IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S, Appellee	BRIEF ON BEHALF OF APPELLEE
v.	**Docket No. ARMY 20200347**
Private First Class (E-3) **AUSTIN C. HAMILTON,** United States Army, Appellant	Tried at Joint Base Lewis-McChord, Washington, on 20 February, 15 May and 22–26 June 2020, before a general court-martial convened by Commander, 7th Infantry Division, Colonel Joseph Keeler, 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 ABUSED HIS DISCRETION WHEN HE PERMITTED TWO WITNESSES TO PROVIDE SPC [redacted]'S ACCOUNT OF HER ALLEGED RAPE UNDER THE EXCITED UTTERANCE EXCEPTION TO HEARSAY.

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING THE SANE'S WRITTEN REPORT.

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

PANEL NO. 4

III.

WHETHER THE FACTS CHARGED IN SPECIFICATION 5 OF CHARGE I ARE INSUFFICIENT AS A MATTER OF LAW TO SUPPORT A CONVICTION OF AGGRAVATED SEXUAL CONTACT.

Statement of the Case

On 26 June 2020, a panel with enlisted representation, sitting as a general court-martial, convicted appellant, contrary to his pleas, of one specification of rape and one specification of aggravated sexual contact, in violation of Article 120, Uniform Code of Military Justice [UCMJ] 10 U.S.C. § 120 (2018).[2] (R. at 757; Statement of Trial Results). The military judge sentenced appellant to a reduction to E-1, confinement for eight years, and a dishonorable discharge. (R. at 760, 841). The convening authority took no action. (Action). The military judge entered judgment on 21 July 2020. (Judgment).

Statement of Facts

A. Appellant behaved aggressively towards Specialist [redacted] at a party.

On 31 March 2019, a mutual friend invited Specialists (SPCs) [redacted] and SR to attend a barbeque near the 4th Battalion, 23d Infantry Regiment barracks in honor of a fellow Soldier who had recently passed away. (R. 334, 473). Specialists [redacted] and SR arrived at the gathering around 1600 and socialized with other attendees. (R. at 338). Specialist [redacted] introduced herself to several individuals, including appellant. (R. at 338). Although appellant claimed he had previously met SPC [redacted] on several occasions, she did not remember the prior encounters. (R. at 338).

[2] The panel acquitted appellant of two specifications of rape, one specification of aggravated sexual contact, one specification of abusive sexual contact, and one specification of assault consummated by battery. (Statement of Trial Results).

About ten minutes after the introduction, appellant became "very aggressive" and made "inappropriate comments," which included that SPC [redacted] "would be waking up in his bed." (R. at 339–40). Appellant's subsequent actions and comments made SPC [redacted] "very uncomfortable," and she expressed her concerns to SPC SR. (R. at 339–40). Specialist SR told SPC [redacted] she "was going to take care of it," and she pulled appellant aside on two separate occasions to discuss appellant's aggressive behavior toward SPC [redacted]. (R. 351, 476).

B. Appellant raped SPC [redacted] in his barracks room.

Later in the evening, appellant asked SPC [redacted] to go with him to his room to retrieve some beer for the gathering. (R. at 353–54). Specialist [redacted] agreed after she made appellant "promise [] nothing will happen." (R. at 354). When the two arrived at the door to the common room leading to his bedroom, he cornered SPC [redacted], opened the door, and SPC [redacted] "stumbled back" into the common room. (R. at 357). He "pinned [her] up against the common door on the other side of the door." (R. at 357). Appellant kissed SPC [redacted] "very forcefully and roughly." (R. at 357). Appellant "started kissing down [her] neck on onto [her] chest . . . around [her] breast area." (R at 359–60). Specialist [redacted] yelled and told appellant to stop, but he did not and instead unbuttoned her pants. (R. at 360–61).

Appellant opened his bedroom door and pushed SPC [redacted] onto his bed. (R. at 365–67). He held her legs in the air while her pants were around her legs. (R.

365–70). Appellant performed oral sex on SPC [redacted]. (R. at 369–70). He then overpowered her and inserted his penis into her vagina "about four to five times." (R. at 370). Specialist [redacted] screamed, "kicked [appellant] in the chest[,] . . . pulled up [her] pants[,] and grabbed [her] phone and ran out" of the room. (R. at 371).

C. Soon after the rape, SPC [redacted] told two friends she was assaulted.

After SPC [redacted] escaped from appellant, she ran to her barracks room located on the first floor of the building, made a brief telephone call to her roommate asking her to come back to the room, and went outside to find SPC SR. (R. at 372–74). Approximately five minutes elapsed between the rape and the time SPC [redacted] went to find SPC SR. (R. at 374). Specialist [redacted] found SPC SR in the courtyard standing near SPC MM and Corporal (CPL) AK. (R. 375, 477). Specialist [redacted] approached SPC SR "fast," was "crying hysterically" and "shaking," and immediately pulled SPC SR away from SPC MM and CPL AK. (R. at 477–78). Specialist MM confirmed that SPC [redacted] "came out frantically crying and looking for friends," and SPC [redacted] "looked scared and petrified." (R. at 509–10).

Specialist SR thought SPC [redacted] "seemed like she just desperately needed to tell someone" what occurred and "wanted to tell someone immediately." (R. at 478). Specialist SR also indicated that SPC [redacted]'s voice "br[oke] up because she was crying so much." (R. at 478). Specialist SR described what SPC [redacted] told her:

> She told me that he asked her to come upstairs to his room to grab beer with him, and she told him that she would. They went up to the room, and he had pushed her against the door once they got into the room, and that he was trying to kiss her. Somehow, they made it to the bed, and [h]e was trying to unbutton her pants. He said, "Let me take a bit of that pussy." He got her pants undone as she trying to force him off, and he orally had sex with her. Then she had said that he penetrated, and she was still trying to force herself off of him. Then she came back down after that had happened.[3]

(R. at 480–81).

Specialist SR left SPC [redacted] with SPC MM, a trusted friend, and "grabbed" CPL AK, appellant's roommate, to go confront appellant. (R. at 482). Specialist MM noticed SPC [redacted] "sounded broken," was "crying profusely," and was "very scared and worried." (R. at 510). Specialist [redacted] indicated that she was injured, including a bruise on her arm. (R. at 511). As SPC [redacted] described the injuries, she "was very frantic and scared and still crying." (R. at 512). Specialist MM attempted to comfort SPC [redacted], and then SPC [redacted] told SPC MM what occurred. (R. at 512). This conversation occurred approximately fifteen minutes after SPC [redacted] came out of the barracks. (R. at 513). Specialist MM described what SPC [redacted] told her regarding the rape:

[3] At trial and over defense objection, the military judge permitted SPC SR to testify concerning SPC [redacted]'s statements about the rape under the excited utterance exception to the hearsay rule. (R. at 480). The military judge did not articulate the basis for his ruling on the record.

> [SPC MM]: She told me initially he tried to hold her down and perform oral intercourse on her and then successfully later then penetrated her sexually.
>
> [Trial Counsel]: Did she describe how he held her down?
>
> [SPC MM]: Yes, sir. At first he was holding her hands back kind of like her arms up, sir, and then he just continued holding her down like that, sir.
>
> [Trial Counsel]: At some point did she describe to you anything that he said to her?
>
> [SPC MM]: No, sir.
>
> [Trial Counsel]: Did she tell you how she got away from him?
>
> [SPC MM]: Yes. She said she kicked him off, sir.[4]

(R. at 516).

D. Appellant made incriminating statements to other soldiers.

Soon after SPC SR learned of the rape, she and CPL AK went to appellant's room. (R. at 482–83). Specialist SR asked appellant "what he did to [her] best friend," and appellant initially "denied what happened," but then he stated, "because [SPC [redacted]] had walked into his room, it was okay for him to rape her." (R. at 484). Appellant also admitted "he penetrated" SPC [redacted]. (R. 485). Specialist SR

[4] At trial and over the defense objection, the military judge permitted SPC MM to testify about SPC [redacted]'s statements about the rape under the excited utterance exception to the hearsay rule. (R. at 515). The military judge did not articulate the basis for his ruling on the record.

and CPL AK left the barracks, went back to the courtyard, and met SPC MM. (R. at 489). The three then returned to the barracks to confront appellant a second time. (R. at 518).

Corporal AK entered the barracks room alone to speak with appellant, and after SPC MM heard yelling in the room, SPC MM entered the room. (R. 518; Pros. Ex. 20, pp. 1–2). A physical altercation occurred between appellant, CPL AK, and SPC MM. (R. 518, 547; Pros. Ex. 20, pp. 1–2). Following the physical altercation, appellant went to the charge of quarters (CQ) desk at approximately 1830 and "seemed very anxious . . . bothered or worried." (R. 559). Sergeant (SGT) JC, who was working at the CQ desk, assumed someone had "beat his ass" and wanted to deescalate the situation. (R. at 559). During interactions with appellant, SGT JC heard appellant state on three separate occasions, "I fucked up," and noticed he was emotional and "kind of teary eyed." (R. at 559–60). Sergeant JC testified, "[a]fter we exchanged words he walked me upstairs to the second floor [and] I tried to see actually who it was but nobody was there." (R. at 560).

Eventually, SPC [redacted] calmed down and returned the barbeque. At some point, "someone from CQ" approached SPC [redacted] and asked if she thought she had been raped. (R. at 377). Specialist [redacted] said "yes," and the solder from CQ told her that the military police would be notified. (R. at 377). Military police arrived at the courtyard later in the evening. (R. at 378).

E. Forensic evidence corroborated SPC [redacted]'s account that appellant penetrated her vagina with his penis.

Following the rape, SPC [redacted] got a sexual assault forensic examination (SAFE). (R. at 378, 573). Appellant also had a SAFE examination. (R. at 609). Ms. MH, a United States Army Criminal Investigation Laboratory forensic biologist, tested the sexual assault kits from SPC [redacted] and appellant. (R. at 606, 609–10). Ms. MH did not find appellant's DNA on SPC [redacted]'s vaginal pool swabs. (R. at 610). However, Ms. MH detected "a mixture of two individuals" on appellant's penile swab and determined that appellant and SPC [redacted] were the two contributors to the DNA profile. (R. at 611). Ms. MH concluded, "[g]iven this DNA profile taken from the penile swab[,] it was at least one quintillion times more likely that it came from [SPC [redacted]] and [appellant] rather than coming from [appellant] and an unknown individual." (R. at 611). In addition, "[t]he rough estimation was that [SPC [redacted]] was providing 68 percent approximately to the DNA profile from the penile swab and [appellant] the remaining 32 percent." (R. at 613).

Additional facts are incorporated below.

Assignment of Error I

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE PERMITTED TWO WITNESSES TO PROVIDE SPC [redacted]'S ACCOUNT OF HER ALLEGED RAPE UNDER THE EXCITED UTTERANCE EXCEPTION TO HEARSAY.

Standard of Review

A military judge's ruling admitting or excluding an excited utterance is reviewed for an abuse of discretion. *United States v. Henry*, 81 M.J. 91, 95 (C.A.A.F. 2021) (citing *United States v. Feltham*, 58 M.J. 470, 474–75 (C.A.A.F. 2003)). A military judge's ruling will only be reversed if the findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law. *Id.* (internal citations omitted). Less deference is afforded to a military judge if they fail to articulate the basis for their evidentiary ruling on the record. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010).

Law

"A statement relating to a startling event or condition, made while the declarant was under the stress of excitement caused by the event or condition," is admissible as an exception to the general prohibition on hearsay. Military Rule of Evidence [Mil. R. Evid.] 803(2). For a statement to qualify as an excited utterance: (1) the statement must be "spontaneous, excited or impulsive rather than the product of reflection and deliberation"; (2) the event prompting the utterance must be "startling"; and (3) the declarant must be "under the stress of excitement caused by the event." *United States v. Arnold*, 25 M.J. 129, 132 (C.M.A. 1987) (internal quotation marks omitted) (citations omitted). "The implicit premise [of the exception] is that a person who reacts 'to a startling event or condition' while

'under the stress of excitement caused' thereby will speak truthfully because of a lack of opportunity to fabricate." *United States v. Jones*, 30 M.J. 127, 129 (C.M.A. 1990) (citation omitted).

"The physical and mental condition of the declarant" and "the lapse of time between the startling event and the statement" are relevant to the third prong of this inquiry. *United States v. Donaldson*, 58 M.J. 477, 483 (C.A.A.F. 2003) (internal quotation marks omitted) (citation omitted). However, "[i]t is the totality of the circumstances, not simply the length of time that has passed between the event and the statement, that determines whether a hearsay statement was an excited utterance." *United States v. Belfast*, 611 F.3d 783, 817 (11th Cir. 2010). The proponent of the excited utterance has the burden to show by a preponderance of the evidence that each element is met. *See Bourjaily v. United States*, 483 U.S. 171, 175, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987) (explaining that though a court determines admissibility of evidence, the Supreme Court has "traditionally required that these matters be established by a preponderance of proof").

Argument

The military judge properly admitted testimony from SPC SR and SPC MM under the excited utterance exception to the hearsay rule because the testimony met all three prongs of the *Arnold* test. Contrary to appellant's argument, SPC [redacted]'s statements were excited, rather than the product of reflection and deliberation, and

were made under the stress of excitement caused by the rape.[5] (Appellant's Br. 12–15). Further, even assuming arguendo that the military judge erred, the error did not materially prejudice appellant's substantial rights.

A. Specialist [redacted]'s outcry to SPC SR met all three prongs of the *Arnold* test.

Contrary to appellant's argument, (Appellant's Br. 12–14), SPC [redacted] was under the stress of excitement caused by the rape when she made the statement to SPC SR between five and ten minutes after escaping from appellant's room. (R. at 374). Although SPC [redacted] did not make the statement immediately following the rape, the statement was not a product of reflection and deliberation.

After appellant raped SPC [redacted], she ran to her barracks room. (R. at 372). Specialist [redacted] felt "violated and unsafe," and when she did not find her roommate in their room, SPC [redacted] quickly called her and asked her to "come home." (R. at 373). In a state of fear and unaware of appellant's whereabouts, SPC [redacted] then "came out [to the courtyard] frantically crying and looking for friends." (R. at 374, 477, 509). Specialist [redacted] approached a group of soldiers "fast," was "shaking," and "looked scared and petrified." (R. at 478, 510). Consequently, "because she was real upset and crying and [] in a panic," she did not have time to reflect. *United States v. Chandler*, 39 M.J. 119, 123 (C.M.A. 1994).

[5] Appellant challenges the military judge's ruling as it relates to the first and third prongs of the *Arnold* test and implicitly concedes that the event prompting the utterance was "startling" under the second prong of test. (Appellant's Br. 12–15).

Further, less than ten minutes elapsed between the rape and the statement SPC [redacted] made to SPC SR. (R. at 374); *see United States v. Haner*, 48 M.J. 72, 75–76 (C.A.A.F. 1998) (finding the excited utterance exception applied when twenty minutes elapsed). Specialist SR's description of SPC [redacted]'s physical and mental state established that the statement was excited and the short period of time between the rape and the statement support the conclusion that the statement was not a product of reflection and deliberation. *Arnold*, 25 M.J. at 132. Specialist SR testified that SPC [redacted] "seemed like she just desperately needed to tell someone" what occurred and "wanted to tell someone immediately." (R. at 478). Specialist SR also indicated that SPC [redacted]'s voice was "breaking up because she was crying so much." (R. at 478).

Moreover, SPC [redacted]'s demeanor coupled with the short amount of time between the rape and the statement demonstrated she remained under the stress of excitement caused by the rape. *See State v. Young,* 161 P.3d 967, 973 (Wash. 2007*)* (explaining that physical appearance and demeanor showed the victim was still "under the stress" of the traumatic event). Consequently, because SPC [redacted] sought to inform "someone immediately" about the rape and remained in a visibly frantic state, all three prongs of the *Arnold* test were satisfied.

Appellant's reliance on *United States v. Johnson* to challenge whether the statement was spontaneous, excited, or impulsive, rather than the product of

reflection and deliberation, is misplaced. (Appellant's Br. 14). In that case, this court cited five factual reasons for finding the military judge erred in applying the first prong of the *Arnold* test; four of these reasons are not present in appellant's case. ARMY 20180527, 2020 CCA LEXIS 249, at *4 (Army Ct. Crim. App. 23 Jul. 2020) (mem. op.). First, the victim in *Johnson* testified she showered after the assault and felt "the emotion coming," which indicated she reflected upon what happened. *Johnson*, slip op. at *5. Here, although SPC [redacted] made a "brief" phone call following the rape, there is no evidence that SPC [redacted] reflected and deliberated upon what had occurred. (R. at 372–74). Second, because the victim in *Johnson* waited for at least thirty minutes in her friend's barracks room prior to making the statement, the statement continued to lose spontaneity. *Johnson*, slip op. at *5. Here, a mere ten minutes elapsed before SPC [redacted]'s outcry. (R. at 480). Third, the victim in *Johnson* made the statement in response to a question from her friend. *Johnson*, slip op. at *5. In contrast, SPC [redacted] proactively made the statement after locating SPC SR. (R. at 480). Fourth, the victim's testimony in *Johnson* was inconsistent with her in-court testimony. *Johnson*, slip op. at *6. In this case, SPC [redacted]'s testimony concerning the rape remained consistent.

Consequently, although SPC [redacted] sought out SPC SR like the victim in *Johnson* who sought out a friend, the evidence established that SPC [redacted]'s statement was made "under the stress of excitement" from the rape. *Young*, 161 P.3d at 973.

B. Specialist [redacted]'s outcry to SPC MM met all three prongs of the *Arnold* test.

Specialist [redacted] remained under the stress of excitement caused by the rape when she made the excited statement to SPC MM approximately twenty minutes after the rape. (R. at 374, 512). After SPC [redacted] spoke with SPC SR, SPC SR took SPC [redacted] to a trusted friend, SPC MM, and then left the courtyard. (R. at 482). At that point, SPC MM noticed SPC [redacted] "sounded broken," was "crying profusely," and was "very scared and worried." (R. at 510). Specialist [redacted] indicated that she was injured, including a bruise on her arm. (R. at 511). As she described the injuries, SPC [redacted] "was very frantic and scared and still crying." (R. at 512). Specialist MM attempted to comfort SPC [redacted], and then SPC [redacted] told SPC MM what occurred. (R. at 512). Specialist MM's description of SPC [redacted]'s physical and mental state established that the statement was excited and occurred approximately twenty minutes after appellant raped SPC [redacted]. *See, e.g., Chandler*, 39 M.J. at 123 (admitting statement made to friend which occurred a half-hour after the friend drove the declarant away from the startling situation).

Although the statement was further attenuated from the rape then the statement to SPC SR, given that the prior conversation with SPC SR was an excited utterance describing the attack, there was no evidence that SPC [redacted] reflected and deliberated prior to speaking with SPC MM. Additionally, SPC [redacted]'s continued hysterical demeanor coupled with the relatively short amount of time

between the rape and the statement demonstrated she remained under the stress of excitement caused by the rape. *Chandler*, 39 M.J. at 123; *Young*, 161 P.3d at 973. Consequently, the record supported the conclusion that SPC [redacted]'s statement to SPC MM satisfied all three prongs of the *Arnold* test.

C. Even if the military judge erred, appellant was not prejudiced.

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. This court evaluates an evidentiary ruling for prejudice by 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. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1995). Assuming arguendo the military judge abused his discretion in admitting the statements SPC [redacted] made to SPC SR and SPC MM, appellant was not materially prejudiced.

First, the government's case was strong as it related to the two specifications appellant was found guilty. In both instances, there was uncontroverted physical evidence to corroborate SPC [redacted]'s testimony. The contusion on SPC [redacted]'s arm demonstrated that the physical encounter was violent and SPC [redacted] was held against her will. (R. at 357–60, 511, 585). The suction mark on her chest was direct evidence of the aggravated sexual contact. (Pros. Ex. 19). Also, the penile swab

established that appellant penetrated SPC [redacted]'s vagina with his penis because it was at least one quintillion times more likely to have come from SPC [redacted] and appellant rather than from appellant and an unknown individual. (R. at 611). Additionally, appellant admitted to having sexual intercourse with SPC [redacted] and attempted to justify his actions by stating "because [SPC [redacted]] had walked into his room, it was okay for him to rape her." (R. at 485–88). He also repeatedly stated, "I fucked up," and a witness noted he appeared "teary eyed." (R. at 559–60). All of this demonstrated appellant's consciousness of guilt.

On the other hand, the defense case related to the two guilty findings was weak. Appellant's defense at trial hinged on attacking the witnesses' credibility and injecting an unpersuasive argument that SPC [redacted] had a motive to fabricate. (R. at 717–718, 720, 732 –33). Although some of SPC [redacted]'s testimony was contradicted, including by SPC SR and SPC MM, (R. at 490, 524), appellant could not explain away the physical evidence supporting the specifications or his own words following the rape.

Although the statements made to SPC SR and SPC MM were material in some respects, the challenged testimony was not "particularly significant." *See, e.g., United States v. Dobson*, 63 M.J. 1, 20–21 (C.A.A.F. 2006) (finding two prior incidents of verbal abuse had minimal significance on the issue of self-defense under a prejudice analysis). Moreover, the quality of the evidence was weak

compared to other evidence presented at trial. Neither SPC SR nor SPC MM testified concerning the aggravated sexual contact specification, and their testimony about the sexual assault specification was cumulative with other evidence presented at trial. Simply put, because SPC [redacted] testified and was subject to cross-examination concerning the rape, SPC SR and SPC MM's testimony was of "no better quality than that which was already before the finder of fact." *United States v. Roberson*, 65 M.J. 43, 48 (C.A.A.F. 2007). The panel's ultimate decision indicates it conducted thoughtful review of all the evidence presented at trial and weighed SPC SR's and SPC MM's testimony appropriately. Indeed, the panel acquitted appellant of one specification of rape alleging appellant performed oral sex on SPC [redacted] that both SPC SR and SPC MM noted in their testimony about SPC [redacted]'s statements. (R. at 480–81, 516, 757).

In sum, the military judge properly admitted testimony from SPC SR and SPC MM under the excited utterance exception, and even if he erred, the error did not materially prejudice appellant's substantial rights. Article 59(a), UCMJ.

Assignment of Error II

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING THE SANE'S WRITTEN REPORT.

Additional Facts

Following the rape, SPC [redacted] took an ambulance to Madigan Army Medical Center for a medical examination. (R. at 377). On direct examination, SPC [redacted] testified about her understanding of the purpose of the exam:

> [Trial Counsel]: You mentioned you went in the ambulance to Madigan to get a SAFE exam; what's a SAFE exam?
>
> [SPC [redacted]]: It is an exam to see if the person that you had encounters with was clean so that there was [sic] no diseases and to see if there was [sic] any unfortunate injuries within this encounter.
>
> [Trial Counsel]: Were you worried about your health when you went to Madigan?
>
> [SPC [redacted]]: Yes, ma'am.
>
> [Trial Counsel]: Is that something that you have to consent to, to get that SAFE exam?
>
> [SPC [redacted]]: Yes, ma'am.
>
> [Trial Counsel]: Did you consent?
>
> [SPC [redacted]]: Yes, ma'am.

(R. at 377).

Subsequently, Ms. AS, the sexual assault nurse examiner (SANE) who conducted SPC [redacted]'s medical examination, testified concerning the purpose of obtaining the patient's medical history: "[A] patient [sic] history is going to affect what care you may or may not be able to provide for a patient. Any procedures that they may have had in the past, any allergies they might have, it effects what

care and treatment you are able to provide to the patient." (R. at 575). She further explained that "[t]he history of the assault is going to affect what treatment we are able, to provide for them. It is going to affect the rest of the examination and what we are going to be looking for." (R. at 576).

After receiving testimony from SPC [redacted] and Ms. AS, the government moved to admit the medical history. (R. at 578). Trial defense counsel objected on hearsay grounds and argued the medical exception under Mil. R. Evid. 803(4) did not apply. The military judge overruled the objection and stated:

> I'm going to admit it as a statement for medical diagnosis or treatment. In the direct examination of [SPC [redacted]] she did talk about going to the nurse to get medical treatment to find out if she had a sexually transmitted disease and that is what her focus was. I'm going to admit it into evidence.

(R. at 581). The military judge further explained his ruling: "I found that it was a statement that is made for and is reasonably pertinent to the medical diagnosis or treatment and it describes the medical history, past and present symptoms, and sensations." (R. at 602).

Ms. AS read SPC [redacted]'s history to the panel and then discussed the "head to toe examination." (R. 582–84). During the examination, Ms. AS identified two injuries, "a suction injury on the chest and . . . two contusions . . . on her left arm." (R. 585). Ms. AS took photographs of the two injuries and the injuries were documented in the report. (R. at 585–88; Pros. Ex. 19). A genital exam did not

reveal any injuries. (R. at 593). Ms. AS opined that her findings related to SPC [redacted]'s injuries were consistent with SPC [redacted]'s primary report. (R. at 594).

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) (marks and citation omitted). "This standard requires more than just [the appellate court's] disagreement with the military judge's decision." *United States v. Bess*, 75 M.J. 70, 73 (C.A.A.F. 2016) (citation omitted). Rather, a military judge abuses his discretion when his "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 104 (marks and citations omitted). A military judge's finding as to the declarant's state of mind in making a statement is a "preliminary question of fact under [Mil. R. Evid] 104(a). As such, it will be set aside 'only if clearly erroneous.'" *United States v. Kelley*, 45 M.J. 275, 280 (C.A.A.F. 1996) (quoting *United States v. Quigley*, 40 M.J. 64, 66 (C.M.A. 1994)).

Law

As a general rule, hearsay is inadmissible except as provided by the rules of evidence or an act of Congress. Mil. R. Evid. 802. Military Rule of Evidence 803(4) permits admission of "[s]tatements made for purposes of medical diagnosis

or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." In *United States v. Edens*, 31 M.J. 267 (C.M.A. 1990), the Court of Appeals for the Armed Forces (CAAF) established a two-part test for evaluating statements offered as exceptions to the hearsay rule under Mil. R. Evid. 803(4). "First the statements must be made for the purposes of 'medical diagnosis or treatment'"; and, second, the patient must make the statement "with some expectation of receiving medical benefit for the medical diagnosis or treatment that is being sought." *Edens*, 31 M.J. at 269 (internal citation omitted). As the CAAF observed, this rule "is premised on the theory that the declarant has an incentive to be truthful because he or she believes that disclosure will enable a medical professional to provide treatment or promote the declarant's own well-being." *United States v. Cucuzzella*, 66 M.J. 57,59 (C.A.A.F. 2008).

Argument

Contrary to appellant's argument, (Appellant's Br. 18–22), the military judge did not abuse his discretion in admitting the medical exam—including the historical narrative concerning the assault—because the statements were made for the purposes of medical diagnosis or treatment, and SPC [redacted] made them with an "expectation of receiving medical benefit." *Edens*, 31 M.J. at 269.

A. Specialist [redacted]'s statement was made for the purpose of medical diagnosis or treatment.

Although appellant challenges the military judge's ruling related to the first prong of the *Edens* test (whether the statement was for the purpose of medical treatment), appellant's argument conflates the first and second prongs of the test. (Appellant's Br. 20). Appellant states that SPC [redacted] "did not make the statement for the purpose of medical diagnosis or treatment," but then focuses on her intent in "going to the hospital" and "undergoing the exam." *Id.* However, the first prong of the *Edens* test focuses solely on the purpose for which the statements were being elicited by the testifying witness. *Edens*, 31 M.J. at 269 (quoting *United States v. Williamson*, 26 M.J. 115, 118 (C.M.A. 1988)) (noting "[i]t is incumbent upon the moving party to show . . . that the medical person was treating or diagnosing the patient . . ."). As part of this analysis, the position and status of the testifying witness is considered to determine whether the hearsay statement was for "medical diagnosis or treatment." *See, e.g., United States v. Welch*, 25 M.J. 23, 25 (C.M.A. 1987) (quoting Fed. R. Evid. 803(4) advisory committee's notes) ("'[T]he statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included'" as long as they are made for the purpose of seeking treatment.).

In this case, Ms. AS was "a registered nurse who ha[d] received additional training to respond to patients who come to the emergency department with reports

of sexual assault." (R. at 567). Ms. AS conducted the examination in the "emergency department" of the hospital. (R. at 574). With respect to the purpose for eliciting patient history, Ms. AS explained that the "history of the assault is going to affect what treatment we are able to provide for them" and "will affect the rest of the examination and what we are going to be looking for." (R. at 576). Because Ms. AS was a medical professional conducting an examination in an emergency room and elicited statements from SPC [redacted] concerning the history of the assault for the purpose of determining the appropriate manner to conduct the exam and subsequent treatment, the military judge properly found SPC [redacted]'s statement satisfied the first prong of the Eden's test as it was "made for and is reasonably pertinent to the medical diagnosis or treatment." (R. at 602).

B. Specialist [redacted]'s statement was made with the expectation of receiving medical benefit.

The subjective state of mind of the declarant is a key factor in deciding whether the second prong of the *Edens* test is met. Specifically, "'the state of mind or motive of the patient in giving the information . . . and the expectation or perception of the patient that if he or she gives truthful information, it will help him or her to be healed.'" *Kelley*, 45 M.J. at 279 (quoting *United States v. Faciane*, 40 M.J. 399, 403 (C.M.A. 1994)). Consequently, "judgments on this element may well hinge on the credibility assessment of the trial judge." *Cucuzzella*, 66 M.J. at 60. Here, the military judge did not abuse his discretion

when he determined that SPC [redacted] made statements to Ms. AS "with some expectation of receiving medical benefit for the medical diagnosis or treatment." *Edens*, 31 M.J. at 269.

Contrary to appellant's contentions, (Appellant's Br. 20–23), SPC [redacted] testified that she was "worried about [her] health" following the rape and that the purpose of the sexual assault examination was to determine "if there [were] any unfortunate injuries" and ensure there were "no diseases." (R. at 378). With this understanding, SPC [redacted] affirmatively consented to the medical exam. (R. at 377). Based upon this testimony, the military judge reasonably found SPC [redacted]'s focus was "going to the nurse to get medical treatment to find out if she had a sexually transmitted disease." (R. at 602).

Consequently, the military judge's credibility assessment and determination that SPC [redacted] had an expectation of receiving medical treatment was not clearly erroneous. *See Kelley*, 45 M.J. at 280 (quoting *Quigley*, 40 M.J. at 66) (A military judge's finding as to the declarant's state of mind in making a statement is a "preliminary question of fact under [Mil. R. Evid] 104(a). As such, it will be set aside 'only if clearly erroneous.'").

Assignment of Error III

WHETHER THE FACTS CHARGED IN SPECIFICATION 5 OF CHARGE I ARE INSUFFICIENT AS A MATTER OF LAW TO

SUPPORT A CONVICTION OF AGGRAVATED SEXUAL CONTACT.

Standard of Review

The question of whether a specification fails to state an offense is a question of law which courts review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A 1994)).

Law

The Sixth Amendment provides that an accused shall "be informed of the nature and cause of the accusation" against him. U.S. Const. amend. VI. Further, the Fifth Amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law," and no person shall be "subject for the same offence to be twice put in jeopardy." U.S. Const. amend V.

The military is a "notice pleading jurisdiction." *United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019) (citing *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011)). As such, the government must allege in each specification, "either expressly or by necessary implication every element of the offense, so as to give the accused notice of the charge against which he must defend and protect him against double jeopardy." *United States v. Turner*, 79 M.J. 401, 403 (C.A.A.F. 2020) (internal quotation marks and citation omitted); *see also* R.C.M. 307(c)(3).

"[W]hen [a] charge and specification are first challenged at trial . . . the wording . . . [is read] narrowly and will only adopt interpretations that hew closely

to the plain text." *United States v. Fosler*, 70 M.J. 225, 230 (C.A.A.F. 2011). A "flawed specification first challenged after trial . . . is viewed with greater tolerance than one which was attacked before findings and sentence." *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986). In situations where a specification is challenged after trial, the specification will be viewed with "maximum liberality." *United States v. Bryant*, 30 M.J. 72, 73 (C.M.A. 1990). The "maximum liberality" standard requires appellate courts to construe specifications in favor of validity when they are challenged for the first time on appeal. *Watkins*, 21 M.J. at 209.

"A specification that is susceptible to multiple meanings is different from a specification that is facially deficient." *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). Where a specification is susceptible to multiple meanings, "it is appropriate to consider" matters such as "proof at trial or to a rule referenced in the specification." *Id*. In other words, a specification is sufficient if the elements "may be found by reasonable construction of other language in the challenged specification." *United States v. Russell*, 47 M.J. 412, 413 (C.A.A.F. 1998).

A defective specification does not constitute structural error or warrant automatic dismissal. *United States v. Humphries*, 71 M.J. 209, 213 (C.A.A.F. 2012). Where defects in a specification are raised for the first time on appeal, dismissal of the affected charges or specifications will depend on whether there is

plain error. *Id.* In the context of a plain error analysis of defective indictments, "[the] [a]ppellant 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." *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011) (internal citations omitted).

The elements of the offense of aggravated sexual contact include: (i) the accused committed sexual contact upon or by another person; and (ii) that the accused did so with unlawful force. Articles 120(a) and (c), UCMJ; *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*] , pt. IV, ¶60.a.(d). The term "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." Article 120(g)(2), UCMJ; *MCM*, pt. IV, ¶60.a.(g)(2).

Argument

Appellant's claim fails because the specification alleged every required element either expressly or by implication, provided sufficient notice for appellant to defend himself, and protected him against double jeopardy.

A. This court should view the challenged specification with maximum liberality.

As a threshold matter, this court should apply the "maximum liberality" standard because appellant is first challenging the adequacy of the language in the specification on appeal. *Watkins*, 21 M.J. at 209. Although defense counsel made "a perfunctory" void for vagueness motion to dismiss the three abusive sexual contact specifications "understanding that they're following the model [specification] as now newly written," the basis of the motion challenged the second element; specifically, it challenged the language: "gratify the sexual desire of any person." (R. at 47–48). At no time prior to appeal did appellant contest that the language of the specification alleging the first element of the offense (that appellant committed sexual contact upon SPC [redacted]) failed to provide him notice of the charge against him. Thus, maximum liberality applies.

B. The specification is sufficient because it puts appellant on notice of the elements of aggravated sexual contact.

Regardless of whether this court applies the "maximum liberality" standard, appellant's argument fails because the specification expressly, or at the very least by necessary implication, puts appellant on notice of the elements of the offense. Importantly, the challenged specification is labeled as "Aggravated Sexual Contact" and states appellant did "touch the chest" of SPC [redacted] with his mouth and "with the intent to arouse or gratify the sexual desire of any person by using unlawful force." (Charge Sheet); *see Crafter*, 64 M.J. at 211 (noting that where a specification is susceptible to multiple meanings, "it is appropriate to consider"

matters such as "a rule referenced in the specification"). Appellant correctly notes that the specification includes the term "chest," which is not a term included in the definition of "sexual contact" or in the model specification. (Appellant's Br. 27). However, the term "chest" in this context is the functional equivalent of the term "breast," which is included in the definition of "sexual contact." *See* Merriam-Webster Online Dictionary, at https://www.merriam-webster.com/dictionary/chest (last visited 22 Aug. 2021) (defining the body part "chest" as "breast"); *see also United States v. Dunton*, NMCCA 201300148, 2014 CCA LEXIS 333, at *2 n.1 (N-M. Ct. Crim. App. 29 May 2014) (dismissing assignment of error without discussion alleging failure to state an offense in that the word "chest" alleged in wrongful sexual contact specifications did not fall within the statutory definition of sexual contact).

Furthermore, SPC [redacted]'s testimony clarified that appellant kissed her breast. *See Crafter*, 64 M.J. at 211 (noting that where a specification is susceptible to multiple meanings, "it is appropriate to consider" matters such as "proof at trial"). When the trial counsel asked, "When you say he was kissing your chest, where was he kissing on your chest?" SPTC [redacted] responded, "Uh, around my breast area, ma'am." (R. at 360). Finally, even if the terms "chest" and "breast" are qualitatively different, the breast is undoubtably part of the "chest" on a human body. Given that the only body part in the definition of "sexual contact" that is

synonymous with "chest" is "breast," the specification at the very least provides notice of the required element "by necessary implication." *Turner*, 79 M.J. at 403.

C. **There was no prejudice.**

Assuming arguendo the specification was defective, appellant failed to meet his burden to establish the error materially prejudiced a substantial right. In the plain error context, the defective specification alone is insufficient to constitute substantial prejudice to a material right. *Humphries*, 71 M.J. at 215. Appellate courts "look to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Id.* at 215–16.

In this case, the evidence presented in the government's case-in-chief placed appellant on notice of the government's theory. Specialist [redacted] testified appellant "started kissing down [SPC [redacted]'s] neck on onto [her] chest . . . around [her] breast area," and she told him to stop. (R. at 359–60). In addition, Ms. AS took a photograph of the injury which illustrated its location, and the photograph was admitted into evidence and published to the panel. (R. at 585–88; Pros. Ex. 19).

Moreover, the military judge correctly instructed the panel on the elements of the offense and the definition of "sexual contact." (R. at 677–78; App. Ex. LV, p. 5). Ultimately, after the panel was presented with the evidence at trial—including the photograph of the injury—the charge sheet, and the military judge's

instructions on the definition of "sexual contact," the panel properly convicted appellant of the specification. *See United States v. Sewell*, 76 M.J. 14, 19 (C.A.A.F. 2017) ("We presume, absent contrary indications, that the panel followed the military judge's instructions."). In other words, the panel did not convict appellant because of the language he now alleges is erroneous. *See Girouard*, 70 M.J. at 11 (internal citations omitted) (noting the plain error test requires that the error "materially prejudiced a substantial right of the accused").

Conclusion

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

JAIRED D. STALLARD
LTC, JA
Appellate Government
Counsel

FOR BRETT A. CRAMER
MAJ, JA
Branch Chief, Government
Appellate Division

CRAIG J. SCHAPIRA
LTC, JA
Deputy Chief, Government
Appellate Division

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

APPENDIX

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BURTON, RODRIGUEZ, and FLEMING
Appellate Military Judges

UNITED STATES, Appellee
v.
Cadet SHELDON D. JOHNSON
United States Army, Appellant

ARMY 20180527

Headquarters, United States Military Academy
Teresa L. Raymond, Military Judge
Colonel Erik L. Christiansen, Staff Judge Advocate

For Appellant: Captain Rachele A. Adkins, JA; Daniel S. Conway, Esquire (on brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Jonathan S. Reiner, JA; Captain Christopher T. Leighton, JA (on brief).

23 July 2020

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

BURTON, Senior Judge:

Appellant asserts the military judge erred in admitting the victim's statement that appellant sexually assaulted her as an excited utterance.[1] Although we agree the statement was not an excited utterance, we find no prejudice.[2]

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[1] A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of three specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920. The military judge sentenced appellant to two years of confinement and a dismissal. The convening authority approved the findings and sentence as adjudged.

(continued . . .)

BACKGROUND

Appellant and the victim, Cadet (CDT) TN, met at the United States Military Academy at West Point and became close friends, but were never romantic. One night, CDT TN texted appellant that he could come to her barracks room. Appellant had previously visited CDT TN's room on many occasions.

Appellant entered CDT TN's room and went directly to lay on her bed. Cadet TN asked appellant to move over so she could get in bed and go to sleep. As she laid down next to appellant, she could smell alcohol on his breath. Appellant started playfully poking CDT TN's stomach. She told him to stop and go to sleep. Appellant started rubbing CDT TN's thighs, butt, and the side of her breast. Cadet TN continued to tell him to stop. Appellant replied, "[j]ust pretend you're dreaming." As appellant moved his hand down her shorts, CDT TN testified that her body felt frozen and that her mouth felt dry preventing her from speaking. Appellant then penetrated CDT TN's vagina with his finger, tongue, and penis.

After appellant finished, CDT TN got up, grabbed her phone, and had the following text exchange with a friend, Second Lieutenant (LT) CB:[3]

> CDT TN: [LT CB] I'm freaking out like no shit.
> LT CB: Where are you?
> CDT TN: My room, I think I'm going to leave[.] I need to leave[.]
> LT CB: What? What is your room number?
> CDT TN: I'm going to leave[.]
> LT CB: Where you at?
> CDT TN: No you can't come here, I need to go[.]
> LT CB: Go where? Yes [I'm] here[.]
> CDT TN: Where is your room?

(. . . continued)

[2] We have given full and fair consideration to appellant's other assigned error, claiming that the evidence is legally and factually insufficient, and find it merits neither discussion nor relief.

[3] At the time of the offense, LT CB was a cadet.

Cadet TN then took a shower. A video captured CDT TN in the hallway entering and leaving the bathroom. In both videos CDT TN appears calm and composed. After showering, CDT TN went to her friend's, LT CB's, barracks room. Lieutenant CB was not there when she arrived, so CDT TN waited in the room with his roommate, LT GC.[4] Cadet TN testified that she was crying, "very distraught" and "very confused." When LT CB returned to the room, approximately thirty minutes later, CDT TN stated to LT CB and LT GC that appellant sexually assaulted her. The government introduced CDT TN's statement through both LT GC and LT CB. Defense counsel only objected during LT GC's testimony on the basis of hearsay. Initially, the military judge sustained the objection and stated the following, directed at trial counsel:

> In order to hit the excited utterance, you've got to prove that [CDT TN was] still under the tension and excitement of the situation. So, check and see after, because [LT GC] has said that there's [thirty] minutes at least that he sat there with her, what is her demeanor, what is the [sic] how does she seem, has she gotten better, or is she still kind of excited, what is the situation[?]

Trial counsel continued to ask foundational questions of LT GC. Lieutenant GC testified that when CDT TN first entered the room, she appeared "very confused," "shocked," "upset," and "crying." Approximately thirty minutes after she entered the room, when LT CB arrived, LT GC testified that CDT TN was "still distressed," "very retracted," "and not very talkative." Trial counsel then elicited CDT TN's statement from LT GC. The military judge overruled the defense objection without providing any factual findings or statements of law.

LAW AND DISCUSSION

A. Admissibility of Cadet TN's Statement under the Excited Utterance Exception

Appellant asserts the military judge erred in admitting CDT TN's statement to LT GC as an excited utterance.[5] We review a military judge's decision to admit or

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[4] At the time of the offense, LT GC was a cadet.

[5] It is unclear whether appellant also claims on appeal the military judge erred in admitting CDT TN's statement to LT CB as an excited utterance. Defense counsel did not object to this testimony at trial. Nevertheless, we considered this issue and find it does not rise to the level of plain error. *See United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019) (explaining that, where non-constitutional error is

(continued . . .)

exclude evidence for an abuse of discretion. *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003). "An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact." *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003). However, we afford military judges less deference if they fail to articulate the basis for their evidentiary ruling on the record, as the military judge failed to do in this case. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010). For non-constitutional errors, the Government must demonstrate that the error did not have a substantial influence on the findings. *McCollum*, 58 M.J. at 342.

"A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," is admissible as an exception to the general prohibition on hearsay. Military Rule of Evidence [Mil. R. Evid.] 803(2). "The implicit premise [of the exception] is that a person who reacts 'to a startling event or condition' while 'under the stress of excitement caused' thereby will speak truthfully because of a lack of opportunity to fabricate." *United States v. Jones*, 30 M.J. 127, 129 (C.M.A. 1990). In order for a hearsay statement to qualify as an excited utterance it must satisfy the following three-prong test: (1) the statement must be "spontaneous, excited or impulsive rather than the product of reflection and deliberation;" (2) the event prompting the utterance must be "startling;" and (3) the declarant must be "under the stress of excitement caused by the event." *United States v. Arnold*, 25 M.J. 129, 132 (C.M.A. 1987) (citations omitted).

In appellant's case, and affording the military judge little deference due to her failure to articulate the factual and legal basis of her ruling on the record, we find the military judge erred in applying the law regarding the first prong of the *Arnold* test. As we explain below, we find CDT TN's statement to LT GC was not spontaneous, excited, or impulsive for five reasons. First, CDT TN reflected on the sexual assault while showering. Second, she decided to tell a friend, LT CB. Third, CDT TN continued to reflect on the sexual assault while waiting at least thirty minutes in her friend's barracks room prior to telling him what happened. Fourth, CDT TN's statement was in response to a specific question from LT CB. Finally, CDT TN's statement to LT GC and LT CB is unreliable because it is inconsistent with her in-court testimony.

(. . . continued)
forfeited, it must amount to clear, obvious error, and there must be a reasonable probability that, but for the error, the outcome of the proceeding would have been different) (citing *Molina-Martinez v. United States*, 136 S.Ct. 1338, 1343 (2016)).

Immediately after the sexual assault, CDT TN texted LT CB to see if she could come to his barracks room. Cadet TN then went to take a shower. While showering, CDT TN testified that she felt "the emotion coming." She explained that she felt "kind of empty and betrayed," and she "couldn't see how someone she thought who was, like, my brother and that I had so much respect for could do something like that to me." Cadet TN's testimony indicates she immediately began reflecting upon what happened. This period of reflection diminished the trustworthiness of CDT TN's later statement to LT GC. *See United States v. Keatts*, 20 M.J. 960, 963 (A.C.M.R. 1985) (noting that a declarant's inability to "reflect and shade the truth" is key to the excited utterance rule).

After reflecting in the shower, CDT TN went to LT CB's room. Cadet TN testified that she sought out LT CB because she trusted him and felt he could help her. In other words, CDT TN decided to tell LT CB that appellant sexually assaulted her prior to arriving at LT CB's barracks room. Thus, according to CDT TN's own testimony, her statement to LT CB and LT GC was not spontaneous.

Cadet TN's statement continued to lose spontaneity once she arrived at LT CB's barracks room and waited for him for approximately thirty minutes with LT GC. There is a strong presumption against admitting a statement as an excited utterance when it is not made immediately after the startling event. *Jones*, 30 M.J. at 129. However, case law has not delineated a specific period of time; instead, "[t]he critical determination is whether the declarant was under the stress of or excitement caused by the startling event." *United States v. Feltham*, 58 M.J. 470, 475 (C.A.A.F. 2003) (citing *United States v. Lemere*, 22 M.J. 61, 68 (C.M.A. 1986). In appellant's case, by the time CDT TN spoke to LT CB and LT GC, she was no longer under the stress of or excitement caused by the sexual assault. Although CDT TN was upset, her upset state was not a result of the event itself, but rather a result of her reflection and processing of the event.[6]

When LT CB entered the room, he and LT GC went into the hallway to have a discussion. When they returned, they both sat with CDT TN and asked her "what was going on?" Lieutenant GC testified CDT TN stated she saw appellant in the hallway and he had been drinking. She tried to get him to return to his room however, they ended up in her room. "Eventually, they were both in her room . . . .

[6] As we find CDT TN's statement does not satisfy the first *Arnold* prong, we need not determine whether it met the third prong requiring the declarant be under the stress of excitement caused by the event at the time the statement is made. Nevertheless, we note that given CDT TN's testimony regarding her reflection and decision to seek out LT CB, we would also find the third prong is not satisfied.

[CDT TN] continued trying to get [appellant] to not be there, to go, and then she said she tried to fight, and she said she stopped trying to fight because it hurt."[7] Here, CDT TN's statement was not spontaneous, but rather made in response to a specific question from LT CB. *See Jones*, 30 M.J. at 129-30 (noting that when statements are made "in response to a question" rather than "the product of impulse or instinct," such circumstances weigh against finding an excited utterance).

Lastly, the inconsistencies between CDT TN's in-court testimony and her statement to LT GC and LT CB undermine the reliability of her statement. *See Untied States v. Bowen*, 76 M.J. 83, 88 (C.A.A.F. 2017) ("a statement that qualifies for admission under a firmly rooted hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability") (citations and internal quotation marks omitted). Specifically, on direct examination, CDT TN testified she was texting with appellant and he came to her room. In contrast, LT GC and LT CB testified that CDT TN told them she saw appellant in the hallway in the barracks, and then they went to her room. Further, CDT TN testified that she froze during the sexual assault. Whereas, LT GC and LT CB testified CDT TN told them she tried to fight, but "[s]topped trying to fight because it hurt." These inconsistencies tend to show the exciting influence dissipated by the time CDT TN made the statement to LT GC and LT CB.

Under the aforementioned circumstances, we are not satisfied that CDT TN's statement to LT GC was spontaneous. Therefore, it was an abuse of discretion to admit the statement.

B. Prejudice

Having found the military judge erred, we next determine whether appellant was prejudiced. "[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." UCMJ, art. 59(a). We evaluate the harmlessness of an evidentiary ruling by 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. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999).

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[7] Lieutenant CB's testimony, to which defense counsel did not object, was that CDT TN stated appellant "raped" her. Cadet TN stated appellant was intoxicated and she tried to help him in the barracks so that he would not get in in trouble. "Once they got to her room, [appellant] proceeded to try to have sex with her." Cadet TN told LT CB she tried to fight appellant off and that appellant told her, "This is going to happen . . . . [W]e're going to have sex."

Applying the *Kerr* factors, we find the military judge's error in admitting CDT TN's statement to LT GC harmless. The government's case was strong while the defense case was weak. Appellant testified at trial and made significant admissions corroborating CDT TN's testimony. Specifically, appellant testified that his relationship with CDT TN had never been romantic. Appellant admitted that when he started poking CDT TN, she told him to go to sleep. Appellant testified that, while penetrating CDT TN's vagina, at one point he "[e]xited from her vagina, and [appellant] asked [CDT TN] to move in a different position." Appellant admitted that he was concerned with CDT TN's response telling him, "[j]ust go to sleep, Sheldon, it is bad enough already." Appellant testified he was confused and thought it was due to his sexual performance. When CDT TN left the room to go take a shower, appellant immediately texted his friends he just "clapped" someone in his company. Appellant texted one of his friends, "I don't know what [CDT TN] is complaining about. She got the good dick." Appellant also sent the following lengthy message to his friends:

> [CDT TN] said I could come to her room at [0100], so I went and [played] with her, then started rubbing her everything. At first, she said, 'Just go to sleep, Sheldon,' in a seductive way, but I stopped for a minute and then started rubbing her again, and she didn't say nothing or move me or away from me, so then I started fingering her, and she was just moaning and shit. Then I pulled her pants down and ate her out and fucked, and she enjoyed every fucking moment of it and said my name and grabbed my hand and shit.

Appellant's admissions supported CDT TN's testimony, particularly that she told him to go to sleep when he first started touching her and she did not say anything specifically indicating that she wanted to have sex. Though CDT TN's statement to LT GC was material, it was cumulative with LT CB's testimony to which there was no objection. We also find the quality of the statement low because CDT TN's statement to LT GC differed from her in trial testimony. Essentially, CDT TN's excited utterance to LT GC could be deemed helpful to the defense case. Accordingly, we find no prejudice to appellant by the military judge's admission of CDT TN's statement to LT GC.

CONCLUSION

On consideration of the entire record, we hold the findings of guilty and the sentence, as approved by the convening authority, correct in law and fact. Accordingly, the findings of guilty and the sentence are AFFIRMED.

Judge RODRIGUEZ and Judge FLEMING concur.

FOR THE COURT:

JOHN P. TAITT
Chief Deputy Clerk of Court

United States v. Dunton

United States Navy-Marine Corps Court of Criminal Appeals

May 29, 2014, Decided

NMCCA 201300148

Reporter
2014 CCA LEXIS 333 *; 2014 WL 3510236

UNITED STATES OF AMERICA v. IAN R. DUNTON, CORPORAL (E-4), U.S. MARINE CORPS

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Subsequent History: Corrected Opinion Issued July 15, 2014.

Review denied by *United States v. Dunton, 2014 CAAF LEXIS 926 (C.A.A.F., Sept. 11, 2014)*

Review denied by *United States v. Dunton, 2014 CAAF LEXIS 1166 (C.A.A.F., Dec. 10, 2014)*

Prior History: [*1] SPECIAL COURT-MARTIAL. Sentence Adjudged: 28 September 2012. Military Judge: LtCol Elizabeth Harvey, USMC. Convening Authority: Commanding Officer, 7th Marine Regiment, 1st Marine Division (REIN), I Marine Expeditionary Force, MCAGCC, Twentynine Palms, CA. Staff Judge Advocate's Recommendation: Col D.K. Margolin, USMC.

Case Summary

Overview

HOLDINGS: [1]-On charges under Unif. Code Mil. Justice art. 120, *10 U.S.C.S. § 920* and Unif. Code Mil. Justice art. 128, *10 U.S.C.S. § 928*, the military judge erred by admitting under Mil. R. Evid. 404(b), Manual Courts-Martial (2012), testimony concerning the servicemember's sexual orientation because under Mil. R. Evid. 403, Manual Courts-Martial (2012), there was little probative value and there was potential prejudice arising from the sexual overtones associated with the "situation" alluded to, but the error was harmless because the defense made numerous references to the servicemember's sexual orientation; [2]-There was no unlawful command influence because the servicemember's partial acquittal of one of the three charged offenses for wrongful sexual contact cut against his argument that the Heritage Brief and its focus on sexual assault prevention unlawfully influenced the panel.

Outcome
Findings and sentence affirmed.

Counsel: For Appellant: LT Jennifer Myers, JAGC, USN.

For Appellee: LT Ian MacLean, JAGC, USN.

Judges: Before R.Q. WARD, J.R. MCFARLANE, K.M. MCDONALD, Appellate Military Judges. Judge McFARLANE and Judge McDONALD concur.

Opinion by: R.Q. WARD

Opinion

OPINION OF THE COURT

WARD, Senior Judge:

Officer members sitting as a special court-martial convicted the appellant, contrary to his pleas, of two specifications of wrongful sexual contact and one specification of assault consummated by a battery,[1] in violation of Articles 120 and 128, Uniform Code of Military Justice, *10 U.S.C. §§ 920* and *928*. The members sentenced the appellant to 12 months'

[1] Although **[*2]** charged with wrongful sexual contact, the members found the appellant guilty of assault consummated by a battery as a lesser included offense.

confinement, to forfeit $994.00 pay per month for 12 months, to be reduced to pay grade E-1, and to be discharged with a bad-conduct discharge. The convening authority approved the sentenced as adjudged and, except for the bad-conduct discharge, ordered it executed.

On appeal, the appellant alleges multiple assignments of error.[2] We find merit in the appellant's argument that the military judge erred by admitting over defense objection certain testimony concerning the appellant's sexual orientation. Under the circumstances of this case, however, we conclude that the error was harmless. We further find that no error materially prejudicial to the substantial rights of the appellant occurred. *Arts. 59(a)* and *66(c), UCMJ*.

Factual Background

The appellant, a noncommissioned officer and infantry squad leader, faced at trial three specifications of wrongfully committing sexual contact in the barracks upon three different members of his company. At the time of his offenses, two of the three Marines were members of his platoon; Corporal (Cpl) [P] and Lance Corporal (LCpl) [E]. A third victim, LCpl [B] lived in the same barracks and was a member of a different platoon within the company.

The first incident involved Cpl [P]. After a night of drinking out in town with the appellant, Cpl [P] returned to his barracks room and "passed out" in his rack. Later that evening, the appellant came into his room and sat down next to Cpl [P], who lay asleep in his bed. Cpl [P]'s roommate, Cpl [W], heard what he would later describe at trial as "a rustling noise" and then heard Cpl [P]'s voice saying "get your f[**]king hands out of my pants."[3] When Cpl [W] got out of his bed and went to look, he observed the appellant sitting next to a prone Cpl [P] with one hand down Cpl [P]'s pants. Cpl [W] then told the appellant to leave the room and he obliged. The next morning, Cpl [W] told Cpl [P] what happened. Although Cpl [P] later testified at trial that learning of the appellant's conduct "made him angry", he did not report the incident.[4]

Several days later, the incident with LCpl [B] occurred. The appellant, drunk, approached LCpl [B], also drunk, on the catwalk outside LCpl [B]'s barracks room. LCpl [B] then went into his room and went to bed. The next morning LCpl [B] awoke to find the appellant lying naked next to him in his bed with the appellant's hand under LCpl [B]'s shirt resting on his chest. LCpl [B] hurriedly got up and went into the bathroom. After showering and shaving, he came back into the room to find the appellant gone. LCpl [B] then went downstairs for morning formation. As several others had already seen the appellant lying in bed next to LCpl [B], word quickly spread among the platoon, and several other Marines at formation began teasing LCpl [B]. However, LCpl [B] did not report what had happened.

[*5]

The third incident occurred some months later, this time with LCpl [E]. That evening while LCpl [E] was sitting in his room playing a video game, the appellant knocked on the door. After LCpl [E] opened the door he sat back down and continued playing his video game. The appellant eventually came over and sat down on the arm of LCpl [E]'s chair, drinking a beer and watching. LCpl [E] testified at trial that the appellant leaned over, unzipped LCpl [E's] fleece shirt, placed his hand down LCpl [E]'s shirt and began rubbing LCpl [E's] bare chest.

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[2] (1) That Specifications 1 and 2 of the Charge, alleging wrongful sexual contact, by "touching the chest and touching the buttocks" of two male Marines failed to state an offense in that the word "chest" alleged in the specifications does not fall within the statutory definition of sexual contact under *Article 120(t)(2), UCMJ*;

(2) That the military judge erred by failing to *sua sponte* excuse two members for their expressed views on homosexuality;

(3) That the Commandant of the Marine Corps unlawfully influenced the panel through his remarks made at a brief conducted at Twentynine Palms ("Heritage **[*3]** Brief");

(4) That the military judge erred by admitted improper character evidence to prove the appellant's sexual orientation and such evidence inflamed the panel who were already predisposed against homosexual conduct;

(5) That the guilty finding for assault consummated by a battery is not legally and factually sufficient;

(6) That the military judge erred by denying his motion for release from pretrial confinement and erred in failing to award appropriate sentence credit pursuant to *United States v Suzuki, 14 M J 491 (C M A 1983)*, raised pursuant to *United States v Grostefon, 12 M J 431 (C M A 1982)*; and

(7) That cumulative error at trial warrants relief.

[3] Record at 294-95.

[4] *Id* at 316-17.

LCpl [E] then described how after he removed the appellant's hand and leaned forward, the appellant "shoved" his hand down the back of LCpl [E]'s sweatpants and grabbed his buttocks.[5] LCpl [E] abruptly stood up and after telling his roommate he needed to go do laundry, he left the room. LCpl [E] then went to find the duty noncommissioned officer (DNCO) to get the appellant out of his room. Approximately five minutes later the DNCO came to the room and told the appellant to leave.

After speaking with the DNCO, LCpl [E] told Cpl [W] what happened. Cpl [W] and LCpl [E], along with two others, Cpl [S] and Cpl [P], then went to the duty hut to report the incident in the duty logbook. On the way to the duty hut or shortly after arrival, the group encountered the appellant. Accounts of what happened next differed at trial. What is clear is that an altercation ensued during which Cpl [P] punched the appellant in the face and one other Marine took the appellant to the ground in a "full mount" hold. Following this scuffle, **[*6]** LCpl [E] reported the earlier events of the evening.

An investigation ensued soon after LCpl [E] reported the appellant's conduct. Along with LCpl [E], Cpl [P] and LCpl [B] also reported unwelcome physical contact from the appellant that occurred months earlier. After charges were referred to trial, several additional Marines also reported similar unwelcome physical contact from the appellant.[6] One of these additional Marines was LCpl [T]. He alleged that one evening the appellant approached him while LCpl [T] was standing on the catwalk outside his barracks room. He described the appellant as being very drunk. The appellant came up and put his arm around LCpl [T]'s shoulder in a manner that LCpl [T] later described at trial as "awkward."

During his testimony, LCpl [T] also described how, in an effort to get away from the appellant, he went into his barracks room and sat down in a chair in front of his TV and started playing a video game. He testified that the appellant followed him into the room and sat down on the floor next to him. Moments later, the appellant placed his head on LCpl [T]'s leg and began rubbing his face along the top of LCpl [T]'s thigh. LCpl [T] testified **[*7]** that next the appellant began "passionately kissing" LCpl [T]'s forearm at which point LCpl [T] jumped up and exclaimed "What the f**k!" The appellant then left the room.

The appellant's sexual orientation and the topic of homosexuality in the military first appeared at trial as a topic addressed in supplemental member questionnaires requested by individual military counsel (IMC) and approved by the military judge.[7] During group and individual *voir dire*, the military judge and counsel for both sides also discussed the issue of homosexuality with the members.[8] During the Government's case-in-chief, the trial counsel avoided any overt reference to the appellant's sexual orientation; however, the defense opted for a different approach.

In his opening statement, IMC made the following comments alluding to the appellant's sexual orientation and a motive by the victims for fabricating their allegations:

> Gentlemen, how do you make a mountain out of a molehill? You just throw dirt on it. Today you're going to hear testimony about Corporal Dunton **[*8]** and that when he gets drunk, he gets overly friendly. He's a bubble breaker. Means that he invades your personal space. Now, what you're not going to hear is that Corporal Dunton is a criminal; that Corporal Dunton committed any sexual contact, any sexual assault on anybody.
>
> Now, let's look at what happened on the night of February 27th of this year. It was a little molehill that began with [LCpl E]. That night, the members - later that night, is when the real crime occurred. That was when [LCpl P], [Cpl W] and [Cpl S] committed a hate crime on Corporal Dunton. When Corporal Dunton was coming up, they punched him twice in the face.
>
> . . . .
>
> Now, don't let the government try to tell you that this was self-defense or protection of a third-party. You need to see it for what it is. It was a hate crime. If this were - - if the same incident occurred in, say, Alabama and it was three white guys beating up a black guy for the same reason, that would be a hate crime.
>
> . . . .
>
> [LCpl B] became a butt of the joke for the whole platoon. And they would always kid him about . . . being caught in the same bed with Corporal Dunton. And he didn't like that. Because when

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[5] *Id* at 418.

[6] Appellate Exhibit XVII at 13-14, 31-32, 34-43.

[7] AE VI, Defense Motion for Appropriate Relief; AE XXIV, Members Questionnaires; Record at 166.

[8] Record at 232-74.

> Corporal Dunton was under the microscope **[*9]** and he was the fag of the platoon, anybody who came up - - whose name was associated with him, also would take it with the same butt of the joke. . . .
>
> So to take the heat off of himself to quit being the butt of the joke of the platoon, [LCpl B] said, you know what, what happened to me there was nothing consensual or anything about that night. That was a sexual assault. It wasn't until that night that all of a sudden he said, hey, I was sexually assaulted as well to deflect the attention off of himself (sic).

Record at 288-90.

During closing argument, IMC returned to this theme, arguing that while the appellant may be perceived as "creepy" by others, the "victims" brought their allegations forward as a means of deflecting attention and accountability for assaulting the appellant, or in response to incessant teasing within the platoon and being perceived as homosexual.[9]

Analysis

1. **[*10]** Relevance of the Appellant's Sexual Orientation, Probative Value and Attendant Prejudice

Before trial, the Government sought to admit under MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) evidence indicating that the appellant had a sexual interest in men. This evidence consisted of, *inter alia*, LCpl [T]'s testimony that the appellant followed him into his barracks room, then the appellant laid his head down on LCpl [T]'s leg and began "passionately kissing" LCpl [T]'s forearm. Following a defense motion in *limine*,[10] the military judge ruled that the appellant's interaction with LCpl [T] was sufficiently similar to the charged offenses involving LCpl [P], LCpl [B] and LCpl [E], and therefore probative of the appellant's "intent to gratify his sexual desire." Furthermore, she concluded, "[t]he probative value of this evidence [was] not substantially outweighed by the danger of unfair prejudice."[11] The Government subsequently offered this testimony at trial.

During its case-in-chief the Government also **[*11]** called LCpl [B], who testified concerning his encounter with the appellant. He testified that he was standing next to LCpl [J] on the catwalk outside his barracks room one evening when the appellant approached them, drunk and stumbling. LCpl [B] explained that he went inside his room and his next recollection was when he woke up the next morning in his rack with the appellant lying naked beside him, the appellant's hand resting on LCpl [B]'s chest.

After LCpl [B] stepped down from the witness stand, the trial counsel next called LCpl [J]. LCpl [J] explained that he was standing next to LCpl [B] outside LCpl [B]'s barracks room that evening and he also saw the appellant approach, drunk and stumbling. Once he saw the appellant, however, he decided to leave and go to his own room. Despite LCpl [B]'s testimony placing the appellant drunk and outside LCpl [B]'s room, the military judge permitted the trial counsel to elicit the following testimony over defense objection:[12]

> TC: Okay. Lance Corporal [J], just to remind you of my question before we broke there. You said that you decided to leave when you saw the [appellant] coming down the catwalk?
>
> WIT: Yes, sir.
>
> TC: Why?
>
> WIT: Corporal Dunton's prior **[*12]** activities or prior knowledge of him. He would get uncomfortably close to you, sir. And I just didn't want to make it a situation.

Although LCpl [J] did not elaborate on his meaning of "a situation," the trial counsel continued to explore the innuendo:

> TC: Why did you tell [LCpl B] that he should go back to his room to —
>
> WIT: I told [LCpl B] to go back to his room to stop anything from happening, sir.
>
> TC: At this point, did you go back to your room?
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> WIT: I did, sir.
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> TC: From the point you went back to your room, *do you know anything else about the — about the*

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[9] In reference to the incident with LCpl [B], IMC argued that "It got spread around. The whole company heard . . . [t]hat morning after that incident, spread like wild fire. And now who's the butt of everybody's jokes? And now who's perceived as being the homo, like Corporal Dunton? Lance Corporal [B]." Record at 555.

[10] AE XVI.

[11] Record at 168; AE LXXIII, Court Ruling on Defense Motion in Limine to Exclude Evidence under M.R.E. 404(b), at 5-6.

[12] IMC objected on relevance grounds and improper character evidence under MIL. R. EVID. 404(b).

[LCpl B] situation?

WIT: *Not anything personally, but I heard things around.*

Record at 373-74 (emphasis added).

a) *Mil. R. Evid. 404(b) and the Uncharged Misconduct Involving LCpl [T]*

As the appellant objected to this evidence at trial, we review for an abuse of discretion. *United States v. Staton, 69 M.J. 228, 230 (C.A.A.F. 2010)*. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith"; however, such evidence may "be admissible for other purposes, such as **[*13]** proof of motive, opportunity, intent, preparation, plan, knowledge, [or] identity . . . ." MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). To be admissible under MIL. R. EVID. 404(b), evidence of uncharged misconduct must satisfy the three-pronged test enumerated in *United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989)*.[13]

We begin our analysis by underscoring the importance of clearly articulating the theory of relevance under MIL. R. EVID. 404(b). Here, the Government initially offered LCpl [T]'s testimony to show intent and a "common scheme [] that when [the appellant] gets drunk, [he] finds a junior Marine or a Marine equal to him, somebody that he feels that he can get close to, and encroaches on their physical space in his intoxicated state, and progressively **[*14]** increases his touching with the intent to sexually gratify himself." Record at 144. The military judge agreed, in large part, with the theory of intent mainly due to the high degree of similarity between the conduct involving LCpl [T] and the charged offenses. Appellate Exhibit LXXIII at 5-6. In articulating her rationale, she distinguished the conduct involving LCpl [T] from other conduct offered by the Government as proof of sexual intent.

On the third *Reynolds*prong, the military judge concluded that "this probative value [of intent] is not outweighed by the danger of unfair prejudice to the [appellant]" and that the appellant's uncharged conduct with LCpl [T] was "prejudicial, to be sure, but not unfairly so." *Id.* at 6. As she conducted her MIL. R. EVID. 403 balancing on the record, we afford her decision great deference and only determine whether therein lies a "'clear abuse of discretion.'" *United States v. Tanksley, 54 M.J. 169, 176-77 (C.A.A.F. 2000)* (quoting *United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000)*). As she differentiated between the probative value and attendant prejudice, and distinguished this evidence from other uncharged acts offered by the Government, we **[*15]** afford her great deference and conclude that there lies no clear abuse of discretion.

b) *Probative Value and Attendant Prejudice of LCpl [J]'s Testimony*

In evaluating the testimony of LCpl [J], however, we are not so convinced. In short form, there existed no evidentiary value in his explaining his reason for leaving the scene when the appellant approached him and LCpl [B] on the catwalk. Anything beyond corroborating LCpl [B]'s testimony placing the appellant outside LCpl [B]'s barracks room was of little value.

By exploring LCpl [J]'s desire to "avoid a situation" with the appellant, LCpl [J]'s testimony improperly bolstered LCpl [B]'s testimony of what happened later with unnecessary innuendo and speculation. Explaining "why [LCpl J] left" was not material to any controversy in the case. Defense counsel never disputed that the appellant entered LCpl [B]'s barracks room that evening after LCpl [J] left. With little, if any, probative value and the potential prejudice arising from the sexual overtones associated with the "situation" alluded to by LCpl [J], we conclude that the military judge erred in allowing this line of testimony. Despite recent changes in the military concerning homosexuality, **[*16]** the subject remains controversial, a fact borne out by the military judge's excusal of two members following *voir dire* based on their views of the subject.

Having found error, we turn to the subject of prejudice. This was a case involving multiple allegations of unwanted sexual contact by a male accused upon other males. The issue of the appellant's sexual orientation was placed in front of the members before trial through the supplemental questionnaires. The Government's case relied on numerous witnesses' descriptions of the appellant passed out and naked in the rack with other Marines. Even the defense made numerous references to the appellant's sexual orientation during opening statement and closing argument. Consequently, the innuendo arising from LCpl [J]'s testimony likely caught

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[13] The test looks to the following three factors: 1) does the evidence reasonably support a finding by the court members that the 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) is the "probative value . . . substantially outweighed by the danger of unfair prejudice?" *Id at 109*.

no one by surprise. Finally, the members found the appellant not guilty of the charged offense involving sexual contact with LCpl [B] and guilty of the lesser offense involving assault consummated by battery. This cuts against the appellant's argument on appeal that the panel improperly responded to the insinuation of LCpl [J]'s testimony.

Consequently, to the extent that we find error in the military **[*17]** judge's ruling, we are convinced that the appellant suffered no material prejudice.

2. The Appearance of Unlawful Command Influence, Curative Measures and Resulting Prejudice

In another assignment of error, the appellant argues that the Commandant of the Marine Corps (CMC) unlawfully influenced the tribunal through his focus on the issue of sexual assault during his "Heritage Brief" tour, his White Letters 2-12 [14] and 3-12 [15] and the ensuing media coverage of both.[16] Although the military judge recognized the appearance of unlawful influence, he argues she erred by failing to revisit the issue following the impanelling of the members. Appellant's Brief of 25 Sep 2013 at 24-26.

Following a defense pretrial motion to dismiss for unlawful command influence (UCI),[17] the military judge found the appearance of UCI sufficiently raised to shift the burden to the Government. She then concluded that the Government met its burden of proving **[*18]** beyond a reasonable doubt that the appearance of UCI would not prejudice the appellant. Record at 167. In summarizing a RULE FOR COURTS-MARTIAL 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) conference with counsel wherein she notified them of her ruling, the military judge explained her ruling as follows:

> At this point, in the case, prior to members being seated, the defense's motion to dismiss is denied. However, without the identified members, the court could not make a determination concerning the effect of apparent UCI on them. The court has already allowed for the expanded questionnaire . . . . Additionally, the court intends to allow individual voir dire on the topic of the Heritage Brief and any related training or command discussions on the treatment of sexual assault cases.
>
> The liberal grant mandate will allow for liberal granting of defense challenges for cause on this matter.

Record at 167-68. The military judge then offered to provide White Letter 3-12 to any member unaware of the letter in addition to any instruction on its content desired by the parties. Finally, the military judge concluded with the following:

> Once members are seated, the defense can reevaluate **[*19]** and if it feels that actual or apparent UCI will still prejudice the proceedings, it may renew its motion.

Id. at 168.

The appellant now contends that the military judge erred by "failing to readdress the [defense motion to dismiss] after members were seated, because her initial ruling was incomplete." Appellant's Brief at 26.[18] The Government responds by arguing that regardless of what transpired at trial, on appeal the appellant has failed to meet his burden of providing "some evidence" that his trial was unfair and that the unlawful influence was the cause. Government Answer of 7 Jan 2014 at 31-32 (citing *United States v. Biagase, 50 M.J. 143, 151 (C.A.A.F. 1999)*.

We review allegations of UCI *de novo.* *United States v. Salyer, 72 M.J. 415, 423 (C.A.A.F. 2013)*. At trial, the defense must provide "some evidence" of unlawful influence, specifically "facts which, if true, constitute unlawful command influence, and that the alleged

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[14] AE XII at 45-47.

[15] AE XIII at 35.

[16] We recently addressed in detail the CMC's Heritage Brief, the ensuing media coverage, and White Letters 2-12 and 3-12 in *United States v Howell, No 201200264, 2014 CCA LEXIS 321, unpublished op (N M C Ct Crim App 22 May 2014)*.

[17] AE XII.

[18] The appellant also contends that the military judge failed to rule on the issue of actual UCI citing comments made by the senior member of the panel to the defense counsel following trial. Appellant's Brief at 30-32; AE LXIX; Record at 624. We disagree. We find no evidence of any actual UCI simply because a member of the panel thought it unfair that the Government detailed more senior judge advocates to the prosecution over more junior attorneys representing the appellant. Based on our view of these comments, assuming **[*20]** that they are accurately represented in the record, the senior member applied his own judgment in deciding the case rather than succumbing to any of the pressures or influence identified by the defense in its UCI motion at trial. Having reviewed the record, we find no evidence that the appellant met his initial burden of providing "some evidence" of actual UCI either at trial or on appeal.

unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *Biagase, 50 M.J. at 150* (citations omitted).

On appeal, however, the appellant carries the burden of providing some evidence that the proceedings were unfair and the unlawful influence was the cause. *United States v. Ayers, 54 M.J. 85, 95 (C.A.A.F. 2000)*. The quantum of evidence required to raise UCI on appeal remains the same; "some evidence" more than mere allegation or speculation. *Id.*

Once the appellant **[*21]** makes this initial showing, whether at trial or on appeal, the burden shifts to the Government. The Government may meet this burden "(1) by disproving the predicate facts on which the allegation of unlawful command influence is based; (2) by persuading the military judge or the appellate court that the facts do not constitute unlawful command influence; (3) if at trial, by producing evidence proving that the unlawful command influence will not affect the proceedings; or (4), if on appeal, by persuading the appellant court that the unlawful command influence had no prejudicial impact on the court-martial." *Biagase, 50 M.J. at 151*. The quantum necessary remains proof beyond a reasonable doubt. On appeal, we must be must be convinced beyond a reasonable doubt that the unlawful command influence did not exist or that it did not affect the findings or sentence of the court-martial. *Id.*

The test for the appearance of UCI is objective. "We focus upon the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public." *United States v. Lewis, 63 M.J. 405, 415 (C.A.A.F. 2006)*. An appearance of UCI arises "where an objective, disinterested **[*22]** observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Id.* On appeal, we view whether the "proceedings appeared to be unfair and that the unlawful command influence was the cause of the appearance of unfairness." *Ayers, 54 M.J. at 95*.

Assuming *arguendo* that the appellant satisfied his burden on appeal of raising the issue of an appearance of unlawful command influence, we are convinced beyond a reasonable doubt that any such appearance did not affect the findings or sentence of the court-martial. *Salyer, 72 M.J. at 423*.

At the time of her ruling, the military judge did not have the benefit of the members' supplemental questionnaires, *voir dire*, or challenges. She ruled that the Government met its burden of demonstrating beyond a reasonable doubt that the appearance of UCI would not prejudice the appellant at trial. However, that ruling was coupled with the additional measures of supplemental questionnaires, extensive *voir dire*, liberal challenges and potential instruction on White Letter 3-12.[19] While the appellant characterizes the ruling as "ambiguous and confusing",[20] we conclude that the military judge **[*23]** conditioned her ruling on those curative measures she identified at the time of her ruling.

Based on our *de novo* review of the record, we conclude that "an objective, disinterested observer, fully informed of all the facts and circumstances, would [not] harbor a significant doubt about the fairness of the proceeding." *Lewis, 63 M.J. at 415*. The members provided comprehensive answers on the issues of the CMC's Heritage Brief, the ensuing media attention, sexual assault, **[*24]** homosexuality, and the military's repeal of DADT. AE XXIV; Record at 232-77. Furthermore, the military judge conducted comprehensive general *voir dire* addressing the topics of the Heritage Brief, sexual assault prevention and related issues. Record at 215-18. Each member was questioned again in more depth during individual *voir dire. Id.* at 232-76. The military judge granted all three defense challenges for cause, citing the liberal grant mandate on two, despite the fact that the defense raised no challenge against any member for their responses concerning the Heritage Brief. *Id.* at 277-79.

Once members were impaneled, the defense opted not to renew its UCI motion despite the military judge's earlier invitation to do so. The responses from those impaneled, whether from the supplemental

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[19] When discussing appropriate questions for *voir dire*, both IMC and trial counsel recommended that the military judge not instruct potential members on 3-12 who were unaware of the letter. Record at 184-87. Both parties agreed the better approach to identifying member's views on sexual assault and the Heritage Brief would be better served without reference to 3-12. The military judge agreed and did not instruct any member on the contents of White Letter 3-12. Of the five members who were impaneled, only one indicated on his supplemental questionnaire that he was unaware of 3-12. AE XXIV at 8. But he also indicated he had not attended or heard the Heritage Brief and had not read White Letter 2-12. *Id*

[20] Appellant's Brief at 32.

questionnaires, the military judge's general *voir dire*, or from individual *voir dire*, give no appearance of unlawful influence. Last, the member's partial acquittal of one of the three charged offenses for wrongful sexual contact cuts against the appellant's argument that the Heritage Brief and its focus on sexual assault prevention unlawfully influenced the panel.

Consequently, we conclude beyond a reasonable **[*25]** doubt that "the disinterested public would now believe that [the appellant] received a trial free from the effects of unlawful command influence." *Lewis, 63 M.J. at 415*.

3. Remaining Assignments of Error

We have reviewed the appellant' remaining assignments of error and, after reviewing the record and applying the appropriate standard of review, conclude that they are without merit. *United States v. Clifton, 35 M.J. 79, 81 (C.M.A. 1992)*.

Conclusion

The findings and the sentence as approved by the convening authority are affirmed.

Judge McFARLANE and Judge McDONALD concur.

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