant his right to mount a defense, and allows the Government to meet its burden based on **[*10]** an incomplete description of events.

Actual Consent and the Importance of Credibility

The Government also had to prove that HP did not, in fact, consent to the sexual act. HN P's credibility was the key to answering that question. HN P testified during the trial that he "was straight." *Id*. at 859. This could only have left the members with the impression that, since HN P was not gay, he would not have consented to the sodomy. The appellant's inability to confront and impeach him on this critical point severely impacted his ability to present a defense. Compounding the problem, the military judge's ruling only served to further hamstring the defense's ability to impeach HN P's statement that he was not homosexual. The likely result of asking the one question allowed by the military judge - "to confirm his sexual orientation" - would have been only to reinforce HN P's earlier testimony to the members.

Not Harmless Beyond a Reasonable Doubt

Based upon the Government's affirmative use of HN P's sexual orientation to meet its burden of proof, as well as HN P placing his sexual orientation in evidence, we find HN P's statement to the appellant to be relevant and material. As we also find its probative **[*11]** value to outweigh the dangers of unfair prejudice,[4] and that the appellant's theory of admissibility is supported by the record, the statement's admission was constitutionally required. We, therefore, must test whether exclusion of this evidence was harmless beyond a reasonable doubt. In doing so, we apply the five nonexclusive factors developed in *Van Arsdall*:

> [T]he importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the

[4] While the prosecution warned of distraction and the need for a "trial within a trial" should the statements be admitted, these concerns are unfounded. First, the only issue relevant to the appellant's belief as to consent was whether and in what context the appellant heard HN P make the statement; it does not matter on this point whether the statement was true. Second, had the appellant been allowed to attack HN P's credibility by challenging his claims of heterosexuality, we do **[*12]** not doubt the military judge could have fashioned proper limits on the questioning regarding HN P's sexual orientation.

> testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

475 U.S. at 684 (citations omitted).

The only evidence presented by the Government in this case to prove what happened in HN P's trailer on the night in question was HN P's testimony. HN P's statements that he was straight and did not consent to the sodomy were crucial to the appellant's conviction. The trial defense counsel was not allowed to cross-examine HN P on his claim of heterosexuality. While the military judge did permit the defense's expert to testify regarding why a victim of sexual assault may invent facts in order to deal with behavior of which the person might be ashamed, this theoretical discussion was clearly eclipsed by HN P's unchallenged, sworn testimony that he was not gay and did not consent to the sodomy. Finally, the Government's case was far from overwhelming, there being little, if any, evidence to corroborate HN P's description of events in the trailer.

We find that, had the military judge admitted HN P's statement, the members could have "received a significantly different impression" of both HN P's credibility and the reasonableness of any mistaken belief held by the appellant. **[*13]** *Ellerbrock, 70 M.J. at 321* (citations and internal quotation marks omitted). Furthermore, we are convinced that there is "a reasonable possibility that the [exclusion of the evidence] might have contributed to the conviction." *Id.* (citation and internal quotation marks omitted). This is particularly true when the statement is combined with the sounds and words overheard in the trailer that night by Sgt B. Accordingly, we find this error was not harmless beyond a reasonable doubt.

Conclusion

The findings of guilty and the sentence are set aside. The record of trial is returned to the Judge Advocate General of the Navy for remand to an appropriate CA with a rehearing authorized.

Senior Judge MCFARLANE and Judge BRUBAKER concur.

End of Document

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).

Counsel: For Appellant: William E. Cassara, Esquire; Lieutenant Doug R. Ottenwess, JAGC, USN.

For Appellee: Lieutenant Allyson L. Breech, JAGC, USN; Lieuten-ant 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, 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

[1] Record at 459.

[2] *Id.* at 461.

[3] *Id.*

[4] *Id.* at 465.

[5] *Id.*

[6] *Id.* at 466.

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 AOEs are included below.

II. Discussion

A. Factual sufficiency

1. The law

The appellant asserts the sexual assault conviction is factually insufficient.[10] 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, 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

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[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 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.

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 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

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[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)***.

[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.

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.

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

[19] Record at 461.

[20] *Id.* at 465.

[21] *Id.*

[22] *See generally id.* at 467.

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 the appellant's mistake of fact claim and demonstrate his consciousness of guilt.

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 reasonable doubt.

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

[23] Prosecution Exhibit 4 at 1-2.

[24] *Id.* at 2.

[25] The government also presented unrebutted 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.

"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 *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 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

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[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.

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 assault by bodily harm for what occurred in the rack[36] 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

[35] *Variance*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[36] "Rack" is a common military term for "bed."

[37] Record at 428.

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 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.

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[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 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.

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 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

[42] Record at 211.

[43] *Id.* at 216.

[44] *Id.* at 220.

[45] *Id.* at 218.

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]

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 Midshipmen 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 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

[46] *Id.* at 401-02.

[47] *Id.*

[48] *Id.* at 400-01.

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

[1] Record at 449.

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 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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[2] *Id.* at 526.

[3] *Id.* at 459.

[4] *Id.*

[5] *Id.* at 549.

[6] *Id.* at 461.

[7] *Id.*

United States v. Yepez

United States Army Court of Criminal Appeals

January 11, 2023, Decided

ARMY 20210236

Reporter
2023 CCA LEXIS 12 *

UNITED STATES, Appellee v. Specialist THOMAS R. YEPEZ, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, 1st Cavalry Division. Lanny J. Acosta Jr., Military Judge. Colonel Howard T. Matthews Jr., Staff Judge Advocate.

Counsel: For Appellant: Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Christian E. DeLuke, JA; Captain Sarah H. Bailey, JA (on brief).

For Appellee: Colonel Christopher B. Burgess, JA; Major Pamela L. Jones, JA; Captain Lisa Limb, JA (on brief).

Judges: Before BROOKHART, PENLAND, and ARGUELLES[1], Appellate Military Judges. Senior Judge BROOKHART and Judge ARGUELLES concur.

Opinion by: PENLAND

Opinion

MEMORANDUM OPINION

PENLAND, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his plea, 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 to be confined for twenty-eight months. The convening authority took no action on the findings or sentence.

We review the case under *Article 66*, and we have fully and fairly considered all matters either assigned as error or personally raised by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*. Among them, appellant asserts the military judge abused his discretion by denying the defense motion to introduce Military Rule of Evidence [Mil. R. Evid.] 412 evidence. We agree, and, considering this error is **[*2]** of constitutional magnitude, we also find the government has not disproven prejudice beyond a reasonable doubt.[2],[3]

BACKGROUND

The government's evidence at trial consisted mainly of testimony from SGT AT (hereinafter referred to as "victim"), who was appellant's friend. On 21 June 2018, she went to his apartment after work; appellant was also there. The victim and appellant listened to music, drank alcohol, and played UNO; after drinking heavily, the victim got sick. Appellant held her hair while she vomited, then

[1] Judge ARGUELLES decided this case while on active duty.

[2] Pretrial motion papers regarding appellant's request to introduce evidence under Mil. R. Evid. 412 were sealed, as were the transcripts of the hearing involving the request. Our decision contains discussion of sealed material necessary for our analysis.

[3] The remaining assignment of error and the matters personally raised by appellant under *Grostefon* merit neither discussion nor relief.

encouraged her to rest on a bed, which she did. The victim woke up to appellant "trying to do something to me." She intermittently blacked out, but also told appellant to stop. The victim testified that appellant removed her pants and underwear, saying, "You asked for this. You wanted this . . . You wanted this to happen." According to her testimony, appellant penetrated her vagina with his penis without her consent. The next day, the victim made a restricted report, then changed it to unrestricted approximately one year later. She told her boyfriend three days after the incident. In addition to the victim's testimony, the government called a sexual assault forensic medical examiner **[*3]** and a forensic DNA expert. Taken together, they established DNA transfer between appellant and the victim.

Before trial, the defense sought to introduce evidence of a flirtatious relationship between appellant and the victim. This evidence consisted of three selfie photographs of her; the first two depicted her in underwear, and the third depicted her naked, with emoji images covering her breasts and genitalia. The defense called the victim to testify in a closed Mil. R. Evid. 412 hearing, where she denied flirting with appellant or sending any of the photos directly to him. Of the third photo, she said that — if she sent it to anyone — she would have sent it directly and exclusively to her boyfriend, a person other than appellant. In contrast with her testimony, the defense offered an "affidavit"[4] from appellant. He asserted: (1) he and the victim had a flirtatious relationship before the charged misconduct; (2) the victim sent all three photos directly to him, and not to a larger group of people; (3) the victim sent him the photos in the spring and summer of 2018; and, (4) she sent appellant additional photos after the third selfie.

[4] To characterize the document as an "affidavit" is too generous. Although it concludes "I declare under penalty of perjury that the foregoing it true and correct," it is still essentially an unsworn memorandum for record, signed by appellant. Nonetheless, we recognize when "deciding [whether evidence is admissible], the military judge is not bound by evidence rules, except those on privilege." Mil. R. Evid. 104(a).

The military judge ruled against appellant, writing that it was unclear **[*4]** where the victim had sent the photographs and that "the Defense ha[d] failed to show any evidence that these photographs were in anyway intended for [appellant] alone." Among other things, the military judge found as fact "no evidence of the time or date for any of the photos or to whom they were sent." On the other hand, the military judge did find appellant possessed the three photos. Denying the motion under Mil. R. Evid. 412(b)(2) and (b)(3), he ruled the proffered photos were neither relevant nor material, as they were not evidence of the victim's "sexual behavior with the accused."

LAW AND DISCUSSION

We are keenly aware that we review military judges' Mil. R. Evid. 412 admissibility decisions for an abuse of discretion. *United States v. Carpenter, 77 M.J. 285 (C.A.A.F. 2018)*; *United States v. Erikson, 76 M.J. 231 (C.A.A.F. 2017)*; *United States v. Gaddis, 70 M.J. 248 (C.A.A.F. 2011)*. "'Trial judges retain wide latitude . . . to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *Gaddis, 70 M.J. at 256* (quoting *Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)*). Military Rule of Evidence 412 is an exclusionary rule, requiring a proponent to meet the burden to show that an exception prevails. *Gaddis, 70 M.J. at 251-52*; *United States v. Banker, 60 M.J. 216, 223 (C.A.A.F. 2004)*; *United States v. Savala, 70 M.J. 70, 72 (C.A.A.F. 2011)*.

In deciding whether a military judge has abused his discretion in establishing evidentiary limits, we do not **[*5]** ask ourselves whether we would have made the same decision if presiding over the trial; such an approach would deprive the trial judge of the deference required by the standard of review. Instead, we ask, among other things, whether his

relevant factual findings are clearly erroneous, or whether his conclusions from the facts and applicable law are clearly unreasonable. *See Erikson, 76 M.J. at 235* (quoting *United States v. Olson, 74 M.J. 132, 134 (C.A.A.F. 2015)*) ("A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect"); *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)*) (The challenged action must be "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous."). Under the circumstances, we answer yes to both.

The military judge's factual findings were clearly erroneous in at least two material respects. First, there was evidence of the photos' timing: appellant's memorandum stated that he received them from approximately April to June, 2018.[5] While this might not have dispositively proven when they were made, it was some circumstantial evidence thereof. Second, there was also evidence that appellant received them directly from the victim: again, his memorandum asserted "[s]he sent me these photos directly as a one-on-one **[*6]** Snapchat message."[6] It is unclear why the military judge positively stated there was no evidence of these matters. In his ruling, he correctly cited *Banker, 60 M.J. at 224*, for the principle that it was not his function to assess the credibility of the proffered evidence in deciding its admissibility.[7] We can only conclude he either: (1) made such a determination regarding appellant's memorandum; or (2) overlooked multiple material parts of it. In either event, the military judge erred.

We also find clearly unreasonable the military judge's conclusions that the excluded evidence was not relevant or material under Mil. R. Evid. 412(b)(2) and Mil. R. Evid. 412(b)(3). At the very least, the photos "ha[d] [the] tendency to make a fact[8] more or less probable than it would be without the evidence; and . . . the fact [was] of consequence in determining the action." Mil. R. Evid. 401. We hasten to add that we are not finding as a matter of fact that the victim **[*7]** *actually* sent the photos directly to appellant, or that they, by themselves, *actually* established her consent[9] or an honest—and reasonable—mistake of fact in appellant's mind. Instead, we find, as a matter of legal relevance, the proffered evidence made it more likely for the fact finder to conclude that she sent the photos to appellant, that she consented, or that he honestly and reasonably believed she did. As a result, the excluded evidence was relevant, and its probative value outweighed the countervailing considerations in Mil. R. Evid. 403 or Mil. R. Evid. 412(b)(3).[10] *See United States v. Roberts, 69 M.J. 23, 27 (C.A.A.F. 2010)* (holding that there is a "low

[5] The government charged appellant with sexually assaulting the victim "on or about 21 June 2018[.]"

[6] On the other hand, the military judge did rely on appellant's memorandum in making at least one of his findings: that appellant possessed the three photos. The military judge could have only derived that fact from the memorandum.

[7] Quoting *Banker, 60 M.J. at 224*, the military judge wrote:

> In applying M.R.E. 412, the judge is not asked to determine if the proffered evidence is true; it is for the members to weigh the evidence and determine its veracity. Rather, the judge serves as a gatekeeper deciding first whether the evidence is relevant and then whether it is otherwise competent, which is to say, admissible under M.R.E. 412.

[8] The disputed facts here were, at minimum, whether the victim consented, or whether appellant honestly and reasonably believed she did.

[9] We recognize *Article 120*'s definition of consent, which includes: "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." We take this to mean that the photos, by themselves, were insufficient to constitute consent. However, we also recognize that, in accordance with Article 36, the President has promulgated Mil. R. Evid. 412, which allows admission of "evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the accused to prove consent[.]" Reading them in harmony with one another, we interpret these provisions to mean that, *taken together with other evidence in the case*, a victim's sexual behavior with an accused may be admissible if it makes it more likely to conclude the victim consented to the charged sexual misconduct.

[10] We do not criticize the military judge for not conducting these balancing analyses; he determined the evidence was not relevant in the first place.

threshold for relevant evidence" under Mil. R. Evid. 412). The error was constitutional in proportion,[11] for it unreasonably curtailed both appellant's *Fifth Amendment* due process right to present a defense and his *Sixth Amendment* right to meaningfully cross-examine the victim.

Presented with a non-structural constitutional error, "the Government must prove...harmless[ness] beyond a reasonable doubt." *United States v. Cueto, 82 M.J. 323, 334 (C.A.A.F. 2022)* (quoting *United States v. Tovarchavez, 78 M.J. 458, 460 (C.A.A.F. 2019)*. While the government correctly writes of *Van Arsdall's* multi-part prejudice inquiry, we are not "confident that there was no reasonable possibility that the error might have contributed to the conviction." *Tovarchavez, 78 M.J. at 460* (citing **[*8]** *Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)*. The victim's testimony was pivotal to the government's case, especially where the government offered no evidence to corroborate her allegation that the sexual activity was non-consensual. And, the excluded evidence was not cumulative with other admitted evidence — the fact finder received no information about the victim's and appellant's allegedly flirtatious relationship. Considering these factors, we conclude the fact finder might reasonably have viewed the excluded evidence as a reason to doubt the government's proof, whether pertaining to the victim's credibility, lack of consent, or appellant's state of mind.

CONCLUSION

The finding of guilty and the sentence are set aside. A rehearing may be ordered by the same or a different convening authority. All rights, privileges, and property, of which appellant has been deprived by virtue of the findings set aside by this decision are ordered restored. *See* *UCMJ arts. 58b(c)* and *75(a)*.

Senior Judge BROOKHART and Judge ARGUELLES concur.

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[11] Considering the error's constitutional dimension, we do not assess whether the excluded evidence would cause unfair prejudice to the victim's privacy. *See* *Gaddis, 70 M.J. at 256* ("M.R.E. 412 cannot limit the introduction of evidence required by the Constitution"); Mil. R. Evid. 412(b) ("In a proceeding, the following evidence is admissible . . . (2) evidence of specific instances of a victim's sexual behavior with respect to the person accused of sexual misconduct, if offered by the accused to prove consent . . . and (3) evidence the exclusion of which would violate the accused's constitutional rights.")

CERTIFICATE OF SERVICE, U.S. v. GERANEN (20210306)

I certify that a copy of the foregoing was sent via electronic submission to Ms. Terri Zimmermann, civilian appellate defense counsel, at ***Terri@texasdefenselawyers.com***, and the Defense Appellate Division at ***usarmy.pentagon.hqda-otjag.mbx.dad-accaservice @mail.mil***, on the 24th day of January, 2023.

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