IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.	Docket No. ARMY 20210520
Staff Sergeant (E-6) **LESLY J. LINDOR,** United States Army, Appellant	Tried at Fort Hood, Texas, on 30 June and 21 September 2021, before a general court-martial convened by Commander, III Corps, Colonel Maureen A. Kohn, military judge, presiding.

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

Assignments of Error[1]

I. WHETHER THE GOVERNMENT VIOLATED THE RELIGIOUS FREEDOM RESTORATION ACT BY USING APPELLANT'S RELIGION AGAINST HIM.

II. WHETHER THE GOVERNMENT VIOLATED THE FREE EXERCISE CLAUSE BY USING APPELLANT'S RELIGION AGAINST HIM.

III. WHETHER THE GOVERNMENT VIOLATED THE FREE EXERCISE CLAUSE BY BEING HOSTILE TO APPELLANT'S RELIGION.

[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 3

IV. WHETHER THE GOVERNMENT VIOLATED THE EQUAL PROTECTION CLAUSE BY USING APPELLANT'S RELIGION AGAINST HIM.

V. WHETHER THE GOVERNMENT INTRODUCED EVIDENCE IN VIOLATION OF R.C.M. 1001 AND MADE IMPROPER ARGUMENT.

VI. WHETHER APPELLANT IS ENTITLED TO RELIEF FOR UNREASONABLE POST-TRIAL DELAY.

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Statement of the Case

On 21 September 2021, a military judge sitting as a general court-martial convicted appellant, consistent with his pleas, of three specifications of attempted premeditated murder, one specification of conspiracy to commit premeditated murder, one specification of willful disobedience of a warrant officer, one specification of murder, and one specification of stalking, in violation of Articles 80, 81, 91, 118, and 120a, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, 891, 918, 920a (2016) [UCMJ]. (R. at 16, 108). The military judge sentenced appellant to confinement for life with the eligibility for parole and a dishonorable discharge. (R. at 298). Pursuant to a pretrial agreement, the convening authority approved 209 days confinement credit and only so much of the sentence as provided for 70 years confinement and a dishonorable discharge. (Action). On 1 November 2021, the military judge entered judgment. (Judgment).

Statement of Facts

A. Appellant murdered his wife by poisoning her with a toxic insecticide he obtained from an accomplice in Haiti.

Appellant attempted to murder his wife with poison three times during the summer of 2018.[2] (Pros. Ex. 1, paras. 38–45, 82–88, 89–95). On 3 September 2018, appellant finally succeeded in murdering her when he poisoned her with the

[2] Specifications 1, 2, and 3 of Additional Charge I reflect these attempts. (Charge Sheet).

toxic insecticide methomyl.[3] (Pros. Ex. 1, paras. 96–108). Appellant, who was born and raised in Haiti, obtained the poisons from a Haiti-based, foreign national accomplice named Bertin Charles. (Pros. Ex. 1, paras. 2, 15–27, 31–37, 46–53, 56–58, 61–74, 76–78, 81).

B. Appellant and Bertin Charles attempted to effect the murder through physical and mystical means.

In addition to his attempts to kill his wife with poison, appellant also attempted to enlist the aid of mystical forces to bring about her death. (37–38). In accordance with the Haitian Vodou belief system, appellant paid Bertin Charles over $2,400 to acquire and send him various *coup de poudre*, or powders, used within the Vodou tradition "to kill or sicken on contact."[4] (Pros. Ex. 1, para. 12; R. at 37). He also provided Bertin Charles two photographs of his wife and her home address to use in an "expedition" against her in the hope that it would bring about her death.[5] (Pros. Ex. 1, paras 16–18).

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[3] Charge I denotes appellant's murder of his wife. (Charge Sheet).

[4] Appellant described his belief that the toxic powder would work because "Bertin was using a voodoo ritual. For him, the powder can do a lot of—a lot of things. So the powder can make somebody sick or dead. And that's…the intention of powder. The powder is not supposed to be toxic—it's supposed to be something mystical, like done by voodoo like ritual and things of that nature[.]" (R. at 37–38).

[5] An expedition is a Vodou sorcery ritual where a Vodou spirit is commanded to execute an order, task or particular kind of work, such as "mak[ing] someone fall in love, have an accident, go crazy, or die." (Pros. Ex. 1, para. 17). "When seeking to have an expedition performed, the requestor will provide as much

C. Appellant plead guilty to his crimes.

On 21 June 2021, appellant agreed to plead guilty to, *inter alia*, attempting to murder, conspiring to murder, and ultimately murdering his wife. (R. at 93; App. Ex. IV). As part of the offer to plead guilty, appellant agreed:

> To enter into a written stipulation of fact … setting forth the facts and circumstances of the offenses to which I am pleading guilty. This stipulation may be used to determine the providence of my plea, as evidence in aggravation, and to inform the military judge of matters pertinent to an appropriate sentence[.]

(App. Ex. IV).

On 22 June 2021, appellant signed the agreed upon stipulation of fact. (Pros. Ex. 1). He agreed that "the facts contained in [the] stipulation are true, and are admissible, despite any Military Rule of Evidence, confrontation right, or Rule for Courts-Martial that might otherwise make them inadmissible." (Pros. Ex. 1, para. 1). Appellant agreed that the facts could be considered by the military judge to reach findings, to determine the providence of appellant's guilty plea, and by "the Military Judge, the sentencing authority, the Convening Authority, and any appellate authority to determine an appropriate sentence, even if the evidence of

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specific information as possible about the target person […] so the [Vodou spirit] knows exactly whom to target." (Pros. Ex. 1, para. 17). In appellant's own words: "It's a type of ritual that they do in Haiti. It's a type of ritual a voodoo priest can do in Haiti and when they do it good things can happen to you or bad things can happen to you." (R. at 32). Appellant commissioned the expeditions against his wife "to make [her] sick and she can pass away." (R. at 32).

such facts is deemed otherwise inadmissible[.]" (Pros. Ex. 1, para. 1). Finally, appellant expressly waived any objection to the admissibility of the exhibits, photographs, and videos outlined in and provided as enclosures to the stipulation of fact, and agreed "that they may be used for the providence inquiry and the pre-sentencing portion of trial, as well as on appeal for all purposes described above in Section I." (Pros. Ex. 1, para. 129).

Additional facts are incorporated below.

Summary of Argument (Assignments of Error I–V)

Appellant's assignments of error (I–V) allege that the government violated his rights by using his religion against him and by being hostile to his religion. (Appellant's Br. 10–26). Appellant's underlying premise is flawed, however, as the government was neither hostile towards appellant's religion nor used his religion against him. While the government made some references to appellant's Vodou religion, these references were neutral, objective statements about the religion which were necessary for a full account of the facts and circumstances surrounding appellant's crimes. The government's references cast no aspersions upon the truth or wisdom of Vodou, did not exaggerate or misrepresent any Vodou beliefs or traditions, and imposed no improper burden upon appellant's religious practice.

Appellant's belief in Vodou—specifically his belief in the efficacy of Vodou

sorcery—thoroughly informed appellant's actions in conspiring to murder his wife. An account of his crimes omitting this background context would make little sense, if it were even possible at all. Appellant effectively conceded the relevance and necessity of reference to Vodou in accounting for his actions when he confessed his own intent to employ Vodou against his wife during his unsworn statement to the court-martial in pre-sentencing. (R. at 258). It was appellant's actions—and not the government's—which made *some* discussion of Vodou relevant and necessary for for a full accounting of appellant's crimes. Moreover, by agreeing to the stipulation of fact between the parties, appellant expressly waived his objections to the government's use of these facts. Finally, even if appellant did not waive his objections, and even if the government's use of these facts was erroneous, the error was plainly harmless beyond a reasonable doubt.

Waiver

Standard of Review

Whether an appellant has waived an objection is a legal question that this court reviews de novo. *United States v. Day*, 2022 CAAF LEXIS 892, at *6 (C.A.A.F. 2022) (quoting *United States v. Gudmundson*, 57 M.J. 493, 495 (C.A.A.F. 2002)).

A. Appellant's guilty plea, stipulation of fact, and colloquy with the military judge constituted an affirmative waiver of his Assignments of Error.

In pleading guilty to the charges for which he was convicted, appellant

signed a stipulation of fact expressly waiving objection to the facts and enclosures contained within the exhibit, "even if the evidence of such facts is deemed otherwise inadmissible."[6] (Pros. Ex. 1, paras. 1, 129). The military judge confirmed that appellant read the document thoroughly before signing it, that appellant truly wanted to enter into the stipulation and that he believed it was in his best interest to do so. (R. at 18–19). The military judge further ensured that appellant understood that the military judge would use the stipulation to determine his guilt and to determine an appropriate sentence, that everything in the stipulation was true, and that the stipulation did not contain anything appellant did not wish to admit was true. (R. at 18–19).

More importantly, appellant *wanted* to plead guilty to his crimes. As the C.A.A.F. stated in *United States v. Hardy*, 77 M.J. 438, 442 (C.A.A.F. 2008), when an accused unconditionally pleads guilty, he is waiving any nonjurisdictional objections and appeals. The military judge confirmed that the offer to plead guilty originated with appellant. (R. at 102). No one attempted to force or coerce appellant into making his offer to plead guilty. (R. at 102, 105). He had enough time to discuss his pretrial agreement with his defense counsel, and he was satisfied with his attorney's advice concerning the agreement. (R. at 104, 105). He did not have any questions about the meaning and effect of his guilty plea. (R.

[6] *See generally,* R.C.M. 705(c)(2)(A) and R.C.M. 811.

at 106).

Although military courts have applied a presumption against finding a waiver of constitutional rights, a waiver of constitutional rights is effective if it "clearly established that there was an intentional relinquishment of a known right." *United States v. Sweeney*, 70 M.J. 296, 304–06 (C.A.A.F. 2011) (internal citations omitted). An "unconditional plea of guilty waives all nonjurisdictional defects at earlier stages of the proceedings." *United States v. Bradley*, 68 M.J. 279, 281 (C.A.A.F. 2010).

Here, to the extent that appellant's assignments of error implicate constitutional rights at all, his stipulation of fact and unconditional plea of guilty effectively waived those concerns.

B. Appellant's failure to raise his objections constitutes waiver under Rule for Courts-Martial 905(e).

Rule for Courts-Martial 905(e) states:

> (1) Failure by a party to raise defenses or objections or to make motions or requests which must be made before please are entered under subsection (b) of this rule forfeits the defenses or objections absent an affirmative waiver. […]
> (2) Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case. Failure to raise such other motions, requests, defenses, or objections, shall constitute

forfeiture, absent an affirmative waiver.[7]

Appellant's failure to raise his objections to the religious references in the stipulation of fact and the government's closing argument at pre-sentencing at any time prior to adjournment of his court-martial constitutes waiver of his objections.

C. This court should not pierce waiver because there was no error and therefore no prejudice to appellant.

Notwithstanding the lack of legal error, it remains for this court to determine whether the sentence "should be approved" under Article 66, UCMJ. In *United States v. Conley*, 78 M.J. 747, 751 (Army Ct. Crim. App. 2019), this court articulated the circumstances under which it will consider exercise of its "unique authority" to notice waived error. *Conley* clarified that

> while [this court's] authority under Article 66 is in no way limited to certain issues, on a practical level the exercise of this unique power is more likely to be found in certain military circumstances which—while not technically amounting to legal error—have disadvantaged the accused in a manner that the CCA [Court of Criminal Appeals] determines needs correction or has resulted in a court-martial where the perception of unfairness in the trial may have the actual effect of *undermining* good order and discipline.

Id. (emphasis in original).

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[7] In Section 5 of Executive Order (EO) 13,825, 83 Fed. Reg. 9889, the President designated 1 January 2019 as the default effective date for the MJA 16 provision amending R.C.M. 905(e) to this version. The Court of Appeals for the Armed Forces has held that EO 13,825 "was a valid exercise of the President's rulemaking authority." *United States v. Brubaker-Escobar*, 81 M.J. 471, 473 (C.A.A.F. 2021).

Accordingly, even if this court looks to its broad plenary authority to review waived issues, this is not one of those cases which have disadvantaged the accused in a manner that needs correction or in which the perception of unfairness may undermine good order and discipline. *Conley*, 78 M.J. at 752. 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). Here, "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." *United States v. Olson*, 2021 CCA LEXIS 160 at *11 (Army Ct. Crim. App. 2021), pet. denied, 81 M.J. 454 (C.A.A.F. 2021) (declining to notice waived unreasonable multiplication of charges issue).

More obviously, appellant was not disadvantaged in a manner that needs correction, nor could a perception of unfairness in his case undermine good order and discipline, because appellant willingly and knowingly plead guilty to numerous charges—including the heinous and premeditated murder of his wife. Even if it were possible to relate the facts and circumstances of appellant's months-long efforts to murder his wife without *any* reference to the Vodou-related means

he employed,[8] there is no reasonable probability that appellant would have received a less severe sentence.

Appellant faced life in prison *without* eligibility for parole, but he was sentenced to life *with* eligibility for parole, and further received the benefit of his bargain with the government by seeing his sentence reduced to seventy years per the terms of his pre-trial agreement.[9] Simply put, even if his assignments of error were valid, appellant has suffered no prejudice, and there can be no reasonable perception of unfairness as to the providency of his guilty plea. Accordingly, this court should not invoke its extraordinary Article 66 authority to pierce appellant's waiver of these assignments of error.

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[8] Appellant does not explicitly argue that the government could not permissibly reference his Vodou religion *at all*, but given the innocuous references to Vodou in the record this seems to be his implication. There is no authority to support such an argument, however. A nexus between an accused's religious beliefs and his crime may be reflected in the factual account of his actions without any prejudice to either the accused personally or his religion in general. *See, e.g., United States v. Hasan*, 80 M.J. 682, 692 (Army Ct. Crim. App. 2020) ("As soon as Ms. LW left the area, appellant raised [his weapon], yelled, 'Allahu Akbar!' and opened fire on the soldiers at Station Thirteen.").

[9] *See Conley*, 78 M.J. at 752 ("Nearly all pretrial agreements involve compromise by the accused and government…. The government usually agrees to reduce the sentence exposure of the accused and often agrees to dismiss some of the charges that the accused is facing. The accused gives up, most importantly, the obligation for the government to prove guilt.").

Assignment of Error I

WHETHER THE GOVERNMENT VIOLATED THE RELIGIOUS FREEDOM RESTORATION ACT BY USING APPELLANT'S RELIGION AGAINST HIM.

Additional Facts

In the stipulation of fact, under the section entitled "Evidence in Aggravation," paragraph 123 includes in relevant part the following stipulation:

> [Appellant], who served in a position of trust as a U.S. Army CID Agent, used the Army [law enforcement] systems for his own personal benefit. He used these platforms to acquire information about his love interest [the stalking victim], her former husband, and her then current boyfriend[.] He also used the platforms to acquire information about individuals involved in his investigation to include law enforcement officers and the military prosecutor assigned to the case. [Appellant] sent the information to numerous Vodou practitioners so they could perform rituals to cast love spells against [the stalking victim] and obstruction spells against the chain of command, investigators, and the prosecutor assigned to the case. The Accused sent one Vodou practitioner, Paul Surin, images of the Accused's chain of command and the military prosecutor in the case. Paul Surin used these images to conduct an expedition which consisted of wrapping these images around a rooster, stabbing the images through the face and into the rooster, and then setting fire to the images and rooster.

(Pros. Ex. 1, para 123).

Closing argument for the government during pre-sentencing also included several references to Vodou which are attached at Appendix A, *infra* p. 43.

Standard of Review

"Our review of the requirements of [The Religious Freedom Restoration Act] [RFRA], although largely factual in nature, presents mixed questions of fact and law." *United States v. Sterling*, 75 M.J. 407, 415 (C.A.A.F. 2016) (citing *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996)). This Court reviews legal questions, including the application of RFRA, de novo. *Id*.

Law

A. Religions Freedom and Restoration Act

The RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government "demonstrates that application of the burden … (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a-b).

To establish a prima facie RFRA defense, an accused must show by a preponderance of the evidence that the government action (1) substantially burdens (2) a religious belief (3) that the defendant sincerely holds. *Sterling*, 75 M.J. at 415.

B. Rule for Courts-Martial 1001(b)(4) – Evidence in Aggravation

Rule for Courts-Martial 1001(b)(4) addresses evidence which the government may introduce in aggravation during an accused's pre-sentencing

procedure. "The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4).

Argument

The evidence does not support appellant's argument that the government violated the RFRA. As a threshold matter, appellant does not dispute that his belief in Vodou was sincerely held. (Appellant's Br. 13). The relevant inquiry, therefore, concerns the nature of the government's action in this case, and whether the action substantially burdened appellant's religious practice. The government's actions during its pre-sentencing case and closing argument did not substantially burden appellant's religious practices. Instead, the government's references were properly used to provide context to appellant's heinous crimes.

A. The government did not burden appellant's religious belief by referencing Vodou practices that were directly related to appellant's crimes.

Appellant claims that the government violated the RFRA by "using his religion against him … as evidence in aggravation at trial." (Appellant's Br. 12).[10]

The RFRA does not define "substantially burden," and as the CAAF

[10] Appellant also claims that the government violated RFRA by using his religion against him in placing him in pretrial confinement. (Appellant's Br. 12). However, because this Court denied attachment of appellant's appellate exhibit offered to substantiate this claim (Def. App. Ex. O), and because there is no other evidence in the record bearing on this issue, the government declines to address this specific RFRA claim.

observed in *Sterling*, the federal appellate courts have provided several different formulations. *Sterling*, 75 M.J. at 417. *See also id* at fn. 5 (discussing various formulations of "substantial burden" in the federal appellate circuits). However, under any conceptualizations of what constitutes a "substantial burden," impact upon an appellant's "practice," "exercise," "behavior," or "conduct" is a condition precedent to application of the standard. In other words, the appellant's religious practice—his actions, his conduct, or his beliefs—must be affected by the government action at issue. *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719 (2014) (finding a RFRA violation where government mandate required petitioner to "*engage in conduct* that seriously violates their religious beliefs.") (emphasis added); *Sterling*, 75 M.J. at 418 ("We reject the argument that every interference with a religiously motivated *act* constitutes a substantial burden on the exercise of religion. […] Appellant did not present any testimony that the signs were important to her *exercise* of religion, or that removing the signs would either prevent her from engaging in *conduct* [her] religion requires, or cause her to *abandon* one of the precepts of her religion.") (emphasis added) (internal citations omitted); *Apache Stronghold v. United States*, 38 F.4th 742, 754 (9th Cir. 2022) ("So under RFRA, the government imposes a substantial burden on religion only when … individuals are *forced to choose* between following the tenets of their religion and receiving a governmental benefit … or when individuals *are coerced*

to act contrary to their religious beliefs by the threat of civil or criminal sanctions.") (emphasis added) (internal citations omitted).

Here, the government's references to Vodou neither required nor prohibited appellant's religious activity or belief. Rather, the government properly and impartially described appellant's religious beliefs and how these beliefs informed the actions he took to murder his wife; namely, the employment of a Vodou sorcerer to conduct "expeditions" against his wife and provide *coup de poudre* to poison her. Moreover, appellant agreed to the truth of all of this information and to its use in support of his offer to plead guilty. (Pros. Ex. 1, 129).

The government also described appellant's attempts to use Vodou sorcery to "cast love spells against [the stalking victim] and obstruction spells against the chain of command, investigators, and the prosecutor assigned to the case[]" as evidence in aggravation. (Pros. Ex. 1, para. 123). These references were "directly related to or resulting from the offenses" in which appellant was convicted and explain how appellant "used the Army [law enforcement] systems for his own personal benefit." (R.C.M. 1001(b)(4); Pros. Ex. 1, para. 123). *See also* Assignment of Error VI argument*, infra* p. 31.

Appellant has not identified any reference to his religion in the government's closing argument which mischaracterized or exaggerated the objective facts concerned as reflected in the stipulation, or which in any way impacted (much less

burdened) his religious practice. *See* Appendix A, *infra* p. 43. Because appellant's exercise of his religion was in no way substantially burdened, he has failed to make a prima facie RFRA case and is entitled to no relief.

B. The RFRA's "least restrictive means" test is inapplicable to this case.

Appellant also claims that the government's actions were not the least restrictive means of furthering a compelling government interest. (Appellant's Br. 15–16). However, appellant fails to articulate in what sense he was restrained. For the reasons argued above establishing that appellant's religious practice was in no way burdened, his practice was likewise in no way restrained. Because he has failed to make a prima facie RFRA claim, the "least restrictive means" analysis is inapplicable.

C. Conclusion

Appellant has failed to make a prima facie RFRA claim. The government's references to appellant's religion were impartial and within the bounds of what appellant agreed was true in his stipulation of fact and what he volunteered in his colloquy with the military judge. He has not alleged any burden upon his practice of Vodou imposed by the government's argument, and he is entitled to no relief.

Assignment of Error II

WHETHER THE GOVERNMENT VIOLATED THE FREE EXERCISE CLAUSE BY USING APPELLANT'S RELIGION AGAINST HIM.

Law

The First Amendment of the Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …." U.S. Const. amend. I.

"The Supreme Court has recognized that it is 'constitutionally impermissible' for a court to use a defendant's religion against him at sentencing." *United States v. Ayers*, 855 Fed. Appx. 111 (4th Cir. 2021) (per curiam) (citing *Zant v. Stephens*, 462 U.S. 862, 885 (1983)); *see also* U.S. SENT'G GUIDELINES MANUAL § 5H1.10, P.S. (2018) (providing that a defendant's religion is "not relevant in the determination of a sentence.").

"The government … cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop, Ltd. V. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). The Free Exercise Clause bars even "subtle departures from neutrality" on matters of religion. *Id*. (citing *Church of Lukumi Babalu Aye*, 508 U.S. 520, 534 (1993)).

Argument

Appellant concedes that "[t]here is no statute, regulation, or published order to reference [as a government action] in this case." (Appellant's Br. 20). Rather, he argues that "[e]ven though it did not go through any official enactment or promulgation, the government still subjected appellant to its power" through "the pervasive and derogatory use of appellant's religion," and by "attacki[ing] appellant's religion." (Appellant's Br. 20). Additionally, appellant insists that the government's use of "evidence of appellant's religious practices … [was] facially not neutral." (Appellant's Br. 19). Appellant's claims are not supported by the record.

Appellant cannot point to any particular instance of a derogatory use of appellant's religion, much less pervasive use, and he has not provided an exampleof the government "attack[ing] appellant's religion." (Appellant's Br. 21).

To the contrary, the government provided (and appellant stipulated to) information related to Vodou which was facially neutral. Specifically, appellant stipulated to the testimony of an expert in the Vodou religion, who would testify that:

> Within the Vodou tradition, various powders can be used to kill or sicken on contact. These "*coup de poudre*" or powder hits take several forms which include *poud simen* (powder to spread) and *poud bedann* (powder to ingest). Use of physical powders is often combined with mystical ceremony or ritual to bring about the desired end state.

(Pros. Ex. 1, para. 12) (emphasis added).

> [A]n expedition or Creole "*ekspedisyon*" is a Vodou sorcery ritual where a Vodou "*Loa*" or spirit is commanded to execute an order, task, or particular kind of work. Common types of "work" are commanding the *Loa* to make someone fall in love, have an accident, go crazy, or die. Death can take any form to include an accident, a sickness, or random gunfire. When seeking to have an expedition performed, the requestor will provide as much specific information as possible about the target person to include, but not limited to, name date of birth, address, and photographs. The purpose of this information is to provide information to the *Loa* so it knows exactly whom to target.

(Pros. Ex. 1, para. 17) (emphasis added).

This information objectively describes certain features of the Vodou tradition, without which appellant's use of "*coup de poudre*" and the commissioning of "expeditions" against his wife would remain inscrutable.

Elsewhere in the stipulation of fact, stipulation of expert testimony provided additional background information necessary to understand appellant's actions:

> On 29 April 2018, while requesting that Bertin Charles organize an expedition to kill Mrs. Lindor, [appellant] also begin (sic) research via Google regarding the acquisition of tetrodotoxin (TTX). Tetrodotoxin is a deadly neuro-toxin which can be extracted from various species of pufferfish. If [the expert] were to testify, she would testify that pufferfish toxin is one of the active ingredients in Haitian Vodou "zombie powder" which, *within the Haitian culture*, is believed to cause death, paralysis, and/or literal zombification.

(Pros. Ex. 1, para. 20) (emphasis added).

> In [a video of an expedition provided by Bertin Charles to appellant], Bertin Charles invoked Bawon and ti-Bousou to move without delay against Rachelle Gachette. If [the expert] were to testify, she would testify that within the Vodou tradition, Bawon is the guardian of the cemetery and the spirit ruler of the dead, of justice, and of punishment. She would also testify that ti-Bousou is another spirit or *Loa* capable of facilitating an expedition.

(Pros. Ex. 1, para. 25) (emphasis added).

> If [the expert] were to testify, she would testify that there are several categories of toxins in the Vodou tradition which are used in water, oil, or powder. She would testify that the substance described by Bertin Charles is *typical* of the oil type toxin used within the Vodou tradition.

(Pros. Ex. 1, para. 63) (emphasis added).

Before Bertin Charles provided appellant with the poison he ultimately used to murder his wife, Bertin Charles called the toxic substance "*a la segond*," or "in a second." (Pros. Ex. 1, para. 78). Stipulation of expert testimony again clarifies:

> If [the expert] were to testify, she would testify that when dealing with Haitian Vodou poisons it is very common for the poisons to have unique names which describe the impact they will have on the intended victim. For example, "cholera powder" is so named since it will give the person the same effects as cholera – diarrhea, vomiting, and ultimately death. "In a second" and "three steps" are likely so named because they are intended to bring about death "in a second" and within "three steps."

(Pros. Ex. 1, para. 79) (emphasis added).

The references to Vodou in the stipulation of fact (as well as in government's pre-sentencing argument) neither purport to establish nor prohibit

any religion. Moreover, there is simply no way to read these passages as attacks on appellant's religion. The government's references to Vodou "do not remotely reflect bias against persons who practice that religion or against [appellant] in particular for …practicing that religion." *Ayers*, 855 Fed. Appx. at 114. Finally, the government's references do not "pass judgment upon or presuppose[] the illegitimacy of [appellant's] religious beliefs and practices."[11] *Masterpiece Cakeshop*, 138 S. Ct. at 1731.

In sum, while the evidence of appellant's use of *coup de poudre*, and his conspiracy to employ "expeditions" against his wife (and others) is certainly aggravating, this information was not used "against" appellant in an impermissible sense, nor did it constitute "hostility" towards appellant's religion. *See also United States v. Fletcher*, 62 M.J. 175, 182–83 (C.A.A.F. 2005) ("Disparaging comments are … improper when they are directed to the defendant himself and constitute more of a personal attack on the defendant than a commentary on the evidence."). The discussion of Vodou here was properly included as background information, offered by way of placing appellant's behavior into context. There was no infringement of appellant's free exercise rights in this court-martial.

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[11] To the contrary, trial counsel explicitly noted that "[i]t's not important whether these [evil and supernatural] forces exist or whether they are effective. What matters is that [appellant] believed in them." (R. at 270). Appellant inaccurately construes this passage as "the United States of America fe[eling] it necessary to explain that appellant's religion was not real." (Appellant's Br. 23).

Assignment of Error III

WHETHER THE GOVERNMENT VIOLATED THE FREE EXERCISE CLAUSE BY BEING HOSTILE TO APPELLANT'S RELIGION.

Law

See Assignment of Error II Law section, *supra* p. 17.

Argument

The government was not hostile towards appellant's religion; thus, the free exercise clause was not violated. Appellant claims that the government's sentencing theme was that "Christianity was good and Vodou was bad." (Appellant's Br. 23). In support of his position, appellant claims the government emphasized '"*twice* that appellant's wife lived a 'life characterized by faith…."' and portrayed appellant's religion as the '"the occult"' populated by '"evil and supernatural forces.'" (Appellant's Br. 23; R. at 263–64). Appellant argues that this contrast constituted the government's "moral judgment." (Appellant's Br. 23). Appellant's claim is not supported by the record.

Appellant correctly notes that the government offered evidence of his wife's Christian faith in pre-sentencing, including through the testimony of her two aunts (R. at 126–27; 136–37, 165–170; 172; 174–75); and her friend (R. at 143).[12] This

[12] Testimony from five other government pre-sentencing witnesses did not discuss

testimony reflected the basis of the relationship between appellant's wife and the witnesses, which in these particular relationships was of a specifically religious nature. For example, one aunt testified:

> "We are both believers. Like any good preacher that she knows we will share sometime. We…do the services together, like if it's online or anything. […] I am Catholic. She is Protestant, but we still talk a lot about God."

(R. at 126). This testimony informed the witness's response to a later question from trial counsel about whether she still observed a particular religious program ("40 days of prayer") she shared with the victim: "No, it's too-too-too-too painful. […] I stopped because it's like a program that we shared together. I - I can't do it." (R. at 136–37). It was in this context that the government referenced that witness's faith in pre-sentencing argument:

> "And the things that she used to enjoy in life she can't now because of [the victim] being gone. She can't because the things she shared, like the 40 days of prayer with [her] are never going to be the same, because now that [she] is gone all they do is remind her of that loss."

(R. at 261).

Courts have long held that such testimony is permissible. In *United States v. Wilson*, 35 M.J. 473 (C.M.A. 1992), the court noted that R.C.M. 1001(b)(4) allows impact evidence that shows the crimes' effect on the victim, the victim's family,

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either the witness's or the victim's religious practice. (R. at 153–57; 158–62; 177–205; 206–15; 215–25).

and the close community.[13] Notably, appellant did not object to any of these questions by the government, or to these comments in the sentencing argument.[14]

"Whenever a judge has discretion as to sentencing, consideration of the impact of the offense is an important factor in the exercise of that discretion." *United States v. Russell*, 76 M.J. 855, 859 (Army Ct. Crim. App. 2017); *see also Payne*, 501 U.S. at 819–20 ("Assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern in

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[13] *See also United States v. Hodge*, 2015 CCA LEXIS 99, *8–9 (A.F. Ct. Crim. App. 23 Mar. 2015) ("In the sentencing context, however, in finding that the Eighth Amendment did not bar the introduction of victim impact evidence and prosecutorial argument on that subject, the Supreme Court has reversed prior precedent which had held such evidence, including a victim's religiosity, was barred. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Thus, 'a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.' *Id*. *See also United States v. Murphy*, 36 M.J. 1137 (A.C.M.R. 1993) (holding that the appellant's complaint about victim-impact evidence of a murder victim's deep religious beliefs was rendered moot by the Supreme Court's decision in *Payne*), *rev'd on other grounds*, 50 M.J. 4 (C.A.A.F. 1998); *see also United States v. Bernard*, 299 F.3d 467, 478 (5th Cir. 2002) (allowing testimony that two murder victims were youth ministers in part because religion played a vital role in their lives); *United States v. Mitchell*, 502 F.3d 931, 989—90 (9th Cir. 2007) (holding that the government could introduce evidence about Navajo religious tradition to show that a murder victim's family no longer had access to its primary source of religious knowledge); *United States v. Nelson*, 347 F.3d 701, 714 (8th Cir. 2003) (noting that religious references can be included in admissible victim-impact evidence)."

[14] Even if this court were to find the questions or their answers were improper, the military judge is nevertheless presumed to know the law and apply it correctly, filtering out objectionable material to reach a proper outcome. *United States v. Rodriguez*, 60 M.J. 87, 90 (C.A.A.F. 2004).

criminal law, both in determining the elements of the offense and in determining the appropriate punishment.").

The government's witnesses were not the only ones to reference their Christian faith, however. When asked about rehabilitative potential,[15] appellant's own witness testified that "[y]es, I'm a Christian and I believe in redemption. And I believe in Christ dying for us and having us redeemed and stuff." (R. at 243). Appellant's defense counsel also discussed not only the victim's faith, but also spoke about Christianity in general:

> "There have (sic) been a lot of talk over the past couple of days about Christianity and [the victim's] Christian faith. Well, lust and greed are two in the Christian religion. Two of the seven deadly sins. Two of the tenets of the Christian faith are mercy and forgiveness."

(R. at 294).

Finally, even appellant himself alluded to religion *four times* in his unsworn statement:

> "[My wife] was turning to God and her Christian faith more and more. I wanted to try some help from a voodoo priest and I felt we began to fall apart more as we argue over the different way we look at religion and life."
>
> (R. at 256).
>
> "[She] believed that [to] go into a dance club was against

[15] In fact, defense counsel's specific question was: "You actually characterize it when we spoke earlier, not as rehabilitative potential, but as a *potential to be redeemed*, is that right?" (R. at 243) (emphasis added).

> her Christian faith. So I will go without her and that's where I met a woman."
>
> (R. at 257).
>
> "About a month later I asked [my wife] for a divorce, but divorce was not an option for her. It was against her Christian faith."
>
> (R. at 257).
>
> "I turned to a man that I had met through a friend a year earlier on my visit to Haiti. … I knew he was very into voodoo faith and I reach[ed] out to him for help to end [her] life."
>
> (R. at 258).

These references to religious belief—either through the government, defense, or by appellant himself— belie appellants argument that it was the government alone who injected religion into appellant's case. More importantly, the government's references to religion in no way constitute a governmental endorsement or denigration of any religion. Appellant's assignment of error to the contrary is meritless.

Assignment of Error IV

WHETHER THE GOVERNMENT VIOLATED THE EQUAL PROTECTION CLAUSE BY USING APPELLANT'S RELIGION AGAINST HIM.

Law

The Equal Protection Clause of the Constitution states that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. IV, §1.

Argument

For the reasons articulated above, appellant has failed to establish a prima facie equal protection case because the government did not use appellant's religion against him. He was in no way subject to a classification based upon religion. (Appellant's Br. 24) (citing *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)). He was not targeted by the government because of his religion. (Appellant's Br. 24) (citing *Parents Involved in Cmty. Sch. V. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007)). The Equal Protection Clause is plainly unimplicated by the facts of this case and appellant is entitled to no relief.

Assignment of Error V

WHETHER THE GOVERNMENT INTRODUCED EVIDENCE IN VIOLATION OF R.C.M. 1001 AND MADE IMPROPER ARGUMENT.

Standard of Review

In the absence of an objection, improper argument is reviewed for plain error. *Fletcher*, 62 M.J. at 179. "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." *Id*.

Law

Rule for Courts-Martial 1001(b)(4) addresses evidence which the government may introduce in aggravation during an accused's pre-sentencing procedure. "The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4).

The rule defines evidence in aggravation as including (but not limited to) "evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense."

Trial counsel can "argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *United States v. Baer*, 53 M.J. 235,

237 (C.A.A.F. 2000) (citation omitted). However, "[a] sentencing argument by trial counsel which comments upon an accused's exercise of his or her constitutionally protected rights is beyond the bounds of fair comment." *United States v. Paxton*, 64 M.J. 484, 487 (C.A.A.F. 2007) (citation omitted).

Argument

The government's pre-sentencing argument properly advanced matters in aggravation. For this assignment of error, appellant persists in his underlying premise that the government's references to his religion constituted impermissible evidence in aggravation. Again, appellant's argument is not supported by the record. The government did not "focus[] on appellant's religion as evidence in aggravation." (Appellant's Br. 28).

Under the section entitled "Evidence In Aggravation," the stipulation of fact notes that:

> From approximately 26 March 2018 to 7 November 2018, [Appellant], who served in a position of trust as a U.S. Army CID Agent, used the Army [law enforcement] systems for his own personal benefit. He used these platforms to acquire information about his love interest [the stalking victim], her former husband, and her then current boyfriend[.] He also used the platforms to acquire information about individuals involved in his investigation to include law enforcement officers and the military prosecutor assigned to the case. [Appellant] sent the information to numerous Vodou practitioners so they could perform rituals to cast love spells against [the stalking victim] and obstruction spells against the chain of command, investigators, and the prosecutor assigned to

> the case. The Accused sent one Vodou practitioner, Paul Surin, images of the Accused's chain of command and the military prosecutor in the case. Paul Surin used these images to conduct an expedition which consisted of wrapping these images around a rooster, stabbing the images through the face and into the rooster, and then setting fire to the images and rooster.

(Pros. Ex. 1, para. 123). The aggravating fact in this passage is contained in its first sentence: "From approximately 26 March 2018 to 7 November 2018, [Appellant], who served in a position of trust as a U.S. Army CID Agent, used the Army [law enforcement] systems for his own personal benefit." (Pros. Ex. 1, para. 123). The balance of the passage, including the references to Vodou, are offered to explain *why* appellant used these systems, *how* his use was for his own personal benefit, and *what* he did with the information he obtained. Although "jarring and disturbing" in its effect, "Vodou" was not the focus of this evidence, neither qua religion nor with respect to appellant's personal beliefs. (Appellant's Br. 14). Moreover, the fact that these features of appellant's actions are disturbing does not preclude their inclusion, as they were factually accurate and "directly related" to the offenses to which appellant plead guilty.

The same is true for trial counsel's references to Vodou in pre-sentencing argument. *See Appendix A, infra* p. 43. The government's references to Vodou in no way constituted the "focus" of the government's argument and were always

offered as a matter of the objective, factual truth of appellant's actions.[16] The focus of the government's argument was the fact that appellant murdered his wife in cold blood. It was on account of this fact, and appellant's other convictions that appellant was sentenced to seventy years confinement. There is nothing in the record to support any other conclusion.

Assignment of Error VI

WHETHER APPELLANT IS ENTITLED TO RELIEF FOR UNREASONABLE POST-TRIAL DELAY.

Additional Facts

The military judge announced appellant's sentence on 22 September 2021, and the court-martial adjourned. (R. at 299; Statement of Trial Results). That same day, appellant requested speedy post-trial processing through his assigned trial defense counsel. (Speedy Post-Trial Processing Request). On 29 October 2021, the convening authority approved the adjudged finding and sentence. (Action). On 1 November 2021, the military judge entered judgment. (Judgment). On 8 February 2022, the trial counsel completed the precertification review of the record of trial. (Chronology). On 17 March 2022, the military judge certified the

[16] Appellant attempts to analogize trial counsel's comments in his case to those of the trial counsel in *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007) (finding plain and obvious error where the trial counsel compared the appellant to Adolph Hitler, Saddam Hussein, Osama bin Laden, and the devil). Here, trial counsel's remarks during his sentencing argument are orders of magnitude removed from the statements considered in *Erickson*.

record of trial. (Authentication). On 21 March 2022, the court reporter certified the record of trial. (Chronology).

On 25 March 2022, this court docketed appellant's case. (Docketing Notice). The total number of days from adjournment to docketing was 184 days. (Statement of Trial Results; Chronology).

Standard of Review

This court conducts a de novo review of claims of unreasonable post-trial delay. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006).

Law

There are two distinct analyses in addressing claims of post-trial delay: determining whether appellant suffered a due process violation under the Constitution and determining sentence appropriateness under Article 66(d)(1), UCMJ. *United States v. Simon*, 64 M.J. 205, 207 (C.A.A.F. 2006).

A. Fifth Amendment Procedural Due Process.

Servicemembers convicted at courts-martial have a due process right to a timely review and appeal of their convictions. *Moreno*, 63 M.J. at 135. Unreasonable delay in post-trial processing is presumed when "more than 150 days elapse between final adjournment and docketing with [the Army Court of Criminal Appeals]." *United States v. Brown*, 81 M.J. 507, 510 (Army Ct. Crim. App.

2021).[17] This presumption triggers a four-factor analysis (*Barker* factors) that examines: "(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 *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). The four *Barker* factors must be balanced, and "no single factor [is] required to find that post-trial delay constitutes a due process violation." *Id.* at 136 (citing *Barker*, 407 U.S. at 533). However, the *Barker* analysis is not required if this court determines that any due process violation is harmless beyond a reasonable doubt. *United States v. Finch*, 64 M.J. 118, 125 (C.A.A.F. 2006).

Military CCAs will also further examine prejudice, one of the *Barker* factors, in light of three primary sub-factors: (1) prevention of oppressive incarceration; (2) minimization of appellant's anxiety and concern while awaiting the outcome of the appeal; and (3) limiting the possibility of impairment of the grounds for appeal and defense at a possible rehearing. *Moreno*, 63 M.J. at 138–39. The first sub-factor "is directly related to the success or failure of an appellant's substantive appeal. If the substantive grounds for the appeal are not meritorious, an appellant is in no worse position due to the delay, even though it may have been excessive." *Moreno*, 63 M.J. at 139 (citing *Cody v. Henderson*,

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[17] "The government asks this court to overturn *United States v. Brown*." *United States v Winfield,* ARMY 20210092 (Army Ct. Crim. App. argued 12 Jan. 2023) (en banc) (decision pending).

936 F.2d 715, 720 (2d Cir. 1991)). Similarly, for the third sub-factor, the showing of prejudice "is directly related to whether an appellant has been successful on a substantive issue of the appeal and whether a rehearing has been authorized." *Id.* at 140. The second sub-factor requires an appellant to "show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Id.*

In situations where the appellant is unable to show they have suffered prejudice, "[the court] cannot find a 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.'" *Brown*, 81 M.J. at 511 (quoting *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006)). If the court finds a due process violation, the burden shifts to the government to prove the constitutional error was harmless beyond a reasonable doubt. *United States v. Ashby*, 68 M.J. 108, 125 (C.A.A.F. 2009) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). In determining whether a due process error was harmless beyond a reasonable doubt, the court analyzes the case for prejudice. *Ashby*, 68 M.J. at 125. This analysis is "separate and distinct from the consideration of prejudice as one of the four *Barker* factors." *Id.* Under this review, the court considers "the totality of the circumstances" based on the "entire record." *Id.* The court "will not presume prejudice from the length of the delay alone," but instead requires "evidence of

prejudice in the record." *Id.*

B. Sentence Appropriateness.

Absent a due process violation, this court next considers whether relief for excessive post-trial delay is warranted based on the CCA's sentence appropriateness authority under Article 66(d), UCMJ. *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). Pursuant to Article 66(d)(2), UCMJ, a CCA may provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record. Similarly, in conducting its sentence appropriateness review under Article 66(d), a CCA has "broad discretion to grant or deny relief for unreasonable or unexplained [post-trial] delay . . . ." *Ashby*, 68 M.J. at 124 (quoting *United States v. Pflueger*, 65 M.J. 127, 128 (C.A.A.F. 2004)). Therefore, even without a showing of actual prejudice, this court may also grant relief for "unexplained and unreasonable post-trial delay." *Tardif*, 57 M.J. at 224 (citing *United States v. Collazo*, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000)).

When there is post-trial processing delay, this court looks to the totality of the circumstances to determine what sentence should be approved. *United States v. Garman*, 59 M.J. 677, 678 (Army Ct. Crim. App. 2003). There is no "bright-line time limit" for post-trial processing; rather, various factors such as the length of the record, existence of post-trial processing errors, and failure to demand

speedy post-trial processing. *Id.* at 681–82. Moreover, even "unacceptably slow" post-trial processing does not immediately render a sentence inappropriate. *Id.* at 683. This is a "highly case specific" review. *Simon*, 64 M.J. at 207.

Argument

Appellant's case exceeded the presumptive 150-day standard under *Brown*. 81 M.J. at 510. However, the government did not violate appellant's due process rights because there was no prejudice and the delay was *de minimis*. Further, under the totality of the circumstances, he deserves no relief under a sentence appropriateness analysis. Therefore, this court should affirm the findings and sentence as adjudged.

A. The first and third *Barker* factors weigh in favor of appellant.

From the date the military judge adjourned appellant's court-martial to the date of docketing with this court, 184 days elapsed, exceeding the timeline provided in *Brown* by 34 days. 81 M.J. at 510; (R. at 299; Docketing Notice). Thus, the first factor weighs in favor of appellant. The third factor also weighs in appellant's favor because he asserted his right to timely review and appeal immediately following adjournment in his case. (Speedy Post-Trial Processing Request).

B. The second and fourth *Barker* factors weigh in favor of the government.

Nevertheless, the delay was reasonable given the Chief Court Reporter's temporary loss of eye sight and other valid reasons placed upon Fort Hood's court

reporters. (Post-Trial Processing Memorandum). As the memorandum reflects:

> "III Corps has only two Court Reporters and between May and December 2021 they had 5 cases of which 3 were panel cases. The Chief Court Reporter (CR) was assigned as the Senior MJ Operations NCO from beginning of July through the end of August. Due to loss of vision, Chief CR was on sick leave the week of Thanksgiving until end of December."

(Post-Trial Processing Memorandum). Should this court nevertheless decide that this factor weighs in favor of appellant, it should at least be mitigated by those operational requirements. *See United States v. Canchola*, 64 M.J. 245, 247 (C.A.A.F. 2007) ("Reviewing courts can then weigh and balance [operational requirements] in determining whether they provide adequate explanation for any apparent post-trial delays.").

Regarding the fourth *Barker* factor, appellant fails to establish prejudice. Appellant's only claim under this assignment of error is his *ipse dixit* assertion that "all four factors of the Moreno test favor appellant." (Appellant's Br. 29). He offers no argument that the thirty-four day delay imposed an oppressive incarceration, caused him particularized anxiety or concern pending the outcome of his appeal, or in any way increased the possibility of impairment of the grounds for his appeal or defense at a possible rehearing. *Moreno*, 63 M.J. at 138–39.[18] As

[18] Elsewhere, with respect to the merits of his assigned errors, appellant alleges that the prejudice was appellant being forced "to sit through his court-martial while

such, the fourth *Barker* factor weighs heavily in the government's favor.

C. The delay does not impugn the fairness or integrity of the military justice system.

Appellant has failed to show, or even attempt to show, that the delay was so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system" and overcome the absence of prejudice. *Brown*, 81 M.J. at 511 (citing *Toohey*, 63 M.J. at 362). Here, the government exceeded the timeline provided in *Brown* by thirty-four days, but well within the eighteen months allowed for this court to render its opinion.

This court has tended to find post-trial delays between trial and convening authority action to be egregious under the *Toohey* standard when they were much greater in length than 235 days. *See Brown*, 81 M.J. at 511 (finding that 373 days between adjournment and docketing at ACCA was "not so egregious as to adversely affect the public's perception of our system's fairness and integrity"); *see also United States v. Arias*, 72 M.J. 501, 507 (Army Ct. Crim. App. 2008) (finding no public perception issue based on a post-trial processing timeline of 294 days). Appellant does not argue that a delay of 235 days is "egregious" under *Toohey*. As

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the United States of America vilified his religion." (Appellant's Br. 25). Such harm, he claims, "requires no prejudice analysis" and "the nature of the error in this case should obviate the need for any prejudice analysis" and demands the setting aside of his sentence. (Appellant's Br. 26, 28). The court should reject this argument.

such, even under the "difficult and sensitive balancing process," the facts of this case show that appellant did not suffer a due process violation. *Moreno*, 63 M.J. at 145.

D. Appellant does not merit relief under a sentence appropriateness analysis.

Even where no due process violation occurs, this court must still determine "on the basis of the entire record" what sentence "should be approved." UCMJ art. 66(d). Here, appellant's sentence is appropriate in light of his crime and the maximum allowable punishment for his conviction.

Appellant viciously murdered his wife by poisoning her with a toxic pesticide, causing prolonged suffering over the course of several days. Appellant was well aware of the kind of death he was inflicting upon his unsuspecting wife, having watched the video provided by Bertin Charles showing the poison's gruesome effects upon a cat. (Pros. Ex. 1, para. 122). Appellant was also a first-hand witness to these effects in his wife, which included nausea, vomiting, diarrhea, drooling, and seizures. (Pros. Ex. 1, para. 122). After appellant and his wife returned home to Texas from their last trip to Haiti, and as a "result of the continuous poisoning [appellant's wife] had received at the hands of [appellant]," appellant found her in their bedroom "having a seizure, her eyes were twitching, and she was drooling uncontrollably." (Pros. Ex. 1, para. 97; R. at 64). Appellant called 911, and Rachelle "can be heard in the background [of the 911 call] in a

tremendous state of pain, crying out, gasping, and struggling to survive." (Pros. Ex. 1, para. 97). Appellant feigned concern for his wife on the call, but "at no point during the call did [appellant] inform the dispatcher that [his wife's] condition was the result of being poisoned. Later that night, while his wife's body struggled mightily against the poison in the hospital as she was urinating and defecating on herself, appellant was texting his paramour. (Pros. Ex. 1, paras. 98–99). The next day, while still in the hospital, appellant again added the poison he received from Bertin Charles to his wife's water. (Pros. Ex. 1, para. 102). As the poison began to take its devastating effects on his wife that evening, appellant left the hospital to meet his paramour for dinner at a sports bar. (Pros. Ex. 1, para. 104). After dinner, they went out dancing at a club. (Pros. Ex. 1, para. 104). For these and other crimes and actions, appellant was convicted to life in prison, of which sentence a term of confinement of seventy years was approved.

Consequently, the post-trial delay in this case is unrelated to the appropriateness of appellant's sentence. In light of the seriousness of the offenses for which appellant was convicted, and the fact that the trial proceeding was not tainted by the post-trial delay, this court should affirm appellant's sentence. *See Garman*, 59 M.J. at 678 (noting that this court "look[s] to the totality of the circumstances of the post- trial process" when assessing whether relief is warranted).

CONCLUSION

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

[redacted]

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CPT, JA
Appellate Government Counsel

[redacted]

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

[redacted]

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

APPENDIX A

Appendix A – References to Vodou in Government's Pre-Sentencing Closing Argument

- "He carried out [his wife's] murder and he attempted to through both spiritual and physical means." (R. at 264).

- "On 29 April 2018, [appellant] began also seeking tetrodotoxin, also known as TTX. Tetrodotoxin is a deadly neurotoxin that can be extracted from puffer fish. It's a component of the Haitian voodoo zombie powder, which within the Haitian culture is believed to cause death, paralysis and sometimes literal zombification of persons." (R. at 268–69).

- "[Appellant] doggedly pursued any means for his end. Tetrodotoxin, liquid mercury, snake venoms, poison oils, poison powders, toxic paint, toxic paints (sic) and the occult as well. [He] was willing to invoke evil and supernatural forces on his own behalf. It's not important whether these forces exist or whether they are effective. What matters is that [appellant] believed in them. He will spare no effort, legal or illegal, scientific or supernatural, to serve his own desires." (R. at 270).

- "The reason he [sent photographs of his wife along with her address to Bertin Charles] was so that Bertin Charles would be able to arrange for a voodoo sorcerer, bokor, to perform an expedition against [his wife]. And in the Haitian Creole culture, an expedition is a voodoo sorcery ritual where the voodoo loa or spirit is commanded to execute an order, a task or a particular kind of work. And for the next 5 months, [appellant] commissioned numerous expedition[s] designed to kill [his wife]. Prosecution Exhibit 6 is a video of just one of those expeditions. In this video, the Bokor is invoking Baron, the guardian of the cemetery in the spirit ruler of the dead and justice and of punishment. And he's asking him to take action against [his wife]." (R. at 270–71).

- "On 13 May 2018, [appellant] continues his efforts to find a way to kill [his wife] and to make it seem like it was an accident. He searches for the anvwa mo or the 'sending of the dead' and the site he find[s] specifically states that the victims of the anvwa mo become physically ill, spit up blood [and] are led on the road to disaster. It states that the main purpose of sending the anvwa mo to someone is death." (R. at 271).

- "On 19 May 2018, [appellant] searches in Creole for black magic spell used to kill someone. He visits Web sites with instructions for a high magic death

ritual, and the instructions include arranging an inverted pentagram, dropping six … drops of blood onto a candle and saying, 'I invoke the prince of the underworld, Satan, master of all, come to me. I need your services to kill.' [Appellant] was so obsessed with lust and greed that any means justified his end." (R. at 271).

- "Bertin Charles arranged for another expedition on 9 July 2018, and he explains this to [appellant]. He's going to a large cemetery at midnight where they will invoke the spirit Master Baron [Samedi] to break Rachelle's neck. That same day [appellant] sent Bertin Charles [his wife's] phone number, her license plate number and her date of birth. All intended to give Master Baron Samedi specific information to target and kill [his wife]. It's clear those photographs that I showed you earlier there, prosecution exhibits embedded in the stipulation of fact are the same ones that are used. Those are the photographs provided by [appellant] to Bertin Charles are the ones using these expeditions. These photographs and the audio voice message of the ritual being performed later sent back to [appellant] and the voodoo priest in that expedition invokes Baron La Croix, Baron Samedi and all the barons in the cemetery to assist with the expedition. And the Bokor asked that the Barons travel to Texas, seek out [appellant's wife] and the Voodoo priest states, "In the name of the pretty woman, […], we don't want her to stand alive but like the dead, we need for her to be face down, not alive anymore. For the dead." (R. at 271–72).

- "[Appellant], on the other hand, took an oath of marriage to [his wife], and instead of protecting her, he attempts to have her murdered by voodoo spirits, having Baron Samedi travel into [his wife's] home at night and snap her neck." (R. at 273).

- "Your Honor, society is not safe, others in society are not safe, with [appellant] free. His efforts for supernatural forces were not limited only to those targeting [his wife]. He also used them to cast love spells on [his stalking victim]. He commissioned other ceremonies to thwart members of his chain of command and a previous JAG prosecutor, once he realized he was under investigation." (R. at 273)

- "He then used DMDC and ALERTS to obtain information on the chain of command, law enforcement officers and the prosecutor on this case … which he then shared with voodoo sorcerers. [Appellant] sent one voodoo practitioner Paul Surin the images here from his chain of command. Paul Surin then used those images to conduct a violent ritual." (R. at 273).

- "He's willing to abuse his access, invoke supernatural forces to take action against his own leadership in a criminal investigation. He's also willing to murder his own wife for his own purposes, having a voodoo sorcerer, disfigure and burn images of his chain of command to get himself off." (R. at 274).

- "After [appellant's] multiple attempts to murder [his wife], which eventually succeeded, after his voodoo spells to make [his stalking victim] love him, he learned she was seeing someone else and he wanted to keep her." (R. at 275).

- "[Appellant] paid Bertin Charles more than $2400 for voodoo spells, rituals designed to kill [his wife], he paid for toxic powders, toxic oils, and poisons that [appellant] could use to kill [his wife]." (R. at 278).

- "We draw your attention, Your Honor, specifically to the later part of the video this is filmed by Bertin Charles in a sacred chamber of a voodoo sorcerer. Bertin Charles gave the cat poison oil and videotaped the results. He planned on giving the same poison oil to [appellant]." (R. at 281).

- "Despite multiple failed attempts, despite her recover[ies], extensive efforts with his conspirator, snake venom, liquid mercury, attempts to acquire tetrodotoxin, death rituals, voodoo expeditions, trips to Haiti to acquire poisons, three separate attempts at premeditated murder and a final completed brutal murder, causing comparable effects to VX and sarin gas. He did all that he could to murder [his wife] and satisfy his own lust and greed." (R. at 291–92).

United States v. Hodge

United States Air Force Court of Criminal Appeals

March 23, 2015, Decided

ACM 38563

Reporter
2015 CCA LEXIS 99 *

UNITED STATES v. Senior Airman JORY D. HODGE United States Air Force

Notice: THIS OPINION IS ISSUED AS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 18.4.

Subsequent History: Review denied by *United States v. Hodge, 2015 CAAF LEXIS 567 (C.A.A.F., June 15, 2015)*

Prior History: **[*1]** Sentence adjudged 13 January 2014 by GCM convened at Grand Forks Air Force Base, North Dakota. Military Judge: Natalie D. Richardson (sitting alone). Approved Sentence: Dishonorable discharge, confinement for 20 years, forfeiture of all pay and allowances, and reduction to E-1.

Counsel: For the Appellant: Major Christopher D. James and Brian L. Mizer, Esquire.

For the United States: Captain Meredith L. Steer and Gerald R. Bruce, Esquire.

Judges: Before HECKER, WEBER, and TELLER, Appellate Military Judges.

Opinion by: HECKER

Opinion

OPINION OF THE COURT

HECKER, Senior Judge:

A general court-martial, composed of a military judge alone, convicted the appellant pursuant to his pleas of rape, forcible sodomy, assault consummated by a battery, burglary, and communicating threats, in violation of Articles 120, 125, 128, 129, and 134, UCMJ, *10 U.S.C. §§ 920*, *925*, *928*, *929*, *934*. The military judge sentenced the appellant to a dishonorable discharge, confinement for 34 years, total forfeiture of pay and allowances, and reduction to E-1. Pursuant to a pretrial agreement, the convening authority lowered the confinement to 20 years and approved the remainder of the sentence as adjudged.

On appeal, the appellant argues (1) he was denied due process of law at his sentencing **[*2]** proceeding when a central theme of the Government's sentencing case was the impact of the appellant's crimes on the religious faith of the victim, her husband, and their church; (2) trial counsel's sentencing argument constituted prosecutorial misconduct and unfairly prejudiced the appellant; and (3) two of the specifications are multiplicious.

Background

While attending an on-base party during the evening of 9 August 2013, the appellant consumed beer and vodka and became rambunctious. Another party attendee arranged for Security Forces to give him a courtesy ride to his on-base home shortly after midnight. The appellant entered his own house but later left and broke in to a nearby house of a co-worker. The appellant knew the co-worker was deployed, and had been at the house several months earlier to help move furniture.

The appellant drove to the house and entered through a kitchen window. He went upstairs to the master bedroom and stood by the bed, where the co-worker's wife was asleep. She awoke and screamed for him to leave her house. He responded by repeatedly striking her in the face with his closed fist, causing injuries. For this conduct, the appellant was convicted of burglary **[*3]** and assault consummated by a battery.

The woman begged the appellant to stop but he continued, removing her clothes and his pants. He yelled that he would kill her if she did not have sexual intercourse with him, placing her in fear that she would be subjected to death or grievous bodily harm. The appellant then engaged in sexual intercourse with her. He also forcibly penetrated her mouth with his penis after hitting her in the face and again threatening her. The appellant forced her to engage in sodomy and sexual intercourse multiple times during the time he remained in her house. Throughout this time, he made repeated threats and vulgar comments and asked her questions about her personal life. For this, the appellant was convicted of forcible sodomy, two specifications of rape, and two specifications of wrongfully communicating a threat.

After he left, the woman contacted law enforcement at 0300 hours to report the assault. Although she could not identify who attacked her, the information she provided to investigators led them to the appellant. Biological evidence collected during a sexual assault examination was later matched to the appellant. This examination also revealed that she **[*4]** had suffered tearing in her vaginal area and severe bruising on her cervix.

Government Sentencing Case

The victim in this case was a member of the Church of Jesus Christ of Latter Day Saints. As part of her victim impact testimony during the sentencing phase of the trial, trial counsel asked her how the incident affected her faith. She replied, "[T]here are sometimes where I feel really strongly touched by the spirit, and that . . . my savior is with me. And then there are so many other times where I just wonder what did I do wrong? . . . [W]as I not good enough?" She testified the assault had caused her to stop performing her duties with the church's Achievement Day program because she did not feel "clean or pure enough to be around" the 8—11-year-old girls and did not want to "ruin or "taint" them. She also felt that she was not "clean enough or good enough, righteous enough" to wear her sacred garments (which the appellant had removed during the assault).

The victim's husband was also asked how the crimes affected his faith. He described how he placed a blessing on his home before he deployed so it could be "a place where the spirit of Christ dwells, a place of peace and a place of comfort" and **[*5]** also blessed his family so they would be protected in his absence. After this incident, he felt "betrayed by [his] heavenly father" and stopped going to church. When trial counsel asked how he felt about the appellant violating the church tenant prohibiting sexual relations outside of marriage, the husband said he "felt that there was a stain on [their] marriage, that [he] didn't have a right to be sexually attracted to her anymore, because it wasn't fair that someone had forced themselves onto her. He also stated that the accused's decision to take away his wife's free will and ability to choose "is akin to saying that God's plan doesn't matter. You are not important to him."

The Government also called the bishop for the ward (congregation) where the victim and her husband worshiped. Following a relevancy objection, the military judge allowed the witness to testify about the "significance of the victim's faith in this case and the religious aspects in it." The bishop then explained that a subset of church members receive sacred garments when they pledge to live by a "higher law and a higher standard" and are required to treat them with respect. He also explained that he had previously **[*6]** selected the victim to work with the young girls because he thought they would benefit from her leadership and outgoing nature.

In sentencing argument, trial counsel stated:

> Now we know that he targeted [the victim]. We don't know why he did that. We don't know if it was because he knew about her or her husband or their faith. But the fact is, they do have faith which his actions have negatively affected in a serious way. Individually and faith-based, the impact of these heinous crimes is immense.

The appellant argues he was denied due process of law when the "central theme" of the Government's sentencing case was the impact of the appellant's crimes on the religious faith of the victim, her husband, and their church. In making this argument, he cites to federal cases that discuss the constitutionally impermissible use of the defendant's religion in fashioning a sentence. He also argues the President has limited the use of religion as a matter in aggravation to circumstances where the accused has targeted the victim based on her religion. *See* Rule for Courts-Martial (R.C.M.) 1001(b)(4) ("[E]vidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because **[*7]** of the actual or perceived . . . religion . . . of any person."). The appellant also contends trial counsel's reference to the victim's faith was improper and amounted to prosecutorial misconduct.

At trial, defense counsel made a relevancy objection during the bishop's testimony, but the military judge allowed trial counsel to continue with the presentation of evidence on the victim's faith. The defense did not object to this evidence as being improper aggravation evidence or as being unduly prejudicial under the balancing test of Mil. R. Evid. 403. Nor did trial defense counsel object when trial counsel referred to this issue during sentencing argument. Under those circumstances, we review these issues for plain error. Under a plain error analysis, the appellant must show that: "(1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the [appellant]." *United States v. Girouard, 70 M.J. 5, 11 (C.A.A.F. 2011)*; *see also United States v. Hardison, 64 M.J. 279, 281 (C.A.A.F. 2007)*; *United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005)*.

First, we disagree that the religion-based impact of the appellant's crime was a "central theme" of the Government's sentencing case. Although evidence on this topic was presented by trial counsel, this subject was not a primary focus of the Government's sentencing case. The **[*8]** victim and her husband primarily testified about the impact of the appellant's crimes on other aspects of their lives. Further, trial counsel's reference to the couple's religion was found in a short paragraph of a six-page sentencing argument, most of which focused on the deliberate and protracted violence the appellant inflicted on the victim.

Second, we do not find plain error in the admission of this evidence or in the argument relating to it. There are some instances where religion cannot be admitted or considered at a court-martial, none of which are implicated in the appellant's case. For example, Mil. R. Evid. 610 states "[e]vidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the credibility of the witness is impaired or enhanced." Also, it would be improper to consider an accused's religion and/or religious fealty as a sentencing factor, or for a military judge to bring her personal religious beliefs into the sentencing process. *See United States v. Green, 64 M.J. 289, 293—94 (C.A.A.F. 2007)*.

In the sentencing context, however, in finding that the *Eighth Amendment*[1] did not bar the introduction of victim impact evidence and prosecutorial argument on that subject, the Supreme Court has **[*9]** reversed prior precedent which had held such evidence, including a victim's religiosity, was barred. *See Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)*. Thus, "a State may properly conclude that for the jury to

[1] *U.S. CONST. Amend. VIII*.

assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." *Id.* *See also* *United States v. Murphy, 36 M.J. 1137 (A.C.M.R. 1993)* (holding that the appellant's complaint about victim-impact evidence of a murder victim's deep religious beliefs was rendered moot by the Supreme Court's decision in *Payne), rev'd on other grounds*, *50 M.J. 4 (C.A.A.F. 1998)*; *see also* *United States v. Bernard, 299 F.3d 467, 478 (5th Cir. 2002)* (allowing testimony that two murder victims were youth ministers in part because religion played a vital role in their lives); *United States v. Mitchell, 502 F.3d 931, 989—90 (9th Cir. 2007)* (holding that the Government could introduce evidence about Navajo religious tradition to show that a murder victim's family no longer had access to its primary source of religious knowledge); *United States v. Nelson, 347 F.3d 701, 714 (8th Cir. 2003)* (noting that religious references can be included in admissible victim-impact evidence).

In light of this, we find the presentation of this evidence is permissible under R.C.M. 1001(b)(4), which authorizes the Government to introduce evidence "as to any aggravating circumstances directly relating to or resulting from the offenses **[*10]** . . . [which] includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to" the victim and was not unduly prejudicial. *See* *United States v. Wilson, 35 M.J. 473 (C.M.A. 1992)* (noting that R.C.M. 1001(b)(4) allows impact evidence that shows the crimes' effect on the victim, the victim's family, and the close community). The Rule's inclusion of the language cited by the appellant ("[E]vidence in aggravation may include evidence that the accused intentionally selected any victim . . . as the object of the offense because of the actual or perceived . . . religion . . . of any person.") does not mean this is the only way religion can be properly admissible under the rule. *See Manual for Courts-Martial, United States*, app. 21 at A21-73 (2012 ed.) (stating the rule was amended to recognize that evidence an offense was a hate crime "may also be presented to the sentencing authority" and that "hate crime" motivation is admissible in the court-martial presentencing procedure").

Here, the victim and other witnesses testified about the negative impact the appellant's crimes had on an aspect of her life that was important to her. The fact that this aspect of her life involved religion does not, in our view, make it impermissible **[*11]** aggravation evidence. Furthermore, the introduction of this evidence was not "so unduly prejudicial that it renders the trial fundamentally unfair." *Payne, 501 U.S. at 825*. The evidence was only a small portion of the overall sentencing case, and the appellant was sentenced by a military judge

Similarly, we find trial counsel's argument did not constitute misconduct and find no plain error. During sentencing argument, trial counsel is entitled "to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000)*. Trial counsel's argument must also be viewed within the context of the entire court-martial, not isolated words or phrases. *Id. at 238* (citing *United States v. Young, 470 U.S. 1, 16, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985))*. When considered in its entirety, the argument of trial counsel did not "unduly . . . inflame the passions or prejudices" of the sentencing authority. *United States v. Marsh, 70 M.J. 101, 102 (C.A.A.F. 2011)* (quoting *United States v. Schroder, 65 M.J. 49, 58 (C.A.A.F. 2007))* (alteration in original) (internal quotation marks omitted); *United States v. Kirk, 41 M.J. 529, 533 (C.G. Ct. Crim. App. 1994)* (holding an appeal to the religious impulses or beliefs of the sentencing authority as an independent source of a higher law calling for a particular result would be improper argument).

Trial Counsel's Sentencing Argument

In addition to trial counsel's comment on the

victim's religion discussed above, the appellant **[*12]** also claims another aspect of trial counsel's argument was improper and amounted to prosecutorial misconduct. Trial counsel argued:

> And you'll see in the defenses [sic] package of extenuation and mitigation lots of pictures. I have one picture. I have a picture of [the two-year-old daughter of the victim]. What does [her mother] tell [her], when [she] asks her someday whether monsters are real? For most parents, that's an easy answer. Monsters aren't real. They're figments of nightmares. They don't live in the closet. They don't hide under the bed. They don't come out in the middle of the night and get you. They are not real. But to [the victim], monsters are real, because her monster is right there.
>
> He lives in her nightmares, then, and into the future. She can't tell her daughter right now that monsters aren't real. But maybe, maybe after today, maybe after this court imposes a sentence, she will be able to say, maybe monsters aren't real, but maybe there are bad people who do bad things. Maybe it's your family and your friends and your community [sic] protect you from those bad people that do bad things. And maybe we will be able to tell [the daughter], we will be able to tell her **[*13]** friends and our friends, we will be able to tell the Grand Forks Community and the Air Force Community as a whole, that the military justice system is part of that protection, that it both protects and imposes judgment on those who commit the most heinous of crimes and those bad people that do heinous things. Your sentence to include reduction to E-1, obviously; total forfeitures, obviously; dishonorable discharge, obviously, but also a term of imprisonment between 25 years and life will send just that message to those people.

Trial defense counsel did not object to this argument. On appeal, however, the appellant argues that this aspect of trial counsel's argument was improper because he called the appellant a "monster," and displayed a photograph of the victim's two-year-old daughter (who was sleeping in a downstairs bedroom when her mother was assaulted) while arguing the appellant should be severely punished so that the victim could tell her child "monsters aren't real."

As discussed, supra, when the defense does not object to arguments of trial counsel, we review for plain error. *Fletcher, 62 M.J. at 179*. The lack of a defense objection is relevant to a determination of prejudice because it is "some measure **[*14]** of the minimal impact of a prosecutor's improper comment." *United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001)* (quoting *United States v. Carpenter, 51 M.J. 393, 397 (C.A.A.F. 1999))* (internal quotation marks omitted).

"Disparaging comments are . . . improper when they are directed to the defendant himself" and constitute "more of a personal attack on the defendant than a commentary on the evidence." *Fletcher, 62 M.J. at 182—183*. We review the context of the entire court-martial to determine whether or not comments are fair. *Gilley, 56 M.J. at 121* (citations omitted). Here, trial counsel referred to the appellant as "the victim's monster." To the extent that is a comment directed to the appellant himself in this context, we find the reference was not outside the bounds of fair comment or beyond the norm. *Cf. United States v. Erickson, 63 M.J. 504 (A.F. Ct. Crim. App. 2006)* (holding that comparisons to Adolph Hitler, Saddam Hussein, Osama bin Laden, and the devil were outside bounds); *United States v. McPhaul, 22 M.J. 808 (A.C.M.R. 1986)* (noting references to appellant as degenerate scum, slavering animal, subhuman, and miserable human being were based on evidence in the record and were fair comment). We find trial counsel's use of that term is not outside the norms of fair comment in a court-martial where the appellant has pled guilty to rape, forcible sodomy, assault, burglary, and communicating threats as described in detail above.

The appellant also **[*15]** contends trial counsel

improperly argued for a harsh sentence to prove to the appellant's child that "monsters aren't real" and to send a message to her, the base community, and the Air Force community. We find this argument by trial counsel does not constitute plain error. Trial counsel essentially argued that the military justice system serves a public role in protecting the community and imposing judgment on those who commit crimes. A trial counsel's sentencing argument can refer to generally accepted sentencing philosophies, including the protection of society from the wrongdoer and general deterrence. *United States v. Frey, 73 M.J. 245, 249 (C.A.A.F. 2014)*. Accordingly, his argument here was not error, plain or otherwise.

Finally, the sentencing authority in this case was a military judge, sitting alone. Even if trial counsel's comments were improper, military judges are presumed to know the law and to follow it absent clear evidence to the contrary. *United States v. Erickson, 65 M.J. at 225* (citing *United States v. Mason, 45 M.J. 483, 484 (C.A.A.F. 1997))*. Here, there is no evidence to rebut that presumption. We do not find the sentence imposed by the military judge to be clear evidence that she considered any improperly admitted evidence or argument, and we are confident that he was sentenced on the basis of the evidence alone. **[*16]** *See Erickson, 65 M.J. at 224*.

Multiplicity

The appellant contends the forcible sodomy specification is multiplicious with one of the rape specifications, resulting in him being improperly convicted of both offenses for the single act of penetrating the victim's mouth with his penis.[2] He asks this court to dismiss one of the specifications.

The appellant entered into a pretrial agreement which included a defense-proposed provision that he "waive all waiveable motions." The military judge **[*17]** explained this meant he was "giving up the right to make any motion, which by law, is given up when you plead guilty" and that it precludes any appellate court from "having the opportunity to determine if you are entitled to any relief based upon those motions." Trial defense counsel told the military judge that, but for the pretrial agreement, she would have made a multiplicity motion regarding these specifications. The appellant indicated he had discussed this motion and the waiver provision with his defense counsel, understood their meaning and effect, and had voluntary entered into the pretrial agreement in order to get the benefit of his pretrial agreement. When asked by the military judge, defense counsel indicated the multiplicity motion would not have been based on constitutional grounds. She also agreed with the military judge that this motion was "waived if not made before the entering of pleas."

In light of this pretrial agreement provision and express waiver of the multiplicity issue, we find the appellant has intentionally waived a known right, which extinguished his right to raise this issue on appeal. *United States v. Gladue, 67 M.J. 311, 313—14 (C.A.A.F. 2009)*.

Conclusion

The approved findings and the sentence are correct in law **[*18]** and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, *10 U.S.C. §§ 859(a), 866(c)*. Accordingly, the approved findings and the sentence are

[2] The rape specification alleges the appellant caused his penis to penetrate the victim's mouth by placing her in fear that she would be subjected to death or grievous bodily harm, while the sodomy specification stated he committed the act by force and without consent. During the guilty plea inquiry into the rape specification, the appellant described penetrating the victim's mouth with his penis shortly after he threatened to kill the victim and admitted she engaged in the activity because she was in fear of death or grievous bodily harm. While discussing the sodomy specification, the appellant described a second incident of penetration that occurred after he used his hand to forcefully push the victim's open mouth onto his penis.

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] 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

[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.

Code of Military Justice, *10 U.S.C. §§ 920*, *928*, 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]

[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.

which stated "help," SPC [TEXT REDACTED BY 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

[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."

was video recorded, his explanation of what 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

[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.

of the proffered evidence outweighs the danger of 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

[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.

no more relevant to consent than the sexual 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.

[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 401 and 402) and legally relevant (Mil. R. 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]

[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.

Evidence of the victim's diagnosis with HSV and 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

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

examination and the admission of any evidence of 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

[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.

only after being informed of the results of the 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.

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[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.

Witnesses who interacted with the victim 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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CERTIFICATE OF SERVICE, U.S. v. LINDOR (20210520)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on the 6th day of February, 2023.

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