IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.	Docket No. ARMY 20210276
Staff Sergeant (E-6) **MICHAEL L. WILSON,** United States Army, Appellant	Tried at Fort Stewart, Georgia, on 22 October and 30 November 2020 and 7, 10–13 May 2021, before a general court-martial convened by the Commander, Headquarters, Fort Stewart, Colonel G. Bret Batdorff, Military Judge, presiding.

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

Assignments of Error[1]

I.

WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ADMITTING APPELLANT'S JOURNAL UNDER MILITARY RULE OF EVIDENCE 404(B).

[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.

II.

WHETHER THE EVIDENCE WAS LEGALLY AND FACTUALLY SUFFICIENT.

III.

WHETHER THE MILITARY JUDGE ERRED DENYING APPELLANT'S REQUEST TO INSTRUCT THE PANEL THAT A UNANIMOUS VERDICT WAS NECESSARY TO FIND APPELLANT GUILTY IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO AN IMPARTIAL PANEL

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Statement of the Case

On 13 May 2021, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of three specifications of rape of a child, three specifications of sexual abuse of a child, and one specification of sexual assault of a child, all in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b (2012, 2016, 2019). (Statement of Trial Results (STR); R. at 658). The military judge sentenced appellant to a reduction to the grade of E-1, forfeiture of all pay and allowances, to be confined for three life sentences plus fifty years, and a dishonorable discharge.[2] (STR; R. at 724).[3] On 11 August 2021, the convening authority took no action on the findings and approved the adjudged sentence, and the military judge entered judgment on 13 August 2021. (Action; Judgment).

[2] Appellant elected to be sentenced by the military judge alone. (R. at 661).

[3] Appellant's sentence to confinement was divided into three parts. For the first part (Specifications 1, 2, 4, and 5 of The Charge), appellant was sentenced to life with the possibility of parole for Specification 1, life with the possibility of parole for Specification 2, confinement for 10 years for Specification 4, and confinement for 10 years for Specification 5, to run concurrently with each other. For the second part (Specifications 3 and 6 of The Charge), appellant was sentenced to one life sentence with the possibility of parole for Specification 3, and confinement for 10 years for Specification 6 to run concurrently with each other. Finally, appellant was sentenced to confinement for 20 years for Specification 7 of The Charge. The three sentencing parts were ordered to be served consecutively. (R. at 724-25, App. Ex. XLIX).

Facts

On 12 March 2019, appellant's biological daughter, [redacted], reported to her friends that her father was inappropriately touching her. (R. at 532). [redacted] then disclosed to a school counselor that appellant had been touching her "bathing suit area" for three or four years. (R. at 540). [redacted] later specified that on multiple occasions appellant orally and anally penetrated her with his penis as well as touched her breasts, genitals, inner thighs, anus, and pubic area in two houses on Fort Leonard Wood, Missouri. (R. at 465, 469-72). [redacted] further disclosed that the appellant committed the same acts at their home in Richmond Hill, Georgia. (R. at 476-77, 488-89). The allegations occurred between 2012 and 2019. (Charge Sheet). [redacted] was five years old when she moved to Fort Leonard Wood, Missouri, was ten years old when she made the report, and was twelve years old when she testified at trial. (R. at 463, 532).

In July 2019 [redacted] left a distraught voicemail message with a friend indicating that her mother, LW, was making her lie. (Pros. Ex. 12; R. at 522-23). In August 2019 [redacted] apparently recanted her allegations. (R. 578-80). [redacted] was called as a witness for the Government at appellant's court-martial and explained that LW told her that if she did not lie, the family would be homeless, would not have money, and would be torn apart. (R. at 492). Prior to trial, LW pled guilty in federal court to tampering with a victim or witness. (R. at 576-77;

Pros. Ex. 16, 17).

One of [redacted] friends and neighbors in Richmond Hill was [redacted]. (R. at 363-64). [redacted] began interacting with appellant in March 2018. (R. at 365). At some point appellant gave [redacted] a bracelet as a gift. (R. at 366; Pros. Ex. 3). Despite not being allowed to go to appellant's home, [redacted] approached him and expressed her attraction to him. (R. at 371-72). Appellant reciprocated this feeling to [redacted] (R. at 372). Appellant set a time and created a plan to meet [redacted]. (R. at 373). The two met at a construction site where appellant hugged [redacted], kissed her, touched her sides, and rubbed his erect penis on her through their clothing. (R. at 375-77). The next day, appellant met [redacted] at the same location. (R. at 378). Appellant asked [redacted] to have sex with him and she agreed after he assuaged her pregnancy concerns by telling her he had "a surgery."[4] (R. at 379-80). Appellant then led [redacted] into a partially finished house and penetrated her vulva with his penis from multiple sexual positions, eventually ejaculating onto her back and using her underwear to clean it off. (R. at 380-82). [redacted] was twelve years old at the time of the assault. (R. at 383).

After the incident, appellant and [redacted] continued to have a relationship via telephone conversations while [redacted] was at her grandparents' home. (R. at 388). Phone records indicate there were ten phone calls between appellant and

[4] Appellant had a bilateral vasectomy in 2009. (Pros. Ex. 4; App. Ex. XXXI).

[redacted] grandparents' number between 10 March and 13 March 2019. (R. at 448). During one of these conversations, appellant confirmed to [redacted] that he had been attracted to children "forever." (R. at 389). In another conversation, [redacted] confronted appellant about [redacted] allegations and appellant pressed [redacted] for details about what [redacted] was reporting. (R. at 390).

In October 2019 [redacted] disclosed to her mother, AC, that appellant had sexual intercourse with her in March 2019. (R. at 417). When confronted by AC, [redacted] produced a slip of paper with appellant's phone number that he had given her. (R. at 417-18).

Assignment of Error I.

WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ADMITTING APPELLANT'S JOURNAL UNDER MILITARY RULE OF EVIDENCE 404(B).

Additional Facts

On 16 November 2020 the government submitted a motion for a preliminary ruling on the admissibility of a journal written by appellant. (App. Ex. IV; R. at 436). The journal contained stories involving sexual intercourse and other sexual activities with minors. (App. Ex. IV).[5] In its motion, the government indicated the

[5] The military judge found that the stories depicted female minors engaging in sexual intercourse with adult males. (Ap. Ex. XXIX, pg. 9). One such story in appellant's journal features a child under the control of her parents. (Pros. Ex. 15). Although the other stories do not include explicit reference to the female being a

journal is "direct evidence of [appellant's] intent to engage in sexual behavior with minors." (App. Ex. IV, p. 4). On 23 November 2020 appellant objected to the government's motion on the basis of Military Rules of Evidence [Mil. R. Evid] 402, 403, and 404(b). (App. Ex. V). The military judge held an Article 39(a) session on 30 November 2020 and dealt, in part, with the motion to pre-admit the journal. (R. at 25). At that hearing the military judge determined the evidence was covered by Mil. R. Evid. 404(b). (R. at 42-43). At the military judge's request, the government then identified intent as the permitted use for the evidence under Mil. R. Evid. 404(b)(2). (R. at 42-43). Appellant argued the evidence failed to satisfy the requirements of the test set forth in *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). (R. at 46-49). Appellant asked, should the court not exclude the evidence, that it reserve its ruling until trial, when a proper foundation could possibly be laid. (R. at 49). The military judge ruled on the motion to pre-admit, telling the trial counsel, "you haven't met your foundation, and the government's

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minor, a reasonable inference that the characters are children can be drawn from their descriptions. These include being described as school aged and "young" or "little sister," and the illegality of the acts in the United States. (Pros. Ex. 15). Further, the girls' physical features are described consistent with a child, including descriptions of pre-pubescent features and small bodies. (Pros. Ex. 15). *See generally United States v. Lyons*, 33 M.J. 88, 90 (C.A.A.F. 1991) (stating "a permissible inference was lawful where it can . . . be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." (citing *Leary v. United States*, 395 U.S. 6, 36 (1969)).

motion is, at this time, denied." (R. at 53). The military judge did, however, permit the government to discuss the evidence in opening statement, provided counsel had a good faith basis to believe it would be admissible at trial. (R. at 53).

Prior to trial, the military judge emailed the parties with further questions regarding, in part, the journal evidence. (R. at 71). In the email exchange, the government specified three stories from the journal that had similarities to the charged offenses and identified intent and motive as permitted uses under Mil. R. Evid. 404(b). (App. Ex. XX).[6] Appellant raised several objections to the evidence, most notably that they were not substantially similar to the charged offenses and that the stories did not explicitly describe children. (App. Ex. XX). On 7 May 2021 a second Article 39(a) session was held. (R. at 67). At the hearing appellant again raised the fact that "child" was not mentioned in the stories, and also raised a Mil. R. Evid. 403 concern that the conduct in the journal was "very different from the alleged conduct." (R. at 75-76). During the Article 39(a) hearing the military judge indicated that he would make a written ruling on the issue. (R. at 92). The military judge issued an extensive written ruling, with findings of fact and proper conclusions of law, allowing the journal entries to be used to show intent, motive, and lack of mistake. (App. Ex. XXIX).

[6] The text of the emails are contained in App. Ex. XX. The military judge's questions are at labeled with a "Q", the government's response is labeled "A", and the defense's response is italicized. (App. Ex. XX).

Standard of Review

A military judge's decision to admit evidence is reviewed for an 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." *Frost*, 79 M.J. at 109 (quoting *United States v. Kelly*, 72 M.J. 237, 242 (C.A.A.F. 2013)).

Law

Evidence of uncharged misconduct to show "a person's character in order to show that on a particular occasion the person acted in accordance with that character" is inadmissible. Mil. R. Evid. 404(b)(1). However, it can be admitted for other purposes, including those listed in Mil. R. Evid. 404(b)(2). *United States v. Staton*, 69 M.J. 228, 230 (C.A.A.F. 2010). The government must "provide reasonable notice" before trial of the general nature of the evidence being offered. Mil. R. Evid. 404(b)(2); *United States v. Shuford*, ARMY 20190594, 2021 CCA LEXIS 72, at *10 (Army Ct. Crim. App. 19 Feb. 2021) (memo. op.). The notice requirement is construed broadly. *Id*. at *12. (citing *United States v. Blount,* 502

F.3d 674, 678 (7th Cir. 2007).[7]

Military courts evaluate the admissibility of evidence under Mil. R. Evid. 404(b) using a three-pronged test: (1) whether the evidence reasonably supports a finding by the court members that appellant committed prior crimes, wrongs, or acts; (2) what fact of consequence is made more or less probable by the existence of this evidence; and (3) whether the probative value is substantially outweighed by the danger of unfair prejudice. *Reynolds*, 29 M.J. at 109. If the evidence fails any of these three prongs it is inadmissible and should be tested for prejudice. *United States v. Cousins*, 35 M.J. 70, 74 (C.M.A. 1992); Article 59(a), UCMJ.

Argument

Appellant was on notice of the journal entries and for what purpose the government intended to use them before trial. *Shuford*, 2021 CCA LEXIS 72, at *10. Further, the military judge did not abuse his discretion when he admitted the journal entries as evidence of appellant's motive and intent to commit the charged offenses. *Reynolds*, 29 M.J. at 109. Even if the military judge abused his

[7] *See, e.g., United States v. Watson*, 366 U.S. App. D.C. 188, 409 F.3d 458, 465-66 (D.C. Cir. 2005) (stating 48 hours' notice is sufficient); *United States v. Preciado*, 336 F.3d 739, 745 (8th Cir. 2003) (stating several days' notice is sufficient). The notice of the nature of the testimony requirement is construed broadly as well. See *United States v. Erickson*, 75 F.3d 470, 478 (9th Cir. 1996) (holding that general disclosure of pre-trial statements satisfies the notice requirement.); *United States v. Russell*, 109 F.3d 1503, 1507 (10th Cir. 1997) (courts have not required more than the "general nature" of the evidence).

discretion, appellant was not materially prejudiced by that error. Article 59(a), UCMJ.

A. Appellant was on notice of the journal and its permitted uses.

The reasonable notice requirement of Mil. R. Evid. 404(b)(2)(A) was satisfied in this case. Appellant was properly put on notice on 16 November 2020, nearly six months before trial, when the government gave notice to the appellant of the general nature of the evidence and the intended purpose through its motion to for a preliminary ruling on admissibility. (App. Ex. IV). The government described the journal entries, their general content, and specifically noted the evidence was relevant to appellant's "intent to engage in sexual behavior with minors." Mil. R. Evid. 404(b)(2); (App. Ex. IV). Appellant demonstrated he was on notice when he objected to the evidence on Mil. R. Evid. 404(b) grounds in writing. (App. Ex. V).

Appellant was again put on notice of the general nature of the evidence at the 30 November 2020 Article 39(a) session. Although the government initially believed the evidence was not covered by Mil. E. Evid. 404(b), trial counsel then asserted that it was admissible under that rule to show intent. (R. at 43, 45). Appellant argued the government had failed to satisfy the *Reynolds* factors and the intent basis had not been established. (R. at 46-47). Appellant then asked the military judge, should he not exclude the evidence, to reserve his ruling until trial.

(R. at 49). Although the military judge denied the government's motion to pre-admit, appellant's objection to the evidence was reserved until trial.[8] (R. at 53).

Appellant was put on notice a third time when the military judge asked for further details prior to the 7 May 2021 Article 39(a) session. (R. at 71). In an email exchange, the government specified in detail the three stories it wished to enter into evidence, its theory of admissibility, and case law to support its position. (App. Ex. XX).[9] Appellant responded to each of the government's arguments. (App. Ex. XX). In neither appellant's e-mail responses nor at the 7 May 2021 Article 39(a) session did appellant object to the journal on the basis of lack of notice.[10] (App. Ex. XX; R. at 74-76). Prior to appellant entering a plea of not guilty, the military judge indicated a ruling was forthcoming. (R. at 92, 94). In

[8] Appellant's assertion that the military judge excluded the evidence at the 30 November 2020 Article 39(a) session is unsupported by the record. (R. at 53; Appellant's Br. 17). The military judge clearly indicated that the evidence *may* be admissible at trial. (R. at 53). The military judge went so far as to say the motion "at this time" was denied. (R. at 53). This is consistent with appellant's request that the ruling be deferred. (R. at 59). The written ruling explicitly notes that the sustained objection to admissibility was based on lack of foundation. (App. Ex. XXIX, p. 2).

[9] Contrary to appellant assertion, the military judge included the text of the email exchange on the record as App. Ex. XX. (Appellant's Br. 6). During the Article 39(a) session, the military judge outlined the various portions of the exchange. (R. at 71).

[10] In both the email exchange and at the 7 May 2021 Article 39(a) session appellant only objected to the lack of similarities between stories and the charged offenses. (App. Ex. XX; R. at 74). At the Article 39(a) appellant also raised a Mil. R. Evid. 403 concern. (R. at 76). He did not raise a notice objection at that time.

that ruling, issued in writing and orally prior to trial, the defense's Mil. R. Evid. 402, 403 and 404(b) objections to the three journal entries were overruled, provided the government could lay the proper foundation. (R. at 99).

Appellant's reliance on *United States v. Hilliard* is misplaced. No. ARMY 20170377, 2019 CCA LEXIS 216, (Army Ct. Crim. App. Jan. 17, 2019) (remanded on other grounds). Although the alleged offenses are similar in both cases, the issue is not. The only pre-trial notice received in *Hilliard* was Section III disclosures. *Id*. at *3-4. The appellant in *Hilliard* did not learn of the government's theory of admissibility until trial. *Id*. at* 4-6. That is simply not the case here. Appellant knew of the evidence and government's theory of admissibility almost six months prior to trial, and his lack of surprise is further supported by his prepared defense. Appellant pre-marked Def. Ex. D, the first two pages of the journal, and admitted the same at trial. (R. at 450). Those pages dedicate the journal to appellant's wife, LW. (R. at 450). Appellant then elaborated on that defense in closing argument. (R. at 632).

It is clear from the record of trial that appellant was aware of the general nature of the evidence, the government's theory of admissibility, and that the evidence may be admissible well before, and up to, trial.[11] *Shuford,* 2021 CCA

[11] Appellant's argument that he was unable to ask for a continuance due to his defense counsel's impending exit from the Army is immaterial as he and his counsel were on notice of the evidence and the government's intent to use it since

LEXIS 72. The government provided reasonable notice, not once but three times, prior to trial. Due to the clear and repeated notice, this court can be certain that appellant was not denied a fair trial.

Appellant's claim that the military judge's ruling was untimely lacks merit. (Appellant's Br. 17). Significantly, appellant conflates his objections to pre-admission with a narrow category of pre-trial motions. Rule for Courts-Martial 905(b)(1)-(6) outlines motions that must be made prior to entry of pleas.[12] Appellant never filed such a motion; rather, appellant *objected* to evidence offered for pre-admission based on Mil. R. Evid. 402, 403, and 404(b). (App. Ex. V). Presumably recognizing the need to make detailed findings of fact and conclusions of law to settle a number of contested pre-trial issues, including overruling

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November 2020. (Appellant's Br. 4, 14, 26; App. Ex. IV; Def. App. Ex. A). It is unclear from the record and Def. App. Ex. A when the defense counsel's final day on active duty was or if a continuance was, in fact, impossible. (Def. App. Ex. A). However, the lack of any request for a continuance after the military judge's ruling and appellant's prepared defense to the journal indicate that appellant's claims in Def. App. Ex. A are without merit. (R. at 450).

[12] Rule for Courts-Martial 905(b) states, "Any defense, objection, or request which is capable of determination without the trial of the general issue of guilt *may* be raised before trial" (emphasis added). The rule then, in subsections (1) through (6), lists motions which *must* be made prior to trial. Closest to the case before the court is a motion to suppress evidence (R.C.M. 905(b)(3)), but appellant filed no such motion; he merely objected to government's motion to pre-admit the journal entries, which, as explained *supra*, and *in accordance with* R.C.M. 905(d), the military judge deferred ruling upon until trial. ("A motion made before pleas are entered shall be determined before pleas are entered unless, if otherwise not prohibited by this Manual, the military judge for good cause orders that determination be deferred until trial of the general issue . . . ." R.C.M. 905(d).)

appellant's Mil. R. Evid. 402, 403, and 404(b) objections to the journal entries, the military judge issued an eighteen-page ruling in the intervening period between the 7 May 2021 Article 39(a) session and assembly of the court-martial on 10 May 2021. (App. Ex. XXIX). This is distinct from the required ruling on the sort of pretrial motion contemplated by R.C.M. 905(b)(1)-(6).[13]

B. The military judge did not err when admitting the journal entries.

The military judge did not abuse his discretion in admitting the journal entries in accordance with Mil. R. Evid. 404(b), and he properly instructed the panel. The standard for satisfying the first prong of the *Reynolds* test is "quite low." *United States v. Dorsey*, 38 M.J. 244, 246 (C.A.A.F. 1993); *see also United States v. Thompson*, 63 M.J. 228, 230 (C.A.A.F. 2006). "[D]irect evidence is not necessary, and *circumstantial evidence may be utilized* to meet the preponderance-of-evidence standard . . . ." *United States v. Levitt*, 35 M.J. 108, 110 (C.A.A.F. 1992) (emphasis added). The military judge considered the low threshold for the first prong, the evidence that appellant's admission to FBI Special Agent [redacted] that

[13] Additionally, appellant had six months between the November (2020) and May (2021) 39(a) sessions to prepare for trial, including a three-month defense continuance to accommodate contracting for an expert consultant at appellant's request. (App. Ex. XIII). Furthermore, appellant's argument that one of his counsel was due to leave the Army is immaterial. If the ruling was an "unfair surprise" as appellant claims, and a continuance was truly necessary, a request for a continuance could have been requested. (Appellant's Br. 13).

the journal belonged to and was written by him, and the fact that the stories described sexual acts with minors, and determined the first *Reynolds* prong was met. (App. Ex. XXIX, p. 7-8; *Reynolds*, 29 M.J. at 109).

Concerning the second *Reynolds* prong, the military judge properly determined the evidence supported appellant's motive to "incite or stimulate" his desire to engage in sexual behavior with minors.[14] The military judge based this determination on the similarities between the characters in the stories and appellant, as well as the incestual intercourse captured in the stories and Specifications 1 through 6. (App. Ex. XXIX, p. 9). The military judge properly determined that the evidence also supported appellant's intent to commit acts similar to those described in the stories. (App. Ex. XXIX, p. 11). The military judge based this determination on the same reasons as above, and an application of "a minimal degree of common sense when reading the journals." (App. Ex. XXIX, p. 11). The military judge correctly noted that in cases involving sexual exploration of children an accused's intent to engage in those acts is probative. (App. Ex. XXIX, p. 10).[15] The determination that "a reasonable factfinder may

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[14] The military judge correctly cites *People v. Weiss*, 252 AD 463, 300 NYS 249 (1937) for this definition and expounded on *United States v. Lips*' proposition that possession of graphic and explicit material can show motive to engage in an act. 22 M.J. 679 (AFCMR 1986).

[15] The military judge cited *United States v. Lieu*, 298 F. Supp 3d 32, 52, (D.D.C. 2018) to support his position. He additionally cites *Unites States v. Hays*, 62 M.J. 158 (C.A.A.F. 2005) for a similar proposition.

find that a journal author's state of mind when writing graphic and detailed stories regarding sex between children and adults may possess a sufficiently similar state of mind during the commission of the alleged offenses to make the evidence of the prior acts relevant on his intent during the commission of the alleged offenses" was proper. (App. Ex. XXIX, p. 10).

Contrary to appellant's claim, the military judge made clear distinctions regarding the individual specifications. (App. Ex. XXIX, p. 9-11). As such, the military judge appropriately determined journals met the second prong of the *Reynolds* test. (App. Ex. XXIX, p. 9-11; 29 M.J. at 109).

Appellant incorrectly argues that the military judge failed to properly apply the balancing test under Mil. R. Evid. 403. (Appellant's Br. 21). The military judge did not abuse his discretion in determining that the evidence in this case met the third *Reynolds* prong.[16] Appellant relies on *United States v. Curtain*, where the trial court's Mil. R. Evid. 403 analysis failed because the judge did not review all of the evidence admitted. 489 F.3d 935, 957 (9th Cir. 2007). That is not the case

[16] The military judge should receive widest discretion in conducting his Mil. R. Evid. 403 balancing because he articulated that analysis on the record. *United States v. St. Jean,* __ M.J. ___, at *7 (C.A.A.F. 30 January 2023). Even if he had not, "an absence on the record of a military judge's reasoning does not—by itself—provide a basis for finding error. Unless there are contrary indications, we must assume a military judge properly considered an accused's claim consistent with the law." *Id.* (citing *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012).

here. The military judge reviewed the three stories and thoroughly analyzed the evidence under the Mil. R. Evid. 403 balancing test. (App. Ex. XXIX, p. 11-13). The court noted:

> "Although the language used in the three journal stories is offensive, that is the nature of much of the evidence in cases involving alleged child predation offenses. In light of the nature of the alleged offenses and the evidence likely to be admitted, the prejudicial impact of these stories does not substantially outweigh their probative value in demonstrating [appellant]'s intent and motive to molest children…"

(App. Ex. XXIX, p. 12). This determination is in line with the analysis of case law, as outlined in the military judge's ruling. Most notably, this finding is consistent with *United States v. Acton*, where the court determined, in an incest case, that "[a]ny prejudicial impact based on the shocking nature of the evidence was diminished by the fact the same conduct was already before the court members.."[17] 38 M.J. 330, 334 (C.A.A.F. 1993).[18] This case is similar—offensive, graphic acts similar to those contained in the stories were already described in great detail by [redacted] by the time the journal entries were admitted

[17] While the evidence at issue in *Acton* was appellant's confession, the "shocking nature" of the information contained within that confession is similar to that of the present case. 38 M.J. at 334.

[18] *See also Hays*, 62 M.J. 158 (holding that images of minors engaging in sexually explicit conduct, images of adults engaging in bestiality, and requests for sexually explicit pedophilia content was not more prejudicial than probative) and *United States v. Garot*, 801 F.2d 1241, 1247 (10th Cir. 1986) (holding that in cases of child pornography there is an unavoidable risk of the introduction of evidence that would offend the average juror).

into evidence without further objection by appellant. (R. at 430-31). The military judge did a proper Mil. R. Evid. 403 analysis in this case, he made no clearly erroneous factual findings, the law he relied on was correct, he properly applied the law to the facts, and his determination that the prejudicial affect did not outweigh the probative value is not clearly erroneous. *United States v. White*, 69 M.J. 236 (C.A.A.F. 2010) (holding that mere difference of opinion does not rise to an abuse of discretion).

Finally, consistent with his ruling, the military judge properly instructed the panel. (App. Ex. XXIX, p. 13; R. at 606-07). Before closing argument, the military judge instructed the panel that the journal entries could only be used for the "limited purpose of its tendency, if any" to determine if appellant intended, or had a motive, to commit the charged offenses. (R. at 606-07). He then properly warned the panel: "you may not consider this evidence for any other purpose, and you may not conclude from this evidence that the accused is a bad person or has general criminal tendencies and that he therefore committed any of the charged offenses." (R. at 607). *Huddleston v. United States*, 485 U.S. 681, 681 (1988). There were no objections to this proper instruction at trial. (R. at 595).[19]

[19] It is noteworthy that appellant objected to the instruction neither at trial nor does so on appeal. (R. at 595).

C. Even if the military judge erred, appellant suffered no material prejudice to a substantial right.

"A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ. An erroneous admission of evidence under Mil. R. Evid. 404(b) or Mil. R. Evid. 413 is not of constitutional magnitude. *see United States v. Harrow*, 65 M.J. 190, 203 (C.A.A.F. 2007) (holding "that any error stemming from the admission of [404(b)] evidence did not substantially prejudice Appellant."). *See also Solomon*, 72 M.J. at 182–83; *United States v. Berry*, 61 M.J. 91, 97 (C.A.A.F. 2005); *United States v. McCollum*, 58 M.J. 323, 342 (C.A.A.F. 2003). As such, the government has the burden of demonstrating that the error did not have a substantial influence on the findings. *United States v. Pablo*, 53 M.J. 356, 359 (C.A.A.F. 2000).

The government meets this burden by showing there is no "reasonable probability that, but for the error, the outcome of the proceeding would have been different." *United States v. Tovarchavez*, 78 M.J. 458, 464 n.10 (C.A.A.F. 2019) (quoting *Molina-Martinez v. United States*, 578 U.S. 189, 136 S. Ct. 1338 (2016)). Reviewing courts consider four factors in evaluating whether the erroneous admission of government evidence is harmless, weighing: (1) the strength of the government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. *United States*

v. Kohlbek, 78 M.J. 326, 334 (C.A.A.F. 2019) (citing *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

Here, the government's case was strong. Both [redacted] and [redacted] testified in great detail about the sexual acts committed on them by appellant. (R. 376-89, 464-90). Details from [redacted] testimony were independently corroborated, including appellant's vasectomy and the photos of the crime scene. (R. at 380-81, 404, 442-47; Pros. Ex. 4). Her testimony regarding appellant's continued contact with her via telephone was also supported by records, which corroborated [redacted] testimony. (R. at 388-89, 448). [redacted] testified about the sexual abuse she suffered, including disturbing descriptions of the look, feel, and taste of appellant's ejaculate. (R. at 468). [redacted] also testified how she distracted herself by watching Barbie or toy unboxing videos on her phone as appellant anally penetrated her from behind. (R. at 477-78). The two victims described appellant's behavior similarly, including the sexual position he used. (R. at 381-82, 477-78).

In contrast, the defense case was weak. Appellant raised no motive to fabricate for either victim beyond a vague reference that they could have disclosed the assaults because they were angry or lying. (R. at 563). Appellant never connected that underdeveloped theory to why either [redacted] or [redacted] would have been angry or lied. Appellant did elicit that [redacted] recanted and did not

fully report the allegations at first. (R. at 497-99). However, the recantation evidence's effectiveness was completely blunted by the distraught voicemail [redacted] left on her friend's phone, [redacted] testimony that her mother manipulated her to recant with threats of poverty and homelessness, and LW's federal conviction for victim tampering. (R. at 492, 522-24, 554-63; Pros. Ex 12.) Further, [redacted] piecemeal reporting of the abuse was explained by child forensic psychiatrist Dr. MS' testimony on why children may recant or disclose details differently or in stages. R. at 576-77; Pros. Ex. 16, 17).[20]

Finally, the quality and materiality of the evidence was low. The journals were not the only evidence of appellant's intent and motive to have sexual intercourse with children (R. at 389). [redacted] testified that when she asked appellant how long he "liked little kids," appellant replied "forever." (R. at 389). This evidence is stronger and more material than the stories contained in the journal, as it is an expression of actual intent and motivation that predated any of

[20] Dr. MS, a forensic child psychologist testified that it is not atypical for children to delay reporting. (R. at 556). He explained that a variety of factors influence reporting, including the child's age, their ability to understand what has occurred, the possible ramifications to reporting, and, critically, the relationship the child has with the non-offending parent. (R. at 556-7). Dr. MS also testified that a "pact of secrecy" between the abuser and the victim is "the second step" of sexual abuse (R. at 559). Finally, Dr. MS testified that recantation is influenced by factors such as age of the victim, relation to abuser, and non-support or non-protection by the non-offending parent post disclosure. (R. at 561).

the charged offenses.[21] (R. at 389). Most importantly, testimony was elicited from [redacted] that appellant attempted to entice her to engage in future sexual acts with him, which is stronger and more compelling evidence than the journal. (R. at 389). As the military judge correctly instructed the panel, such evidence is indicative of a propensity to engage in child sex offenses (R. at 607), and this testimony was elicited prior to the journal stories being introduced at trial. This permissible propensity evidence, by its nature, is stronger than non-propensity evidence. *See, e.g., United States v. Wright*, 53 M.J. 476 (C.A.A.F. 2000) (holding that the prohibition against propensity evidence, as explicitly intended by congress, does not extend to Mil. R. Evid. 413 evidence).[22]

The overwhelming evidence including but not limited to, testimony of an expert witness in child psychology, extrinsic corroboration of [redacted] testimony, the evidence of appellant's prior sex offense with a child, and most especially the detailed testimony of [redacted] and [redacted], proves appellant's guilt

[21] Any concern appellant has regarding the panel's confusion regarding trial counsel's statements and the military judge's instructions are alleviated by those very instructions. (Appellant's Br. 28; R. 606-07, 641). *United States v. Washington*, 57 M.J. 394, 403 (C.A.A.F. 2002) (holding that panels are presumed to follow the military judge's instructions).

[22] While present case deals with Mil. R. Evid. 414 the language of the two rules and analysis of the rules are identical save for the age of the victim. See also; *Michelson v. United States*, 335 U.S. 469, 476 (1948) (superseded by statute) (explaining the traditional prohibition of propensity evidence is based on the evidence "weigh[ing] too much with the jury and to so overpersuade them as to prejudge").

by itself beyond a reasonable doubt. (R. at 377-89, 404, 442-8, 464-490, 491-2, 554-62). Therefore, even if the Mil. R. Evid. 404(b) evidence was erroneously admitted, appellant suffered no material prejudice to any substantial right.

Assignment of Error II.

WHETHER THE EVIDENCE WAS LEGALLY AND FACTUALLY SUFFICIENT.[23]

Additional Facts

[redacted] then aged twelve, testified extensively at trial. (R. at 461-502, 521-25). She testified that appellant had sexually abused and raped her in their two homes on Fort Leonard Wood, Missouri. (R. at 464-75). [redacted] was between the ages of four and eight when she lived in Missouri[24]. (R. at 463; Pros. Ex. 11). [redacted] also testified about how appellant had sexually abused and raped her in Richmond Hill, Georgia both before and after his deployment to Kuwait. (R. at 476-90). [redacted] was between the ages of eight and ten when she lived in Richmond Hill before her report. (Pros. Ex. 12). Appellant was assigned to Fort Stewart, Georgia 21 December 2016 through the trial, except for when he was deployed to Kuwait from 7 July 2018 to 23 February 2019. (Pros. Ex. 11). [redacted]

[23] Appellant challenges the legal and factual sufficiency of Specifications 1-6 and apparently does not challenge the legal or factual sufficiency of Specification 7. (Appellant's Br. 34-42).

[24] At the time of the charge, [redacted] was between the ages of five and nine. (R. at 463; Charge Sheet).

[redacted] reported appellant's abuse to a school counselor on 12 March 2019. (R. at 538).

During [redacted] testimony, the trial counsel properly used both non-leading and leading questions. (R. at 461-502, 521-25). Defense counsel objected only once to a leading question, when [redacted] was discussing her mother's attempt to get her to recant. (R. at 493). No other objections to leading questions were made during [redacted] testimony.

[redacted] testified at that while living in the "fuzzy stair house" at Fort Leonard Wood appellant penetrated her mouth with his penis. (R. at 464-65). She described appellant ejaculating into her mouth. (R. at 468). [redacted] testified that appellant touched her breasts, genital areas, "bottom," and pubic area at the second house on Fort Leonard Wood. (R. at 469). She stated that this abuse would "usually" occur when her mom and brothers were not home, either in her room, her parents' room, or the living room. (R. at 470). She also described one incident where appellant anally penetrated her in the living room of the second house. (R. at 472). She further testified that the appellant penetrated her mouth or anus more than once at the second house. (R. at 472).

[redacted] testified that the sexual abuse continued in Georgia, when appellant would touch her breasts, genital areas, buttocks, and inner thighs. (R. at 476). This abuse would occur "almost every day" prior to appellant's deployment

to Kuwait. (R. at 476). [redacted] similarly testified that appellant orally and anally penetrated her in Georgia prior to his deployment. (R. at 476-77). She described that he would occasionally ejaculate inside of her, while other times, on her. (R. at 479). Finally, [redacted] testified that when appellant returned from Kuwait he continued to touch her breasts, "bottom," and between her legs. (R. at 480, 488). She also described appellant telling her to orally pleasure him by licking his penis while her "mouth was on [it]." (R. at 488).

Standard of Review

The "Courts of Criminal Appeals have a statutory mandate to 'conduct a de novo review of both legal and factual sufficiency of a conviction.'" *United States v. Rosario*, 76 M.J. 114 (C.A.A.F. 2017) (citation omitted). Questions of factual and legal sufficiency are reviewed de novo. *United States v. Bright*, 66 M.J. 359, 363 (C.A.A.F. 2008).

Law

This court reviews legal and factual sufficiency of court-martial convictions and only affirms findings of guilty that are correct in law and fact. Article 66(d)(1), UCMJ; 10 U.S.C. § 866(d). This court employs an extremely deferential test when evaluating legal sufficiency. Under the test, "evidence is legally sufficient if, viewed in the light most favorable to the [g]overnment, a rational trier of fact *could have* found the essential elements of the crime beyond a reasonable

doubt." *United States v. Winckelmann*, 70 M.J. 403, 406 (C.A.A.F. 2011) (emphasis added). This court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Craion*, 64 M.J. 531, 534 (Army Ct. Crim. App. 2006); *Bright*, 66 M.J. at 365.

"The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of appellant's guilt beyond a reasonable doubt." *Craion*, 64 M.J. at 534 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). To sustain appellant's conviction, a court of criminal appeals "must find that the government has proven all essential elements and, taken together as a whole, the parcels of proof credibly and coherently demonstrate that appellant is guilty beyond a reasonable doubt." *United States v. Gilchrist*, 61 M.J. 785, 793 (Army Ct. Crim. App. 2005). Under this analysis, "[r]easonable doubt . . . does not mean the evidence must be free from conflict." *United States v. Rankin*, 63 M.J. 552, 557 (N.M. Ct. Crim. App. 2006).

A court applies "neither a presumption of innocence nor a presumption of guilt," but "must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). While weighing the evidence, a reviewing court must be mindful that it did not personally observe

and hear the witnesses. Article 66, UCMJ; *Turner*, 25 M.J. at 325.

Factfinders "are expected to use their common sense in assessing the credibility of testimony as well as other evidence presented at trial." *United States v. Frey*, 73 M.J. 245, 250 (C.A.A.F. 2014). "In weighing and evaluating the evidence, [the factfinder is] expected to use [his] own common sense and [his] knowledge of human nature and the ways of the world. In light of all the circumstances in the case, [the fact finder] should consider the inherent probability or improbability of the evidence." Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 2-5-12 (29 February 2020) [Benchbook].

The relevant elements of rape of a child (before 1 January 2019) are:

(i) That the accused committed a sexual act upon a child causing penetration, however slight, by the penis of the anus and mouth; and

(ii) That at the time of the sexual act, the child had not attained the age of 12 years.

Manual for Courts-Martial, United States (2016 ed.) [*MCM* 2016], pt. IV, ¶45b.b(1)(a).

The elements of sexual assault (after 1 January 2019) are:

(i) That the accused committed a sexual act upon a child; and

(ii) That at the time, the child had not attained the age of 12 years.

MCM, 2019, pt. IV, ¶62.b.(1)(a).

The elements of sexual abuse of a child (before 1 January 2019) are:

(i) That the accused committed sexual contact upon a child by touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person; and

(ii) That the accused did so with intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

MCM, 2016, pt. IV, ¶45b.b.(4)(a).

The element of sexual abuse of a child (after 1 January 2019) is:

(i) That the accused committed a lewd act upon a child.

MCM, 2019, pt. IV, ¶62.b.(3).

"Lewd act" means any sexual contact with a child. *MCM*, 2019, pt. IV, ¶62.a.(h)(5). "Sexual contact" means touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. *MCM*, 2019, pt. IV, ¶60.a.(g)(2). "Divers occasions" means two or more occasions. Benchbook, para. 7-25.

"Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness." Mil. R. Evid. 611(c). "It is within the discretion of the military judge to permit leading

questions." Mil. R. Evid. 611 analysis at A22-57 (*MCM,* 2016). *See United States v. Wood*, 36 M.J. 651, 654 (A.C.M.R. 1992) (citing *United States v. Mansfield*, 33 M.J. 972, 989 (A.F.C.M.R. 1991) (stating, "it is within the sound discretion of the trial judge to permit such [leading] questions."). An example where the use of leading questions may be appropriate is when a child is a witness. *Id*. Leading questions that do not replace the child victim's testimony with that of the trial counsel are appropriate. *Id.*

"As a general matter, [there is] greater latitude and flexibility when it comes to treatment and testimony of child witnesses." *United States v. Rodriguez-Rivera*, 63 M.J. 372, 378 (C.A.A.F. 2006). "Courts generally recognize that child witnesses present special challenges when testifying in sexual abuse cases and that these challenges must be recognized and accommodated. *Id.* (quoting *Paramore v. Filion*, 293 F. Supp. 2d 285, 292 (S.D.N.Y. 2003). "Inconsistencies […] are not uncommon when child abuse victims testify, [as] 'persuasive testimony […] from a child, from whom gathering more exact details as to when the sexual conduct precisely began, is an unreasonable expectation and formidable hurdle.'" *United States v. Cano*, 61 M.J. 74, 77 (C.A.A.F 2005) (quoting *Filion*, 293 F. Supp. 2d at 292).

"In performing its review under Article [66(d)], UCMJ, a Court of Criminal Appeals (CCA) may narrow the scope of an appellant's conviction to that conduct

it deems legally and factually sufficient." *United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019) (citing *United States v. Piolunek*, 74 M.J. 107, 112 (C.A.A.F. 2015) (upholding the CCA's determination that only nineteen of twenty-two charged images of child pornography were legally sufficient to support a conviction); *United States v. Rodriguez*, 66 M.J. 201, 203 (C.A.A.F. 2008) (upholding the CCA's decision to strike "on divers occasions" from the specification at issue and affirm only one instance of the offense)).

Argument

This court can be confident in affirming the convictions as they are legally and factually sufficient. When every reasonable inference from the evidence of record is viewed in favor of the prosecution it is clear the conviction is legally sufficient. *Craion*, 64 M.J. at 534; *Bright*, 66 M.J. at 365. Further, this court's independent review of the evidence, as described below, will show beyond a reasonable doubt that appellant's conviction is factually sufficient. . *Turner*, 25 M.J. at 325.

A. The form of [redacted] testimony does not render Appellant's convictions for Specifications 1-6 of The Charge insufficient.

Appellant's argument that [redacted] testimony is insufficient to sustain a conviction for Specifications 1-6 of The Charge rests, largely, on the fact that

assistant trial counsel asked her leading questions, at times.[25] (Appellant's Br. 34). To support his position, appellant relies on non-binding and unpersuasive precedent from the Western District of Oklahoma and the Court of Appeals of Texas. (Appellant's Br. 32-34). *United States v. Bramley*, No. CR-13-063-F, 2015 U.S. Dist. LEXIS 183656 (W.D. Okla. Sep 16, 2015) and *Owens-Corning Fiberglas Corp. v. Malone*, 916 S.W.2d 551, 568 (Tex. App.—Houston [1st Dist.] 1996). To the extent this court gives these cases any weight they are easily distinguishable from present case and, importantly, inconsistent with binding precedent on this court. *See Rodriguez-Rivera*, 63 M.J. at 378; *Wood*, 36 M.J. at 654.

The *Bramley* court was dealing with adult witnesses who were either hoping to avoid prosecution, gain favorable terms in sentencing, or were FBI employees. 2015 U.S. Dist. LEXIS 183656 at *46. The court was concerned that these witnesses were predisposed to be overly cooperative and would give answers beyond their personal knowledge. *Id.* at *45. The prosecutor in that case often insistently asked follow-up leading questions "when the witness would give an

[25] Appellant's defense counsel did not object to any leading questions during this portion of [redacted] testimony. (R. at 461-94, 500-24). As such, appellant forfeited the objection. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). Forfeited objections are reviewed for plain error. *Id.* (citing *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008)). As it is within the discretion of the military judge to allow leading questions, there is no error. Mil. R. Evid. 611 analysis at A22-57 (*MCM,* 2016). *Wood*, 36 M.J. at 654.

answer that was perfectly cogent and responsive." *Id.* at *49. This can easily be distinguished from a child victim testifying in front of her sexually abusive father.

Likewise, appellant's reliance on *Malone* is unsupported. The *Malone* court explicitly stated, "we need not address whether the trial court abused its discretion in allowing the plaintiffs to ask [the witness] leading questions because [appellant] cannot demonstrate harm." 916 S.W.2d at 568. That non-binding holding does not limit leading questions when admitted evidence establishes the same fact. (Appellant's Br. 33). Even if *Malone* was consistent with binding precedent, the holding is narrowly tailored to the facts of the case, and the court's declination to rule on the central question of law makes the case extremely unpersuasive.

This court should instead look to the precedent established regarding child victims in the military justice arena. The Court of Appeals for the Armed Forces (CAAF) has long held that child victim testimony is different, and should be treated with wide latitude and flexibility. *Rodriguez-Rivera*, 63 M.J. 378.The inherent challenge of having a child victim of sexual abuse testify about the abuse *must* be recognized and accommodated. *Rodriguez-Rivera*, 63 M.J. at 378. This is especially true here, where [redacted] had to testify in front of her sexually abusive father, rather than an unrelated man, as in *Rodriguez-Rivera*. *Id*. at 375. Most importantly, asking a child leading questions has been specifically contemplated by this court's predecessor in *Wood.* 36 M.J. at 654. The *Wood* court specifically

identified a child victim as an instance when leading questions are appropriate. *Id.* Appellant's claim that [redacted] testimony is not evidence because it was occasionally an affirmative response to a leading question is unpersuasive and counter to the logic of both *Rodriguez-Rivera* and *Wood*. 63 M.J. at 378; 36 M.J. at 654. (Appellant's Br. 42). This court should not be concerned with the legal or factual sufficiency of the evidence on account of questions posed in an appropriate form.

Importantly, this is not a case where the only evidence of essential elements is an affirmative response to leading questions as [redacted] testified in detail to the assaults and appellant's specific touching and penetrative acts. *See State v. Orona*, 92 N.M. 450, 454 (1979) (where the only evidence of the essential elements of the offense were elicited via leading questions on direct examination, the New Mexico court held "the trial court, in permitting every word describing the alleged offense to come from the prosecuting attorney rather than from the witness, abused its discretion in such a manner as to violate principles of fundamental fairness.") Unlike in *Orono,* the description of the sexual abuse was largely provided by [redacted]. As discussed below, [redacted] testified in great detail to the penetrative acts. (R. at 465-72, 476-79, 487-89). For the allegations that appellant sexually touched his daughter, [redacted] she testified to the abuse in response to open ended questions. For specification 4, she testified that appellant had touched her "on my

breasts, and on my genital areas, and my butt." (R. at 476). For specification 5, she testified "he took my shirt, and said, 'Oh, your breasts got bigger,' and then he touched them" and "he sat me on the side, and touched my bottom." (R. at 480). Finally, for specification 6, when asked where appellant would touch her, she answered, "my breasts and my genital areas." (R. at 469.)

B. Specification 1 of The Charge is Legally and Factually Sufficient

[redacted] was under twelve years old when appellant orally and anally raped her in Richmond Hill, Georgia. (R. at 463, Pros. Ex. 11). [redacted] was eight when the family moved to Richmond Hill sometime before 21 December 2016. (R. at 463; Pros. Ex. 11). She testified that the events of Specification 1 occurred prior to appellant's deployment on 25 July 2018. (R. at 476-79; Pros. Ex. 11). [redacted] testified that appellant put his penis in her mouth and anus in that timeframe. (R. at 476-79). She further testified that this would "generally" occur in her room. (R. at 477). She described in detail how she would distract herself during the rapes, how she only remembers appellant using lubricant one time, and would ejaculate both inside and on her. (R. at 477-79). When viewed in the light most favorable to the government, it is well established that appellant penetrated [redacted] anus and mouth with his penis prior to her attaining the age of twelve. *Winckelmann*, 70 M.J. at 406. It is also clear that these sexual acts occurred on divers occasions between 18 November 2016 and 31 December 2019. (R. at 476-

80). Given this testimony, this court can also be confident, beyond a reasonable doubt, that the specification as a whole is legally and factually sufficient.[26]

As discussed, this is not a case like *Bramley* where the trustworthiness of the testimony can be doubted due to the form of the question. 2015 U.S. Dist. LEXIS 183656 at *46. Nor is this case like *United States v. Crews*, No. ARMY 20130766, 2016 CCA LEXIS 127 (Army Ct. Crim. App. Feb. 29, 2016). In *Crews*, the child victim answered "I don't know" to "every question of substance on direct exam." *Id.* at *7. The government then used the child's mother to introduce un-objected hearsay statements by the victim in order to prove the elements of the offense. *Id.* at *17. The child's out-of-court statement that the crime occurred was elicited through leading questions by her mother, and as such was concerning to the court. *Id.* *Crews* is not a case of leading questions being asked on direct examination of the victim, and its applicability to the present case is minimal.

Appellant's application of both *Bramley* and *Crews* to this case is unpersuasive. [redacted] was testifying in court against her sexually abusive father, had minutes before described in shocking detail a prior oral penetration,

[26] Appellant apparently does not contest that anal penetration occurred in the relevant time period charged nor does he apparently contest that the sexual acts occurred on divers occasions. (Appellant's Br. 34-36). Rather, appellant solely challenges that appellant's penetration of [redacted] mouth was not sufficient to sustain a conviction. (Appellant's Br. 35).

affirmatively adopted the statements concerning the elements of the offense, and was subject to cross examination by appellant's counsel. (R. at 465-68). This is the inherent challenge that *Rodriguez-Rivera* contemplates, and the question was within the wide latitude authorized by the CAAF. 63 M.J. at 378. Further, given the appropriateness of asking leading questions to a child witness, appellant's argument that the evidence is insufficient is without merit.[27] *Wood*, 36 M.J. at 654; (Appellant's Br. 35). Contrary to appellant's assertion, [redacted] *did* testify to the essential elements in contest in an appropriate form and fashion, that appellant penetrated her mouth with his penis. *Rodriguez-Rivera,* 63 M.J. at 378; *Wood*, 36 M.J. at 654; (Appellant's Br. 35).

After reviewing the evidence, applying common sense and understanding, and allowing for the fact that it did not view the witnesses testify, this court can be convinced that Specification 1 of The Charge was factually sufficient. *Turner*, 25 M.J. at 325; *Frey*, 73 M.J. at 250. [redacted] testimony proves, beyond a reasonable doubt, that appellant penetrated her mouth and anus at Richmond Hill,

[27] Appellant does not cite any case law to support his apparent assertion that additional details or evidence, outside of [redacted] testimony, is needed to establish an element of this offense. (Appellant's Br. 35). This argument is counter to established precedent. *Rodriguez-Rivera*, 63 M.J. at 383 (holding that a requirement for the government to produce more evidence than testimony of one witness in order to establish guilt beyond a reasonable doubt is holding the government to a higher standard than the law requires).

Georgia prior to his deployment. Her testimony of the various ways the rapes occurred proves they happened on divers occasions.

C. Specification 2 of The Charge is Legally and Factually Sufficient

A plain reading of the record indicates that [redacted] explained that after appellant returned from Kuwait, while still in Richmond Hill, he showed her his penis, told her to lick it, and then penetrated her mouth with it. (R. at 487). This establishes every element of the charged offense, and is therefore legally sufficient. *Winckelmann*, 70 M.J. at 406. The conviction is also factually sufficient, as [redacted] explained that she licked appellant's penis while her mouth was on it. This testimony proves that the charged offense occurred beyond a reasonable doubt. *United States v. Ruppel*, 45 M.J. 578, 588 (A.F.C.M.R. 1990).

This case is very similar to *Ruppel*, but for a different reason than appellant claims, as it supports the finding of guilt beyond a reasonable doubt. *Id.* In *Ruppel*, as in this case, a child victim testified that that she put her mouth on that appellant's penis and that it tasted bad. *Id.* at 587. Appellant rightfully notes that the Air Force court held that "the use of the term mouth in connection with the fact that it tasted bad implies penetration." (Appellant's Br. 37); *Ruppel*, 45 M.J. 488. But the court also reasoned further: "using the common understanding of the word mouth, if [the victim] put her mouth on appellant's penis, there is a penetration of the lips. . . . [W]e are persuaded that when a child licks an adult penis, some part of

the plane of the penis would necessarily penetrate her mouth." *Id.* The *Ruppel* court was not narrowly holding that the use of the words mouth *and* taste, together, imply penetration. Rather, it was explaining why, by the facts of that case, it could be satisfied in the factual sufficiency. Furthermore, this court applied the *Ruppel* court's logic in *United States v. Jordan*, stating "the word mouth refers to the oral cavity on the inside of the human head, and thus to access the mouth, there must be a penetration, however slight, of it." ARMY 20180003, 2019 CCA LEXIS 256 (Army Ct. Crim. App. June 13, 2019) at *1 (Citing *Ruppel*, 45 M.J. 488). See also *United States v. Cox*, 23 M.J. 808, 818 (N.M.C.M.R. 1986) (holding that penetration past the lips but not past the teeth is sufficient to prove penetration).

Using the same logic as the *Ruppel* and *Jordan* courts, this court can also be satisfied that appellant penetrated [redacted] mouth with his penis after returning to Richmond Hill from Kuwait. [redacted] testified that she licked appellant's penis "like a stripe down" while her "mouth was on [it]." (R. at 488).[28] Appellant's claim that [redacted] "provided no details to indicate penetration" is inconsistent with that specific and detailed testimony, particularly in light of *Ruppel* and *Jordan*. (Appellant's Br. 38). The common understanding of the word mouth and the common sense understanding of the act of "licking down" necessarily imply

[28] As discussed *supra*, appellant's claim that [redacted] testimony regarding the use of her mouth is insufficient solely based on the form of the question is unpersuasive.

that appellant's penis penetrated [redacted] lips. *See Frey*, 73 M.J. at 250 (holding that factfinders "are expected to use their common sense in assessing the credibility of testimony as well as other evidence presented at trial.") This act could simply not have been done as described without some penetration, however slight.

Furthermore, appellant's argument that "[redacted] failed to establish the dates of the alleged act" is inconsistent with the record. (Appellant's Br. 38). Although initially unsure about when the "daddy-daughter date" occurred, [redacted] did testify that the oral sexual assault – the actual charged offense – occurred after appellant returned from Kuwait but before she made the report. (R. at 480, 487). This places the offense squarely within the charged time period. (Charge sheet; Pros. Ex. 11; R. at 538).[29] As such, this court can be certain that a reasonable factfinder could have found evidence of oral penetration while also be convinced beyond a reasonable doubt that there was such penetration. *Turner*, 25 M.J. at 325.

[29] Furthermore, appellant's claim that [redacted] "could not answer the government's leading question definitively when asked whether this event occurred before or after the deployment" asks this court to ignore the fact that [redacted] memory of the timing was rehabilitated, and asks this court to hold a child victim's memory to an inappropriately high standard. *Rodriguez-Rivera*, 63 M.J. 378. (R. at 487; Appellant's Br. 38).

D. Specification 3 of The Charge is Legally and Factually Sufficient

Appellant's argument that there is insufficient evidence to support oral penetration on divers occasions is unpersuasive. (Appellant's Br. 38-39).[30] Appellant was charged with oral and anal penetration of [redacted] on divers occasions between 13 August 2012 and on or about 17 November 2016 while living at Fort Leonard Wood, Missouri. (Charge Sheet). In order to prove that specification, the government must show that on two or more occasions appellant penetrated [redacted] anus or mouth in that time period and location. *United States v. Neblock*, 45 M.J. 191, 199 n.10 (C.A.A.F. 1996). This court should have no doubt that the government did so.

At trial [redacted] testified about specific sexual assaults while she was living at Fort Leonard Wood, Missouri. (R. at 464-72). Appellant and his family lived there between 12 August 2012 and 21 December 2016. (Pros. Ex. 11). [redacted] described living in two houses on Fort Leonard Wood. She described in detail how appellant orally penetrated her with his penis in a closet at the "fuzzy stair house." (R. at 465-66). That was the only assault she testified to at that house. (R. at 466).

[30] Appellant apparently only contends that the specification is insufficient as to oral penetration and does not challenge the sufficiency of the anal penetration, the time frame, or the location of the assaults. (Appellant's Br. 38-39).

[redacted] then testified to a series of sexual acts at her second Fort Leonard Wood home, including a specific instance of anal penetration in her living room. (R. at 469-72). Again, [redacted] described the assault in great detail. (R. at 471-72). Appellant claims "[redacted] testified that appellant did not put his penis in her mouth in the second house." (Appellant's Br. 39). That assertion is wholly inconsistent with a reasonable reading of the record. [redacted] stated "one time, he had offered me waffles, so he said that if I wanted waffles, I'd have to play with him first." (R. at 471). The trial counsel then asked if appellant "placed his penis in [her] mouth that time," which she denied before describing an instance of anal penetration. (R. at 471). This is not a categorical denial of oral penetration at the second house, but rather an explanation that *in that instance* anal, not oral, penetration occurred. Using its common sense, this court can be certain that [redacted] was not denying oral penetration when she was describing the abuse. *Frey*, 73 M.J. at 250.

After her description of the anal penetration, assistant trial counsel had the following exchange with [redacted]:

> Q: Did this happen—when he put his penis in mouth, and in your anus, your bottom—did that happen more than once while you were living at the second house?
> A: Yes.
> Q: How often do you think it happened?
> A: I know it felt like every few days.
> Q: So, when he actually finished, sometimes, he would ejaculate inside of you, is that right?

A: Yes.
Q: Would he ever ejaculate someplace else?
A: Sometimes, on my stomach.

(R. at 472). This testimony is not "an injection of facts" by trial counsel. *Wood*, 36 M.J. at 654. (Appellant's Br. 39). Rather, it is normal and appropriate examination of a child sexual assault victim where government counsel is attempting to expand upon the child's recollection of events. *Wood*, 36 M.J. at 654; *Rodriguez-Rivera*, 63 M.J. at 378. [redacted] testimony also establishes that oral penetration – and anal penetration – occurred on two or more occasions, thereby dismissing any concern that an essential element is missing. (Appellant's Br. 39). *See United States v. Rodriguez*, 66 M.J. 201, 203 (C.A.A.F. 2008) (holding "when members find an accused guilty of an 'on divers occasions' specification, they need only determine that the accused committed two acts that satisfied the elements of the crime as charged -- without specifying the acts, or how many acts, upon which the conviction was based."). Applying common sense and all reasonable inferences, the description of two specific incidents and the statement that oral and anal penetration occurred what "felt like every few days" is more than sufficient to meet the elements of Specification 3. *Frey*, 73 M.J. at 250; *Craion*, 64 M.J. at 534; *Bright*, 66 M.J. at 365. This court can be certain that a reasonable factfinder could have found evidence of penetration on divers

occasions, and also be convinced beyond a reasonable doubt of the same. *Turner*, 25 M.J. at 325.

E. Specifications 4, 5, and 6 of The Charge are Legally and Factually Sufficient

Appellant was convicted of touching [redacted] vulva, anus, groin, breasts inner thighs, and buttocks. (STR). These acts occurred at Fort Leonard Wood and over two periods of time at Richmond Hill.[31] (STR). Appellant now argues that the government failed to prove each individual body part was touched, and therefore all three specifications should be dismissed.[32] (Appellant's Br. 39-42). After weighing the evidence, this court can be certain that the government did establish that appellant touched [redacted] vulva. *Turner*, 25 M.J. at 325. Even if this court agrees with appellant that some body parts were not proven sufficiently, the court does not have to dismiss the entire specification as appellant suggests, but rather may narrow the scope of an appellant's conviction to the legally and factually sufficient conduct. *English*, 79 M.J. at 120.

[31] Appellant was convicted of the acts before and after 1 January 2019 while in Richmond Hill. (Charge Sheet).

[32] Appellant argues that the government failed to establish a touching of the vulva and anus for Specifications 4 and 6 of The Charge, and the vulva, anus, and inner thighs for Specification 5 of The Charge. (Appellant's Br. 39-42). As appellant does not appear to raise any other challenges to the specifications' sufficiency, the government will focus on those body parts alone.

1. [redacted] testimony that appellant touched her genitals and genital area establishes that he touched her vulva.

For Specifications 4, 5, and 6 of The Charge, [redacted] testified that appellant touched her "genital areas," "pubic area," "the inside of [her] thighs," and "between [her] legs." (R. at 469-70, 476, 488-89). For Specification 4, she testified that appellant touched her "on [her] genital areas." (R. at 476). She furthered testified that this occurred frequently and almost every day at home, prior to appellant's deployment, while living in Richmond Hill. (R. at 476). For Specification 5, she testified that appellant touched her between her legs, after appellant's deployment, while living in Richmond Hill. (R. at 478-80).[33] Finally, for Specification 6, [redacted] testified that appellant touched her "pubic" and "genital areas." (R. 469-70). As discussed *supra*, this court should continue to apply a greater latitude and leniency to this child's testimony. *Rodriguez-Rivera*, 63 M.J. at 378. The context of the examination clearly references appellant's sexual touching of her genitalia. *Frey*, 73 M.J. at 250; *Craion*, 64 M.J. at 534; *Bright*, 66 M.J. at 365.

The military judge correctly instructed the panel members that "the vulva is the external genital organs of the female, including the entrance of the vagina and

[33] [redacted] answered "yes" to between "Did he touch in between your legs after he got back from deployment?" and "yes" to "As well as between your legs?" (R. at 480, 488).

the labia majora and labia minora." (R. at 601). Benchbook, para. 7-25 (citing *United States v. Williams*, 25 M.J. 854, 855 (A.F.C.M.R. 1988). Applying that definition, common sense, the *Rodriguez-Rivera* standard, and all reasonable inferences, the description of appellant's action by [redacted] is sufficient to establish that he touched her vulva. *Frey*, 73 M.J. at 250; *Craion*, 64 M.J. at 534; *Bright*, 66 M.J. at 365. *See United States v. Spencer*, 2012 CCA LEXIS 50 (A.F. Ct. Crim. App. Jan. 26, 2012) at *6 (stating, "plainly, the anatomical part referred to as the 'vulva' is included within the meaning of the broader term 'genitalia' and is commonly understood as such.")[34] After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court can be convinced that when [redacted] was describing appellant's contact with her genitalia and between her legs, she was at the same time describing him touching her vulva. *Craion*, 64 M.J. at 534.[35]

2. "Anus and Inner Thighs."

Upon review of the record and under the specific facts of this case, the government concedes the word "anus" should be excepted from Specifications 4,

[34] *See also United States v. Phillips*, 70 M.J. 161, 165 (C.A.A.F. 2011) ("In deciphering the meaning of a statute, we normally apply the common and ordinary understanding of the words in the statute.").

[35] *See also United States v. Rubirivera*, No. ARMY 20200628, 2023 CCA LEXIS 55 (Army Ct. Crim. App. Jan. 26, 2023) (short form aff.) (where this court recently affirmed a conviction when the victim testified that appellant "put his penis inside of me" in reference to penetration of the vulva.)

5, & 6 of The Charge and the words "inner thighs" should be excepted from Specification 5 of The Charge. However, this court should still find appellant guilty of the remaining language in those specifications as factually and legally sufficient as described above. *English*, 79 M.J. at 122. *See also United States v. Brown*, No. ARMY 20160139, 2019 CCA LEXIS 514 (Army Ct. Crim. App. Dec. 23, 2019) (sum. disp) (where this court affirmed the conviction for two specifications of sexual contact for rubbing the thigh, breasts and vaginal area, but excepted the word "breasts" from both specifications).

Assignment of Error III.

WHETHER THE MILITARY JUDGE ERRED DENYING APPELLANT'S REQUEST TO INSTRUCT THE PANEL THAT A UNANIMOUS VERDICT WAS NECESSARY TO FIND APPELLANT GUILTY IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO AN IMPARTIAL PANEL

Appellant presented no argument, but raised this issue for preservation due to the pending status of *United States v. Anderson*, 82 M.J. 440 (C.A.A.F. 2022). (Appellant's Br. 42). This court rejected a substantially similar claim in *United States v. Pritchard*, 82 M.J. 686, 694 (Army Ct. Crim. App. 2022) (holding the appellant's equal protection claim was meritless because military accused and civilian defendants are not similarly situated for purposes of criminal trials). Accordingly, appellant's claim on this assignment of error lacks merit.

Conclusion

WHEREFORE, the government respectfully requests this honorable court affirm the findings and sentence as approved by the convening authority.

[redacted]

PATRICK S. BARR
CPT, JA
Appellate Attorney, Government Appellate Division

[redacted]

KALIN P. SCHLUETER
MAJ, JA
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[redacted]

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

[redacted]

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

CERTIFICATE OF SERVICE

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

[redacted]
ANGELA R. RIDDICK
Paralegal Specialist
Government Appellate Division

APPENDIX

United States v. Shuford

United States Army Court of Criminal Appeals

February 19, 2021, Decided

ARMY 20190594

Reporter
2021 CCA LEXIS 72 *; 2021 WL 659527

UNITED STATES, Appellee v. Chief Warrant Officer Two ABDUL M. SHUFORD, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by United States v. Shuford, 2021 CAAF LEXIS 365, 2021 WL 1930667 (C.A.A.F., Apr. 20, 2021)

Petition for review filed by United States v. Shuford, 2021 CAAF LEXIS 362 (C.A.A.F., Apr. 20, 2021)

Review denied by United States v. Shuford, 2021 CAAF LEXIS 567 (C.A.A.F., June 17, 2021)

Prior History: [*1] Headquarters, 1st Cavalry Division. Douglas K. Watkins and Lanny J. Acosta, Jr., Military Judges, Colonel Emily C. Schiffer, Staff Judge Advocate.

Counsel: For Appellant: Captain Alexander N. Hess, JA; William E. Cassara, Esquire (on brief and reply brief).

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

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

Opinion by: BROOKHART

Opinion

MEMORANDUM OPINION

BROOKHART, Senior Judge:

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

Contrary to his pleas, a general court-martial composed of officers found appellant guilty of one specification of attempting to indecently record the private area of Specialist (SPC) [TEXT REDACTED BY THE COURT], in violation of Article 80, Uniform Code of Military Justice, 10 U.S.C. § 880 (2016) [UCMJ]. The panel sentenced appellant to a dismissal, confinement for three months, and forfeiture of all pay and allowances. The convening authority approved the portion of the adjudged sentence extending to a dismissal and confinement for three months, but set aside the portion of the adjudged sentence extending to forfeiture of all pay [*2] and allowances.

Appellant raises two assignments of error before this court for our review under Article 66, UCMJ. First, appellant avers the military judge erred by instructing the panel they could consider evidence pursuant to Military Rule of Evidence [Mil. R. Evid.] 404(b). In his second assignment of error, appellant argues the evidence was legally and factually insufficient to sustain his conviction. We find appellant is entitled to no relief on either assignment of error, however, the first assignment of error warrants some discussion.

BACKGROUND

A. Appellant's Misconduct

In November 2018, appellant and SPC [TEXT REDACTED BY THE COURT] were deployed to Poland to participate in a training rotation. Their unit was housed on a base near the city of Skwierzyna. The unit's shower facility consisted of a series of stalls built into two shipping containers, which were set a few feet apart from one another. A slightly raised walkway ran between the two containers. Each shower stall had its own door accessible only from the outside on the raised walkway. The shower doors on the right shipping container were all painted blue, while those on the left shipping container were all painted red. The far end of the [*3] raised walkway was blocked by a fence such that there was only one way to enter and exit from the shower facility. On the inside, each shower stall was separated from the adjacent stall by walls that ran from near the ceiling down to a few inches from the floor.

On the day of the offense, SPC [TEXT REDACTED BY THE COURT] was taking a shower in one of the blue shower stalls. While showering, she looked down and saw her own image reflected on the screen of a cell phone on the floor of her stall. The phone was extended partway through the gap at the bottom of the wall separating her stall from the neighboring stall and a eared to be filming her. She screamed and the phone was retracted. Specialist [TEXT REDACTED BY THE COURT] then bent down and looked through the gap at the bottom of the stall into the neighboring stall. She saw what she described as a skinny brown-skinned ankle and feet wearing black flip flops with blue markings. She

reached through and tried to grab one of the flip flops. While doing so, she heard a voice from the neighboring stall curse at her in what she described as an African accent. Specialist [TEXT REDACTED BY THE COURT] was unable to hold on to the flip flop [*4] and quickly dressed so she could wait outside to confront whomever had attempted to record her.

As Specialist [TEXT REDACTED BY THE COURT] stood outside the shower stall, positioned where she could see the doors to the adjacent shower stalls, she saw Private (PVT) TA, and another soldier walking by and asked them to assist. While she explained to the two soldiers what happened to her in the shower, she turned away from the shower doors. At some point, out of the corner of her eye, she saw a blur of a brown-skinned person running across the raised walkway from a shower stall near hers on the blue side and towards one of the red-doored shower stalls in the opposite shipping container. Private TA testified he saw one of the red doors towards the end of the shipping container open and close as he spoke with SPC [TEXT REDACTED BY THE COURT] Private TA noted which stall the person entered.

At that point, Sergeant First Class (SFC) JF arrived and was guided to the door of the stall in which the individual entered. After knocking on the door for a while, appellant, who is African American, eventually emerged. Appellant denied any wrongdoing; however, he appeared visibly nervous and stammered [*5] as he spoke. He also declined to provide his phone to SFC JF. Both SPC [TEXT REDACTED BY THE COURT] and SFC JF observed that appellant was wearing black Crocs flip flops with blue markings. Both also heard that appellant spoke with an accent.

Appellant's company commander, Captain (CPT) DJ, was notified of the incident and she, in turn, informed Army Criminal Investigation Command (CID). Army CID, however, had only limited manpower in Poland and was already working another case. Therefore, CID advised CPT DJ to obtain appellant's phone and hold it until agents arrived a few days later. Captain DJ asked appellant to provide his phone for CID, but ultimately she allowed appellant to keep it so he could communicate with his family and with the chain of command.

When CID arrived approximately four days after the incident, they contacted CPT DJ to arrange to meet with appellant and retrieve his phone. Captain DJ sent a text message to appellant indicating that CID was there to question him. Appellant did not respond. She then sent a runner to notify appellant that CID wanted to see him. Eventually, two CID agents met with appellant and proceeded to his open-bay living area to retrieve his [*6] phone. However, when the agents arrived to where the phone was supposedly located, nothing was there except for a charging cord. Appellant claimed his phone had just been stolen and insinuated that the CID agents had something to do with its disappearance. Captain DJ attempted to use an application on her phone to locate appellant's missing

phone. However, in order for the application to work, CPT DJ required a username and password from appellant, which he maintained he could not recall. The phone was never located. One CID agent did testify that he saw a pair of black Crocs with blue markings while searching appellant's belongings for the phone. The flip flops were neither seized nor photographed. Following the CID investigation, in April 2019, the government preferred The Charge and its Specification against appellant.

B. Appellant's Court-Martial

In opening statement, trial counsel told the members, "[u]nfortunately, the government will not be providing the cellphone or any digital footprint from that cellphone because shortly after being notified that the accused would have to relinquish that cellphone to CID, and the day that CID arrived to take that cellphone, it was stolen." [*7] Appellant did not object. Instead, in his brief opening statement, appellant's civilian defense counsel focused on the evidentiary standard and highlighted that the government would not present certain evidence, including appellant's phone, and therefore would not be able to meet its burden.

During the trial, CPT DJ testified about her interactions with CID and her communications with appellant about his phone being seized. The two CID agents also testified about their efforts to secure appellant's phone and ultimately being unable to do so. Appellant offered no objection to any of this testimony. However, after the close of evidence, during an Article 39(a), UCMJ, hearing on findings instructions, trial counsel requested a Mil. R. Evid. 404(b) instruction because the government intended to assert consciousness of guilt in its closing argument based on appellant disposing of his phone. Civilian defense counsel objected to the instruction on grounds that the facts did not raise any uncharged misconduct, only that the phone had been stolen. He also argued the government failed to provide proper notice under Mil. R. Evid. 404(b).

After hearing from both parties, the military judge concluded that the government's notice, although [*8] late by his pretrial order, was still timely under the rules of evidence and contained a sufficient proffer to place appellant on notice of admissible prior conduct under Mil. R. Evid. 404(b). The military judge made findings that the evidence met the standard for admissibility under Mil. R. Evid. 404(b) and that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Following his ruling, the military judge instructed the panel:

> You may consider the evidence that the accused no longer possessed his phone when CID attempted to locate it for the limited purpose of its tendency, if any, to show the accused's awareness of his guilt to the offense charged. You may not consider this evidence for any other purpose, and you may not conclude from this evidence that the

> accused is a bad person, or had general criminal tendencies, and that he, therefore, committed the offense charged.

In closing argument, trial counsel argued "there's evidence of the accused's consciousness of guilt" before discussing appellant's nervous demeanor outside the showers and "[o]n 7 November 2018, his phone was missing, and he already knew that CID wanted it. He already knew that [SFC F] and [SPC [TEXT REDACTED [*9] BY THE COURT]] had confronted him looking for it. This is evidence that he knew he had done this. That he knew they were looking for him, and then his phone was stolen. When CID went to seize it, his phone was stolen." In his closing argument, civilian defense counsel only once mentioned that the phone was stolen and, in the context of arguing the government's failure to meet its burden of proof, rhetorically asked the panel, "But again, where's the phone?"

LAW AND DISCUSSION

Before this court, appellant argues the military judge erred in three ways: (i) by instructing the panel pursuant to Mil. R. Evid. 404(b) because the government's notice was insufficient; (ii) by providing an unfairly worded Mil. R. Evid. 404(b) instruction; and (iii) by providing the Mil. R. Evid. 404(b) instruction because the evidence that appellant no longer possessed the phone was not admissible Mil. R. Evid. 404(b) evidence. As discussed below, we disagree.

As a threshold matter, we conclude appellant preserved this issue at trial. Although he did not object to any of the evidence forming the basis for the challenged Mil. R. Evid. 404(b) instruction, he did object to the characterization of that evidence as prior conduct under Mil. R. Evid. 404(b) and to the military judge's provision of an instruction to that effect. Accordingly, [*10] we reject the government's argument on brief that this issue was waived at trial.

Having concluded this issue was preserved, we review the military judge's decision to admit the evidence under Mil. R. Evid. 404(b) for an abuse of discretion. *United States v. Phillips*, 52 M.J. 268, 272 (C.A.A.F. 2000) (citing *United States v. Robles-Ramos*, 47 M.J. 474, 476 (C.A.A.F. 1998)). The abuse of discretion standard is deferential, predicating reversal on more than a mere difference of opinion. *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015); *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) ("[T]he abuse of discretion standard of review recognizes that a judge has a wide range of choices and will not be reversed so long as the decision remains within that range."). We review the content and adequacy of a military judge's instructions de novo. *United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006).

Military Rule of Evidence 404(b) allows the admission of uncharged misconduct for relevant purposes other than demonstrating a person's bad character and their conformity therewith. The rule provides a non-exclusive list of purposes for which such evidence may be considered. Although not specifically listed in Mil. R. Evid. 404(b), consciousness of guilt is recognized as one of the "other purposes" for which prior conduct may be admitted. *United States v Staton*, 69 M.J. 228, 230 (C.A.A.F. 2010) (citing *United States v. Cook*, 48 M.J. 64, 66 (C.A.A.F. 1998)).

In order to be admitted, the prosecution must "provide reasonable notice" before trial of the general nature of the evidence being offered. Mil. R. Evid. 404(b)(2)(A). The military judge then admits such evidence only if [*11] it satisfies all three parts of the test established in *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). First, the military judge must find that the evidence reasonably supports a finding by the members that the accused committed the prior crimes, wrongs, or acts. *Id.* Second, the military judge must determine that some fact of consequence will be made more or less probable by the evidence in question. *Id.* Finally, the military judge must determine that the probative value of the evidence is not substantially outweighed the danger of unfair prejudice. *Id.*

We first address appellant's argument that the government provided insufficient pretrial notice, which we find to be without merit. Approximately one month before the panel was seated, the government provided appellant with a document titled "Notice of Intent to Offer Evidence under M.R.E. 404(b)." That notice indicated the government would use evidence that appellant knew CID was seeking his phone to suggest appellant had disposed of the phone before CID arrived and was therefore making a false official statement when he told the CID agents and his commander it had been stolen. The notice indicated the uncharged misconduct demonstrated consciousness of guilt. The specific evidence of appellant's [*12] knowledge detailed in the notice was CPT DJ's November 3rd request for the phone on CID's behalf.

At trial, the government offered additional evidence that appellant knew CID was seeking his phone, specifically the text message from CPT DJ and evidence of the runner sent to find appellant the day CID arrived. According to trial counsel, the government learned of this evidence through interviews sometime after providing the written notice. The government also argued to the military judge that the uncharged misconduct could be described as obstruction of justice in addition to false official statements. Appellant claims that the addition of new predicate evidence and different misconduct rendered the government's notice inadequate. However, Mil. R. Evid. 404(b) only requires that the government provide notice of the "general nature" of the evidence. As stated in the government's brief, the notice requirement is treated broadly. *See, e.g., United States v. Blount*, 502 F.3d 674, 678 (7th Cir. 2007). Here, the government's pretrial Mil. R. Evid. 404(b) notice clearly stated how the evidence would be used, to show consciousness of

guilt, and provided a general summary of the predicate evidence known at the time of notice. We are satisfied that this notice was more than sufficient to apprise [*13] appellant of the general nature of the evidence to be offered under Mil. R. Evid. 404(b). The additional predicate evidence and theory were not so outside the scope of the notice as to render it insufficient.

With regards to the *Reynolds* test, we find that the military judge did not abuse his discretion by allowing the government to argue the questioned evidence under Mil. R. Evid. 404(b) and that his instructions were appropriate. The first prong of *Reynolds* asks only whether the evidence reasonably supports a finding by the panel that appellant committed the prior wrong, crime, or act. In assessing this prong, the military judge "neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence." *United States v. Rhodes*, 61 M.J. 445, 455 (C.A.A.F. 2005) (Crawford, J., concurring in part and dissenting in part) (quoting *Huddleston v. United States*, 485 U.S. 681, 690, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988)). Rather, the military judge simply "decides whether the [panel] could reasonably find the conditional fact" by a preponderance of the evidence. *Id.* (Crawford, J., concurring in part and dissenting in part) (quoting *Huddleston*, 485 U.S. at 690). The standard for establishing this first prong is "quite low" and may rely on circumstantial evidence. *United States v. Dorsey*, 38 M.J. 244, 246 (C.M.A. 1993); *United States v Levitt*, 35 M.J. 108, 110 (C.M.A. 1992).

Here, the evidence showed that CPT DJ notified appellant that CID wanted [*14] his phone several days before investigators arrived. Appellant resisted providing the phone and CPT DJ allowed him to maintain the phone. Further evidence showed that on the day CID arrived, CPT DJ texted appellant that CID was looking for him and sent a runner to appellant with a similar message. When appellant's phone was found to be missing, appellant claimed he could not recall information which might have helped locate it. This circumstantial evidence was more than sufficient to reasonably support an inference by the panel that appellant knew CID would want his phone and therefore he determined to get rid of it because its appearance or contents might be used against him. As such, we do not find the military judge abused his discretion with regard to the first prong of *Reynolds*.

The second prong of *Reynolds* requires the military judge to find that the evidence sought to be admitted under Mil. R. Evid. 404(b) makes it more likely that appellant committed the charged offense. Although the charged offense here is an attempt, the phone's appearance and potential forensic exploitation were still very relevant because a phone was the instrument of the underlying crime. Therefore, any evidence that appellant [*15] may have made the phone unavailable directly supports his consciousness of guilt. If appellant was conscious of his guilt, then it is far less likely that the phone's appearance in SPC [TEXT REDACTED BY THE COURT] shower stall was an accident or that someone

other than appellant was the perpetrator. Therefore, we find that the military judge did not abuse his discretion in determining the evidence regarding appellant's phone made a fact of consequence more likely.

The third prong in *Reynolds* is a balancing test requiring the military judge to weigh the probative value of the evidence against the danger of unfair prejudice. The evidence must be excluded if the military judge finds the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. The probative value of the evidence is in this case is clear as described in the preceding paragraph. If believed by the panel, it would show appellant was conscious that his phone, either through its appearance or contents, was a source of evidence against him. That evidence made the government's version of events more likely. Therefore, consideration of the disposition of appellant's phone was probative for [*16] the proper purpose of showing appellant's consciousness of his guilt.

Potential prejudice is analyzed by determining to what extent the evidence might "mislead, interfere with, or confuse the members in assessing the principal charges." *Rhodes*, 61 M.J. at 456 (Crawford, J., concurring in part and dissenting in part) (citations omitted). As Judge Crawford noted in her separate opinion in *Rhodes*, evidence of consciousness of guilt almost always relates directly to the charged offense, making it difficult to articulate any possible prejudice. *Id.* at 456-57 (Crawford, J., concurring in part and dissenting in part). That analysis holds true in this case where appellant's phone was the instrumentality of the charged offense. If the panel believed appellant committed the charged offense, then evidence that he also might have lied or obstructed justice was unlikely to add much to that determination. On the other hand, under the unique facts of this case, we find it highly unlikely that the panel would conclude that appellant did not commit the charged offense, but still unfairly find him guilty because they believed he obstructed justice or lied about the instrumentality of the offense. To the extent the later contingency was [*17] possible, we find the military judge's instructions adequately protected appellant.[2] *See Staton*, 69 M.J. at 232 (noting the military judge addressed the risk of prejudice through "tailored instruction regarding appropriate use of th[e] information"). Accordingly, we find the military judge did not abuse his discretion in allowing the government's argument and providing the accompanying instructions pursuant to Mil. R. Evid. 404(b).

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[2] Appellant's claim that the instruction was unfairly worded, or otherwise bound the panel to only one consideration of the prior conduct at issue, was waived by his failure to object at trial. *See United States v. Davis*, 79 M.J. 329 (C.A.A.F. 2020); *United States v. Rich*, 79 M.J. 472 (C.A.A.F. 2020). Assuming this argument was not waived, we find no error, plain or otherwise, in the military judge's instruction. The military judge's instruction was consistent with that found in the Military Judge's Benchbook and properly advised the panel that they could only consider evidence that appellant might have disposed of his phone to the extent it showed consciousness of guilt and for no other purpose. In the context of how the government argued the phone's disposition, we find the military judge "clearly, simply, and correctly instructed [the members] concerning the narrow and limited purpose for which the evidence may be considered." *Rhodes*, 61 M.J. at 453 (quoting *United States v. Jobson*, 102 F.3d 214, 222 (6th Cir. 1996)).

Finally, even if the military judge abused his discretion, we do not find the error materially prejudiced appellant's substantial rights. UCMJ art. 59(a). Appellant was found in the immediate area right after SPC [TEXT REDACTED BY THE COURT] reported the attempt to wrongfully record her showering. Based on her location and that of the other soldiers, it was not possible for anyone to have come or gone from the showers. Moreover, appellant's physical appearance matched SPC [TEXT REDACTED BY THE COURT] description, he appeared nervous when confronted, and both his accent and shower shoes matched SPC [TEXT REDACTED BY THE COURT] descriptions. Under these circumstances, the evidence against appellant, while circumstantial, was overwhelming. We therefore find that the admission of evidence regarding [*18] appellant's possible involvement with the disposition of his phone and the military judge's accompanying Mil. R. Evid. 404(b) instructions, even if erroneous, did not substantially influence the findings.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Chief Judge (IMA) KRIMBILL and Judge ARGUELLES concur.

United States v. Hilliard

United States Army Court of Criminal Appeals

January 17, 2019, Decided

ARMY 20170377

Reporter
2019 CCA LEXIS 21 *

UNITED STATES, Appellee v. Sergeant First Class RONDELL A. HILLIARD, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review dismissed by, Without prejudice United States v. Hilliard, 78 M.J. 408, 2019 CAAF LEXIS 162 (C.A.A.F., Mar. 5, 2019)

Vacated by, Remanded by, Review granted by, Without prejudice United States v. Hilliard, 79 M.J. 243, 2019 CAAF LEXIS 632 (C.A.A.F., Aug. 28, 2019)

Reaffirmed, On remand at United States v. Hilliard, 2020 CCA LEXIS 8 (A.C.C.A., Jan. 13, 2020)

Review denied by United States v. Hilliard, 2020 CAAF LEXIS 249 (C.A.A.F., Apr. 29, 2020)

Prior History: [*1] Headquarters, Fort Bragg. Michael Hargis, Military Judge, Colonel Jeffrey C. Hagler, Staff Judge Advocate.

Counsel: For Appellant: Major Todd W. Simpson, JA; Captain Joshua B. Fix, JA (on brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Eric K. Stafford, JA; Major Hannah E. Kaufman, JA; Lieutenant Colonel Karen J. Borgerding, JA (on brief).

Judges: Before WOLFE, SALUSSOLIA, and ALDYKIEWICZ Appellate Military Judges. Judge SALUSSOLIA and Judge ALDYKIEWICZ concur.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION

WOLFE, Senior Judge:

In May of 2015, appellant began regularly having sex with his sixteen-year-old biological daughter. About two years later, appellant's misconduct was discovered when his daughter became pregnant and his wife discovered his misdeeds.[1] Appellant's daughter testified that the sexual acts were not consensual and involved coercion, threats and physical violence. A military judge convicted appellant, contrary to his pleas, of two specifications of sexual assault and one specification of adultery in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934 (2012) (UCMJ).[2]

Appellant appeals his conviction and assigns three errors.[3] We address in depth appellant's claim that [*2] the military judge allowed, over appellant's objection, the government to introduce evidence that he had beat his daughter on prior occasions. We agree with appellant that the military judge erred, but do not find the error to have prejudiced appellant.

LAW AND DISCUSSION

At trial the government sought to introduce evidence that appellant had hit his daughter on prior occasions. The defense objected. The military judge overruled the objection, but allowed a recess for the defense to interview appellant's daughter prior to cross-examination.

A. Was there error?

Military Rule of Evidence [Mil. R. Evid.] 404(b) allows the government to introduce evidence of an accused's prior acts for certain purposes. So that we can get to the heart of the issue, we briefly make the following threshold conclusions of law and fact.

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[1] As appellant is both the father and grandfather to his daughter's baby, we will avoid confusion by referring to the victim as appellant's daughter, and the child as appellant's granddaughter.

[2] The military judge sentenced appellant to be dishonorably discharged from the Army, confined for sixteen years, and to be reduced to the grade of E-1. The convening authority reduced appellant's sentence by ten days at action.

[3] Appellant first claims the military judge applied the wrong law in determining the *mens rea* necessary to find appellant guilty of sexual assault. *See generally Elonis v. United States*, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015). The central holding in *Elonis* is applicable only in cases where it is necessary to separate wrongful conduct from innocent conduct. *Id.* at 2010-11. We do not decide whether a father having sex with and impregnating his biological daughter is "wrongful" for purposes of *Elonis* when the incestuous nature of the relationship was uncharged. Rather, we find that in this judge alone trial where: (a) the judge made no relevant misstatements of the law; (b) the defense made no motions preserving the issue they now appeal; (c) the defense did not request special findings; and (d) after reviewing the entire record, there was no error that materially prejudiced appellant's substantive rights.

Appellant also claims the military judge erred in not suppressing the results of a DNA test. Three different DNA tests all came to the same result - appellant was the father of his daughter and granddaughter. The first test was questionably conducted. For the second test, the military judge rejected appellant's claim that the results should have fallen within appellant's attorney-client privilege. The government only introduced the results of the third test. The military judge's findings that the third test was independent of any claim of privilege regarding the second test are not clearly erroneous.

First, evidence that appellant hit his daughter on prior occasions was logically relevant[4] to show why, in the context of a parental sexual relationship, his daughter did not consent to the sexual acts.

Second, to be admissible under Mil. R. Evid. 404(b), the government must notify the accused of its intent to use the evidence "before trial." The military judge may excuse the lack of [*3] notice for "good cause."

Third, the government did not answer the military judge's repeated questions as to whether they had provided the required notice to the defense. From this intransigence, it is a reasonable inference that notice was not provided. We so infer, and find as fact that no notice was provided.

Fourth, we assume that the evidence, except for the issue of notice, was otherwise admissible under Mil. R. Evid. 404(b) to show both that appellant's daughter did not subjectively consent, and to demonstrate appellant's intent and awareness of the lack of consent.[5]

Fifth, both parties agree on appeal that the defense team was not surprised by the allegation that appellant had previously hit his daughter. More specifically, descriptions of the prior assaults were contained in the government's pretrial discovery to the defense team and the defense did not claim that they were unaware of the accusations.

With these threshold issues resolved, we must next determine whether there was good cause to excuse the government's failure to provide timely notice.

At trial, the government's only stated excuse for why it did not provide notice was a mistaken belief that the evidence did not fall within Mil. R. Evid. 404(b). The government [*4] did not offer support for its bare assertion. For example, the trial counsel did not point to case law that he had reasonably relied on. The government did not point to any reliance on pretrial rulings by the judge. Nor was the lack of notice due to the evidence being newly discovered.

On appeal, the government asserts that the trial counsel's disclosure of the daughter's pretrial statements to the defense, "can provide a basis upon which a military judge can find good cause [to excuse] a lack of pretrial notice." The government relies on two unpublished cases from our sister courts in support.[6] We respectfully disagree.

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[4] *See* Mil R. Evid. 401-402.

[5] Neither the parties nor the military judge articulated whether the proffered testimony would be admissible under the test established in *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989).

[6] *See United States v. Gerhardt*, ACM 37946, 2013 CCA LEXIS 736 at *16 (A.F. Ct. Crim. App. 14 Aug. 2013); *United States v. Reeder*, NMCCA 9800702, 2005 CCA LEXIS 211 at *6-8 (N.M. Ct. Crim. App. 30 Jun. 2005).

There is a difference between when a rule requires *disclosure* of evidence and when a rule requires *notice*. *Compare* Mil. R. Evid. 304(d) (requiring *disclosure* of an accused's pretrial statements) *with* Mil. R. Evid. 807(b) (requiring *notice* of intent to use residual hearsay exception). An accused should never be surprised when the government seeks to admit the pretrial statements by the accused that were previously disclosed to the defense. However, the defense should expect that a witness's hearsay statement will be inadmissible when they have not received notice under the residual hearsay exception and [*5] no other hearsay exception applies.

Or, put another way, there are two different ways a party can be unfairly surprised at trial. Whether or not the party is aware of the *existence* of the "surprise" evidence, the party may nonetheless be surprised by the *admissibility* of the evidence. Certainly, a party can be surprised when the opposing party offers evidence that they were unaware of and which should have been provided in discovery. But, when the rules of evidence require notice as a condition to admissibility, a party can reasonably expect that absent such notice (and good cause) the evidence will not be admissible. Appellant correctly argues that if the requirements for notice are not enforced, the effect would be to allow a type of trial by ambush. Trial by ambush is highly disfavored in the military. *See United States v. Trimper*, 28 M.J. 460, 468 (C.M.A. 1989); *United States v. Adens*, 56 M.J. 724, 735 (Army. Ct. Crim. App. 2002).

The military judge did not specifically state whether or not there was good cause to excuse the lack of notice; and having reviewed the record we see none. Instead, the military judge sought to cure the lack of notice by providing the defense counsel a recess and the opportunity to interview appellant's daughter prior to cross-examination.

As we discuss below, by providing the [*6] defense additional time before cross-examination, the ruling helped ensure that appellant was not prejudiced by the lack of notice. However, curing prejudice is not the same as preventing an error from occurring in the first instance. If, absent good cause, a rule requires a party to provide notice prior to admitting evidence, upon timely objection *it is error* to admit the evidence if there is neither notice nor good cause. Harmless error is still error.[7] In a trial, both parties may plan the presentation of their case on the assumption that each party will be held to the rules. For example, when the defense files no motions under Mil. R. Evid. 412, and the rule requires pretrial notice, the government may plan the presentation of its case under the assumption that evidence of the victim's sexual behavior or sexual predisposition will not be admitted. *See United States v. Schelmetty*, ARMY 20150488, 2017 CCA LEXIS 445 (Army Ct. Crim. App. 30 June 2017).

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[7] And it goes without saying that judges cannot intentionally commit harmless errors.

In the absence of both notice and good cause, it was error to admit testimony that appellant had previously hit his daughter over the defense objection.

B. Was appellant prejudiced by the error?

Although we find error, we do not find prejudice for several reasons.

First, the erroneously admitted evidence touched on [*7] whether appellant had ever previously hit his daughter in moments unrelated to any sexual assault. However, there was unobjected to and admissible testimony that appellant used physical violence and coercion to compel his daughter's submission to his sexual acts. Appellant's daughter testified that eighty percent of the time appellant wanted sex she would voice her opinion that "this is wrong, and I didn't want to do it anymore." In response, appellant told her he would "stop when I feel like it." On two occasions, after voicing her non-consent more forcefully appellant used physical violence, to include hitting her in the face to cause her submission. In the context of the trial, the erroneous testimony added little to the government's case and was submerged underneath the far more probative (and admissible) testimony that appellant used physical violence directly connected to the sexual assaults.

Second, as mentioned above, the military judge offered a recess for the defense to interview appellant's daughter. The defense did not need the additional time and did not take the military judge up on his offer.

Third, at trial, the defense did not claim any specific prejudice from the erroneous [*8] ruling. The defense did not claim, for example, that they had prepared their case in reliance that the evidence was not admissible; that with additional time they could have objected to the admission of the evidence under *Reynolds*;[8] that they were deprived of the ability to call witnesses to rebut the testimony; or, anything at all. That is, while we can imagine a case where the defense had detrimentally relied on the lack of notice to the prejudice of the accused, this is not that case.

Fourth, this is a case where the victim was both a minor and the daughter of the accused. "To recognize that a parent or authority figure *can* exert a moral, psychological, or intellectual force over a child is merely to recognize the obvious." *United States v. Palmer*, 33 M.J. 7, 10 (C.A.A.F. 1991) (emphasis in original). While lack of consent is an element of sexual assault under Article 120, UCMJ, and as such must be proven by the government, the analysis is different when the victim is the minor child of the accused. *See, e.g.*, Dep't of Army, Pam. 27-9, Legal Services: Military Judge's Benchbook, para. 3-45-1 n.7 (10 Sep. 2014) (instruction on constructive force for a child in Article 120,

[8] 29 M.J. 105, 109 (C.A.A.F. 1989).

UCMJ, cases). Within the context of the case as a whole, the erroneously [*9] admitted evidence did not contribute to the verdict.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Judge SALUSSOLIA and Judge ALDYKIEWICZ concur.

United States v. Bramley

United States District Court for the Western District of Oklahoma

September 16, 2015, Decided; September 16, 2015, Filed

Case No. CR-13-063-F

Reporter
2015 U.S. Dist. LEXIS 183656 *

UNITED STATES OF AMERICA, Plaintiff, v. RODGER VANPELT BRAMLEY, KELLEY WARD DIEBNER, AND LEON MARK MORAN, JR., Defendants.

Prior History: United States v. Wilson, 2014 U.S. Dist. LEXIS 198320 (W.D. Okla., July 3, 2014)

Counsel: [*1] For Bartice A King, also known as Luke, also known as Cool, also known as Boss The, Defendant: Nathan J Mays, The Law Offices of Nathan J Mays PC, Houston, TX; Perry W Hudson, Oklahoma City, OK.

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For Spiros G Athanas, also known as Greek The, Defendant: Robert M Goldstein, PRO HAC VICE, Law Office of Robert Goldstein, Boston, MA.

For Robert Joseph Rolly, also known as Bob Rolly, Ten Grandchildren Foundation, Defendants: Daniel Brodersen, PRO HAC VICE, Brodersen Law Firm, Orlando, FL.

For Kassandra Bates, also known as Sandra Bates, also known as Kassandra Vargas, also known as Sandra Vargas, also known as Sandra Teresita Vargas Farrier, Maximillian Magnus McLaren, also known as Max, also known as Maximillian McLaren Magnus, Maria Rojas, also known as Mary North, also known as Maria Isabel Rojas Mata, Arturo Garcia Jimenez, Defendants: Juan Chardiet, Juan Chardiet Attorney at Law, McLean, VA.

For Edward Louis Buonanno, also known as Gooch, also known as Bubbles, Defendant: James D Henderson, Law Offices of James D [*2] Henderson, Santa Monica, CA; Perry W Hudson, Oklahoma City, OK.

For Kory Elwin Koralewski, also known as Ski, Defendant: David B Autry, Oklahoma City, OK.

For Javier Espinosa, also known as Javier Espinosa Jimenez, Defendant: Alain J Ifrah, David S Yellin, Ifrah PLLC, Washington, DC.

For James Franklin Acker, III, also known as Frank Acker, also known as Frank The Bank, Defendant: Michael W Noland, Noland Defense Firm, Oklahoma City, OK.

For Terry Lee Campbell, also known as Top Cat, also known as Gato, Defendant: Ronald Eugene Jenkins, PRO HAC VICE, Jenkins & Kling PC, St. Louis, MO.

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For Joseph Michael McFadden, also known as Joe McFadden, also known as Rolltide, Defendant: Derek [*3] H Ross, Robert G McCampbell, Fellers Snider Blankenship Bailey & Tippens-OKC, Oklahoma City, OK.

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For Gregory Wilson Roberts, also known as Patchmain, Defendant: Gordon D Jones, PRO HAC VICE, Jones & Hawley PC, Birmingham, AL.

For Christopher Lee Tanner, also known as CT, also known as Limo, also known as Tan, also known as Magic, Defendant: Seth A Day, Susanna M Gattoni, Hall Estill-OKC, Oklahoma City, OK.

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For Leon Mark Moran, Jr, also known as Makavelli, also known as Mastiff, Defendant: [*4] Craig D Corgan, Craig Corgan Attorney at Law, Yukon, OK.

For Neil John Myler, also known as Bono, Defendant: Matthew C Kane, LEAD ATTORNEY, Ryan Whaley Coldiron Shandy PC, Oklahoma City, OK.

For Luis Robles, also known as Big Lou, Defendant: J Patrick Quillian, LEAD ATTORNEY, J Patrick Quillian PC, Oklahoma City, OK.

For David Lynn Ross, also known as OB, also known as Obie, Defendant: Robert L Johnston, Law Office of Robert L Johnston, Oklahoma City, OK.

For James Lester Acker, also known as Les Acker, Defendant: Lance B Phillips, Lance B Phillips PC, Oklahoma City, OK.

For Kelly James Dorn, Defendant: Paul A Lacy, Federal Public Defender-OKC, Oklahoma City, OK.

For Todd William Hoss, Defendant: Michael S Johnson, LEAD ATTORNEY, Law Office of Michael S Johnson, Oklahoma City, OK; Troy R Cowin, Lopez Johnson Armenta, Oklahoma City, OK.

For Robert Anthony Lay, Defendant: C Merle Gile, C Merle Gile Inc. PC, Oklahoma City, OK.

For Zima Holdings LLC, Defendant: Derek H Ross, LEAD ATTORNEY, Robert G McCampbell, Fellers Snider Blankenship Bailey & Tippens-OKC, Oklahoma City, OK.

For Rodger Vanpelt Bramley, also known as Doc Bramley, Defendant: Jerry W Biesel, PRO HAC VICE, Jerry W. Biesel, Dallas, [*5] TX; Steve T Jumes, PRO HAC VICE, Varghese Summersett & Smith, Fort Worth, TX.

For Kelley Ward Diebner, also known as Rosek Diebner, Defendant: Dan B Gerson, PRO HAC VICE, Dan B. Gerson, Houston, TX; Robert S Jackson, Oklahoma City, OK.

For United States of America, Plaintiff: Travis D Smith, LEAD ATTORNEY, John S Han, Robert Don Evans, Jr, Scott E Williams, Travis D Smith, Wilson D McGarry, US Attorney's Office-OKC, Oklahoma City, OK; Robin L Sommer, US Attorney's Office-WICHITA, Wichita, KS.

Judges: STEPHEN P. FRIOT, UNITED STATES DISTRICT JUDGE.

Opinion by: STEPHEN P. FRIOT

Opinion

ORDER

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Before the court are the motions of defendants Rodger Vanpelt Bramley, Kelley Ward Diebner and Leon Mark Moran, Jr. for judgment of acquittal or new trial (Bramley motion at doc. no. 1527, Diebner motion at doc. no. 1529 and Moran motion at doc. no. 1528). The government has responded to the motions and, with leave of court, defendant Bramley has filed a reply in support of his motion. The motions are accordingly at issue and ripe for decision.

I. Introduction.

These three defendants were convicted on all three of the counts on which they were tried. The trial began on May 4, 2015 and ended with verdicts of the jury, returned on May 22,

2015.[1] Count 1 of the Superseding Indictment charged a racketeering conspiracy. Count 2 charged the operation of an illegal gambling business. Count 3 charged a money laundering conspiracy.

There is a substantial overlap, at least at a high level of generality, among the three motions. For instance, all three defendants argue, as to the two conspiracy counts, that the evidence presented by [*7] the government at trial failed to establish the interdependence required for those counts. There is also substantial overlap between the issues presented by these motions and the issues presented in the post-trial motions filed by other defendants who have stood trial in this case. By orders previously entered, the court has denied the post-trial motions of defendants Bartice King (order at doc. no. 1547) and defendants Paul Tucker, Zapt Electrical Sales, Inc., Luis Robles and Christopher Tanner (doc. no. 1535). (One aspect of Tanner's motion, asserting a Brady violation, remains pending. *See*, doc. no. 1536, at 8 - 11.) Some of the discussion in the previous orders is relevant to the court's disposition of the present motions. Consequently, the court will refer to relevant parts of those orders, as appropriate. However, the three defendants whose motions are now before the court were, of course, tried separately from the other defendants. The disposition of the present motions is not necessarily dictated by the disposition of the previous rounds of post-trial motions.

The arguments that these three defendants have in common — such as failure of proof of interdependence — will be addressed [*8] together. Aside from their contentions as to matters such as venue and the sufficiency of the evidence, all three defendants seek relief on the basis of asserted prosecutorial misconduct. *See*, doc. no. 1572, at 7 (Bramley), doc. no. 1529, at 17 - 18 (Diebner) and doc. no. 1528, at 16 - 21 (Moran). Those contentions will be addressed separately, in part III (B), below.

II. The motions for judgment of acquittal.

A. Standard of review.

The standard of review has been articulated in the court's other orders on post-trial motions, but that standard bears repeating here — mainly because, as to Bramley, especially, the issues as to the sufficiency of the evidence are close.

In ruling on a Rule 29 motion for acquittal, the court, viewing the evidence most favorably to the government, determines whether a rational jury could have found the elements of the offense to have been proven beyond a reasonable doubt. The evidence supporting the conviction must be substantial and do more than raise a mere suspicion of guilt. United States v. Anderson, 189 F.3d 1201, 1205 (10th Cir. 1999). For very good reasons, Bramley

[1] The trial of these three defendants was the third jury trial in this case. (The fourth trial will begin in October, 2015.) The Superseding Indictment names 56 individuals and entities as defendants. Of those, 34 have been arraigned. (It appears unlikely that the defendants who have not yet been arraigned will ever be arraigned.) The sheer number of the defendants to be tried has necessitated the multiple trials.

cites and quotes (as relevant here) from United States v. Rufai, 732 F.3d 1175, 1188 (10th Cir. 2013), as follows:

> The test is not whether some evidence could have reasonably supported a guilty verdict, but whether a rational jury could have found [*9] each element of a crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). [Footnote omitted.] The test is not whether a rational jury could decide that guilt was more likely than not, but beyond a reasonable doubt.

If the government's case depends on piling inference on inference, that will not suffice. *Id.* A jury will not be allowed to engage in a degree of speculation and conjecture that renders its finding a guess or mere possibility. *Id.* (quoting from United States v. Michel, 446 F.3d 1122, 1127-28 (10th Cir. 2006).

B. Interdependence.

All three defendants contest the interdependence requirement as to the conspiracy counts.[2] And, in a sense that informs the court's consideration of interdependence as to the conspiracy counts, interdependence is also relevant to the § 1955 count. The court's interdependence analysis starts with defendant Bramley, because his situation differs from that of the other two defendants.

1. Bramley.

As to defendant Bramley, it is necessary first to examine what it is that the jury could have found, beyond a reasonable doubt, that he actually did to subject himself to criminal liability on Counts 1 and 3.

The jury could have found the following facts to be true, beyond a reasonable doubt:

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[2] Well after the start of the first of the three jury trials that have been conducted in this case, the government asserted, for the first time, that interdependence was not required for Count 1, the RICO conspiracy count or for Count 3, the money laundering count. As explained here, however, that argument came too late and was waived (although the court went on to address it during the first trial, on its merits). Scheduling in this case has been governed by Case Management Order No. 1, doc. no. 409, entered on September 18, 2013, and subsequent case management orders. Under Case Management Order No. 1, objections to requested jury instructions were due on October 13, 2014. *Id.* at 8, ¶ 31. Interdependence was clearly raised by the instructions proposed by the defendants' jury instructions committee, filed October 14, 2014. *See, e.g.*, doc. no. 924, pp. 77, 78. The government did not object when required to do so. Interdependence was then included in the court's first draft of the jury instructions, filed December 23, 2014. This draft was submitted to all parties for purposes of all trials, and any objections were required by mid-January, 2015. Doc. no. 1079. Again, the government made no objection to any instructions regarding interdependence. It was only after a follow-up jury instructions conference had been conducted for purposes of the first trial, after opening statements were given in the first trial during which defendants pointedly argued that interdependence could not be proven, and after cross-examination by defendants focusing on the lack of evidence of interdependence, that the government brought up its contention that interdependence was not a required element of the conspiracies (even though, as to Count 3, the government expressly pleaded interdependence — *see*, doc. no. 354, ¶ 91, p. 51). This occurred several days into the presentation of evidence in the first trial, despite repeated directives indicating that deadlines for instructions-related matters would be strictly enforced due to the complexities of the case. *See, e.g.*, doc. no. 1079, p. 2.

Rodger Bramley was, and perhaps still [*10] is, a bookmaker. He made no bones about that. Doc. no. 1527, at 8 ("Bramley had an [i]ndependent [b]ookmaking [b]usiness."). He had his own book of business, which he apparently built up through his own considerable efforts over an extended period of time.[3] His association with the Legendz organization was as a "pay-per-head" (PPH) bookmaker. As a PPH bookmaker, Bramley paid a flat weekly fee (on a per-bettor basis) to Data Support Services (based in Panama, and beneficially owned by defendant Bartice King) for "back office" services. Thus, if Bramley had 1000 bettors in his book of business in a given week, and the agreed PPH fee was $18, Bramley would owe $18,000 to DSS for its services for that week.[4] As a PPH bookmaker, Bramley was in business for himself — he kept the losing bettors' losses and was on the hook for their winnings. Wagering risk was not shared with, or otherwise borne by, Legendz.

Bramley's bettors could place their bets online, using the DSS website, or by calling one of the toll-free numbers that rang at the DSS call center in Panama. Tr. 1058, 1070 - 71.[5] The "line" that would control the bet (*e.g.*, Oklahoma minus 7 points versus Texas) would be established by DSS (the Legendz organization). Bets would be accepted and recorded by DSS. This relieved Bramley of the record keeping and other clerical drudgery that would otherwise be unavoidable in his bookmaking operation.

The record reflects numerous payments, attributed to "Doc" (*e.g.*, associated with Bramley), made to entities affiliated with Legendz. But those payments were largely unexplained, even by Karlo Stewart, the chief financial officer of the Legendz organization. Many of those payments, reflected on the exhibits as having been received, for the most part, in weekly intervals, [*12] were in the amount of $20,000, which is at least as consistent with faithful remittance of PPH fees as with anything else (such as

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[3] At some point, and for an unknown period of time, Bramley may have been in partnership, in his bookmaking business, with a "Dewight Findley." Tr. 876. And, at some point (perhaps during the entire relevant period), Bramley had subagents working under him. Tr. 1004.

[4] As explained by Michael Lawhorn, a government witness:

> A. [Bramley] was a pay-per-head, he would pay a service fee per each client he had per week.
>
> Q. And what do you mean by -- what do you mean by that?
>
> A. For example, if you have a bettor and you bet with a company, they would charge a fee. Because at one time, I also had a pay-per-head deal. So what we agreed on is sometimes [*11] it was 15 bucks, sometimes it was 18. You would -- say, for example, you had a thousand clients bet that week and it was $15 per head, that's per client, so your fee would be 15 times a thousand, be 15,000 for that week. That's what you pay the house. And the house didn't back you. You backed yourself. You were booking it yourself.

Tr. 852 - 53.

[5] In this order, citations to "Tr." refer to the transcript of the trial of the three defendants whose post-trial motions are addressed in this order. In addition, there are some citations to the transcript of the trial of the defendant Bartice King, cited as: "B. King Tr. __."

sending losing bettors' payments to Panama, which would be an indication that Bramley was also affiliated with Legendz on a risk-sharing basis).[6]

Bramley traveled to Panama several times (presumably at the expense of DSS or Legendz), for the Super Bowl and on other occasions, activities that, regardless of their significance for other purposes, do not cut one way or the other [*13] for purposes of determining whether he was anything other than a very active and apparently successful PPH bookie.

Bramley was, thus, a successful PPH bookie. The government has also sought to portray Bramley as a bookie with players who dealt with Legendz on a post-up[7] or credit[8] basis — *e.g.* as a bookie who was affiliated with Legendz on a risk-sharing basis. There is no direct evidence that that sort of a relationship existed, and the circumstantial evidence — consisting mostly of spreadsheet entries that have been explained only on a highly conjectural basis — is far too weak to support the government's assertion, given the government's burden of proof at trial and the standard of review that applies to the court's consideration of the present motions.[9] The closest the government could come to

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[6] On cross examination of Mr. Lawhorn:

> Q. Now, earlier we had a bunch of different slides go up or exhibits go up and it showed Mr. King paying money -- I mean, Mr. Bramley paying money on a regular basis.
>
> A. Correct.
>
> Q. Okay. And that would be what you'd expect for somebody that had a per-head basis, they would have to pay every month, wouldn't they, for their services?
>
> A. Yeah, they needed to pay, yeah, uh-huh.
>
> Q. Yeah. And that fee would vary from time to time according to how busy you were. You know, around Super Bowl, it would be real busy, a lot of players. Around August, you wouldn't have anybody to speak of. Is that --
>
> A. Well, there were seasons, yeah. During the football season it was busy. During baseball it wasn't busy.

Tr. 1016.

[7] In post-up betting, the player establishes a positive cash balance with Legendz, to secure payment of losses to Legendz.

[8] In credit betting, the player is not required to put up a cash reserve. Depending on the results of his betting, his balance will run positive or negative, with agreed limits to trigger payments to settle up in favor of the bookie or the bettor.

[9] The lack of anything resembling cogent evidence that Bramley was anything other than a PPH bookie may be the reason that, at the Rule 29 stage, the government cut one of its arguments on this issue from the whole cloth. The court expressed its concerns about the status of Bramley, in part, as follows:

> [By the Court:] The only reason I tease that out is that, again, for possible consideration by the Court of Appeals, I can say without hesitation that the posture of a straight pay-per-head agent is, in my view, decidedly different than that of an agent who had some sort of a split as opposed to just paying a fee per bettor per month or per week, whichever it was, as was the arrangement on a pay-per-head basis. So I wanted to, if you will, tease that out just a little bit for the possible benefit of a reviewing court. Thank you.

The government responded as follows:

> MR. HAN [government counsel]: Just to follow up on that, Your Honor, the Sergio Cabrera checks, I mean, these are checks for weekly losses that were in hundreds of thousands of dollars and they were made out to one of the -- some of the entities involved in this case. It would stretch credulity to suggest that a hundred thousand dollar check from a big bettor like Sergio Cabrera being sent from Texas to Panama and accounted for in Panama would suggest that Sergio Cabrera was a bettor upon [*15] which Defendant Bramley only paid a

presenting a percipient witness who could say that Bramley was something other than a PPH bookie was the government's summary witness David Jansen, a contract forfeiture investigator with the FBI (and obviously not a percipient witness). At that stage of the trial, Jansen was in no position to draw any inferences that the jurors (by then, well-educated with respect to the Legendz operation) would [*14] not have been equally competent to draw, and his speculation about the possibility that Bramley also had post-up bettors dealing with Legendz was pure conjecture. Tr. 1270.

The court is, accordingly, satisfied that Bramley's motion for judgment of acquittal must stand or fall on the basis of his affiliation with Legendz as a pay-per-head bookie, and on no other basis. Thus, as to Bramley, the government's argument that interdependence consisted of "the pooling of bets and money that allowed [the bookies] to accept more bets, offset their expenses, and to increase their profit," doc. no. 1561, at 4, is substantially (if not entirely) irrelevant. Viewing the evidence as favorably to the government as reason will permit, the jury could not have found, without engaging in rank conjecture, that Bramley was anything other than a pay-per-head bookie.[10]

So, what suffices to establish interdependence as to Bramley? As an initial matter, the court will observe that, although interdependence among *other* co-conspirators [*16] is relevant at least for discussion purposes, it is necessary that the web of interdependence include Bramley himself in some identifiable way, United States v. Smith, 413 F.3d 1253, 1276 (10th Cir. 2004), *cert. denied*, 546 U.S. 1120 (2006), *overruled on other grounds*, United States v. Hutchinson, 573 F.3d 1011, 1021 (10th Cir. 2009), *cert. denied*, 558 U.S. 1036 (2009), because interdependence is an element of the conspiracy offenses charged in this case, and each element of an offense must, of course, be proven as to each defendant.

If the interdependence requirement was (as a matter of law, measured under Rule 29 standards) satisfied as to Bramley, it was satisfied because (as a matter of fact) Bramley and Legendz, acting through DSS, had a mutually beneficial relationship in which Bramley

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> weekly fee for his right to bet with the organization. Hundred thousand dollars -- the amount of the check sent to Panama for the Diebner bettor and also for the Bramley bettors would suggest that the relationship -- this profit sharing relationship went well beyond pay-per-head.

Tr. 1747 - 48.

There is not a shred of evidence in the record to support any suggestion that the Sergio Cabrera checks had anything to do with Bramley. *See*, Tr. 734 - 780.

[10] The court is mindful that the Rule 29 standard contemplates evaluation of the sufficiency of the evidence as to *each of the elements of the offense*, Anderson, 189 F.3d at 1205, and not as to isolated snippets of evidence. Thus, every arrow in the government's evidentiary quiver does not have to be a "beyond a reasonable doubt" winner. In this vein, the government argues, as a fall back proposition, that Bramley's status as a PPH bookie, without more, suffices to get past Rule 29 review, doc. no. 1561, at 7 *et seq.*, and the court will address the merits of that contention. Nevertheless, the government's theory that Bramley was *also* a Legendz bookie on a risk-sharing basis (as was apparently the case with respect to the vast majority of the other Legendz bookies) is sufficiently discrete as one leg of the government's case against Bramley, and sufficiently central to that case (especially on the issue of interdependence), that it is appropriate to analyze this theory as a free-standing proposition and not just as one of many evidentiary threads. It was much more than that.

provided customer (bettor) traffic to the Legendz website (or call center), paying the substantial PPH fees associated with that use, and, in turn, Bramley got the benefit of Legendz's line-setting expertise and was relieved of the back office clerical tasks that he otherwise would have had to handle himself — freeing him up to generate more business for himself and Legendz. Bramley benefitted from the scale, sophistication and very evident competence of the Legendz organization. He, even as a bookmaker with a substantial clientele, was in no position to provide the [*17] communications, line-setting and web-based (or call center) infrastructure that was available to him and his players via the Legendz organization.

Although Count 2 is not a conspiracy count, the judicial treatment of the concept of interdependence for purposes of determining whether the five person requirement has been satisfied under § 1955 (conducting a gambling business) is informative for purposes of analysis of the interdependence requirement as applied to the two conspiracy counts. Under § 1955, the gambling business must "involve[]" five or more persons "who conduct, finance, manage, supervise, direct, or own" all or part of the business. 18 U.S.C. § 1955 (b)(1)(ii). Defendants charged under § 1955 have, like Bramley, argued that they were independent bookies, in business for themselves, and not connected with the alleged gambling business in a way that would make them count for purposes of the five person requirement. *E.g.*, United States v. Reeder, 614 F.2d 1179, 1181 - 83 (8th Cir. 1980); United States v. Guzek, 527 F.2d 552, 554 - 58 (8th Cir. 1975), both cited by the government in responding to Bramley's motion. Doc. no. 1561, at 12.

In Reeder, the defendant "clearly was a bookmaker, who accepted and placed bets, published a line, and charged bettors a ten percent juice if they lost their bets." 614 F.2d at 1182 (footnotes omitted). Others in the organization [*18] provided defendant or his wife "with line information, sports scores, and/or received bets." *Id.* at 1182 - 83. Defendant argued that "lay off betting[11] is the major link connecting independent operations into a single effective gambling organization and is necessary for the purpose of finding the jurisdictional five members." 614 F.2d at 1183. The court disagreed: "Lay off betting is thus only a factor, albeit an important one, and its presence or absence is not necessarily controlling. Thus the jury could have concluded the entire relationship, though lacking proof of lay off betting, was nevertheless interdependent to the degree necessary to establish a single gambling enterprise." *Id.* at 1183.

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[11] Lay off betting, which can take various forms, is the shifting of wagering risk from one bookmaker to another, for the purpose (typically) of reducing the financial exposure that results from having too many dollars bet on one side of a game. Lay off betting is risk sharing, which is obviously relevant to interdependence. Although a profit and loss sharing arrangement between Bramley and Legendz (such as 50/50 redline, Tr. 24 - 25) would not, strictly speaking, have been the same as lay off betting, the two concepts are, for present purposes, analytically the same.

Guzek (cited by the government for the proposition that a "bookmaker who exchanged line information on a daily basis was [a] participant in a single gambling business," doc. no. 1561, at 12 - 13) involved a similar situation, but the court's discussion includes some passages that are not helpful to the government in the case at bar. The basic situation was the same — the defendants argued that they were independent bookies. On the issue of interdependence, the court had this to say, quoting from its decision in United States v. Brick, 502 F.2d 219 (8th Cir. 1974):

> Although defendants [*19] argue that they are independent businessmen, it is evident that the success of their individual operations was dependent upon the success of its various related components, e.g., on their ability to pool their bets with Singer (either through lay-offs or profit sharing agreements) and to share line information through him. The degree of interdependence and interrelation thus shown negates the concept of independence urged upon us.

Guzek, 527 F.2d at 556-57.

The court then quoted with approval as follows from its decision in United States v. Schafer, 510 F.2d 1307, 1312 (8th Cir. 1975), *cert. denied*, 421 U.S. 978 (1975):

> The interdependence of the various individual components, including the sharing of line information and the exchanging of profits through layoff betting, outweighs the 'independent businessmen' theory urged by appellants and satisfies us that there was one 'illegal gambling business' here for the purposes of 18 U.S.C. § 1955.

Guzek, 527 F.2d at 557.

Analyzing the case before it in light of the existing Eighth Circuit case law (including the quoted cases), the court affirmed the conviction of Guzek. In so doing, it placed considerable reliance on the fact that Guzek shared wagering risk with others in the organization. *Id.* at 558.

As between Bramley and Legendz, there was no risk sharing that the jury could, without engaging [*20] in sheer speculation, have found to have occurred. But Bramley did depend on Legendz for line setting. When his customers called the toll-free number or went online with DSS to place bets, Bramley was availing himself of the expertise of Legendz in setting lines that would hold down the exposure that unbalanced wagering would cause. In that sense, Bramley was getting a valuable service that did not consist merely of the communications capability, automated online wagering facilities and back office competence offered by DSS. Bramley depended on Legendz to provide good service and to astutely set betting lines — lines on which Bramley's weekly financial outcomes depended. In turn, Legendz depended on Bramley to pay the PPH fees that he owed. The evidence would support a finding by a rational jury that this was not a passive, arms-length

relationship, but, instead, was characterized by a measure of interdependence. The margin by which the court reaches this conclusion is not wide — and exacting review on this point would be entirely appropriate — but the court reaches this conclusion nonetheless. The fact that each bookie or agent had his "own unique agreement" with Legendz, as conceded [*21] by FBI witness David Janzen (Tr. 1250), does not significantly undermine the evidentiary basis for a finding of interdependence, as asserted by Bramley (doc. no. 1527, at 16). *Cf.*, United States v. Pinelli, 890 F.2d 1461, 1469 (10th Cir. 1989), *cert. denied*, 494 U.S. 1038, 110 S. Ct. 1498, 108 L. Ed. 2d 632 (1990), where defendants' "participation in a substantial and continuous bookmaking business" was established (for § 1955 purposes) by the fact that "multiple bookmakers and others [were] linked through lay-off wagering, exchange and use of line information, and ancillary activities." Likewise, the court concludes that the government was not obliged to prove interdependence among the "spokes" (individual Legendz bookmakers and agents) extending from the "hub" (the Panama operation), as Bramley asserts. Doc. no. 1527, at 18. The Legendz organization was far-flung. Aside from the possibility of some social contact during Legendz-financed junkets to Panama, most of the bookies and agents were not acquainted with (and did not deal with) most of the other bookies and agents. The court is unpersuaded that interdependence around the rim of the wheel was required, although the court hastens to add that the absence of interdependence around the rim of the wheel (or among any other combination of defendants) is [*22] fair game for cross examination at trial, on the overall issue of interdependence.

2. Diebner and Moran.

The interdependence issue is less complicated as to defendants Diebner and Moran.

Diebner was a bookie who was (unlike Bramley) financially linked, on a risk-sharing basis, with the Legendz organization. He was an active and apparently successful bookie who enjoyed profitable relationships with Legendz and with his bettor clients. Diebner's relationship with Legendz was mutually beneficial in the ways described above as to Bramley, in addition to which Diebner had significant financial linkage with Legendz.

Moran was a trusted runner in California. Legendz and its bookmakers depended on him to transport funds reliably, mostly at the instance of managers in Panama. In turn, Moran relied on Legendz and the bookmakers to provide a steady flow of work, keeping him busy in his capacity as a runner.

C. Other issues raised by Bramley.

1. Counts 2 and 3.

On Count 2, Bramley argues that the government failed to prove that he "conducted" a gambling business, in violation of 18 U.S.C. § 1955. Doc. no 1527, at 19. Under this heading, Bramley argues, much as he did on the interdependence issue with respect to

the [*23] conspiracy counts, that the proof failed to establish that Bramley "willfully associated with Luke King's independent bookmaking business and/or the other bookmakers charged in this case — in any jurisdiction — through affirmative action." *Id.* In so arguing, he adopts his interdependence arguments.

The prohibition of § 1955 applies to anyone who "conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business." 18 U.S.C. § 1955 (a). As the court noted in its order on the post-trial motions of defendants Robles, Tanner, Tucker and Zapt Electrical Sales, Inc., the most inclusive of these verbs, at least where the defendant is alleged to have been an active participant, is "conducts." Although it is arguable that "conducts" excludes casual or peripheral participation in a gambling business (after all, Congress could have used "participates"), the Supreme Court has eliminated that argument. Sanabria v. United States, 437 U.S. 54, 70-71 n. 26, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978) (citing with approval substantial lower court authority for the proposition that § 1955 proscribes any degree of participation in an illegal gambling business, except participation as a mere bettor). In the same passage, the Court also made it clear that any given defendant need not be shown to [*24] have himself satisfied the durational or gross receipts requirements. These requirements are applied to "the business itself" and not to the individual participants. *Id.*

The state law requirement is similarly lax. The gambling business need only be shown to have violated "the law of *a* state or political subdivision in which it is conducted." 18 U.S.C. § 1955 (b)(1)(i) (emphasis added). In this case, numerous states, not the least of which is Oklahoma, qualify as "a" state in which the business was conducted.[12]

Under § 1955, as with the conspiracy counts, the question once again is: Did the evidence, measured by the Rule 29 standard, give the jury a basis for finding that Bramley had some "degree of participation," Sanabria at 71, in a gambling business that otherwise satisfied the requirements of § 1955? In Pinelli, 890 F.2d at 1469, a prosecution under § 1955, it was enough that "multiple bookmakers and others [were] linked through lay-off wagering, exchange and use of line information, and ancillary activities." In the case at bar, as has been discussed, Bramley has not been shown, with certainty satisfying Rule 29, to have shared wagering risk with others (which, in Pinelli, was why the court referred to "lay-off wagering," which is a form of risk sharing, or at least cooperative [*25] risk mitigation). But Bramley did make use of the sophisticated line setting capability of the Legendz organization — a critically important function that required substantial expertise, on-target judgment and, in some instances, minute-to-minute attention. Bramley engaged in "ancillary activities" in the sense that his bookmaking business used the toll-free number

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[12] In this case, unlike United States v. Truesdale, 152 F.3d 443 (5th Cir. 1998), where the government pitched its state law case on a narrow provision of Texas gambling law, the government has relied on expansive provisions of the gambling laws of Oklahoma and several other states.

and state of the art web-based wagering capability that Legendz had developed. Bramley has a respectable argument that this was not enough — an argument centering of the fact that he was, from the standpoint of business risk and financing, his own entity. However, the court concludes, from the totality of the evidence, that the evidence bearing on the § 1955 charge against Bramley clears the Rule 29 bar, even if barely.

As for Count 3, it must be borne in mind the that the crime of conspiracy to commit money laundering is about as ephemeral a crime as can be imagined. To convict Bramley (or any other defendant) on Count 3, the government was *not* required to prove (per the jury instructions for the trial of Bramley and his two co-defendants, doc. no. 1445, Instruction Nos. 33, 59 and 65 *et seq.*):

— That there was a formal agreement.

— That [*26] the defendant knew who all the other conspirators were.

— That the defendant or any other co-conspirator committed an overt act in furtherance of the objectives of the conspiracy.

— That Bramley or any other defendant actually committed one or more of the alleged money laundering offenses.

Summarizing (at the risk of oversimplification) the key principles stated in the jury instructions cited above, what the government was obliged to prove was:

— That there was an agreement (which could be nothing more than a shared mutual understanding, spoken or unspoken) between two or more persons to commit a substantive money laundering offense.

— That the defendant knowingly and willfully joined the conspiracy, knowing its purpose and with the intent to further the illegal purpose.

— That there was interdependence among the conspirators.

There was evidence from which the jury could rationally have found that Bramley, having been to the Legendz headquarters in Panama several times, and having had a long-term personal and business acquaintance with Bartice King, knew the scope, purpose and methods of operation of the organization and knew that the hundreds of thousands of dollars in PPH fees that he paid [*27] were integral to the much larger stream of funds (which he also knew to exist) flowing south to Panama and then (as and to the extent needed) north to The Woodlands, Texas, where King maintained his principal residence. The jury could rationally have found that Bramley knowingly affiliated himself with that organization and furthered its illicit purposes (including money laundering) by building his own substantial book of business, directing the betting traffic to DSS in Panama via the

website or the toll-free number. All things considered, Bramley's participation in a money laundering conspiracy may have been a bit peripheral to his main activities as an essentially independent bookmaker, but, as has been seen, the federal criminal offense of conspiracy to launder money does not require much more than bad thoughts. The court concludes, again by a fairly narrow margin, that the evidence permitted a rational jury to convict Bramley on Count 3.

2. Variance.

Analytically, Bramley's variance argument is essentially a reprise of his interdependence argument, with elaboration to the effect that the lack of interdependence means that a *single* conspiracy was not proven. The court disagrees, [*28] substantially for the reasons set forth in part II (B)(1), above.

3. Venue.

The evidence established, sufficiently for Rule 29 purposes, that the Count 1 and 3 conspiracies were single conspiracies (not multiple conspiracies) and that acts in furtherance of the conspiracies occurred in this judicial district. The venue challenge as to Counts 1 and 3 is therefore without merit.

As for Count 2 venue, the evidence established that participants in the gambling business undertook activities in furtherance of the business in this district, within the meaning of the broad construction of § 1955 that the Supreme Court embraced in Sanabria v. United States, 437 U.S. 54, 70 - 71 n. 26, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978). The gambling business operated, in part, in Oklahoma. All that is required is that Bramley was a participant in that business, even if he never set foot in Oklahoma. The evidence satisfied that requirement. The court therefore disagrees with Bramley's contention that venue was not established as to Count 2.

D. Other issues raised by Diebner.

1. Acquittal on Count 2.

Defendant Kelley Diebner argues for acquittal on Count 2 on the basis that two of his bettors (Tipton Rowland and Michael Caplan) testified only that they dealt with Diebner, and not with Legendz, while the third (Sergio [*29] Cabrera) dealt only with Legendz and not in any significant way with Diebner. Doc. no. 1529, at 12-13. The court concludes, however, that either of those scenarios would be incriminating under § 1955, as long as Diebner was — in the loose sense required by the Supreme Court — a participant in the Legendz betting organization. He was.

Diebner's argument under United States v. Truesdale, 152 F.3d 443 (5th Cir. 1998) is also without merit. In Truesdale, the government pitched its state law case on a narrow provision of Texas gambling law. In the case at bar, the government has relied on

expansive provisions of the gambling laws of Oklahoma and several other states (and has factually supported that reliance). Truesdale is distinguishable.

2. Venue.

The court rejects Diebner's venue challenge because it disagrees with his contention that the evidence did not satisfactorily establish the existence of a single conspiracy. There was evidence from which the jury could rationally have found that there was a single RICO conspiracy and a single money laundering conspiracy. As for Count 2, Diebner's protest that he has never even been to Oklahoma is of no avail, for the reasons set forth above with respect to Bramley.

3. Lack of willful conduct.

Diebner argues [*30] that the government failed to prove that he acted willfully because "[t]here was no evidence presented at trial to prove Mr. Diebner knew his alleged business relationship with Legendz was a violation of law." Doc. no. 1529, at 16. For purposes of this case, the court has defined willfulness as follows:

> The government has the burden of proving that the defendants acted "willfully." As a general matter, when used in a criminal context, a "willful" act is one undertaken with a bad purpose. Willfulness, or acting willfully, as used in these instructions, is intentional conduct which the actor knows to be a violation of law. The willfulness element requires proof that the defendant you are considering knew the conduct was unlawful, but not that he knew the precise legal duty which he is charged with violating.

Doc. no. 1445 (Instruction No. 32).

The evidence established, with certainty easily sufficient to clear the Rule 29 bar, that Diebner was an experienced bookmaker. He had a substantial book of business that generated a large volume of betting activity. At times, as the government correctly points out, doc. no. 1563, at 18, Diebner opted to conduct his business using methods designed to avoid detection, [*31] which bespeaks consciousness of the illicit nature of his activities — *i.e.*, willfulness. The court accordingly rejects Diebner's willfulness argument.

E. Other issues raised by Moran.

1. Generalized argument as to the sufficiency of the evidence.

Aside from his contentions with respect to interdependence, which generally track the arguments advanced by the other two defendants, Moran asserts, in substance, that his service as a runner in the Legendz organization simply does not suffice to inculpate him for purposes of the three counts on which he was tried and convicted. Doc. no. 1528, at 15. His contentions on this point are augmented by his assertion that the government also unfairly cast him in the role of "an agent and not just a runner," *id.* at 11, which he argues was highly prejudicial. *Id.*

As for the consequences of Moran's service as a runner, for purposes of criminal liability on the three counts at issue here, the court is satisfied that the evidence established that his service as a runner, consisting of the transport of large amounts of money to and from numerous individuals over an extended period of time, brought him within the ambit of the two conspiracy counts and the substantive [*32] count charging participation in a gambling business. Given the very nature of the two conspiracy counts (Counts 1 and 3), and the broad sweep of § 1955 (Count 2), it was not necessary to prove that Mr. Moran was an agent or a bookie or a manager of the Legendz organization. What Mr. Moran did was essential to the day to day functioning of the organization and that is all that was necessary, in terms of his personal activities, for any of the three counts on which he was convicted.

As for the government's portrayal of Moran as an agent, the starting point is the fact that the court granted Moran's motion in limine, doc. no. 1399 (filed on May 5, 2015). In so doing, the court "concluded that prosecution of Leon Mark Moran in this case as an agent or bookie is impermissible under both the Fifth Amendment and the Sixth Amendment." Doc. no. 1443, at 5 (Order entered on May 18, 2015). When the court indicated its ruling from the bench, the court said that: "It is not necessary to redact any exhibits, but the government is prohibited from asserting that the Defendant Moran was an agent, sub-agent, or bookie and is prohibited from eliciting any testimony to that effect." Tr. 771 (proceedings on May12, 2015). To fortify its rulings [*33] on this subject, the court, in the jury instructions, explicitly differentiated between Bramley and Diebner, on one hand, and Moran on the other hand:

> The indictment alleges that defendants Bramley and Diebner participated in the conspiracies charged in Counts One and Three, and in the commercial gambling business charged in Count Two, as agents in the Legendz organization. The indictment alleges that defendant *Moran participated* in the conspiracies charged in Counts One and Three, and in the commercial gambling business charged in Count Two, *as a runner* in the Legendz organization. *Mr. Moran is not charged with having participated in the activities alleged in the indictment as an agent or bookie*.

Doc. no. 1445, at 12 (emphasis added).

Moran points out that an exhibit (Government exhibit 63) that was admitted into evidence before the court ruled on his motion in limine listed Moran (among numerous other individuals) as an agent. Tr. 487-89. At that point, the court did not require redaction of the exhibit, but prohibited the government or its witnesses from characterizing Moran as an agent. Tr. 488. Later, and still before the court ruled from the bench on the motion in limine, a witness [*34] referred to a list that included a reference to Moran as a list of "all agents that I know — that I know of." Tr. 702. The court soon thereafter prevented the witness from answering a question that, as phrased, could have elicited an answer

indicating that Moran was an agent. Tr. 703. Later, after the court ruled from the bench on the motion in limine, the government again (and not improperly) referred to Government exhibit 63. Tr. 933. The witness read Moran's moniker (Makavelli) from that exhibit. Before any more mention was made of Moran, his counsel asked for a bench conference, which resulted in the following comment by the court:

> THE COURT: Well, the exhibits say what they say. I certainly will expect the government counsel to be conscious of this and if need be, I'll address this further in the jury instructions. But the exhibits say what they say. I, frankly, was oblivious to it just now. And I might have interceded at the time. But I'm just going to ask government counsel to be very, very careful to avoid eliciting testimony or making other statements that would indicate that Mr. Moran was an agent.
>
> [AUSA SMITH]: Yes, sir. Absolutely.
>
> THE COURT: Very well.

Tr. 934.

The court disagrees [*35] with Moran's assertion that he was prejudiced by these references during the trial. The evidence overwhelmingly portrayed Moran to be a runner. The court took reasonable steps to protect Moran from being described as an agent, and the brief statements by the witnesses who made those references were, in the context of the entire trial (and in the context of the entire body of evidence characterizing Moran as a runner), *de minimis*.

2. Spillover effect.

Moran makes a multifaceted argument premised on his contention that a "spillover effect" resulted from (i) the fact that the government proved multiple conspiracies, instead of a single conspiracy, (ii) the fact that Moran, a runner, was tried in the same trial as two bookies, and (iii) the government's alleged trial misconduct. Doc. no. 1528, at 15 - 21. It is not clear whether Moran advances these arguments in support of his motion for judgment of acquittal, or his motion for new trial, or both. To the extent that Moran argues that "the government pled one thing and then attempted to prove another[,] contrary to cases such as Kotteakos v. United States[,] 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)," doc. no. 1528, at 15, it would seem that he seeks judgment as a matter of law, rather than a new trial. His [*36] other arguments would appear to be more supportive of a grant of a new trial. In any event, all of his arguments under this heading will be addressed here. The misconduct issue will also be addressed in part III (B), below.

As for Moran's argument premised on his contention that the government proved, at most, multiple conspiracies rather than a single conspiracy, the court's analysis gets back to the familiar subject of interdependence. In this case, there clearly was no conspiratorial agreement in which *each* conspirator had a conspiratorial agreement, express or implied, with *each other* conspirator or even with most of the other conspirators. The fact of the

matter is that, singly or in small groups of individuals loosely cooperating with each other in a particular locality, the defendants who lived and carried out their Legendz-related roles in the United States conspired with Bartice King and his highly competent Panama-based support staff to fulfill the objectives of the charged conspiracies — *e.g.*, to operate an illegal sports betting business and launder the funds generated by that business. The interdependence that existed as and to the extent discussed in part II (B), above, [*37] is what, in the court's view, permitted a rational finding by the jury that a single racketeering conspiracy existed and a single money laundering conspiracy existed. Consequently, on the basis of the court's conclusions with respect to interdependence, the court rejects Moran's contention that, at best, the government proved multiple conspiracies. *Cf.*, United States v. Carnagie, 533 F.3d 1231, 1240 (10th Cir. 2008), *cert. denied*, 555 U.S. 1194 (2009) (interdependence discussed in light of Supreme Court's multiple conspiracy analysis in Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)).

The court is also not persuaded that Moran was prejudiced by being tried with two bookmakers. At trial, the contrast between Moran's role, as a runner, and the roles of the other two defendants, as bookmakers, was quite clear. Moran and the other two defendants were distinct geographically as well as functionally. Bramley and Diebner were from Texas. Moran "operate[d] from" Fresno, California, Tr. 238, and most of his relevant activities took place in California or Panama. When several defendants are tried together and come out looking like peas in a pod, there is a danger that evidence implicating only one defendant will besmirch the others. That simply was not the case here. At the trial of this case, the court did not sense that any evidence [*38] specific to Bramley or Diebner cast a shadow across Moran.

Moran argues at length and with noticeable emphasis that the trial of this case was infected with prosecutorial misconduct. Doc. no. 1528, at 15 - 21. As a general proposition, his assertions as to specific incidents that occurred at trial are correct, and are dealt with in some detail in part III (B) (2), below. And these contentions are more relevant to the issue of whether a new trial should be granted than they are to the issue of whether a judgment of acquittal should be entered. However, Moran does advance his misconduct argument in conjunction with his single conspiracy/multiple conspiracy contentions, so it is appropriate to address the misconduct issue in that context at this point. Moran's misconduct arguments consist predominantly of his complaints about leading questions, pressure on government witnesses, government counsel coaching witnesses by way of head shaking to indicate the desired answer, and an allegedly improper comment, in closing argument, about an evidentiary objection lodged by Moran's counsel. Doc. no. 1528, at 15 - 20. To the extent that these contentions may be relevant to Moran's motion for judgment [*39] of acquittal, the court concludes that form of relief is not warranted. As will be seen below, the court is critical of some aspects of the conduct of government counsel at the trial of this case.

However, excising anything that might have been unfairly "proven" by the matters complained of by Moran (and, consequently, dismissing any inference adverse to Moran that the jury might have drawn from the testimony that was unfairly presented), the remaining very substantial body of evidence amply demonstrated Moran's activities as a runner in the Legendz organization, and, in that capacity, as a knowing and voluntary participant in the charged conspiracies. Indeed, Moran does not tie any of the instances of misconduct cited in his motion to any testimony relating to his activities or role in the Legendz organization. The court rejects Moran's misconduct assertions as a basis for entry of a judgment of acquittal.

F. Ruling.

After careful consideration, the court concludes that the motions for judgment of acquittal filed by defendants Bramley, Diebner and Moran must be denied. As has been noted, this case does present some issues that deserve careful consideration by a reviewing court, and [*40] the court is confident that careful scrutiny will be brought to bear.

III. The alternative motions for new trial.

The granting of a new trial is discretionary with the trial court. United States v. Dewberry, 790 F.3d 1022, 1028 (10th Cir. 2015).

A. Arguments based on the weight of the evidence.

Bramley and Diebner argue that the jury's verdicts against them are contrary to the weight of the evidence. *See*, doc. no. 1527, at 3 (Bramley) and doc. no. 1529, at 16 (Diebner).

As to Bramley and Diebner, the only real issue that could be analyzed in terms of the weight of the evidence is the question of whether the fairly unambiguous evidence as to the way the Legendz organization and its various participants operated satisfies the interdependence requirement — a requirement that exists with respect to both of the conspiracy counts and is also present, albeit in an indirect way, with respect to the § 1955 count. Viewing the matter in that light, the court's conclusion is that the judicial attention that is warranted is exacting appellate review of the *legal sufficiency* of the evidence, rather than the trial court's grant of a new trial because of any deficiency in the *weight* of the evidence. Bramley and Diebner were both active and apparently successful bookmakers affiliated with the Legendz organization. If the government's [*41] case against them is defective, it is defective for the reasons discussed in part II (B), above. There is not really a problem with the *weight* of the evidence. What they did and how they did it was readily ascertainable from a substantial body of evidence.

B. Prosecutorial misconduct.

1. Introduction.

As has been noted, all three defendants seek relief on the basis of asserted prosecutorial misconduct. They contend that they were denied a fair trial because the government engaged in various forms of misconduct.

As a preliminary matter, it is necessary to examine both the scope of the court's review of matters that may amount to prosecutorial misconduct and the standards by which conduct within the appropriate scope of review should be measured.

Needless to say, prosecutorial misconduct can be addressed by way of consideration of whether a new trial is warranted under Rule 33, Fed.R.Crim.P. United States v. Gabaldon, 91 F.3d 91, 93 (10th Cir. 1996). That, of course, puts the issue in a fairly discretionary framework. Prosecutorial misconduct is also sometimes addressed as a due process issue, United States v. Maynard, 236 F.3d 601, 606 (10th Cir. 2000), *cert. denied*, 532 U.S. 989, 121 S. Ct. 1642, 149 L. Ed. 2d 500 (2001), although even when (or perhaps because) the matter is viewed through the lens of due process, the substantive standard is not tightly defined: "To rise to the [*42] level of a due process violation, the prosecutorial misconduct at issue must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.'" *Id.* (quoting from Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987)).

The alleged misconduct "must be placed in the context of the whole trial, and not viewed in isolation." United States v. Oliver, 278 F.3d 1035, 1040 (10th Cir. 2001). The first step in the analysis is to determine whether the conduct was improper; the second step is to determine whether relief is warranted, the focus being on whether the prosecutor's conduct affected the fairness of the trial. United States v. Apperson, 441 F.3d 1162, 1207 (10th Cir. 2006), *cert. denied*, 549 U.S. 1117, 127 S. Ct. 1003, 166 L. Ed. 2d 712 (2007).[13] Relevant to the issue of whether the defendant was denied a fair trial are: (i) the curative measures taken by the trial judge, United States v. Green, 435 F.3d 1265, 1268 (10th Cir. 2006), *cert. denied*, 547 U.S. 1122, 126 S. Ct. 1937, 164 L. Ed. 2d 683 (2006); (ii) the extent of the misconduct, *id.;* (iii) the "role of the misconduct within the case", *id.;* (iv) "whether the prosecutor acted in bad faith," United States v. Meridyth, 364 F.3d 1181, 1183 (10th Cir. 2004), *cert. denied*, 562 U.S. 1052, 131 S. Ct. 620, 178 L. Ed. 2d 450 (2010), *see also*, United States v. Kamahele, 748 F.3d 984, 1016 (10th Cir. 2014) ("record does not suggest bad faith when the prosecutor asked the agent" a question that elicited inadmissible testimony about the contents of a backpack); and (v) whether the misconduct was "merely 'singular and isolated,'" United States v. Ivy, 83 F.3d 1266, 1288 (10th Cir. 1996), *cert. denied*, 519 U.S. 901, 117 S. Ct. 253, 136 L. Ed. 2d 180 (1996) (quoting from United States v. Pena, 930 F.2d 1486, 1491 (10th Cir. 1991).

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[13] Misconduct by investigative agencies is also within the ambit of "prosecutorial misconduct." In Apperson, 441 F.3d 1162, 1207 (10th Cir. 2006), the court addressed, as part of its analysis of the defendant's claims of prosecutorial misconduct, an assertion that a federal investigative agency had tampered with his computer.

On this latter point (whether the misconduct was singular and isolated), [*43] the Supreme Court has opined, in a *habeas* context, that it does not "foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with *a pattern of prosecutorial misconduct*, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 638 n. 9, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) (emphasis added). This language from Brecht raises the question of whether delicts constituting "a pattern of prosecutorial misconduct" must all have occurred in the same trial — *e.g.*, in the complaining defendant's trial — or whether prosecutorial conduct in other cases is relevant to the evaluation of the conduct directly at issue in the case before the court. The answer, at least in this circuit, is that the relevant prosecutorial conduct is not limited to the trial in which the complaining defendant was convicted, and is not limited to conduct precisely the same as the conduct directly at issue in the complaining defendant's trial. *See, e.g.*, Duckett v. Mullin, 306 F.3d 982, 991-94 (10th Cir. 2002), *cert. denied*, 519 U.S. 1131, 117 S. Ct. 991, 136 L. Ed. 2d 872 (1997), where the court's Brecht analysis included other cases involving the same prosecutor. If unrelated cases involving the same [*44] prosecutor are relevant, then, *a fortiori*, other proceedings in the same case are relevant, at least by way of background, or to aid in the determination of whether the misconduct directly at issue was "deliberate." Duckett at 993. And, it should be noted, even outside the framework of a Brecht analysis, the court must consider whether the claimed misconduct was "merely 'singular and isolated.'" Ivy, 83 F.3d at 1288.

With these principles in mind, then, the court turns to an analysis of these defendants' claims of prosecutorial misconduct in their trial, an analysis which will be informed in part by a review of the government's conduct in other aspects of this case.

2. Misconduct specific to this trial.

a. Leading questions.

Under Rule 611(c), Fed.R.Evid., leading questions "should not be used on direct examination except as necessary to develop the witness's testimony." Leading questions are ordinarily permissible, even on direct, if the witness is hostile or is an adverse party (unlikely in a criminal case) or identified with an adverse party. Rule 611(c). As a practical matter, leading questions are not objectionable on direct examination when the examiner is covering a preliminary matter or a clearly uncontested fact.

Even on contested issues, leading [*45] questions on direct examination are usually nothing more than, at most, a minor annoyance. An occasional lapse into a leading question is understandable. But leading questions do make it more likely that false testimony will roll easily off the tongue of a compliant witness. Of course, the hazard is radically increased when the leading question is put by a prosecutor who, after the trial is

over, will be at the table when decisions are made about what the future will hold for the witness and his family. It may well be that, with some (perhaps most) witnesses, a leading question will not substantially increase the likelihood that the witness will *knowingly* give false testimony. The greater hazard is that a leading question will lull a witness — especially one who is predisposed to be cooperative — into testifying beyond the limits of his actual knowledge.[14] The examiner incorporates into his leading question a proposition he hopes to prove and the witness gives an affirmative answer because he assumes the truth of the matter to which the examiner has, in effect, testified.[15]

Leading questions are not commonly the stuff of motions for new trial, or, for that matter, of serious judicial [*46] concern and comment once the trial is over and the dust has settled. This case is different. Some explanation is necessary.

With few exceptions (such as bettors), the government's important witnesses in this case are (i) cooperators who hope to avoid prosecution or have pled guilty and await sentencing, hoping for favorable consideration from the government under USSG 5K1.1, or (ii) FBI employees or contractors. There is nothing unusual about that, but some of the government's most important witnesses in this case are beholden to the government in truly exceptional ways.

Karlo Stewart is a Costa Rican citizen who has U.S. federal and state felony convictions for crimes of dishonesty. He has been incarcerated in state and federal prisons for approximately eight years as a result of his persistence in engaging in fraudulent and otherwise dishonest conduct. He was deported to Costa Rica approximately fifteen years ago and ultimately found employment in the Legendz organization. Before he and his family moved to the United States to facilitate his cooperation with the government in this case (in immigration parlance, a "parole" into the United States), Stewart traveled back and forth between the U.S. [*47] and Panama at government expense. Because of his criminal history, he needed special permission to enter the United States. He is the subject of a criminal investigation, and an arrest warrant, in Panama, all of which resulted in advice from his Panamanian attorneys to leave that country. Tr. 690. He and his family are in the United States only by the grace of the FBI. Tr. 647. Because of Stewart's value to the government as a witness in this case, the government, through the FBI, has paid "close to

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[14] See part III(B)(3)(c), below.

[15] *Id.* In this respect, the testimony of FBI witness Gregory Melzer, discussed in part III(B)(3)(c), below, is a good illustration of the fact that a leading question, put to a friendly witness on direct examination, reduces the thought process otherwise required in formulating and articulating an answer to a simple binary choice: Yes or no, with all presumptions favoring "Yes." The examiner's thought process substantially displaces the witness's thought process.

$60,000" for the support of Stewart and his family in the United States.[16] Tr. 585. Stewart has testified on five different occasions in this case.

Neil Myler was another important government witness. His personal history is not as dramatic, but his immigration status is about as precarious as Stewart's. He is an Irish citizen. He and his family live in the United States. He was determined to be illegally in the United States in 1987 and was removed from the United States. Tr. 1618. He has entered a plea of guilty to Count 1 in this case, rendering him subject to deportation, an outcome that he desires to avoid so that he can stay here with his wife and family. Tr. 1620. He hopes that the [*48] government will file a 5K1.1 motion on his behalf and will also help him stay in the United States. Tr. 1619 - 20.

Various other government witnesses also hope to get 5K1.1 consideration, but at least do not have the immigration problems that Stewart and Myler have. *E.g.*, David Ross (Tr. 149), Robert Paul Wilson (Tr. 278) and Michael Lawhorn (Tr. 962-63).

Also relevant to the court's evaluation of the persistence of government counsel in asking leading questions is the fact that this case involves numerous sensitive and subjective fact issues relating to matters that are neither observable nor objectively verifiable. And in many instances, the witnesses are being asked to give their recollections of events that occurred ten years, or longer, ago.

The cooperators and FBI witnesses have been very compliant on direct examination. But even so, starting as early as the James hearings in this case, the court noted the government's persistent tendency to ask leading questions on direct examination of compliant witnesses. Tr. 4/4/15, at 759 (James hearing).[17] Witnesses like Stewart and Myler, to say nothing of the others who hope for 5K1.1 treatment (but at least are not in the United States at [*49] the sufferance of the Department of Justice), have demonstrated their willingness to agree to almost any proposition embedded in a leading question put by government counsel[18] on direct examination. They are clearly content to have the facts spoon fed to them by government counsel. They share this tendency with the FBI witnesses, which, as to one FBI witness, led to an exceptionally serious problem (facilitation of outright deception), as discussed in part III(B)(3)(c), below. But on occasions too numerous to mention here, in the trial of these defendants as well as in the

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[16] This is in addition to reimbursement paid by the government to Stewart, to make him whole for a bribe he paid to a fellow Legendz employee to get some internal Legendz documents that were important to the government.

[17] The Courtroom Minute Sheet for the pretrial conference that was held on February 3, 2015, before the first of the three jury trials that have been held in this case, reflects the following admonition: "The court strongly cautions counsel about leading questions . . . ." Doc. no. 1129, at 3. This was to no avail.

[18] It should be noted that this persistent disregard of Rule 611 and the court's admonitions cannot be laid to inexperience. Mr. Smith, the least experienced prosecutor on the government's team, was — especially after the court known made its views on the matter — a much less frequent offender than Mr. Han and Ms. Cox.

preceding two jury trials in this case and the other evidentiary hearings, government counsel have insisted on putting their words in the mouths of willing witnesses who were plainly capable of speaking for themselves. To make that situation worse, government counsel tended in many instances to get more insistent with their leading questions when the witness would give an answer that was perfectly cogent and responsive — a guileless answer to an appropriately phrased question — but apparently not quite what the government wanted. In the trial of these three defendants, the court wrote and delivered a jury instruction [*50] intended to ameliorate the effect of the government's persistence in asking improper leading questions.[19] In overruling the government's objection to that instruction, the court stated as follows:

> [By the court]: [T]he unfairness of the . . . the government's just intractable tendency, it's the worst I've seen in 43 years, intractable tendency to lapse into leading questions when you're not getting exactly the answer you want from a very cooperative witness, the unfairness of that is just patent. And in that sense, this instruction has been bought and paid for by the government. I will be the first to acknowledge there has been some improvement at long last, and I say at long last because the record goes way back into probably April of last year in terms of my expressions of discomfort, to put it mildly, with the government's tendency to get into leading questions when the government is not getting exactly what the government wants. But as I say, basically this instruction is bought and paid for by the government. And it's not out of any sense of pique that I say this is the worst I've seen in 43 years. This is -- the government's performance with leading questions in this case is the worst [*51] I have seen in 43 years. And so this is going to very much be in the instructions in this case.

Tr. 1774 - 75.

Inability or unwillingness to ask a non-leading question on direct examination of a compliant witness on a sensitive issue is atrociously bad trial lawyering and a prime example of the fact that experience can count for nothing when it amounts to nothing more than the accumulated residue of bad habits, endlessly practiced. Simply put, this intractable practice of putting leading questions to compliant witnesses subverts the search for the truth that [*52] should be as important to government counsel as it is to anyone else in the courtroom.

b. Head shaking.

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[19] The instruction, at doc. no. 1445, p. 24 (Instruction No. 16), reads in relevant part:

> You would be well-justified in evaluating with great caution testimony given by witnesses in response to inappropriate leading questions. A leading question is a question that suggests the answer that is desired by the questioner. On direct examination as to clearly uncontested facts, and on cross examination, leading questions are not inappropriate. However, an answer given by an apparently cooperative witness to a leading question relating to a contested issue may be unworthy of belief, because the answer to a leading question may not be a reliable indication of facts that are actually within the personal knowledge of the witness.

When a government lawyer sits at the counsel table during cross examination of a witness who is beholden to the government and shakes his head affirmatively or negatively while staring at the witness when a question is pending, the effect is as subversive of the search for truth as is a leading question. This problem first arose during the trial of Bartice King. Counsel for Mr. King asserted, during cross examination of Karlo Stewart, that (as he had been informed by co-counsel) "Mr. Han [government counsel] has been sitting behind me giving indications with his head prior to the witness answering a question." B. King Tr. 1300. Counsel for Mr. King represented to the court that this had occurred twice before, and that he had concluded that he now had no choice but to bring the matter to the court's attention. *Id.* The court responded as follows to a request that the court instruct Mr. Han to refrain from nodding or shaking his head to indicate the desired answer:

> THE COURT: Well, I'm not going to do that at this point and — without adjudicating one way or the other whether Mr. Han has [*53] been doing that, I will observe that in addition to the matters you've described, it's also human nature sometimes unconsciously to do that, and I'm not adjudicating that one way or the other. The matter has been raised. And, consequently, our consciousness, if you will, has been raised, and I think if there's any actual cause for concern on that point, then I think we all know what we need to know and we've all heard what we need to hear.

B. King Tr. 1301 - 02.

There the matter sat until — once again — cross examination of Karlo Stewart in the trial of these three defendants. Co-counsel for Mr. Diebner made the following representation at the bench:

> MR. JACKSON: I've been observing Mr. Han while Mr. Gerson has been conducting his cross-examination. He appears to be both nodding and shaking his head to the witness. I don't know if the witness can see him from his vantage point, but it sure looks like that to me. I don't know if Mr. Han is signaling or not.
>
> THE COURT: Okay. Without me making a finding one way or the other, I'll ask Ms. Cox to relay this representation to Mr. Han and we'll just take it one step at a time.
>
> MS. COX [AUSA]: Thank you, Your Honor.

Tr. 588 - 89.

Later in the cross [*54] examination of Mr. Stewart, counsel for Mr. Bramley lodged this complaint:

> MR. BIESEL [defense counsel]: I've been watching Mr. Han this morning and he's signaling to the witness "yes" and "no." It's a constant situation.
>
> THE COURT: I'll keep an eye on him. You may return to your table.
>
> MS. COX: Your Honor, if I might, for purposes of the record, Mr. Han has not interacted with Mr. Stewart. I've been the attorney who has done all the pretrial

> interview with Mr. Stewart. And, if anything, I think, any head-nodding on the part of Mr. Han is just an internal reaction that he has in listening to evidence.
> THE COURT: Well, it doesn't matter who has been working with the witness, if he is signaling the witness in the courtroom as he sits at the government table -- and I'm not saying he is or he isn't -- all I'm saying is I will keep an eye on it. We'll continue.
> MS. COX: Thank you.

Tr. 623 - 24.

Still later in the cross examination of Mr. Stewart, the court, on its own motion, called counsel to the bench:

> THE COURT: Excuse me. I need counsel, including Mr. Han, to approach the bench.
> (THE FOLLOWING PROCEEDINGS WERE HAD AT THE BENCH AND OUT OF THE HEARING OF THE JURY.)
>
> THE COURT: I'm sure this is entirely [*55] unconscious, Mr. Han, but you are -- in the last -- at times, in the last few questions, you have been shaking your head side to side or up and down. And as I say, I'm sure it's entirely unconscious, but I'm going to ask you to now consciously avoid that. And I don't think it's necessary to elaborate on that any more, but it is necessary to make a determined effort not to unconsciously shake your head from side to side or up and down.

Tr. 656 - 57.

In this last instance, for a variety of reasons, the court chose to be charitable in characterizing Mr. Han's head shaking as unconscious. The fact is that the court did see Mr. Han doing exactly what defense counsel had alleged (and what AUSA Cox had sought to explain as "just an internal reaction"). This conduct is inexcusable, no matter how much a lawyer wants to win a case and no matter how much the lawyer wants the witness to deliver the desired answer.

3. Misconduct not specific to this trial.

As has been discussed, precedent from the Supreme Court and the Tenth Circuit establishes that claims of prosecutorial misconduct may (and in some instances must) be evaluated against the backdrop of the government's behavior in other cases (or, [*56] in this instance, other proceedings in the same case) for the purpose of determining whether there is "a pattern of prosecutorial misconduct." Brecht, 507 U.S. at 638 n. 9. A grant of relief flowing from misconduct that satisfies the stringent standard suggested by Brecht would surely be extraordinary.

a. Deception.

Testimony of FBI Witness Gregory Melzer.

As to the testimony of FBI witness Gregory Melzer, see part III(B)(3)(c),

Deceptive sworn declaration of FBI agent, accompanying deceptive brief filed by government.

At the James hearing, the government did not make a showing sufficient to support a finding that defendant Greg Roberts was a co-conspirator against whom statements by others would be admissible under Rule 801(d)(2)(E), Fed.R.Evid. *See*,, James Hearing Findings and Order, doc. no. 1021, filed on December 1, 2014, at 82 - 87. The court concluded, after more than 43 hours of James hearing proceedings, that "[t]he government has not shown by a preponderance of the evidence that Roberts was a co-conspirator in either of the conspiracies." *Id.* at 87.

A week after the James hearing findings were filed, the government filed a motion to reconsider as to defendant Roberts. Doc. no. 1050. In its motion to reconsider, the government represented that, after [*57] the James hearings were completed, it "became aware of a bettor with Legendz who placed his bets through Roberts." *Id.* at 2. Having preliminarily reviewed the government's motion to reconsider, the court entered an order stating in relevant part as follows:

> The court notes that the motion [to reconsider] is based substantially on information set forth in a report dated October 28, 2014, based on an interview which apparently occurred on October 27, 2014. The government is DIRECTED to supplement the motion as follows: The supplement shall provide a detailed factual explanation as to why (if the government chooses to so assert) the information set forth in the October 28, 2014 report was not and could not, with reasonable diligence, have been discovered well before September, 2014. The factual portion of the government's supplement shall be supported by oath or affirmation or declaration pursuant to 28 U.S.C. § 1746. The factual portion of the supplement shall be so signed, under oath, affirmation or by way of a declaration under § 1746, by a percipient witness and not by counsel of record for the government.

Doc. no. 1058, filed December 8, 2014.

As required by the December 8 order, the government filed its supplement [*58] on December 22, 2014. Doc. no. 1074. The supplement was supported by a declaration under penalty of perjury by FBI Agent Francis J. Bowles, Jr., one of the two case agents assigned to this case. In his declaration, agent Bowles stated that, in November, 20*13* (which was months *before* the James hearings began), the FBI was aware, by way of subpoenaed financial records which were the subject of an analytical report authored by FBI analyst (and former Special Agent) Gregory Melzer, of checks totaling more than $10,000 that evidenced a connection between an individual ("VSI") and Roberts. Doc. no. 1074-1, at 2.

But VSI was not interviewed until October, 20*14*, about eleven months after he was identified in the Melzer report and about one month after the James hearings were completed. *Id.* Agent Bowles explained the delay in part by stating that, by way of follow up to Melzer's initial work relating to VSI and Roberts, subpoenas had been issued to Wells Fargo Bank and one other bank. *Id.* Bowles stated that: "To date [the declaration is undated but was filed on December 22, 2014] Wells Fargo Bank has not produced any records as requested on November 13, 2013." *Id.* To reinforce this point, Bowles [*59] elaborated as follows: "To date, Wells Fargo Bank has *refused* to comply with the request and no records have been produced. Efforts are ongoing to acquire those records from Wells Fargo Bank." *Id.* (emphasis added). Building on this premise — the contumacy of Wells Fargo Bank — Bowles asserted that the delay in getting the Wells Fargo documents was one of the reasons that VSI was not interviewed until a month after the completion of the James hearings in September, 2014 even though the FBI had been aware of VSI since November, 2013. *Id.*

The Bowles declaration was attached to a supplement to the Motion to Reconsider. The supplement was signed by AUSA Susan Dickerson Cox. Doc. no. 1074. In the supplement, AUSA Cox aligned herself with Bowles's statement about the status of Wells Fargo's compliance: "One bank still has not complied with the subpoena request." *Id.* at 4.

Keep in mind that the Bowles declaration — telling the court that Wells Fargo has "refused to comply" with the subpoena — was filed on December 22, 2014. Keep in mind that AUSA Cox's supplement — making essentially the same representation to the court — was filed on the same date. What Bowles and Cox *did not* tell the court is that [*60] the subpoena to Wells Fargo (the subpoena with which Wells Fargo had "refused to comply") was a *trial* subpoena, not an investigative subpoena, and that it *did not require compliance of any kind until February 10, 2015* (fifteen months after it was issued), which was the date the court had set for the start of the first jury trial in this case.[20]

Perhaps it will come as no surprise that the court denied the government's motion to reconsider in part because "[t]he court is extremely reluctant to effectively reward the government's disingenuousness." Doc. no. 1490.[21]

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[20] Lest there be any doubt about AUSA Cox's awareness of these facts, it should be noted that the government attorney listed on the trial subpoena was "Susan Dickerson Cox, AUSA." Doc. no. 1082-1, p. 6 of 7. It should also be noted that this was not the first instance of this sort of difficulty in a government brief in this case. As is discussed in part III(B)(3)(b), below, the government had no basis for venue in this district as to Counts 4 - 16 of the Superseding Indictment. In an attempt to persuade the court that this district is an available venue for those counts, AUSA Cox cited, among other things, two *government briefs* in other cases, available on Westlaw, as "rulings." Doc. no. 693, at 9. They were cited (along with some actual — but distinguishable — judicial decisions) *as judicial decisions* ("rulings") with no mention of the fact that they were not judicial decisions at all. This included one quotation from a government brief, again passed off as a quotation from a judicial "ruling." *Id.* This is discussed in more detail in the court's order dismissing Counts 4 - 16, doc. no. 848, at 30-31.

[21] This was not the first instance of noteworthy testimony from agent Francis Bowles. As the court discussed at length in its James Hearing Findings and Order, doc. no. 1021, agent Bowles testified before the grand jury to the effect that Bartice King and Spiros Athanas had a

b. Government disregard of court order.

Counts 4 - 16 of the Superseding Indictment, charging substantive money laundering offenses, were dismissed for lack of venue in this district. The government could not and did not show: (i) that any of the specific transactions listed in the substantive money laundering counts had anything to do with the Western District of Oklahoma, or with any financial institution in this district, or (ii) that any of the transactions comprising the laundering offenses charged were begun, continued or completed in this district, or [*61] (iii) that any funds identifiably connected with the charged transactions were — by any person, money laundering defendant or not — transferred out of or through the Western District of Oklahoma to the recipients listed in the substantive money laundering counts.

Venue as to Counts 4 - 16 was initially challenged in the first wave of defense motions (motions limited to attacks based on matters appearing on the face of the Superseding Indictment), but those motions were denied because the facts relevant to venue were not apparent from the face of the Superseding Indictment. So the court, on motion of some of the defendants, entered an order for a bill of particulars for the purpose of fleshing out the government's factual basis for venue as to Courts 4 - 16. Doc. no. 672. In language that could not have been more explicit and unequivocal, the court directed the government to file a bill of particulars to provide five items of information, separately, as to each of Counts 4 - 16. Doc. no. 672, at 3-5. But, as the court said in its order dismissing Counts 4 - 16:

> In the face of the plain terms of the order for Bill of Particulars No. 1, the government characterized the format required by [*62] the court's order as a "request." *Id.* at 1. The government then proceeded to substantially ignore the court's "request."[22] The bill of particulars does give an informative general overview of the factual scenario the government plans to present at the trial of this case. To the extent that it provides any "particulars" at all, it describes transfers of funds that have no discernable connection with any of the transactions charged in Counts 4 - 16.

Doc. no. 848, at 16.

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formal partnership: "At some point they merged or became partners. And the partnership agreement completely is not known. We know the partnership exists, we don't know exactly percentages and that kind of stuff." Doc. no. 1021, at 38, quoting from doc. no. 1008 (under seal), at 22 (ECF p. 2) (Bowles's grand jury testimony on March 19, 2013). As the court noted in its James hearing findings, Bowles's assertion that King and Athanas had a partnership in the formal sense — and Bowles's testimony leaves no doubt that he was talking about a partnership in the formal sense — was "bereft of any basis in the record." Doc. no. 1021, at 38. Now, after hundreds of hours of trial proceedings, and after the introduction of hundreds of exhibits, the record remains equally devoid of any basis for this testimony.

[22] [Relevant portion of footnote from doc. no. 848, at 16] The government's all-but-complete disregard of the court's order is wholly inexplicable, but some aspects of that disregard are more egregious than others. For instance, the order directed (as to each of the substantive money laundering counts and each of the substantive money laundering defendants, taking Count 4 as an example) that: "If the government does not contend that King directly participated in one or more identifiable transactions totaling $42,142.26 by which that sum was transferred from the Western District of Oklahoma to the district where the financial or monetary transaction was conducted, *the government shall so state*." Doc. no. 672, at 4 (emphasis added). The government did not, as to any count or any defendant, respond to this requirement.

In other words, in lieu of acknowledging that it did not have facts to support venue as to the counts in question (which would have been plainly apparent if the government had complied with the order for bill of particulars), the government chose to disregard that order in almost every important respect (and, in so doing, characterized an order of this court as a "request").

c. Government's attempted suppression of *Giglio* material.

Although the Superseding Indictment affirmatively alleges that Legendz Sports applied for and was granted a sports book operator's license in Panama, doc. no. 354, at 25 (¶ 87(g)) and 26 (¶ 87(l)), the government reversed course at the trial of the lead defendant, Bartice King, [*63] and pointedly cast aspersions on the legitimacy of the license held by Legendz. *See, e.g.*, B. King Tr. 1101 - 06; 1126 - 29; 1323 - 24. The license status of Legendz in Panama thus became a hotly contested issue at the trial of Bartice King.[23] To undermine the government's contentions as to King's criminal intent, his counsel emphasized the legitimacy (and, hence, the licensed status) of Legendz in Panama.[24] (And King was acquitted on Count 1 — racketeering conspiracy.)

The government continued its rebuttal of the explicit allegations of its Superseding Indictment by pointing out that, on the image of the license that the FBI had printed from the Legendz web site, the name of the license holder is illegible.[25] Gov. Ex. 9 (B. King trial). Adjacent to the heading "Dominio," the license listed "legendzsports.com," but the actual name of the licensee is unreadable. *Id.* Per the government's translation of the license document, the license was issued by the "Gambling Control Board." Gov. Ex. 9A (B. King trial). The activity permitted by the license is "Administration and Operation of Systems for Electronic Communication Games" (presumably internet-based gambling). The license requires compliance [*64] with the "legal provisions" regulating "the gambling industry in Panama." *Id.* The license is required to be displayed in accordance with the requirements of the "Gaming Control Board." *Id.*

Enter Gregory Melzer. Gregory Melzer is a retired Special Agent of the FBI and a former Assistant Special Agent in Charge of the Oklahoma City Division of the FBI. At the time of the Bartice King trial in April, 2015 (and apparently starting at or soon after his

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[23] Defendant Bartice King was tried alone because some documents that were admissible as to other defendants were not (due to the court's granting of King's motion to suppress) admissible as to King.

[24] See, *e.g.*, B. King Tr. 33 - 37 (opening statement for Mr. King); 647 (cross examination of Reginald Berthiaume: Q. And he was very -- it was very important to him to have a license from the Panamanian government to conduct the business in Panama that he was conducting there, wasn't it? A. Yes, sir.). The government withheld any suggestion that it would seek to cast doubt on the license status of Legendz until after King's counsel made an opening statement on King's behalf, pointing out to the jury — consistently with the express allegations of the Superseding Indictment — that Legendz was licensed in Panama.

[25] It appears to have been blacked out.

retirement in 2011), Melzer was employed on a contract basis by the FBI. Doc. no. 1074-1, at 1; B. King Tr. 1423. Before he retired, Melzer "had oversight" of the investigation in this case. *Id.* at 1423 - 24. Melzer's testimony covers more than 200 pages of the transcript of the Bartice King trial.

On direct examination of Melzer, the government brought out the fact that, in June, 2013 (after the original indictment was returned), the Department of Justice, Criminal Division, Office of International Affairs, had submitted a Mutual Legal Assistance Treaty request (MLAT) to the Panamanian government. *Id.* at 1434-35. The MLAT was described (accurately) as a formal request to the Panamanian authorities that they gather specified items of documentary evidence in Panama [*65] and send the documents to the Department of Justice for use in this prosecution. In furtherance of its effort to cast doubt in the license status of Legendz, and for the purpose of conveying to the jury that the prosecution team had made every effort to ascertain that status, the following exchange occurred between AUSA Travis Smith and Melzer:

> Q. And what, if you know, is the status of that [MLAT] request?
> A. We still have not received any information.
>
> Q. ***What documents did we request from Panama***?
>
> A. ***I believe we specifically requested that license***. We requested information about the various companies that we believe Mr. King was involved in, including Investment Consulting Services, Regency Commercial. There were about four or five companies that, I believe, that were included in the MLAT request.
> Q. And to which entity with the Panamanian government did we send those requests?
> A. They ended up going to the entity that would be the counterpart of our Department of Justice.
> Q. And has there been any status updates or status requests with regard to those MLAT requests that we've sent over?
>
> A. We had requested an update back, I believe, in September and we still haven't received any information. [*66]
>
> Q. Okay. ***So specifically for regard to that license that we just talked about, was that one of the documents we specifically requested information from the Panamanian government***?
>
> A. ***Yes***.
> Q. And that's one that we have not had any response for at all from the Panamanian government; is that correct?
> A. Correct.

B. King Tr. at 1435 - 36 (emphasis added).

The testimony emphasized above, bearing on what was then a sharply contested issue, was false. As can be seen, it was first qualified with "I believe." A few seconds later, AUSA Smith spoon fed Melzer a leading question with a false proposition embedded in it, and Melzer adopted the false proposition without qualification. All things considered, it seems unlikely — and the undersigned judge considers it to be *quite* unlikely — that Melzer knowingly gave false testimony. But his testimony was false nonetheless: He testified to an objectively verifiable fact that he could not have known to be true because it was not true. In this respect, he was simply being a compliant witness, like Karlo Stewart, albeit for vastly different reasons.

When FBI witness Melzer gave this testimony, Bartice King's counsel had no way to prove its falsity. They did not [*67] have a copy of the MLAT request to which Smith and Melzer referred in Smith's direct examination of Melzer. At the outset of the next day of trial (before cross examination of Melzer), counsel for Mr. King requested that the court direct the government to produce the MLAT document. B. King Tr. at 1483. AUSA Smith, the AUSA who had elicited the false testimony from Melzer the day before, had the document with him in the courtroom. *Id.* at 1485. He objected to turning the document over to defense counsel because, under Rule 16, Fed.R.Crim.P., it was "an internal document that is not discoverable." *Id.* at 1484. He repeated himself for emphasis: "[T]hose are simply not discoverable as an internal governmental document." *Id.*

The court directed that the MLAT document be produced, and it was immediately produced to defense counsel. *Id.* at 1485. Quite understandably, the defendant offered the MLAT as a defense exhibit and it was received. Def. Ex. 44 (B. King Trial).[26] On cross examination, Melzer, to his credit, acknowledged the falsity of his testimony as quoted above. *Id.* at 1572.[27]

Lest the significance of these events at the trial of Bartice King be obscured by the details, the essential operative facts should be borne in mind: the government elicited false testimony [*68] on a contested issue from an FBI witness. Then, the government, having

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[26] It is worth noting (although this is ultimately of no moment for present purposes) that the MLAT document is about as innocuous as a document request can be. It lists the subjects of the investigation, provides some skeletal information about some of them, summarizes the criminal charges against them, and lists the categories of documents desired. The MLAT is dated June 20, 2013, several weeks after the original indictment in this case was returned. It parrots several allegations from the indictment. From a law enforcement standpoint, it is difficult to discern anything in the MLAT that could reasonably have been deemed sensitive if read by a defendant or a lawyer already in possession of a copy of the original indictment in this case. That said, the court will repeat that, barring truly extraordinary circumstances (not by any stretch present here), any sensitivity of the contents of the document would be of no consequence in terms of its discoverability under the authorities discussed below.

[27] Later, on redirect, in response to still more leading questions, Melzer asserted that "the purpose" of the MLAT (which he did not draft and did not review at the time it was written, B. King Tr. at 1572 - 73) was to "request that license," B. King Tr. at 1616, a purpose that cannot be discerned from the text of the MLAT, because the MLAT does not, in any of its 26 pages (the English and Spanish versions are each 26 pages long, exclusive of attachments), ask for a copy of any license. But, in fairness, it is entirely possible that Melzer, in falsely testifying that the MLAT specifically requested the license, was wrongheadedly extrapolating from what he supposed its purpose (or one of its purposes) must have been. That, of course, detracts not at all from the fact that the MLAT did not request the license.

in hand, in the courtroom, the document that demonstrated the falsity of that testimony, objected to giving the defense a copy of the document because, under Rule 16, it was "simply not discoverable as an internal governmental document."

Extended legal analysis of this instance of prosecutorial misconduct is unnecessary. When AUSA Smith became aware — presumably when he first read the MLAT — that Melzer had given false testimony,[28] he had an affirmative duty to set the record straight. Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959) (due process violated where prosecutor "allows [false evidence] to go uncorrected when it appears"). Not only did Smith not set the record straight, he objected to producing the document that, when produced as ordered by the court, enabled King's counsel to set the record straight by demonstrating the falsity of Melzer's testimony. B. King Tr. at 1484. Due process requires the government to disclose information that may impeach the credibility of a government witness. Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); Douglas v. Workman, 560 F.3d 1156, 1174 - 75 (10th Cir. 2009), *cert. denied*, 525 U.S. 884, 119 S. Ct. 195, 142 L. Ed. 2d 159 (1998). Cases like Napue and Giglio are rooted in the Due Process Clauses of the Constitution. Rule 16, relied upon in this case by the United States government to avoid disclosure of a document that would (and [*69] did) demonstrate the falsity of the testimony of a government witness on a hotly contested issue, does not trump the Due Process Clause.

C. Ruling on motions for new trial.

"[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). Thus, the court, in considering the present motions for new trial, must focus on the fairness of the trial, because "it is irrelevant for Brady purposes '"whether the nondisclosure was a result of negligence or design."' [United States v.] Buchanan, 891 F.2d at 1442 (quoting Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972))." Smith v. Secretary of New Mexico Dept. of Corrections, 50 F.3d 801, 823 (10th Cir. 1995), *cert. denied*, 516 U.S. 905, 116 S. Ct. 272, 133 L. Ed. 2d 193 (1995).

The issue of fairness "must be viewed in context of the whole trial," Nieto v. Sullivan, 879 F.2d 743, 749 (10th Cir. 1989), *cert. denied*, 493 U.S. 957, 110 S. Ct. 373, 107 L. Ed. 2d 359 (1989). "[O]nly by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." Hopkinson v. Shillinger, 866 F.2d 1185, 1210 (10th Cir. 1989), *cert. denied*, 497 U.S. 1010, 110 S. Ct. 3256, 111 L. Ed. 2d 765 (1990).

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[28] The court presumes that, when Smith elicited the false testimony about the contents of the MLAT, he was not aware that it did not request any licenses. As serious as this matter is, it would be considerably more serious if Smith had been aware of the contents of the MLAT when he put the key questions to Melzer — including a leading question with the false proposition embedded in it — on direct examination.

As is discussed in part III(B)(1), above, evaluation of the existence and consequences of a pattern of prosecutorial misconduct is not, at least in this circuit, confined to the trial in which the complaining defendant was convicted. But misconduct that did not occur in the trial that ended with the convictions of these defendants must perforce have less impact on the analysis than misconduct that did occur in [*70] these defendants' trial. The misconduct that is specific to these defendants' trial, as discussed in this order, consists of leading questions (with most, if not all, government witnesses) and head shaking (up and down or side to side, to indicate the desired answer on cross examination, most noticeable on cross examination of Karlo Stewart, who, of all government witnesses, was most highly motivated to do whatever he thought would please the prosecution team).[29]

The misconduct that was not specific to the trial of these three defendants consisted of deception (discussed in part III(B)(3)(a), above), disregard of court orders (part III(B)(3)(b), above), and attempted suppression of Giglio material (part III(B)(3)(c), above). Of course, some of the misconduct that was not specific to the trial of these three defendants still potentially affected them because it occurred in proceedings, such as grand jury testimony or James hearings, that related to all of the defendants in this case. The analytical impact of misconduct that did not occur in the trial of these defendants is, for that reason, somewhat attenuated.

Giving due weight to the misconduct that did not occur in the trial of these [*71] defendants, and greater weight to the misconduct that did occur in these defendants' trial, the court, after careful consideration, concludes that the misconduct does not warrant a new trial. The court's beginning point is the basic proposition that the first obligation of a trial judge is to ensure the fairness of the process by which fact issues are resolved. Reviewing courts can cogitate about the law, but only a trial court can effectively assure the fairness of the fact-finding process. That obligation includes the duty to grant relief if the conduct of a litigant (or, for that matter, the court) undermines the right of opposing litigants to a fundamentally fair trial. The court is satisfied that these defendants did get the fundamentally fair trial to which they were entitled. There were times that the court had to intervene, and in some instances forcefully, to make good on its duty to assure fairness. And the court does not condone the intractable habit of government counsel of asking improper leading questions, let alone the head shaking. But to the extent that that conduct presented the possibility that the government would reap ill-gotten gains from the standpoint of persuasion [*72] of the trier of fact, the court is satisfied that its corrective measures (sustaining objections, admonishing counsel, and giving a curative instruction)

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[29] Moran also complains of government counsel's comment, in closing argument, on the fact that Moran's counsel objected to introduction of a photograph depicting Moran with his bed covered with cash. Doc. no. 1528, at 20. The court does not condone comment, even in closing argument, on objections lodged by an opposing party's counsel. At the outset of every trial, the jurors are instructed that objections made by the lawyers should be no concern of theirs. However, the court is confident that this brief comment had no impact on the fairness of the trial and did not unduly divert the attention of the jurors from the matters that were properly before them for their consideration.

prevented the government's misconduct from undermining the fundamental fairness of these defendants' trial.

A major factor in this analysis is the fact that, as to many of the facts put in issue by the defendants' pleas of not guilty, there was simply no contest. As the court has mentioned more than once, there are legitimate issues as to the legal import of the facts proven by the evidence, but the basic facts as to the activities of Bramley, Diebner and Moran, as discussed in this order, were established by substantial evidence (on some issues overwhelming evidence, and on many issues evidence that was not seriously contested). Careful review of the trial, including review of hundreds of pages of trial transcript, augmented by the court's recollection of what did, and did not, have impact as the trial progressed, leaves the court satisfied that there were no fact issues that hung so closely to the middle of the balance that any effects of the government's misconduct could reasonably be thought to have made a difference. Excising [*73] the government's ill-gotten evidentiary gains would not change the result.

Although it is reasonably clear that, for present purposes, the main issue is the fairness of the trial and not the culpability of the government's conduct, the court may, under a fair reading of Brecht, take into account a pattern of misconduct "even if it did not substantially influence the jury's verdict." Brecht, 507 U.S. 619, 638 n. 9, 113 S. Ct. 1710, 123 L. Ed. 2d 353. Analyzing the matter under Brecht's footnote 9, and thus taking into account *all* of the misconduct discussed in this order (regardless of whether or not it occurred at the trial of these defendants), the result is the same. The court will, at least for now, forego comment or other action with respect to the matters discussed in part III(B) of this order other than as made necessary by the present motions. Viewing the matter broadly (under Brecht) or more conventionally under Rule 33 and Gabaldon, 91 F.3d 91, 93 (10th Cir. 1996), the court is unconvinced that a new trial is warranted.

IV. Conclusion.

The post-trial motions of the defendants Rodger Vanpelt Bramley, Kelley Ward Diebner and Leon Mark Moran, Jr. (Bramley motion at doc. no. 1527, Diebner motion at doc. no. 1529 and Moran motion at doc. no. 1528) are **DENIED**.

Dated September 16, 2015.

/s/ Stephen [*74] P. Friot

STEPHEN P. FRIOT

UNITED STATES DISTRICT JUDGE

United States v. Crews

United States Army Court of Criminal Appeals

February 29, 2016, Decided

ARMY 20130766

Reporter
2016 CCA LEXIS 127 *

UNITED STATES, Appellee v. Sergeant JASON R. CREWS, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by United States v. Crews, 75 M.J. 369, 2016 CAAF LEXIS 552 (C.A.A.F., June 9, 2016)

Motion granted by United States v. Crews, 76 M.J. 37, 2016 CAAF LEXIS 1037 (C.A.A.F., Dec. 5, 2016)

Review granted by, in part United States v. Crews, 76 M.J. 70, 2017 CAAF LEXIS 156 (C.A.A.F., Jan. 25, 2017)

Affirmed by, Without opinion by United States v. Crews, 2017 CAAF LEXIS 560 (C.A.A.F., May 4, 2017)

Vacated by United States v. Crews, 2017 CAAF LEXIS 398 (C.A.A.F., May 5, 2017)

Motion denied by United States v. Crews, 2017 CAAF LEXIS 479 (C.A.A.F., May 16, 2017)

Affirmed by United States v. Crews, 2017 CAAF LEXIS 485 (C.A.A.F., May 17, 2017)

Prior History: [*1] Headquarters, 1st Infantry Division and Fort Riley. Gregory A. Gross, Military Judge, Lieutenant Colonel John A. Hamner, Staff Judge Advocate (pretrial), Colonel Craig E. Merutka, Staff Judge Advocate (post-trial).

Counsel: For Appellant: Captain Matthew L. Jalandoni, JA (argued); Colonel Kevin Boyle, JA; Major Yolanda McCray Jones, JA; Captain Patrick J. Scudieri, JA (on brief); Colonel Mary J. Bradley, JA; Major Christopher D. Coleman, JA; Captain Patrick J. Scudieri, JA (on brief on specified issue).

For Appellee: Captain Timothy C. Donahue, JA (argued); Major Daniel D. Derner, JA; Captain James P. Curtin, JA (on brief); Colonel Mark H. Sydenham, JA; Major Daniel D. Derner, JA; Captain Timothy C. Donahue, JA (on brief on specified issue).

Judges: Before HAIGHT, PENLAND, and WOLFE, Appellate Military Judges. Senior Judge HAIGHT and Judge PENLAND concur.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION

WOLFE, Judge:

A panel composed of officer and enlisted members sitting as a general court-martial convicted appellant, contrary to his pleas, of indecent exposure (as a lesser-included offense of indecent acts) and sexual abuse of a child (as a lesser-included offense of rape of a child), in violation of Articles 120 and 120b, Uniform [*2] Code of Military Justice, 10 U.S.C. §§ 920 and 920b (2006 & Supp. IV; 2012) [hereinafter UCMJ]. Appellant was arraigned on charges that included one specification of rape of a child (KG) under the age of 12 years, and one specification of indecent acts in the presence of Mrs. SG.[1] The convening authority approved the adjudged sentence of a dishonorable discharge, confinement for one year, forfeiture of all pay and allowances, and reduction to the grade of E-1.

Appellant's case is now before this court for review pursuant to Article 66(c), UCMJ. Appellant assigns two errors, both of which merit discussion, and one of which merits relief. Specifically, we find the evidence supporting appellant's conviction for sexual abuse of a child to be factually insufficient.

BACKGROUND

The facts surrounding this case all took place in 2012 in a neighborhood of family housing at Fort Riley, Kansas. While not strictly neighbors, appellant, KG, and Mrs. SG all lived within a few minutes' drive of each other. KG is the five-year-old daughter of an Army specialist who served in the same company as appellant. Appellant, however, did not have any supervisory relationship or [*3] responsibilities over KG's father. Mrs. SG was the wife of an Army soldier. Mrs. SG and KG are not related and lived in separate homes in the neighborhood.

DISCUSSION

[1] A third charge of indecent language was dismissed after arraignment.

A. Factual Sufficiency of Sexual Abuse of a Child

Appellant visited KG's house often. KG's mother testified that appellant stopped by nearly every workday during his lunch break for a brief visit, and often on weekends. During these visits, KG would ask appellant for piggyback rides, and crawl over him while he was on the floor. KG's mother testified that several times appellant volunteered to babysit KG, which she and her husband declined. Appellant was also very gracious with helping around the house, to include changing the brakes and oil on the family car, fixing the dryer, and assisting with an intra-post move to a one-story house necessitated by a back injury to KG's father.

KG had an electronic toy which in addition to playing math and reading games allowed the user to take short 30-second videos. In October of 2012, KG's mother was looking at the toy when she saw a video of appellant and KG that she found disturbing. She asked KG if anyone had ever done anything inappropriate with her. KG answered yes, and indicated [*4] that appellant had touched her genitals. During a subsequent child forensic interview, KG stated that appellant had touched her genitals and penetrated her vagina.

At trial, the government attempted to prove their case that appellant raped KG through the admission of the video and the testimony of KG, KG's mother, and the boy who filmed the video, DH. We will discuss each at length.

1. Facts

a) Testimony of KG's Mother

KG's mother was the government's first witness. She provided background information and the history of interactions between appellant and KG. Most crucially, she also testified to her daughter's statement that appellant had inappropriately touched KG's genitals. Her key testimony was as follows:

> Q [TC]: Has anything between your family and Sergeant Crews changed that relationship?
> A: The instant [sic] that happened with our daughter.
> Q: Can you tell the panel members a little bit about that?
>
> A: It was one September evening, my friend has just gotten back from her grandmother's funeral. So we had a little barbeque and [appellant] was also over there with us, and we were just -- all the adults were outside and the kids were playing in [KG's] bedroom. And my daughter had one of [*5] those Leap Frogs that records videos and stuff. And I actually didn't notice it until October, but I was watching the video and it was actually recorded with [appellant] sitting on the edge of my daughter's

> bed with her completely covered underneath the jacket sitting on his lap, and that is when I discovered it. And I went and told my husband about it because he was in the bathroom -- and our daughter was in the living room when I discussed it with him; and I had walked back into the living room to ask her if anybody had done anything that she thought was wrong, and she shook her head yes; and I asked her, "Who?" I never said any name, but she said, "Sergeant Crews," and I asked her, "What did he do?" and she doesn't know the term names for her body parts because she is only six, but I asked her can -- I said, "Can you show me where he touched you?" and she proceeded to move the blanket and pointed down to her vaginal area, and that is how I discovered what had happened in her bedroom.

KG's mother further clarified that she discovered the video about a month and a half after it was taken. The defense did not object to KG's mother's testimony as hearsay or otherwise. The record provides [*6] no basis to believe that a plausible hearsay exception would have applied.[2]

b) The Video

The video, which was admitted over defense objection, is somewhat grainy.[3] Additionally, the video's camerawork reflects the fact that the video was taken by KG's friend, DH, a six-year-old neighborhood boy.

At the outset of the 30-second video, appellant is seen sitting on the edge of KG's bed. KG is sitting on appellant's lap and has a large adult jacket wrapped around her midsection and waist. Approximately halfway through the video, KG pulls the jacket over her head while appellant embraces KG by the waist with his left arm, [*7] which remains above the jacket. However, appellant then places his hand beneath the jacket, although his upper arm, elbow, and parts of his forearm remain visible. The angle of his forearm makes it possible that appellant has placed his hand near either KG's stomach or pelvic area. The video ends a few seconds later.

c) Testimony of KG

At trial KG's mother generally testified consistently with her initial statement to investigators and her testimony at the Article 32, UCMJ, investigation. KG, however, did

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[2] We note of course that as there was no objection, the government did not attempt to lay down a foundation for a hearsay exception. Our review of the record, to include the criminal investigation, Article 32, UCMJ, investigation, and other allied papers attached to the record under Rule for Courts-Martial [hereinafter R.C.M.] 1103, does not reveal any indication of an applicable exception, such as an excited utterance.

[3] Testimony at trial revealed that a technician was unable to digitally copy the video. Instead the copy presented at trial was made by filming the screen of the video player.

not. While KG answered some initial background questions, such as the name of her dog, her answer to every question of substance on direct exam was "I don't know."[4]

d) Testimony of DH

Finally, the government called DH, the boy who recorded the video. DH's direct testimony, at least when reduced to a written transcript, could generously be described as muddled. It appears that DH, who the government [*8] relied on in authenticating the video, hadn't seen the video at any time between when it was first filmed and when it was played in court. DH at times appears to testify about videos he made which were not admitted into evidence. When recounting a conversation he had with his mother (where he told his mother that KG "got touched in the private") he appears to confuse counsel's questions about where he was when he was talking to his mother, and where he was when KG was touched. DH testified he saw KG get touched, and immediately thereafter said he did not see it. In short, it is not possible to make any sense of DH's testimony one way or the other with respect to the charged misconduct he was called to testify about.

e) The Defense Case

The defense case-in-chief consisted of several witnesses. The first, a child psychologist, testified as an expert witness about child memories. The defense also called several character witnesses who had daughters the same age as KG. After laying the foundation that appellant also spent a lot of time playing with their kids, they testified that they had high opinions of appellant's "character towards children"[5] and that he was helpful.

2. Law

On appeal, appellant claims that the evidence of child sexual abuse is factually insufficient to support the conviction. In response, the government argues that KG's hearsay statement to her mother, in light of the video, is sufficient.[6]

Nonetheless, we have the independent duty to review the record to determine whether it is correct in law *and* fact. UCMJ art. 66(c). The test for legal sufficiency is "whether, after

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[4] The record does not indicate any request for remote live testimony under R.C.M. 914A, or any other accommodation to assist a six-year-old testifying about a difficult subject. Nor was there any attempt by the trial counsel to declare KG unavailable and admit her testimony at the Article 32 investigation. *See* Mil. R. Evid. 804(a)(3).

[5] The testimony was [*9] admitted without objection and it is not necessary for us to address whether this was testimony about the appellant's *behavior* around children, or whether it was a pertinent character trait and admissible under Mil. R. Evid. 404(a)(1).

[6] The government's brief argued only that the evidence was legally sufficient. That is, the government argued that "[w]hen viewed in a light most favorable to the government, there was sufficient evidence for a rational fact finder to find beyond a reasonable doubt that appellant sexually abused a child under the age of twelve." At oral argument, the government made clear that the position of the United States was that the evidence was both legally and factually sufficient.

viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact [*10] could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560, (1979); *see also United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011). The test for factual sufficiency, on the other hand, "involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c), UCMJ, to take into account the fact that the trial court saw and heard the witnesses." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). In exercising this authority this court gives no deference to the *decisions* of the trial court (such as a finding of guilty), but does recognize the trial court's superior ability to see and hear the witnesses. *Id.* (A court of criminal appeals gives "no deference to the decision of the trial court" but is required to adhere to the admonition to take into account the fact that the trial court saw and heard the witnesses).

In reviewing for factual sufficiency we are limited to the facts introduced at trial and considered by the court-martial. *United States v. Beatty*, 64 M.J. 456 (C.A.A.F. 2007). Thus, for example, we do not consider KG's unadmitted pretrial statements, no matter how compelling, in determining whether there was sufficient evidence to support the findings. We may affirm a conviction only if we conclude, as a matter of factual [*11] sufficiency, that the evidence proves appellant's guilt beyond a reasonable doubt. *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002); *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987).

Our superior court does not share either our factual review authority or responsibility. *Compare* Article 66 *with* Article 67, UCMJ. Nonetheless, our decisions are subject to review by the United States Court of Appeals for the Armed Forces (C.A.A.F.). *United States v. Nerad*, 69 M.J. 138, 140 (C.A.A.F. 2010) ("[W]hile CCAs have broad authority under Article 66(c), UCMJ, to disapprove a finding, that authority is not unfettered. It must be exercised in the context of legal—not equitable—standards, subject to appellate review.").

3. Analysis

This case, somewhat uniquely, raises the degree to which we recognize the trial court's superior position in seeing and hearing the evidence. Accordingly, and as we find the evidence factually insufficient, we believe it wise to discuss how we arrive at our conclusion in light of these considerations.

The deference given to the trial court's ability to see and hear the witnesses and evidence—or "recogni[tion]" as phrased in Article 66, UCMJ—reflects an appreciation that much is lost when the testimony of live witnesses is converted into the plain text of a trial

transcript. While court-reporter notes may sometimes reflect a witness's gesture, laugh, or tearful response, [*12] they do not attempt to reflect the pauses, intonation, defensiveness, surprise, calm reflection, or deception that is often apparent to those present at the court-martial. A panel hears not only a witness's answer, but may also *observe* the witness as he or she responds. For instance, a transcript may state "I am showing the witness prosecution exhibit 13 for identification" but will leave unstated the witness's demeanor—whether surprise, recognition, or dread, when reviewing or confronted with evidence.

To say that an appellate court is at a relative disadvantage in determining questions of fact as compared to a trial court is to state the obvious. In New York State—the only other jurisdiction we are aware of where the intermediate appellate court conducts a review for factual sufficiency—the intermediate appellate court gives "[*g*]*reat deference* . . . to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor." *People v. Romero*, 7 N.Y.3d 633, 644, 859 N.E.2d 902, 826 N.Y.S.2d 163 (2006) (emphasis added) (quoting *People v. Bleakley*, 69 N.Y.2d 490, 495, 508 N.E.2d 672, 515 N.Y.S.2d 761 (1987)). However, neither this court, nor our superior court, has quite so clearly delineated the amount of deference due the trial court when conducting a factual sufficiency review.

In *United States v. Johnson*, 30 M.J. 930, 934 (A.C.M.R. 1990), [*13] we distinguished between evidence whose weight depended on the factfinder's assessment of credibility, and evidence where the appellate court was at little or no disadvantage in reviewing the evidence.[7] Similarly, and more recently, in *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015) (en banc), we noted that "the degree to which we 'recognize' or give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witnesses is at issue."

As related above, the government sought to introduce four substantive components of evidence to support the conviction involving KG: First, KG's mother testified that KG had told her that appellant had touched her sexually; second, a video, that while certainly concerning, does not explicitly depict any sexual touching; third, the government's attempt to present testimony by the alleged victim, KG; and fourth, the testimony of DH, who stated both that he saw and didn't see appellant touch KG's "privates."

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[7] In *Johnson* we stated that Article 66(c), UCMJ, "cautions us to bear in mind that 'the trial court saw and heard the witnesses.' Thus, in cases where witness credibility plays a critical role in the outcome of the trial, we hesitate to second-guess the court's findings." 30 M.J. at 934 (citation omitted). This was inartfully stated as it is our duty to "second-guess" a court-martial's findings and we do not hesitate in this duty. However, the underlying concept—that more deference is due when credibility is key to determining the weight of evidence—remains sound. We went on to say in *Johnson*, for example, that when the evidence does not depend on credibility determinations, "our independence as a fact-finder should only [*14] be constrained by the evidence of record and the logical inferences emanating therefrom." *Id.*

With regards to the video, our ability to review the evidence and assign it proper weight is nearly identical to that of the panel members.[8] The record of trial contains the same digital copy of the video that was played for the members. It is what it is. While the video was relevant evidence that explains how the allegations came to light, as well as demonstrating opportunity, the video does not explicitly depict a sexual assault.

While we give little or no deference to the trial court's weighing of a video, the testimony of the two child witnesses falls on the other side of the spectrum. Children sometimes testify with shocking candor, but may also be easily manipulated on the stand. A dry transcript will contain some of these elements, but the trial court is *far* better positioned to determine the appropriate weight such testimony should be given.

Nonetheless, the testimony of the two child eyewitnesses does not support the court-martial's findings. KG's testimony of "I don't know" can be interpreted in two ways: first, as some evidence that the assault did not happen; or second, that she was essentially refusing to answer any questions. Neither interpretation provides evidence of appellant's guilt. Similarly, it is hard to draw any inferences, one way or the other, from DH's internally contradictory testimony. Even applying the "great deference" standard employed by New York intermediate appellate courts, *see, e.g. Romero*, 7 N.Y.3d at 644, the testimony of the [*16] two children in this case does not weigh in favor of appellant's guilt.[9]

Accordingly, the only evidence of weight of appellant's guilt is the testimony of KG's mother. As discussed above, KG's mother had no firsthand evidence of the offense. Rather, the inculpatory evidence consisted of repeating KG's statements that appellant had touched her inappropriately. While these unobjected-to hearsay statements were admitted for their truth—and we consider them as such—the lack of an applicable hearsay exception is concerning. Additionally, as recounted at trial, the key statement by KG was in response to a leading question from her mother. After KG indicated that appellant had done something wrong, her mother asked "can you show me where he touched you" which presupposed that an inappropriate touch was the "something wrong."

Having reviewed the entire record, we are not convinced beyond a reasonable doubt that appellant committed the offense of sexual abuse of a child. The evidence in this case did not "exclude every fair and reasonable hypothesis of the evidence except that of guilt." Dep't [*17] of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook [hereinafter

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[8] We say "nearly identical" for two reasons. First, the panel members had the ability to observe the witness's reaction when the video was played in court. Second, the [*15] admonition that we recognize the panel's ability to see and hear the witnesses applies not only to credibility determinations, but also to "weigh[ing] the evidence." UCMJ art. 66(c).

[9] In its brief the government does not rely on either child's testimony in arguing in favor of affirmance.

Benchbook], para. 8-3 (10 Sept. 2014). Accordingly, we will set aside the finding of guilty in our decretal paragraph.

B. Indecent Exposure

During the course of appellant's friendship with KG's family, he was also introduced to Mrs. SG. Mrs. SG was an adult woman also living in family housing on Fort Riley. Appellant would stop by and talk to Mrs. SG while she was sitting outside on her porch. At trial, however, one instance stood out in her mind.

Mrs. SG stated she was sitting on her porch talking with appellant. She stated it was a perfectly normal conversation, until it suddenly wasn't. Specifically, she testified it got awkward when appellant unbuttoned his ACU pants, took out his penis, and began "messing" with himself by stroking his penis. Mrs. SG estimated this went on for twenty minutes while she tried to ignore what appellant was doing and concentrated on her laptop. She stated she discussed this event with her husband that night but decided not to report the incident as it did not happen again.

Prior to instructing the members on findings, the military judge conducted an Article 39(a), UCMJ, session [*18] to discuss instructions. Specifically, the military judge addressed whether indecent exposure was a lesser-included offense of indecent acts:

> MJ: Now regarding Charge II and its Specification as I mentioned in the 802 conference this morning I saw one lesser include [sic] of indecent exposure; does either side want to be heard on that?
> DC: No, Your Honor.

At the end of the Article 39(a), UCMJ, session, and again at several more instances during the remainder of the trial, the defense did not object to the military judge's proposed instruction on the lesser-included offense.[10] After being notified of the issue first at a R.C.M. 802 conference, and later at the Article 39(a), UCMJ, session, the defense chose not to object to the instruction on the lesser-included offense.

We find that this amounted to an affirmative waiver of the matter.

> "Deviation from a legal rule is 'error' unless the rule has been waived." *United States v. Olano*, 507 U.S. 725, 732-33, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). Waiver is the "intentional relinquishment or abandonment of a known right." *United States v.*

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[10] The maximum authorized punishment for an indecent act includes up to five years of confinement. *See Manual for Courts-Martial, United States* (2008 ed.) [hereinafter *MCM*, 2008 ed.] pt. IV, ¶ 45 f.(6). The maximum authorized punishment for indecent exposure includes up to one year of confinement. *MCM*, 2008 ed. at ¶ 45 f.(7). That is, a conviction on indecent exposure reduced the possible confinement that could be adjudged for that offense [*19] by 80%.

> *Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008) (quoting *United States v. Olano*, 507 U.S. 725, 732-33, 113 S. Ct. 1770, 123 L. Ed.2d 508 (1993)). "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *Id.* (quoting *Olano*, 507 U.S. at 733).

United States v. Girouard, 70 M.J. 5, 10 (C.A.A.F. 2011). In *Girouard*, the court found that waiver was not present, because (unlike this case), the case law governing what constituted a lesser-included offense had changed between trial and appeal. That is, the defense counsel in *Girouard* did not intentionally relinquish a known right, as the right had not yet been clearly identified in *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010). The present case was tried well after *Jones*. Here, the military judge specifically notified the defense that he intended to instruct on the lesser-included offense of indecent exposure, and the defense declined the military judge's invitation to be heard on the matter. Moreover, the defense was provided a copy of the written instructions to [*20] review, and heard the instructions given to the panel. In each instance, the elements of the two offenses in question were laid out one after the other without objection. Under the circumstances of this case, this constituted waiver.

Even assuming that an objection to the instruction on the lesser-included offense of indecent exposure was not affirmatively waived, the failure to object to the instructions forfeited the objection, absent plain error. R.C.M. 920(f); *United States v. Tunstall*, 72 M.J. 191, 193 (C.A.A.F. 2013); *see also United States v. Wilkins*, 71 M.J. 410, 412 (C.A.A.F. 2012) (citing *United States v. Arriaga*, 70 M.J. 51, 54 (C.A.A.F. 2011)); *Davis*, 75 M.J. 537.

"Under a plain error analysis, [an appellant] 'has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused.'" *Tunstall*, 72 M.J. at 193-94 (quoting *Girouard*, 70 M.J. at 11).

Applying the elements test, appellant claims that the military judge committed error as an "indecent act does not require proof of an additional element not found in the instruction for indecent exposure" and that "proof of indecent exposure requires proof that the exposure was intentional and that it was made at a place where the conduct could reasonably be expected to be viewed by people other than members of the accused's family or household."

We first note that a reasonable panel could [*21] have credited the testimony that appellant pulled out and exposed his penis on Mrs. SG's front porch, but not credited the testimony that he then stroked his penis for twenty minutes while she continued to work on

her computer. That is, the panel could have credited the evidence supporting the *exposure*, while not crediting the *act* of masturbation.

We also note that the element of indecent exposure that requires the conduct to occur somewhere other than in front of his own family or household serves as a limitation on what conduct is indecent. That is, being seen naked by your own family—while an "exposure"—is not an indecent exposure. Appellant was charged with exposing his penis to Mrs. SG, a person he clearly knew not to be a member of his family. Moreover, as charged, the specification alleged that appellant pulled out his penis and stroked it on the front porch of Mrs. SG. That is, as charged, appellant's exposure of his penis was an intentional act, committed in public; it was not an accidental or negligent exposure or an exposure in front of his family.

When it comes to unpreserved error, the burden is on the appellant to establish prejudice. *Wilkins*, 71 M.J. at 413; *United States v. Humphries*, 71 M.J. 209, 217 n.10. "Appellant bears the burden of [*22] proving prejudice because he did not object at trial. Appellant must show 'that under the totality of the circumstances in this case, the Government's error . . . resulted in material prejudice to [his] substantial, constitutional right to notice.'" *Wilkins*, 71 M.J. at 413 (alterations in original) (quoting *Humphries*, 71 M.J. at 215) (internal citation omitted).

In *Wilkins* the United States Court of Appeals for the Armed Forces (C.A.A.F.) found that the military judge committed error by instructing the panel on abusive sexual contact as a lesser-included offense of aggravated sexual assault based on how the offense was charged. However, as the appellant had not objected at trial, the C.A.A.F. tested for plain error. The C.A.A.F. found that the appellant was "on notice of all of the elements he had to defend against." *Wilkins*, 71 M.J. at 414. Additionally, the lesser-included offense did not change the defense's strategy at trial. *Id.* Thus while finding error, and finding that it was plain and obvious, the court affirmed the findings as the appellant in *Wilkins* did not carry his burden of demonstrating a material prejudice to a substantial right. *Id.* at 413 ("Appellant has not met this burden because he cannot establish prejudice to his ability to defend against [*23] the charge he was convicted of or his right to notice."). *Cf. United States v. Riggins*, 75 M.J. 78, 85 (C.A.A.F. 2016) (preserved constitutional error reviewed for harmlessness beyond a reasonable doubt).

In the present case, appellant does not even attempt to meet his burden. While appellant's brief identifies that plain error is the appropriate test, the brief addresses only the first prong of the plain error test, and does not address whether the error was plain or obvious, and if so, how the error resulted in a material prejudice to a substantial right of appellant. Accordingly, appellant has failed to meet his burden and is not entitled to relief. Even if we were to attempt to meet appellant's burden for him regarding the plain and obvious nature of the error, we find that as in *Wilkins*, the instruction on the lesser-included offense did

not deprive appellant of notice regarding what he was defending against or alter his trial strategy. The defense in this case did not hinge on whether appellant's actions were an exposure or an indecent act. Rather, the defense's case claimed that the charged misconduct simply never happened, a theory that applies with equal force to both indecent acts and indecent exposure.

Finally, setting aside whether [*24] appellant waived, forfeited, or met his plain error burden in this case, we find that this issue is controlled by our superior court's decision in *United States v. Rauscher*, 71 M.J. 225 (C.A.A.F. 2012). In that case, the appellant was charged with assault with intent to commit murder (a violation of Article 134), but convicted of the lesser-included offense of aggravated assault with a dangerous weapon or means likely to cause death or grievous bodily harm (a violation of Article 128). *Id.* In a per curiam opinion, our superior court never addressed the elements test to determine whether aggravated assault is a lesser-included offense of assault with intent to commit murder. Rather, the C.A.A.F. looked at the words of the specification which alleged that the appellant committed "an assault . . . by stabbing [the victim] in the hand and chest with a knife." *Id.* at 226. *Id.* The court was "convinced that the specification clearly allege[d] every element of [aggravated assault]." *Id.* That is, an elements test is unnecessary if the specification itself alleges the lesser-included offense in question.

In this case, the specification alleged that appellant did "wrongfully commit indecent conduct, to wit: pulling his penis out and openly stroking it with his hand [*25] in the presence of [SG]." One commits indecent exposure when one "intentionally exposes, in an indecent manner, the genitalia . . . ." *MCM*, 2008 ed. at ¶ 45.a.(n). As every element of indecent exposure was contained in the specification, appellant was on notice that he was charged with indecent exposure. *Jones*, 68 M.J. at 472 ("The charge sheet itself gives content to that general language, thus providing the required notice of what an accused must defend against.").

CONCLUSION

The finding of guilt to the Specification of Charge I, sexual abuse of a child, is set aside and that charge and its specification are DISMISSED. The finding as to the Specification of Charge II, indecent exposure, is AFFIRMED. The sentence is set aside. In accordance with R.C.M. 810, a sentence rehearing is authorized. All rights, privileges, and property of which appellant has been deprived by virtue of that portion of the findings and sentence set aside by our decision, are ordered restored. *See* UCMJ arts. 58b(c) and 75(a).

Senior Judge HAIGHT and Judge PENLAND concur.

United States v. Jordan

United States Army Court of Criminal Appeals

June 13, 2019, Decided

ARMY 20180003

Reporter
2019 CCA LEXIS 256 *; 2019 WL 2517817

UNITED STATES, Appellee v. Private First Class DAVID L. JORDAN, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by United States v. Jordan, 2019 CAAF LEXIS 592 (C.A.A.F., Aug. 14, 2019)

Review denied by United States v. Jordan, 2019 CAAF LEXIS 747 (C.A.A.F., Oct. 23, 2019)

Prior History: [*1] Headquarters, First Cavalry Division. G. Bret Batdorff, Military Judge. Colonel Emily C. Schiffer, Staff Judge Advocate.

Counsel: For Appellant: Lieutenant Colonel Tiffany D. Pond, JA; Major Todd W. Simpson, JA; Captain Heather M. Martin, JA (on brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Eric K. Stafford, JA; Lieutenant Colonel Wayne H. Williams, JA; Captain Austin I. Price, JA (on brief).

Judges: Before SALUSSOLIA, ALDYKIEWICZ, and EWING, Appellate Military Judges.

Opinion

Per Curiam:

Appellant contends that the specification for his sole conviction failed to state an offense. We disagree and affirm.[1]

[1] Contrary to appellant's plea, a military judge sitting as a general court-martial convicted appellant of one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2012) [UCMJ]. The convening authority approved the court's adjudged sentence of a dishonorable discharge, confinement for eighteen months, and reduction to the grade of E-1.

The specification at issue reads as follows:

> In that [appellant] U.S. Army, did, at or near Fort Hood, Texas, on or about 9 December 2016, commit a sexual act upon PFC [TH], to wit: placing his mouth on PFC [TH]'s penis, by causing bodily harm to him, to wit: placing his mouth on PFC [TH]'s penis.

Appellant contends that the phrase "mouth *on* . . . penis" (emphasis added) does not describe a sexual act, because it fails to allege penetration of the mouth by the penis, as required by Article 120(g)(1)(A). The "to wit" language in this specification could have been more artfully [*2] drafted.[2] Nevertheless, we agree with the military judge that the specification "either expressly or by necessary implication": (1) alleged every element of the offense; (2) put appellant on notice that he needed to defend against the sexual act of placing his mouth on PFC TH's penis, causing penetration; and (3) protected appellant from double jeopardy. *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994); *see also United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011) ("'A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication.'" (quoting Rule for Courts-Martial 307(c)(3))). The specification's use of the term "sexual act" carried with it the applicable definition of "contact between the penis and the . . . mouth, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight." Article 120(g)(1)(A).

Moreover, we agree with the military judge that the word "mouth" refers to the "oral cavity" on the "inside of the human head," and thus "to access [the mouth], there must be a penetration, however slight, of it." Our sister courts have come to the same conclusion in similar cases. *See, e.g.*, *United States v. Ruppel*, 45 M.J. 578, 587-88 (A.F. Ct. Crim. App. 1997) (upholding a forcible sodomy conviction, and explaining that the victim "did not say that she put her lips on [appellant's] penis. [*3] Rather, she used the word mouth. Using the common understanding of the word mouth, if [the victim] put her mouth on appellant's penis, there is a penetration of the lips."); *United States v. Cox*, 23 M.J. 808, 818 (N.M.C.M.R. 1986) (penetration past lips but not past teeth is sufficient to prove sodomy); *United States v. Escamilla*, NAVY 201400168, 2015 CCA LEXIS 157, at *2-3 (N.M. Ct. Crim. App. 23 Apr. 2015) (finding sufficient evidence of sexual assault in a factually

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Appellant's second assignment of error alleges the government's evidence was factually insufficient to sustain his conviction. This claim warrants neither discussion nor relief. We are personally convinced of appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

Appellant personally raised matters pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). After due consideration, we find that appellant's *Grostefon* matters do not warrant discussion or relief.

[2] For example, the "to wit" language could have read: "placing PFC TH's penis inside [appellant's] mouth, causing PFC TH's penis to penetrate [appellant's] mouth," or words to that effect.

similar case, where the specification alleged that the appellant committed a sexual act by "placing his mouth on [the victim's] penis)."

CONCLUSION

The findings and sentence are AFFIRMED.

United States v. Spencer

United States Air Force Court of Criminal Appeals

January 26, 2012, Decided

Misc. Dkt. No. 2011-09

Reporter
2012 CCA LEXIS 50 *

UNITED STATES, Appellant v. Senior Airman (E-4) TALON J. SPENCER, USAF, Appellee

Judges: [*1] Before Panel No. 1, WEISS, Judge. ORR, Chief Judge, and GREGORY, Senior Judge, concur.

Opinion by: WEISS

Opinion

ORDER

WEISS, Judge:

On 22 November 2011, the United States filed an appeal under Article 62, UCMJ, 10 U.S.C. § 862, challenging the ruling of the military judge dismissing without prejudice the sole charge and specification of wrongful sexual contact, in violation of Article 120, UCMJ, 10 U.S.C. § 920, on the grounds that the specification fails to state an offense. The appellee joins the Government in requesting that this Court reverse the ruling of the military judge. We find that the charge and specification, as alleged, are sufficient to state the offense of wrongful sexual contact. We, therefore, grant the Government's appeal.

Background

A single charge and specification alleging wrongful sexual contact, in violation of Article 120, UCMJ, was preferred against the appellee and referred to a general court-martial. The Specification of the Charge alleges:

> In that SENIOR AIRMAN TALON J. SPENCER . . . did, at or near Hurlburt Field, Florida, on or about 26 May 2011, engage in sexual contact with [AS], to wit: penile penetration of the vulva, and such sexual contact was without legal justification [*2] or lawful authorization and without the permission of [AS].

The defense did not contest the sufficiency of the specification at trial; however, the military judge sua sponte questioned whether it stated an offense. Although the trial and defense counsel agreed that the offense of wrongful sexual contact was properly alleged, the military judge found that the specification failed to state an offense. He dismissed the charge and specification without prejudice. The basis of the military judge's ruling is his interpretation that, by defining a "sexual act" as penile penetration of the vulva, Congress intended to exclude this same conduct from the definition of "sexual contact" and thus from the conduct proscribed by the offense of wrongful sexual contact under Article 120, UCMJ. We disagree.

Discussion

In ruling on an appeal under Article 62, UCMJ, this Court "may act only with respect to matters of law." Article 62(b), UCMJ; Rule for Courts-Martial (R.C.M.) 908(c)(2). The question of whether a specification states an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). "A specification is sufficient if it alleges every element [*3] of the charged offense expressly or by necessary implication." R.C.M. 307(c)(3); *see also United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994). Interpretation of a statute is also a question of law that we review de novo. *United States v. Falk*, 50 M.J. 385, 390 (C.A.A.F. 1999) (citations omitted).

Effective 1 October 2007, Congress amended Article 120, UCMJ, and consolidated numerous acts of sexual misconduct under its various subsections. Drafter's Analysis, *Manual for Courts-Martial, United States* (MCM), A23-15 (2008 ed.). The appellee is charged with a subsection of Article 120, UCMJ, titled "wrongful sexual conduct," which constitutes the following: "Any person . . . who, without legal justification or lawful authorization, engages in sexual contact with another person without that other person's permission is guilty of wrongful sexual contact . . . ." Article 120(m), UCMJ. The term "sexual contact" is defined as:

> [T]he intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person, to touch, either directly or through the clothing, the genitalia, anus, groin, [*4] breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.

Article 120(t)(2), UCMJ.

A "sexual act," on the other hand, is a distinguishing element of the more serious offenses of rape and aggravated sexual assault under Articles 120(a) and 120(c), UCMJ. The term "sexual act" means, in relevant part, "contact between the penis and the vulva . . . contact involving the penis occurs upon penetration, however slight . . . ." Article 120(t)(1)(A),

UCMJ. Viewing the issue as a question of statutory construction, the military judge concluded that the Government was precluded from charging a "sexual act" (penile penetration of the vulva) as wrongful sexual contact.

In reaching this conclusion, the military judge applied "a basic rule of statutory construction that when a list includes certain items, items not included in the list [are] intended to be excluded." The military judge went on to note:

> Significantly, Congress chose to use the words "penis" and "vulva" when defining "sexual act"; [therefore,] one must reasonably infer that because Congress failed to use those words when defining "sexual [*5] contact," that omission was intentional. Similarly, Congress chose to use the word "contact" in the definition of "sexual act," whereas it required "touching" for "sexual contact." And perhaps most importantly, Congress did not include words such as "for example" or "including" when defining "sexual contact," suggesting that Congress intended its list to completely define the type of conduct that constituted "sexual contact." . . . [Therefore] Congress intended to *exclude* penile contact with the vulva from the definition of "sexual contact."

We find that the military judge's interpretation of Article 120, UCMJ, is unduly restrictive and led him to an erroneous legal conclusion that sexual conduct described as penile penetration of the vulva cannot be charged as the offense of wrongful sexual contact. In interpreting a statute "we must look *first* to the plain language of the statute and construe its provisions in terms of its object and policy . . . . [A]bsent evidence to the contrary, the ordinary meaning of the words used expresses the legislative intent." *Falk*, 50 M.J. at 390 (citations omitted) (emphasis added). *See also United States v. Phillips*, 70 M.J. 161, 165 (C.A.A.F. 2011) [*6] (citation omitted) ("In deciphering the meaning of a statute, we normally apply the common and ordinary understanding of the words in the statute.").

The common meaning and understanding of the word "genitalia" or genitals, as used in the Article 120, UCMJ, definition of "sexual contact," is "the reproductive organs; [especially] the external sex organs." WEBSTER'S NEW WORLD DICTIONARY 562 (3d College Edition 1988). "Vulva" is defined as "the external *genital* organs of the female, including the labia majora, labia minora, clitoris, and the entrance to the vagina." *Id*. at 1498 (emphasis added). Plainly, the anatomical part referred to as the "vulva" is included within the meaning of the broader term "genitalia" and is commonly understood as such. It also logically follows that penile penetration of the vulva must also involve touching the genitalia.

Therefore, in applying this ordinary meaning construction, we find that the sexual conduct alleged in this case is included within both the Article 120, UCMJ, definition of "sexual act" and "sexual contact." Furthermore, we find nothing in the language of Article 120, UCMJ, or in considering the object and policy of the statute, that otherwise [*7] prevents

an allegation of "penile penetration of the vulva" from being charged as the offense of wrongful sexual contact, even with its lesser degree of criminal liability than those offenses requiring a "sexual act" as an element of proof. In this case, the charging decision was a matter of prosecutorial discretion. Contrary to the ruling of the military judge, we find that the specification alleges every element of the offense of wrongful sexual contact and is sufficient to state an offense.

Conclusion

We find that the military judge was incorrect as a matter of law in finding that the charge and specification failed to state an offense. We set aside the decision of the military judge and remand the case to the trial court for further proceedings.

On consideration of the United States appeal under Article 62, UCMJ, it is by the Court on this 26th day of January 2012,

ORDERED:

That the United States appeal under Article 62, UCMJ, is hereby **GRANTED**.

ORR, Chief Judge, and GREGORY, Senior Judge, concur.

United States v. Brown

United States Army Court of Criminal Appeals

December 23, 2019, Decided

ARMY 20160139

Reporter
2019 CCA LEXIS 514 *

UNITED STATES, Appellee v. First Lieutenant DAVID BROWN, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by United States v. Brown, 2020 CAAF LEXIS 156 (C.A.A.F., Mar. 24, 2020)

Prior History: [*1] Headquarters, U.S. Army Combined Arms Center and Fort Leavenworth. J. Harper Cook, Military Judge. Lieutenant Colonel Sean T. McGarry, Staff Judge Advocate.

United States v. Brown, 2018 CCA LEXIS 88 (A.C.C.A., Feb. 23, 2018)

Counsel: For Appellant: Lieutenant Colonel Tiffany D. Pond, JA; Major Kyle C. Sprague, JA; Captain James J. Berreth, JA (on brief).

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

Judges: Before ALDYKIEWICZ, SALUSSOLIA, and WALKER Appellate Military Judges.

Opinion

SUMMARY DISPOSITION

Per Curiam:

Appellant challenges the legal and factual sufficiency of his convictions of rape, aggravated sexual contact, and abusive sexual contact. We find appellant's challenges to the legal and factual sufficiency of his convictions[1] meritless, with one exception for which

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[1] Appellant also alleges numerous errors in matters submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We have given full and fair consideration to these matters and find them to be without merit.

we grant relief in our decretal paragraph. Additionally, appellant alleged three additional assignments of error in a supplemental brief. None warrant discussion or relief.

At appellant's first court-martial a military panel composed of officer members convicted appellant of one specification of violating of a lawful general regulation, three specifications of rape, one specification each of aggravated [*2] sexual contact, abusive sexual contact, and assault consummated by a battery, and two specifications of conduct unbecoming an officer and a gentleman in violation of Articles 92, 120, 128, and 133, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920, 928, 933 (2012) [UCMJ]. The convening authority approved the adjudged sentence of a dismissal and confinement for fifteen years.

On 23 February 2018, pursuant to *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016) and *United States v. Hukill*, 76 M.J. 219 (C.A.A.F. 2017), this court set aside appellant's convictions of three specifications of rape and one specification each of aggravated sexual contact and abusive sexual contact, in violation of Article 120, UCMJ. *United States v. Brown*, ARMY 20160139, 2018 CCA LEXIS 88 (Army Ct. Crim. App. 23 Feb. 2018) (summ. disp.). This court affirmed the remaining findings of guilty, set aside appellant's sentence, and authorized a rehearing.

The government opted to retry appellant for the set-aside convictions. On 22 September 2018, a military panel composed of officer members convicted appellant, contrary to his pleas, of one specification of rape, one specification of aggravated sexual contact, and one specification of abusive sexual contact, in violation of Article 120, UCMJ. The panel sentenced appellant to a dismissal, confinement for ten years, and forfeiture of all [*3] pay and allowances.

LAW AND DISCUSSION

We conclude appellant's convictions of Specifications 4 (aggravated sexual contact) and 5 (abusive sexual contact) of Charge I are factually insufficient to the extent that he committed sexual contact on BL's breasts, in that there was no evidence presented at trial that appellant rubbed BL's breasts, as charged. The specifications at issue read as follows:

> Specification 4: At or near Vilsek, Germany, on or about 26 August 2014, did, commit sexual contacts upon Private (E-2) B.L., to wit: rubbing her inner thigh, breasts and vaginal area with his hand, by unlawful force, to wit: bending her over the bed and holding her down with his hands with physical strength sufficient to overcome and restrain the said Private B.L.
>
> Specification 5: At or near Vilsek, Germany, on or about 26 August 2014, did, commit sexual contacts upon Private (E-2) B.L., to wit: rubbing her inner thigh, breasts and vaginal area with his hand, as she was walking away from him, by causing bodily harm

to her, to wit: rubbing her inner thigh, breasts and vaginal area with his hand, without her consent.

This court reviews factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency [*4] is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In conducting this unique appellate review, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington, 57* M.J. at 399. Our assessment of factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

"In performing [our] review under Article 66(c), UCMJ, a Court of Criminal Appeals (CCA) may narrow the scope of an appellant's conviction to that conduct it deems legally and factually sufficient." *United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019) (citing *United States v. Piolunek*, 74 M.J. 107, 112 (C.A.A.F. 2015) (upholding the CCA's determination that only nineteen of twenty-two charged images of child pornography were legally sufficient to support a conviction); *United States v. Rodriguez*, 66 M.J. 201, 203 (C.A.A.F. 2008) (upholding the CCA's decision to strike "on divers occasions" from the specification at issue and affirm only one instance of the offense)) (additional citations omitted). Though BL testified to appellant touching her inner and [*5] outer thigh and vaginal area, she never mentioned appellant touching her breasts. When specifically asked if appellant had touched her anywhere else, she responded, "No, Ma'am." The parties agree that the record contains no evidence that appellant rubbed BL's breasts. After a thorough review of the record, we agree and accept the government's concession that we should disapprove the word "breasts" in appellant's convictions for Specifications 4 and 5 of Charge I.

We are convinced appellant is guilty of Specifications 4 and 5, excepting the word "breasts" from both specifications. In light of our modification of these specifications, we must reassess appellant's sentence in accordance with our superior court's guidance in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). If we can determine that, "absent the error, the sentence would have been at least of a certain magnitude," then we "may cure the error by reassessing the sentence instead of ordering a sentence rehearing." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *Sales*, 22 M.J. at 307). We can easily make such a determination here.

In both modified specifications, appellant was charged with committing sexual contact upon BL by rubbing her "thigh, breasts and vaginal area." Disapproving the word "breasts" does not change the gravamen [*6] of appellant's offenses against BL. We are confident that even without the word "breasts" in the specifications, the members still would have imposed at least a dismissal from the service, confinement for ten years, and total forfeitures.

CONCLUSION

Upon consideration of the entire record, appellant's findings of guilty are AFFIRMED, excepting the word "breasts" from Specifications 4 and 5 of Charge 1.[2] Specifications 4 and 5 are otherwise AFFIRMED. Appellant's sentence is AFFIRMED.

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[2] The findings of guilty we previously affirmed are still affirmed.