IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Specialist (E-4)
TONEY E. HENDERSON, JR.,
United States Army,
Appellant

BRIEF ON BEHALF OF APPELLEE

Docket No. ARMY 20210543

Tried at Joint Base Lewis-McChord, Washington, on 6 May, 9 June, and 27 September–2 October 2021, before a general court-martial convened by the Commander, 7th Infantry Division, Lieutenant Colonel Larry A. Babin, Military Judge, presiding.

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

Assignment of Error I[1]

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION UNDER MIL. R. EVID. 413 BY ALLOWING THE GOVERNMENT TO INTRODUCE EVIDENCE OF A CASE WHERE APPELLANT WAS ACQUITTED.

Assignment of Error II

WHETHER THE PROSECUTORIAL MISCONDUCT BY MISSTATING FACTS ABOUT THE MIL. R. EVID. 413 EVIDENCE CAUSED APPELLANT TO RECEIVE AN UNFAIR TRIAL.

[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.

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Statement of the Case

On 2 October 2021, an enlisted panel sitting as a general-court martial, convicted appellant, contrary to his pleas, of one specification of rape of a child, one specification of sexual assault of a child,[2] one specification of assault consummated by battery, one specification of disorderly conduct, one specification of indecent conduct, and one specification of abusive sexual contact, in violation of Articles 120b, 128, 134, 120, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920b, 928, 934, 920 (2019).[3] (R. at 1624; Statement of Trial Results). The military judge sentenced appellant to be reduced to the grade of E-1, to be confined for 180 months, and to be dishonorably discharged from the service. (R. at 835; Statement of Trial Results). On 9 November 2022, the convening authority denied appellant's request to defer reduction in grade and to defer and waive automatic forfeitures; the convening authority took no action on the adjudged findings and

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[2] The military judge granted the government's motion to conditionally dismiss Specification 3 of Charge I, "subject to Specification 2 of Charge I surviving appellate review." (R. at 1633).

[3] The Specification of Charge II and the Specification of Additional Charge IV were withdrawn and dismissed by the convening authority prior to trial. (R. at 245; Charge Sheet; App. Ex. LXX). When the government rested after its case-in-chief, appellant made a motion under Rule for Courts-Martial [R.C.M.] 917 for a finding of not guilty for Specification 1 of Charge I and the Specification of Charge V. (R. at 1066–67). The military judge, sua sponte, also raised an R.C.M. 917 issue for Specifications 1 and 2 of Charge IV. (R. at 1072). The military judge entered a finding of not guilty for Specification 1 of Charge I and Specifications 1 and 2 of Charge IV, but denied appellant's motion for the Specification of Charge V. (R. at 1079–80, 1086).

sentence. (Action). On 10 December 2021, the military judge entered judgment. (Judgment).

Statement of Facts

A. Appellant assaulted his wife, [redacted].

On 14 February 2019, appellant shoved his wife, [redacted], against the wall, slapped her in the face, and after picking her up, threw her down on the ground over their couch. (R. at 1014–22). Their infant son was present when appellant assaulted [redacted]. (R. at 998, 1020; Pros. Ex. 3, p. 1, 7). When the local police department arrived, the police officers documented [redacted]'s injuries and recorded [redacted]'s statement. (R. at 1014–28).

B. Appellant raped a fifteen-year-old child, whom he met on Facebook.

On 5 April 2019, appellant reached out to [redacted], who was fifteen years old at the time, through Facebook Messenger.[4] (R. at 646–47). Appellant and [redacted] had a few conversations, one of which involved [redacted] telling appellant that she was fifteen years old. (R. at 647–48). On 5 May 2019, appellant messaged [redacted], told her he had a bottle of Hennessey, and that he wanted to meet her. (R. at 648–49). Appellant picked [redacted] up from her friend's house in his car and handed her a full bottle of Hennessey, which [redacted] started to "chug[]." (R. at 660–61). Appellant drove them to his apartment parking lot, where they drank and listened to music.

[4] Facebook Messenger allows Facebook users to message each other. (R. at 647).

(R. at 663). The next thing [redacted] remembered was being in the backseat of appellant's car on her stomach, and appellant raping her from behind as she told him "no" and "stop." (R. at 664–65). Appellant flipped [redacted] over on her back and continued to rape her until someone walked by the car. (R. at 678, 680–81). Appellant then pulled up his pants, went to the driver's seat of his car, and drove [redacted] back to her friend's house. (R. at 681, 683).

C. Appellant sexually abused [redacted], whom he first contacted through Facebook when she was fifteen years old.

On 2 September 2018, when [redacted] was fifteen years old, appellant reached out to her through Facebook Messenger. (R. at 854–55, 857–58; Pros. Ex. 11). In early February 2020, when [redacted] was turning seventeen years old, appellant and [redacted] exchanged phone numbers. (R. at 864–65). During the course of their texting, appellant sent [redacted] videos of him having sexual intercourse with other females. (R. at 866–67; Pros. Ex. 1).

On 12 February 2020, [redacted] told appellant that she was sick. (R. at 869). Appellant responded that he would take care of her and give her medicine. (R. at 869). Appellant drove his car to the side of [redacted]'s house, and [redacted] and appellant sat in his car. (R. at 871). Appellant offered her pills and Hennessey, which [redacted] refused. (R. at 872–73). While [redacted] talked, appellant kept touching her shoulder and inner thigh. (R. at 871). [redacted] told appellant that she was "just trying to get to know [him] and stuff like that. I'm not trying to do any of that stuff." (R. at 871).

Appellant, angry at being rebuffed, tried to kiss [redacted]. (R. at 871–72). When [redacted] kept telling him "no," appellant became irritated and would not say anything. (R. at 871). Appellant then tried to get [redacted] into his backseat by having her lay down in the backseat, but [redacted] refused. (R. at 873). Subsequently, appellant told [redacted] that he was in the Army and pulled out a gun from his backseat. (R. at 873). [redacted] became uncomfortable, made an excuse that she had to go inside to grab something, and left appellant in his car. (R. at 875).

Additional facts are incorporated below.

Assignment of Error I

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION UNDER MIL. R. EVID. 413 BY ALLOWING THE GOVERNMENT TO INTRODUCE EVIDENCE OF A CASE WHERE APPELLANT WAS ACQUITTED.

Additional Facts

A. Appellant was previously acquitted for raping [redacted].

In the fall of 2016, [redacted] met appellant when she was eighteen years old. (R. at 767–68). After their initial meeting, they exchanged their Snapchat[5] contact information; appellant and [redacted] messaged each other and hung out together a few times. (R. at 769). On 1 November 2016, while appellant was driving [redacted] to her

[5] Snapchat is a social media platform used to take and send pictures and messages to other Snapchat users. (R. 769).

car, appellant asked to kiss her multiple times. (R. at 772–73). Although her initial reaction was "no," she eventually agreed to kiss him once they arrived back at her car. (R. at 773). While they were still in appellant's car, the kissing led to appellant giving [redacted] consensual oral sex, with appellant in the driver seat and [redacted] in the front passenger seat. (R. at 773–76).

When [redacted] consented to the oral sex, she made it clear that she did not want to have penetrative sex with him; she had also made her boundaries clear the previous times they had hung out together. (R. at 773). However, as appellant started performing oral sex on [redacted], he started to get aggressive by using his forearm to hold down her abdomen. (R. at 775). Appellant then "snatched" [redacted] from the front passenger seat and moved her to the middle console, between the driver and front passenger seat, so that her stomach was on the console with her head facing the rear end of the vehicle. (R. at 776). Appellant positioned himself behind her legs, which was facing the front side of the vehicle, held down her arms, and rubbed his penis on her vagina despite [redacted] telling him "no." (R. at 777). Appellant ignored her protests and told her, "Oh, you look so good today. Like, what did you think was going to happen?" (R. at 778). After appellant rubbed his penis against [redacted]'s vagina, appellant anally penetrated her and continued to penetrate her despite [redacted] telling him "no" and "stop." (R. at 778–79).

Once appellant eventually stopped, [redacted] ran to her car. (R. at 779). Appellant also ran towards her, wedged himself between [redacted] and her car door, and asked her, "I don't get a hug?" (R. at 780). [redacted] pushed appellant away, went inside her car, locked the door, and drove away. (R. at 780). As [redacted] drove away, appellant called and texted her multiple times; [redacted] responded with, "I told you no," and "No don't ever contact me ever again." (R. at 782; Pros. Ex. 9, p. 1). Later that evening, [redacted] sought medical attention. (R. at 780–81).

In May 2018, appellant was court-martialed for raping and forcibly sodomizing [redacted].[6] (App. Ex. XX, p. 2). Appellant was acquitted of all charges at his court-martial. (R. at 155; App. Ex. XX, p. 2).

B. The military judge partially granted appellant's motion to exclude the government's Military Rule of Evidence 413 evidence.

Before trial, the government provided notice of its intent to introduce evidence under Military Rule of Evidence [Mil. R. Evid.] 413. (App. Ex. XXI, p. 3). The Mil. R. Evid. 413 notice included evidence of uncharged sexual offenses against [redacted], as well as the sexual offenses against [redacted]. (App. Ex. XXXVII, pp. 9–10, 14). Appellant opposed the admission of this evidence, and on 9 June 2021, the military judge heard oral argument. (App. Ex. XX; R. at 20, 153–88). On 5

[6] Appellant was also charged with providing a false official statement to law enforcement when he told them that anal sex did not occur despite DNA evidence to the contrary. (App. Ex. XX, p. 2; App. Ex. XXXVII, p. 3).

September 2021, the military judge rendered a six-page written ruling, which granted in part and denied in part appellant's request to exclude the Mil. R. Evid. 413 evidence. (App. Ex. LXII). Specifically, the military judge ruled that the Mil. R. Evid. 413 evidence against [redacted] was admissible, whereas the evidence against [redacted] was inadmissible. (App. Ex. LXII, p. 6).

C. The military judge provided limiting instructions at trial.

At trial, the military judge provided the following limiting instruction to the panel:

> You have heard evidence that the accused may have committed another sexual offense, that is, the evidence pertaining to Ms. [redacted]. The accused is not charged with this offense. You may consider the evidence of this offense for its bearing on any matter to which it is relevant to include its tendency, if any, to show the accused's propensity to engage in sexual offenses.
>
> However, evidence of another sexual offense on its own is not sufficient to prove the accused's guilt[] of a charged offense. You may not convict the accused solely because you believe he committed another sexual offense or offenses solely because you believe the accused has a propensity to engage in the sexual offenses. You've heard evidence that the accused was acquitted of that offense in a prior court-martial. You should consider that result, but it's not binding on your determination. Bear in mind that the government has the burden to prove that the accused committed each of the elements of each charged offense.

(R. at 1502).

Standard of Review

A military judge's decision to admit evidence under Mil. R. Evid. 413 is reviewed for an abuse of discretion. *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *Id.*

Law

Military Rule of Evidence 413(a) provides that, in a court-martial where the accused is charged with a sexual offense, evidence that the accused committed other sexual offenses may be admitted and considered on "any matter to which it is relevant." In *United States v. Wright*, the Court of Appeals for the Armed Forces (CAAF) required military judges to make the following three threshold findings before admitting evidence under Mil. R. Evid. 413: (1) the accused is charged with an offense of sexual assault; (2) the evidence proffered is evidence of his commission of another offense of sexual assault; and (3) the evidence is logically relevant under Mil. R. Evid. 401 and Mil. R. Evid. 402 and legally relevant under Mil. R. Evid. 403. 53 M.J. 476, 482 (C.A.A.F. 2000). If the proffered evidence meets the threshold findings required by *Wright*, the military judge must still apply the balancing test of Mil. R. Evid. 403. *Solomon*, 72 M.J. at 179–80. The evidence "may be excluded if its 'probative value is substantially outweighed by

the danger of unfair prejudice, confusion of the issues, or misleading the members.'" *United States v. Berry*, 61 M.J. 91, 95 (C.A.A.F. 2005) (quoting Mil. R. Evid. 403).

Military Rule of Evidence 413 is a rule of inclusion. *See Solomon*, 72 M.J. at 179 (noting that "inherent in [Mil. R. Evid.] 413 is a general presumption in favor of admission.") (citation and internal quotation marks omitted). In the context of Mil. R. Evid. 413, "the Rule 403 balancing test should be applied in light of the strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible." *Id.* at 180 (quoting *Wright*, 53 M.J. at 482) (internal quotation marks omitted). In conducting the balancing test, the military judge should consider the following non-exhaustive factors to determine whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice: "strength of proof of the prior act (i.e., conviction versus gossip); probative weight of the evidence; potential for less prejudicial evidence; distraction of the factfinder; time needed for proof of the prior conduct; temporal proximity; frequency of the acts; presence or lack of intervening circumstances; and the relationship between the parties." *Id.* "When a military judge articulates his properly conducted [Mil. R. Evid.] 403 balancing test on the record, the decision will not be overturned absent a clear abuse of discretion." *Id.* (citing *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000)).

"The fact of an acquittal does not necessarily bar the evidence of prior acts." *United States v. Griggs*, 51 M.J. 418, 419 (C.A.A.F. 1999). However, there is "a need for great sensitivity when making the determination to admit evidence of prior acts that have been the subject of an acquittal." *Id.* at 420.

Argument

The military judge did not abuse his discretion in admitting the Mil. R. Evid. 413 evidence pertaining to [redacted]. Nevertheless, appellant asserts that the military judge erred by improperly applying the Mil. R. Evid. 403 balancing test and permitting the government "to exceed" the permissible uses of the Mil. R. Evid. 413 evidence.[7] (Appellant's Br. 8–12). Contrary to appellant's assertions, the military judge produced a detailed, six-page analysis where he demonstrably applied the correct law and rendered a ruling reasonably arising from the applicable facts. (App. Ex. LXII). Further, the government properly utilized the Mil. R. Evid. 413 evidence for its intended purpose: to show appellant's propensity to commit sexual offenses.

A. The military judge properly applied the Mil. R. Evid. 403 balancing test.

Although Mil. R. Evid. 413 is a rule of inclusion, the military judge was clearly aware of his obligation to conduct the required balancing test under Mil. R.

[7] At the motions hearing, appellant conceded that the first two *Wright* threshold requirements were satisfied, and appellant does not contest the third *Wright* requirement on appeal. (R. at 154–55; App. Ex. LXII, p. 3–4).

Evid. 403. *Wright*, 53 M.J. at 482–83; (R. at 168, 173; App. Ex. LXII, p. 4–6). This is evident in his methodical application of each of the *Wright* factors to the Mil. R. Evid. 413 evidence. 53 M.J. at 482; (App. Ex. LXII, pp. 4–6). Because the military judge thoroughly articulated his analysis under Mil. R. Evid. 403, his determination is entitled to deference. *See Solomon*, 72 M.J. at 180 (citing *Manns*, 54 M.J. at 166).

Appellant alleges that the military judge, aside from the intervening circumstances factor, "failed to consider the other relevant factors or provide analysis regarding [appellant's] acquittal." (Appellant's Br. 8). However, the record of trial rebuts appellant's claim. In addition to submitting briefs, the parties extensively litigated appellant's Mil. R. Evid. 413 motion during an Article 39(a), UCMJ, hearing. (R. at 153–89). During the Article 39(a) session, the military judge heard appellant's arguments that "the government [was] grasping at straws to try to draw similarities" between [redacted] and the victims of the charged offenses and that there would be "a trial within a trial about a past trial that [he] was acquitted of." (R. at 183, 185). After hearing appellant's arguments, it is clear that the military judge considered those arguments. (App. Ex. LXII). In his ruling, the military judge addressed appellant's concerns by finding that the probative weight of the evidence favored admission of the evidence for [redacted] due to the similarities between the uncharged and charged offenses. (App. Ex. LXII, p. 4–5). The

military judge also found that the time needed for proof of the prior conduct weighed against admissibility since "there is a risk for a protracted hearing within the trial on this collateral matter." (App. Ex. LXII, pp. 5). Ultimately, the military judge found that the probative value of the evidence pertaining to [redacted] was "not substantially outweighed by the danger of being unfairly prejudicial, confusing the issues, misleading the members, causing undue delay, or wasting time." (App. Ex. LXII, pp. 6)

Additionally, it is clear from the military judge's analysis that he was mindful of appellant's acquittal when he conducted the Mil. R. Evid. 403 balancing test. (App. Ex. LXII, p. 5). In his findings of fact, the military judge adopted, from appellant's motion to exclude, Fact 3, which states: "At a General Court Martial, [appellant] was found Not Guilty to all charges and their specifications." (App. LXII, p. 1; App. Ex. XX, p. 2). Then, during his meticulous application of the *Wright* factors, the military judge took care to not only note appellant's prior acquittal as an intervening circumstance, but also emphasized that "the fact of acquitt[al] and any exculpatory evidence must be given due consideration by the military judge when conducting the [Mil. R. Evid.] 403 balancing test." (App. Ex. LXII, p. 5). By giving appellant's acquittal "due consideration," the military judge ultimately exercised "great sensitivity" in admitting the Mil. R. Evid. 413 evidence: he properly instructed the panel of appellant's acquittal and provided

limiting instructions on the proper use of the evidence. *See, e.g.*, *Griggs*, 51 M.J. at 20 (finding that the military judge exercised "great sensitivity" by limiting the questioning of the alleged victim to a statement that there was an acquittal and by expressly mentioning the acquittal in his instructions); *United States v. Nelms*, No. NMCCA 201400369, 2016 CCA LEXIS 227, at *10 n.24 (N-M Ct. Crim. App. Apr. 14, 2016) (finding that the military judge exercised the requisite sensitivity because "he properly instructed the members about the appellant's acquittal").

Further, in his analysis, the military judge found that, aside from the acquittal and an assertion that [appellant's] sworn statement to the police was in contradiction to [redacted]'s report, no exculpatory evidence was presented." (App. Ex. LXII, p. 5). The military judge then balanced appellant's argument, that his acquittal weighed against admissibility, against the government's argument, that the acquittal favored admissibility since it demonstrated appellant's emboldened tactics in pursuing his victims, before concluding that the intervening circumstances factor was "neutral." (App. Ex. LXII, p. 5–6).

The care with which the military judge analyzed the factors is also evident in the ruling itself. Although the Mil. R. Evid. 413 evidence for both [redacted] and [redacted] met the three threshold findings required by *Wright*, the military judge—after careful weighing of the *Wright* balancing factors—found that the probative value of the evidence pertaining to [redacted] was substantially outweighed by the danger of unfair

prejudice, confusing the issues, misleading the members, causing undue delay, or wasting time. (App. Ex. LXII, p. 6). Instead of conducting a haphazard and wholesale balancing, the military judge parsed out the factors for each set of Mil. R. Evid. 413 evidence before ruling on their admissibility. (App. Ex. LXII). "When the military judge articulates his properly conducted [Mil. R. Evid.] 413 test on the record, the decision will not be overturned absent a *clear* abuse of discretion," *Solomon*, 72 M.J. at 179 (emphasis added). Here, in the face of a heightened standard and the presumption that "evidence of prior sexual offenses should ordinarily be admissible," appellant has not met his high burden. *Wright*, 53 M.J. at 482. This court can be confident that the military judge applied the correct law to the facts, while exercising "great sensitivity" to appellant's acquittal, because the military judge's detailed and thorough analysis is contained in the record. (App. Ex. LXII); *Griggs*, 51 M.J. at 420. Furthermore, the evidence contained in the record firmly supports his ruling. Accordingly, as appellant has not met his burden, this court should not disturb the military judge's ruling.

Appellant insists that the military judge abused his discretion by allowing the government "to exceed any limitation and argue the prior acquittal established appellant had a proclivity, not that his prior acts demonstrated a possible proclivity." (Appellant's Br. 8–9). In support of his argument, appellant avers that [redacted] and [redacted]'s cases are "factually different," since there was no mistake of fact as

to age in [redacted]'s case, and that it was therefore improper for the government to argue that the acquittal "had the deterrent effect of a conviction." (Appellant's Br. 9). Contrary to appellant's assertions, the similarities between the uncharged sexual offense against [redacted] and the charged sexual offenses against [redacted] were striking. Broadly speaking, both the uncharged and charged offenses were "non-consensual sexual acts against young female victims after they have rebuffed [appellant]'s sexual advances. Both involved power dynamics between [appellant] and a young female and [appellant]'s refusal to deny his own gratification when confronted with an unwilling victim, suggesting same, or similar, mens rea." (App. Ex. LXII, p. 4–5; (R. at 665, 777). However, the minute details are similar as well: [redacted] was only two years older than [redacted]; both offenses occurred in appellant's car; appellant communicated with both victims through social media; appellant drove both victims to discreet locations; appellant pinned down both women as he raped them; and appellant forced both victims into the backseat of his vehicle during the rapes. (R. at 646–47, 678, 767, 769, 776; Pros. Ex. 5; Pros. Ex. 9).

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

"A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ. An erroneous admission of evidence under Mil. R. Evid. 413 is not of a constitutional magnitude. *See Solomon*, 72 M.J.

at 182; *Berry*, 61 M.J. at 97; *United States v. McCollum*, 58 M.J. 323, 342 (C.A.A.F. 2003). As such, the government has the burden of demonstrating that the error did not have a substantial influence on the findings. *Solomon*, 72 M.J. at 182. Reviewing courts consider four factors in evaluating whether the erroneous admission of government evidence is harmless, weighing: (1) the strength of the government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. *Berry*, 61 M.J. at 98 (citing *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)).

Here, the government's case was strong regarding appellant's sexual offenses against [redacted] and [redacted]. [redacted]'s friend, [redacted], testified that [redacted] was "incoherent" when she returned from meeting appellant. (R. at 728). [redacted] also described how [redacted] seemed "very stressed" the next morning and how [redacted] told her "she felt like something was wrong." (R. at 729). [redacted]'s mother, [redacted], further testified about [redacted]'s uncharacteristic demeanor the day after the rape and how [redacted] told her about the rape less than twenty-four hours after it occurred. (R. at 711–13). [redacted] also described how, when they went to the scene of the crime that day, [redacted] "was frantic," "visibly afraid," "almost like she was faint," and how [redacted] "just kept crying and begging" for [redacted] not to go to the scene of the crime. (R. at 715–16). For [redacted], there were text messages between [redacted] and appellant, which corroborated [redacted]'s already-credible testimony. (Def. Ex. P, p. 145–48). The messages confirmed that

[redacted] told appellant that she wanted to "take it slow," that she didn't want to "fuck the first night," and how she "kept sayin[g] chill." (R. at 145–48).

In contrast, the defense's case was weak. The defense counsel argued that [redacted] lied about the rape because she was a "troubled girl" who regretted her decision to have sex and wanted validation from her friends and mother.[8] (R. at 1545). The defense counsel further argued that it was reasonable for appellant, who was twenty-two years old at the time, to mistakenly think [redacted] was eighteen years old because she was only "three months from her sixteenth birthday." (R. at 1241, 1547–48). However, the panel, who saw and heard appellant's testimony first-hand, found his credibility to be lacking: they disbelieved appellant's mistake of fact defense as to [redacted]'s age and his story that he stopped having sex with [redacted] despite her pleas for him to continue.[9] (R. at 1245, 1251–52, 1312). *See United States v. Pleasant*, 71 M.J. 709, 712–13 (Army Ct. Crim. App. 2012), pet. denied, 75 M.J. 345 (C.A.A.F. 2016) (explaining that an accused testifies "at his own peril" since a statement by the accused, if disbelieved by the panel, may be

[8] Even if [redacted] and appellant's sexual encounter was "consensual," as defense counsel alluded to in his closing argument, appellant would still be guilty of sexual assault of a child, in violation of Article 120b, UCMJ, because [redacted] was under sixteen years old and therefore under the age of consent. (R. at 1545); *Manual for Courts-Martial*, *United States* (2019 ed.) [MCM], pt. IV, ¶ 62.b.(2).

[9] Additionally, for rape of a child, "it need not be proven that [appellant] knew that the other person engaging in the sexual act . . . had not attained the age of 16 years." MCM, pt. IV, ¶ 62.a.(d). In other words, for rape of a child, there is no defense of mistake of fact.

considered substantive evidence of the accused's guilt, especially where "highly subjective elements" such as the accused's "intent or knowledge" is concerned) (citation omitted). Then, the defense counsel attempted to minimize [redacted]'s testimony by characterizing it as a "bad date." (R. at 1551). However, that argument was directly contradicted by the text messages between [redacted] and appellant. (Def. Ex. P, p. 145–48).

"In examining [the materiality and quality of the evidence in question], we essentially are assessing how much the erroneously admitted evidence may have affected the court-martial." *United States v. Washington*, 80 M.J. 106, 111 (C.A.A.F. 2020). Although the Mil. R. Evid. 413 evidence was material and relevant to the charges, the quality that was ultimately elicited at trial was low—which appellant himself acknowledges. (Appellant's Br. 13). During her cross-examination, [redacted] admitted to consenting to oral sex and appellant licking her breasts, showing her nipple piercings to appellant, and that she had anal sex with another man two weeks prior to her encounter with appellant. (R. at 802–03, 814). Additionally, the panel was well aware that appellant had already been tried and acquitted in a prior court-martial for the offenses against [redacted], which the defense counsel emphasized during his closing argument in order to minimize [redacted]'s testimony. (R. at 1541). Lastly, the military judge properly instructed the panel to consider appellant's acquittal during their deliberations and reminded the panel

that "evidence of another sexual offense on its own is not sufficient to prove the accused's guilt[] of a charged offense." (R. at 1502).

In sum, the proof of appellant's acts against [redacted] and [redacted] stood on their own. Therefore, even if the Mil. R. Evid. 413 evidence was erroneously admitted, this court should determine that appellant suffered no material prejudice to a substantial right. UCMJ, art. 59(a).

C. The government's use of the Mil. R. Evid. 413 evidence was permissible and proper.

1. Appellant forfeited his objections.

Appellant forfeited his objections to the allegedly improper arguments because he failed to timely object. R.C.M. 919(c); (R. at 1512, 1516). Therefore, this court reviews for plain error. *United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018). Under plain error review, "[a]ppellant bears the burden of demonstrating that: (1) there was error, (2) the error was clear and obvious, and (3) the error materially prejudiced a substantial right of the accused." *United States v. Cueto*, 82 M.J. 323, 334 (C.A.A.F. 2022) (cleaned up).

2. There was no error.

Appellant alleges that it was improper for the government to argue that "the panel got it wrong in appellant's earlier court-martial and the current panel had to set things right." (Appellant's Br. 9). Appellant turns to *United States v. Bridges* to support his argument, but *Bridges* is inapposite here. 74 M.J. 779 (Army Ct.

Crim. App. 2015), pet. denied, 75 M.J. 110 (C.A.A.F. 2015). In *Bridges*, the military judge erroneously believed that the appellant would be prejudiced if the panel knew about the appellant's prior acquittal. *Id.* at 781. Consequently, the military judge "only permitted testimony to the effect that a formal report was made but otherwise left the panel hanging by not informing them of the not guilty finding." *Id.* Thus, this court found error because the military judge failed to "consider the effect of the acquittal when resolving admission of the evidence under Mil. R. Evid. 413 and 403, and further erred, in light of its admission, by failing to inform and instruct the panel of the acquittal accordingly." *Id.*

Conversely, in appellant's case, the panel immediately learned of appellant's acquittal at the beginning of trial during opening statements from both parties, and the panel was reminded again, prior to their deliberations, during both closing arguments. (R. at 588, 596, 1510, 1541). Most importantly, unlike in cases such as *Bridges* and *Solomon* where appellate courts found error, the military judge in appellant's case provided a limiting instruction to the panel regarding the Mil. R. Evid. 413 evidence and appellant's prior acquittal.[10] *Bridges*, 74 M.J. 779; *Solomon*, 72 M.J. 176; (R. at 1502, 1506). As noted by this court in *Bridges*:

[10] The government, in their written response to appellant's motion to exclude the Mil. R. Evid. 413 evidence, specifically noted that, if the evidence was admitted, the government would request a limiting instruction "to emphasize" appellant's acquittal and the limited use of Mil. R. Evid. 413 evidence. (App. Ex. XXXVII, p. 14; R. at 182, 1506).

> [B]oth the Supreme Court and the Court of Appeals for the Armed Forces have expressed approval and satisfaction with admission of [Mil. R. Evid. 413] evidence as long as the judge carefully instructed the panel that the accused in each case had been acquitted on a charge of the same allegation and the necessity to conscientiously limit consideration of that evidence accordingly.

74 M.J. at 781.

Appellant argues that the military judge impermissibly allowed the government to argue that "the prior acquittal established appellant had a proclivity, not that his prior acts demonstrated a possible proclivity." (Appellant's Br. 9). However, the government's use of the propensity evidence was wholly proper because the government used the evidence for its intended purpose—"to show [appellant's] propensity to engage in the sexual offenses." (R. at 1502); Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 7-13-1, note 3 (29 Feb. 2020). *See United States v. Payne*, NMCCA 201200477, 2013 CCA LEXIS 1017, at *17 (N.M. Ct. Crim. App. 12 Dec. 2013), pet. denied, 73 M.J. 456 (C.A.A.F. 2014) (finding that the military judge did not abuse his discretion in admitting Mil. R. Evid. 413 evidence where the military judge concluded that the appellant's prior acquittal "may have strengthened the propensity of the [appellant]").

Further, the government never argued that "the current panel had to set things right." (Appellant's Br. 9). The government actually argued that they were "not here to talk about what was going through that panel's mind. That's not at

issue here . . . ." (R. at 1516). The government pointed out that the current panel had propensity evidence before them, which was something that the previous panel did not. (R. at 1516). In doing so, the government properly conveyed to the panel that appellant had a propensity to commit the charged acts and that the panel could use the propensity evidence for its proper purpose. Moreover, the military judge instructed the panel on the proper use of the propensity evidence. (R. at 1502, 1510, 1512, 1516).

Lastly, appellant claims the government "overused [the Mil. R. Evid. 413] for those purposes that are normally allowed." (Appellant's Br. 10). However, appellant's citation to *United States v. Berry* for support is in error. (Appellant's Br. 11). In *Berry*, where the appellant was convicted of sodomy by force and without consent against another adult, there were at least three major differences that clearly distinguish it from appellant's case. 61 M.J. 91. First, the military judge's evidentiary ruling there received less deference because he "made minimal findings relating to the *Wright* factors and did not articulate any balancing of those factors on the record." *Id.* at 95–96. Second, the Mil. R. Evid. 413 evidence that came in occurred eight years ago, when the appellant was thirteen years old committing misconduct against a six-year-old victim. *Id.* at 93. The Court of Appeals for the Armed Forces emphasized that "[w]here a military judge finds that the prior 'sexual assault' acts of a child or adolescent are probative to an act later

committed as an adult, such a determination must be supported in the record by competent evidence;" such competent evidence was lacking in *Berry*. *Id.* at 97. Third, the prosecutor in *Berry* characterized appellant as a child molester, "one of the most unsympathetic characterizations that can be made," when the appellant's misconduct against the child occurred when the appellant himself was also a child. *Id.* at 97. Considering the already limited probative value of the Mil. R. Evid. 413 evidence in *Berry*, any such value was "outweighed by the danger that the members were distracted from considering [the victim's] testimony for its proper purpose." *Id.* Put simply, the fact that the government focused on the Mil. R. Evid. 413 evidence during its closing was not the issue; rather, what the court found problematic was the danger of distracting the factfinder by painting the appellant as a child molester with stale evidence that had minimal relevance. *Id.*

Appellant's citation to *Solomon* is similarly misplaced. 72 M.J. 176. The holding in *Solomon* did not hinge on "the amount of time the government dedicated to the Mil. R. Evid. 413 evidence." *Id.* (Appellant's Br. 11). Instead, the fatal error there was attributable to "the military judge's failure to address or reconcile [the appellant]'s alibi evidence or give due weight to [the appellant]'s acquittal," which ultimately undermined the military judge's Mil. R. Evid. 403 balancing analysis. *Id.* at 182.

Here, there was no alibi evidence, and the military judge gave due weight to appellant's acquittal during his Mil. R. Evid. 403 balancing analysis. (App. Ex. LXII, p. 5–6). Additionally, the Mil. R. Evid. 413 evidence here was limited to one victim, [redacted], as opposed to two in *Solomon*. *Id.*; (Record of Trial). [redacted] provided only relevant and necessary testimony, such as her interactions with appellant prior to the sexual assault, the assault itself, and the aftermath of the assault, including her injuries. (R. at 766–825). Importantly, appellant failed to object to most of [redacted]'s testimony. Although appellant argues that the defense counsel objected to [redacted]'s testimony about her injuries, the defense counsel ultimately withdrew his objection. (Appellant's Br. 12; R. at 784, 787, 790). Similarly, when the government introduced the text messages between [redacted] and appellant, (Pros. Ex. 9), and DNA evidence, the defense counsel did not object. (R. at 784, 1276). When appellant finally did object, he objected to the DNA evidence, but his objection was based on the defense's assertions that the questions were "outside the scope" of direct examination and mischaracterization of testimony. (R. at 1276). More importantly, unlike in *Solomon*, appellant had the benefit of "the ameliorative effect of judicial recognition of [an] acquittal via limiting instruction or judicial notice." *Id.* at 178.

3. Even if there was any error, it was not prejudicial error.

Since appellant did not object during the government's closing argument regarding [redacted],[11] appellant has the burden of establishing prejudice. (R. at 1509–38); *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017). "[R]eversal is warranted only when the trial counsel's comments, taken as a whole, were so damaging that [the court] cannot be confident that the members convicted the appellant on the basis of the evidence alone." *Id.* (cleaned up). This court tests for prejudice using the *Fletcher* factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction. *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005).

Assuming arguendo that there was error, any such error did not materially prejudice appellant. Appellant's main contention with the government's closing argument is that the government "argued appellant was emboldened because of his prior acquittal." (Appellant's Br. 9). That is a far cry from the type of improper closing arguments that the Court of Appeals for Armed Forces has found even "moderately severe." *Cueto*, 82 M.J. at 336 (finding the government's multiple and repeated references to "justice" as "moderately severe"); *see, e.g.*, *United States v. Norwood*, 81 M.J. 12, 21 (C.A.A.F. 2021) (finding that it was improper

[11] Appellant's objections were for facts not in evidence regarding the other victims. (R. at 1528, 1534–35).

for the prosecution to vouch for the victim and to tell the panel to consider how they would be perceived by others based on their decision); *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (finding misconduct after the prosecution attacked the defense counsel, attacked the accused, expressed personal opinions, bolstered, and vouched).

Furthermore, "effective curative measures were taken. The military judge gave the members complete and correct instructions and informed the members that these instructions should control their deliberations. Civilian defense counsel also effectively responded to most of what trial counsel said," especially with respect to appellant's acquittal at his first court-martial. *Cueto*, 82 M.J. at 335; (R. at 1541–42, 1569–70).

In sum, the government properly used the Mil. R. Evid. 413 evidence for its permissible purpose. Even assuming arguendo that the government "overused" the evidence, there was no prejudice because the military judge properly instructed the panel before and after closing arguments and because the weight of the evidence supported appellant's conviction.[12] (R. at 1502; Appellant's Br. 12).

[12] *See* supra pp. 17–18 for a discussion on the strength of the government's case.

Assignment of Error II

WHETHER THE PROSECUTORIAL MISCONDUCT BY MISSTATING FACTS ABOUT THE MIL. R. EVID. 413 EVIDENCE CAUSED APPELLANT TO RECEIVE AN UNFAIR TRIAL.

Additional Facts

Appellant testified in his defense during his court-martial. (R. at 1240). The assistant trial counsel, who was the Special Victims' Prosecutor [SVP], cross-examined appellant about his uncharged offenses against [redacted]. (R. at 20, 1267). While cross-examining appellant, the SVP asked questions which suggested that a DNA examiner had testified at appellant's prior court-martial. (R. at 1276). Appellant responded by confirming that a DNA expert had testified. (R. at 1276). When the SVP then asked, "And you heard that evidence?," appellant replied, "They said it was two forms of DNA, ma'am." (R. at 1276). The SVP continued her cross-examination by asking, "Two forms of DNA, and it was found in Ms. [redacted]'s anus; wasn't it?" (R. at 1276). The defense counsel then objected on the basis of the question being a mischaracterization and outside of the scope of the direct examination. (R. at 1276). The military judge sustained the mischaracterization objection but overruled the beyond the scope objection; once the panel returned, he instructed them to disregard the last question. (R. at 1278–79). The SVP resumed cross-examining appellant about the DNA evidence, during which appellant corrected the SVP that his court-martial occurred in 2018, instead

of 2017, and confirmed again that a DNA expert testified at his prior trial. (R. at 1280; Appellant's Br. at 15–16). The last piece of DNA evidence that the panel heard was appellant telling the SVP that both types of DNA found on [redacted] were not his[13] and that he thought his DNA was not even found around [redacted]'s anus. (R. at 1280–81).

That evening, the parties discovered that no DNA expert had testified at appellant's previous court-martial. (R. at 1328). Appellant moved for a mistrial under R.C.M. 915 for prosecutorial misconduct. (R. at 1329–30). After hearing arguments from both parties, the military judge denied the motion for a mistrial. (R. at 1395). In the alternative, the military judge prohibited the government from offering any evidence pertaining to DNA, and he provided a curative instruction to the panel. (R. at 1395–96). The military judge provided his written reasons for denying the motion for a mistrial after the court-martial, but before the record of trial was authenticated. (R. at 1395; App. Ex. CXI).

Standard of Review

On issues of prosecutorial misconduct, the court reviews the military judge's findings of fact under the "clearly erroneous" standard. *United States v.*

[13] The defense counsel later informed the military judge that their client "was confused and made an inaccurate statement on cross-examination" since appellant's statement, that both of the DNA were not his, was factually inaccurate. (R. at 1333).

Argo, 46 M.J. 454, 457 (C.A.A.F. 1997). Whether the facts found by the military judge constitute prosecutorial misconduct and whether such misconduct is prejudicial error are questions of law reviewed de novo. *Id.*

"An appellate court must not reverse a military judge's decision regarding a motion for mistrial absent clear evidence that the military judge abused his discretion." *United States v. Short*, 77 M.J. 148, 150 (C.A.A.F. 2018) (citing *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000)). In determining whether the military judge abused his discretion by not granting a mistrial, an appellate court "looks to the actual grounds litigated at trial." *Id.* The challenge is to assess "the probable impact of the inadmissible evidence upon the court members." *Id.* (cleaned up). That "judgment is rooted in a simple 'tolerable' risk assessment that the members would be able to put aside the inadmissible evidence." *Id.* (cleaned up).

Law

A. Prosecutorial misconduct.

Prosecutorial misconduct is "action or inaction by a prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *Argo*, 46 M.J. at 457. If there is prosecutorial misconduct, "relief is merited only if that misconduct actually impacted on a substantial right of an accused (*i.e.*, resulted in prejudice)." *United*

States v. Meeks, 44 M.J. 1, 5 (C.A.A.F. 1996). "If it did, then the reviewing court still considers the trial record as a whole to determine whether such a right's violation was harmless under all the facts of a particular case." *Id.*

B. Mistrial.

A military judge has the discretion to "declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." R.C.M. 915(a). "[A] mistrial is a drastic remedy to be used only sparingly to prevent manifest injustice." *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003) (cleaned up). Furthermore, mistrials should be granted with "great caution, under urgent circumstances, and for plain and obvious reasons." R.C.M. 915(a) discussion. "Because of the extraordinary nature of a mistrial, military judges should explore the option of taking other remedial action, such as giving curative instructions." *United States v. Ashby*, 68 M.J. 122 (C.A.A.F. 2009).

Argument

A. There was no prosecutorial misconduct.

Contrary to appellant's allegations, the SVP did not commit prosecutorial misconduct because she did not violate the relevant professional responsibility rules. (Appellant's Br. 23). The SVP had a good-faith basis when she asked

appellant the questions regarding a DNA expert testifying at his prior trial; however, as the SVP herself conceded, she made a mistake. (R. at 1276, 1280, 1350, 1375–76). Despite appellant's insinuations to the contrary, the SVP's mistake was reasonable and understandable. (Appellant's Br. 23). First, there was some confusion because, although a DNA expert never testified at appellant's prior court-martial, the DNA evidence that was referenced did exist in the form of a crime laboratory report. (App. Ex. XCVII; App. Ex. CXI, p. 2, fn. 1). Second, the forensic scientist who prepared the DNA laboratory report was SC, who was a DNA expert for the previous court-martial and was also on the defense's witness list for the current court-martial. (R. at 1323–24, 1335; App. Ex. CXI, p. 2, fn. 1). Third, a Detective [Det.] [redacted] had testified at appellant's prior court-martial, and Det. [redacted] was listed on the DNA laboratory report as the law enforcement "Agency Rep." (R. at 1340; App. Ex. XCVII). Fourth, when the military judge asked the defense counsel whether the defense wanted the SVP removed from this trial, the defense counsel declined "because we're not alleging a vindictive prosecution or anything like that. It's a—a negligence . . . . " (R. at 1372–73). If appellant and his defense counsel seriously believed that the SVP had violated her ethical and professional duties, they would, and should, have requested her removal.

The SVP's mistake is understandable since even appellant, who was present at his prior court-martial,[14] made the same mistake twice by affirming that a DNA expert testified at his previous trial. (R. at 1276, 1280). Nor can it be said that appellant was blindly agreeing to everything the SVP was asking, since appellant corrected and pushed back on her questions during his cross-examination. (R. at 1275, 1280–81). Moreover, even the defense counsel, who was "fully aware" of the prior court-martial, made the same mistake. (App. Ex. CXI, p. 8). In addition to not objecting to the question of whether a DNA expert testified at appellant's prior trial, the defense counsel, when he did object, objected on the question of whether the DNA was found in [redacted]'s anus. (R. at 1276). When the defense counsel explained his objection to the military judge during an Article 39(a), UCMJ, session, the defense counsel also inadvertently supported the idea that a DNA expert testified at the prior court-martial: "The testimony that they're discussing right now is from another individual, not from anything that [appellant] testified to at any point in time . . . ." (R. at 1278).

In terms of the SVP's misstatement regarding whether the DNA evidence was found "inside" [redacted]'s anus, the SVP withdrew her question, the panel members

[14] Neither the SVP nor the defense counsels from the current court-martial participated in appellant's prior court-martial. (R. at 1338–39; App. Ex. CXI, p. 2, fn. 3).

were instructed to disregard the last question, and the SVP re-phrased the question using the word "around" in lieu of "inside." (R. at 1278–80).

The SVP's actions amounted to a mistake, not willful misconduct. There was no prosecutorial misconduct because she had a good-faith basis—albeit a mistaken one—for asking appellant the questions regarding the DNA expert. (R. at 1276, 1280, 1350, 1375–76). Furthermore, the military judge took immediate action by providing a curative instruction to the panel and by prohibiting the government from producing further DNA evidence. (R. at 1395–96, 1399). Therefore, the military judge did not abuse his discretion in denying appellant's motion for a mistrial. (R. at 1395).

B. The alleged prosecutorial misconduct did not prejudice appellant, and the military judge did not abuse his discretion by denying the motion for a mistrial.

Assuming arguendo that there was prosecutorial misconduct, the military judge "ultimately reached the proper result, correctly noting that a mistrial is a drastic remedy to be used only sparingly to prevent manifest injustice." *Thompkins*, 58 M.J. at 47. (App. Ex. CXI, p. 8–9). In his written ruling, the military judge found that appellant was not prejudiced by the SVP's error "because the court fashioned and took adequate remedial action" in the form of a curative instruction and by precluding the government from offering further DNA evidence. (App. Ex. CXI, p. 8). The military judge further found that the SVP's error during

appellant's cross-examination "was limited to whether specific testimony was offered at a prior and trial and does not cast substantial doubt upon the fairness of the proceedings." (App. Ex. CXI, p. 8). The military judge concluded that, "[i]n consideration of all the circumstances and any potential cumulative effect of the various circumstances . . . a mistrial is *not* manifestly necessary in the interest of justice." (App. Ex. CXI, p. 8) (emphasis in original).

"When a military judge is satisfied that the Government has not engaged in intentional misconduct during the trial and concludes that an instruction will cure the potential error, such a procedure is preferred." *United States v. Garces*, 32 M.J. 345, 349 (C.A.A.F. 1991) (cleaned up); *see also Taylor*, 53 M.J. at 198 ("A curative instruction is the preferred remedy for correcting error when the court members have heard inadmissible evidence, as long as the instruction is adequate to avoid prejudice to the accused.") (cleaned up); *United States v. Rushatz*, 31 M.J. 450, 456 (C.A.A.F. 1990) ("Giving a curative instruction, rather than declaring a mistrial, is the preferred remedy for curing error when court members have heard inadmissible evidence, as long as the curative instruction avoids prejudice to the accused."); *Ashby*, 68 M.J. at 122–23 (finding a curative instruction cured the error of trial counsel commenting on the accused's right to remain silent); *United States v. Bozivech*, ARMY 20110683, 2017 CCA LEXIS 403, at *11 (Army Ct. Crim. App. 13 June 2017) (mem. op.) ("As is the case here, when a military judge 'is

satisfied that the Government has not engaged in intentional misconduct . . . and concludes that an instruction will cure the potential error, such a procedure is 'preferred.'") (citing *Garces*, 32 M.J. 349).

In appellant's court-martial, the military judge issued the following curative instruction to the panel members: "You are instructed to completely disregard all questions and answers during the cross-examination of the accused that pertain to DNA or testimony in a prior trial about DNA. Such testimony cannot be considered by you for any purpose and should be completely disregarded." (R. at 1399); *see also United States v. Carter*, 79 M.J. 478, 482 (C.A.A.F. 2020) ("Curative instructions are the preferred remedy, and absent evidence to the contrary, a jury is presumed to have complied with the judge's instructions.") (cleaned up); *United States v. Valentin*, ARMY 20190075, 2021 CCA LEXIS 69, at *6 (Army Ct. Crim. App. 12 Feb. 2021) (summ. disp.), pet. denied, 81 M.J. 319 (C.A.A.F. 2021) ("Curative instructions are a preferred, but not the only, remedy for inadmissible evidence, and 'absent evidence to the contrary, a [panel] is presumed to have complied with the judge's instructions.'") (citing *Carter*, 79 M.J. at 482). This curative instruction was issued immediately after the Article 39(a), UCMJ, session where the military judge announced his ruling denying appellant's motion for a mistrial. (R. at 1395, 1399).

Appellant makes an unfounded assumption that the instruction "did not go nearly far enough because it never addressed the improper impression that the panel received that the DNA evidence from the Ms. [redacted] case was strong." (Appellant's Br. 25). However, "[a]bsent evidence to the contrary, court members are presumed to comply with the military judge's instructions." *Thompkins*, 58 M.J. at 47. Here, there is no evidence to overcome this presumption, especially since all of the panel members indicated that they would follow the military judge's instruction.[15] (R. at 1399). Moreover, the military judge's curative instruction *did* address the DNA evidence by instructing the panel members to disregard everything they had heard concerning the DNA evidence. (R. at 1399).

In addition to the curative instruction, the military judge prohibited the government from "offering any evidence pertaining to DNA as it relates to the incident involving Ms. [redacted]." (R. at 1395–96). This effectively hamstrung the government from supporting their Mil. R. Evid. 413 evidence with DNA evidence, which was the sole reason for eliciting the DNA evidence in the first place. (R. at 1364). Therefore, the military judge's remedial actions, consisting of both a curative instruction and a prohibition on the government from presenting further DNA evidence, did not prejudice appellant.

[15] Neither party objected to the military judge's proposed curative instruction. (R. at 1396).

Appellant claims that the military judge's ameliorative actions hindered his ability to present favorable DNA evidence. (Appellant's Br. 25). Yet, when the military judge pointedly asked defense counsel whether he "[w]ould have brought up DNA evidence if the government had not," the defense counsel conceded that he would not have done so. (R. at 1369). Due to the military judge's curative instruction to the panel, which told them to disregard the DNA evidence they had heard thus far, there was no need for appellant to present favorable DNA evidence. (R. at 1399). Moreover, although the military judge prohibited the *government* from presenting additional DNA evidence, there was no such prohibition on appellant from introducing DNA evidence. (R. at 1396). The military judge even clarified for the defense counsel that "there are no restrictions on the defense as to what evidence you choose to present in light of this ruling by the court." (R. at 1396). The military judge then went a step further and assured the defense counsel that if the defense opened the door by introducing DNA evidence, the parties would have an Article 39(a), UCMJ, session "to discuss the extent to which the door has been opened and what the government may be allowed to offer in rebuttal to whatever you have offered." (R. at 1396).

Appellant nevertheless avers that "a mistrial was the only warranted remedy." (Appellant's Br. 25). However, the DNA evidence was not relevant to any of the charged offenses. (R. at 1364). Rather, the government elicited the

DNA evidence in order to support its Mil. R. Evid. 413 evidence pertaining to [redacted]; as the military judge correctly noted, since it was Mil. R. Evid. 413 evidence, it had "limited use by the panel anyway." (R. at 1364). Ultimately, the SVP's question was not so prejudicial that a curative instruction was inadequate. *See Short*, 77 M.J. at 151 (finding no prejudice in the military judge's decision, to issue a curative instruction instead of granting a mistrial, where the government elicited forbidden testimony approximately forty times during the trial and engaged in improper argument); *United States v. McFadden*, 74 M.J. 87, 90 (C.A.A.F. 2015) ("Absent evidence to the contrary, court members are presumed to comply with the military judge's instructions.").

"While instructions alone may not cure all instances of misconduct, given the overall effect of counsel's conduct in this case, the military judge's timely remedial actions prevented the manifest injustice that would necessitate a mistrial." *Thompkins*, 58 M.J. at 47. Since there was a "clear absence of manifest injustice" here, the military judge did not abuse his discretion by denying the defense's motion for a mistrial. *Id.* at 47–48. Accordingly, this court should uphold the military judge's ruling.

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court affirm the finding and the sentence and deny relief.

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APPENDIX

United States v. Bozicevich

United States Army Court of Criminal Appeals

June 13, 2017, Decided

ARMY 20110683

Reporter
2017 CCA LEXIS 403 *

UNITED STATES, Appellee v. Sergeant JOSEPH C. BOZICEVICH, JR. United States Army, Appellant

Notice: THIS OPINION IS ISSUED AS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT.
NOT FOR PUBLICATION

Subsequent History: Motion granted by *United States v. Bozicevich, 2017 CAAF LEXIS 936 (C.A.A.F., Sept. 15, 2017)*

Review denied by *United States v. Bozicevich, 2018 CAAF LEXIS 3 (C.A.A.F., Jan. 2, 2018)*

Prior History: [*1] Headquarters, 3d Infantry Division. Tara A. Osborne, Military Judge. Colonel Jonathan C. Guden, Staff Judge Advocate (pretrial). Colonel Francisco A. Vila, Staff Judge Advocate (recommendation). Colonel Luis O. Rodriguez, Staff Judge Advocate (addendum).

Case Summary

Overview

HOLDINGS: [1]-A military judge did not abuse her discretion during a servicemember's trial on a charge alleging that he committed premeditated murder, in violation of UCMJ art. 118, *10 U.S.C.S. § 918*, when he shot and killed two other soldiers in Iraq, when she denied the servicemember's motion for a mistrial after she found that the Government failed to disclose notes that were made by a person who investigated the incident, but permitted the defense to recall an expert who testified that the servicemember suffered from a delusional disorder or to strike the expert's testimony and present a self-defense argument to the panel without reliance on a mental health diagnosis; [2]-There was no merit to the servicemember's claim that he was denied effective assistance of counsel because his counsel failed to investigate and use potentially exculpatory information he gave them.

Outcome
The court affirmed the findings and sentence.

Counsel: For Appellant: Captain Patrick J. Scudieri, JA; William E. Cassara, Esquire (on brief); Captain Cody D. Cheek, JA; William E. Cassara, Esquire (on amended brief and reply brief).

For Appellee: Colonel Mark H. Sydenham, JA; Lieutenant Colonel A.G. Courie III, JA; Major Steven J. Collins, JA; Captain Tara E. O'Brien, JA (on brief); Colonel Mark H. Sydenham, JA; Lieutenant Colonel A.G. Courie III, JA; Major Anne C. Hsieh, JA; Captain Tara E. O'Brien, JA (on amended brief).

Judges: Before TOZZI, CELTNIEKS, and BURTON, Appellate Military Judges. Judge CELTNIEKS and Judge BURTON concur.

Opinion by: TOZZI

Opinion

MEMORANDUM OPINION

TOZZI, Senior Judge:

A panel with enlisted representation, sitting as a general court-martial, convicted appellant, contrary to his pleas, of two specifications of premeditated murder, in violation of *Article 118, Uniform Code of Military Justice, 10 U.S.C. § 918 (2006 & Supp. I 2008)* [hereinafter UCMJ]. The panel sentenced appellant to a dishonorable discharge, confinement [*2] for life without eligibility for parole, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the adjudged findings and sentence.

This case is before us for review pursuant to *Article 66, UCMJ*. Appellant raises nine assignments of error, four[1] of which warrant discussion but no relief. We find the matters personally raised by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, are without merit.

BACKGROUND

On 14 September 2008, at Patrol Base Jurf as Sahkr, Iraq, appellant shot and killed Staff Sergeant (SSG) DD and Sergeant (SGT) WD when they attempted to administer a counseling statement to him. Appellant was heard shouting, "I'm going to kill you" before firing his rifle at SSG DD. Eyewitnesses saw appellant continue to shoot his rifle while SSG DD was running away from appellant and after SSG DD collapsed and pleaded for appellant to stop. Sergeant WD was found fatally shot, lying in the Joint Security Station where the attempted counseling took place. Appellant was immediately apprehended after shooting his victims and was heard stating, "I did it so what." At trial, appellant testified he acted in self-defense after SSG DD and SGT WD drew their weapons and [*3] threatened to shoot him if he did not sign the counseling statement.

On 2 October 2008, charges were preferred against appellant for premeditated murder. On 7 July 2009, the convening authority referred the charges as a capital case to a general court-martial.

LAW AND DISCUSSION

A. Discovery Violations and Judicial Remedies

The *Due Process Clause of the Fifth Amendment* requires the prosecution to disclose evidence that is material and favorable to the defense. *Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*. This requirement exists whether there is a general request or no request at all. *United States v. Agurs, 427 U.S. 97, 107, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976)*. Under due process discovery and disclosure requirements, the Supreme Court has "'rejected any . . . distinction between impeachment evidence and exculpatory evidence.'" *United States v. Eshalomi, 23 M.J. 12, 23 (C.M.A. 1986)* (quoting *United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)*). "[W]hen an appellant has demonstrated error with respect to nondisclosure, the appellant will be entitled to relief only if there is a reasonable probability that there would have been a different result at trial if the evidence had been disclosed." *United States v. Santos, 59 M.J. 317, 321 (C.A.A.F. 2004)*.

However, "[t]he military justice system provides for broader discovery than due process and *Brady* require." *United States v. Trigueros, 69 M.J. 604, 610 (Army Ct. Crim. App. 2010)*. In courts-martial, Congress provides both trial and defense counsel with an "equal opportunity to obtain witnesses and other evidence in accordance with such regulations [*4] as the President may prescribe." *UCMJ art. 46*. Under the Rules for Courts-Martial [hereinafter R.C.M.], disclosure by the government generally falls into two categories: (1) information the trial counsel must disclose without a request from the defense; and (2) information the trial counsel discloses upon an appropriate defense request. *United States v. Shorts, 76 M.J. 523, 530 (Army Ct. Crim. App. 2017)* (comparing R.C.M. 701(a)(1), (a)(3), (a)(4), (a)(6), with R.C.M 701(a)(2), (a)(5)). "If it falls into the first category, the defense need not request it—they are always entitled to the evidence. In the latter category, the [trial counsel] is responding to a defense request." *Id.* Therefore, "whether the trial counsel exercised reasonable diligence in response to the request will depend on the specificity of the request." *Id.*

When either party fails to meets its discovery obligations, a military judge has broad discretion in crafting an appropriate remedy for the nondisclosure. *See* R.C.M. 701(g)(3); *United States v. Stellato, 74 M.J. 473, 488-89 (C.A.A.F. 2015)* (explaining the broad authority of a military judge to remedy discovery violations); *United States v. Bower, 74 M.J. 326, 326 (C.A.A.F. 2015)* (summ. disp.) ("Because a [military] judge has broad discretion and a range of choices in crafting a remedy to cure discovery violations and ensure a fair trial, [appellate courts] will not reverse so long as his or her decision remains within [*5] that range."); *United States v. Pomarleau, 57 M.J. 351, 364-65 (C.A.A.F. 2002)* (reviewing for an abuse of discretion a military judge's decision to exclude evidence that the defense failed to disclose in a timely manner).

1. Trial Remedies for Disclosure Violations

[1] We address appellant's first two assignments of error in the same section below because they are controlled by a similar body of law concerning discovery violations and the discretion of military judges to craft appropriate remedies.

In this case, trial defense counsel alleged two discovery violations that appellant now assigns as errors for insufficient judicial remedies. First, the defense alleged the government failed to disclose notes from its investigator, Mr. Garland Slate [hereinafter "Slate notes"], which documented specific instances of appellant's behavior that could support the conclusion of Dr. Thomas Grieger, one of the defense experts, that appellant suffered from a delusional disorder. The defense argued this information was discoverable even without a specific request because it "tended to negate or reduce Appellant's degree of guilt and tended to reduce the punishment." Second, the defense claimed the government failed to disclose information from Ms. LD that SSG DD threatened her with a gun during an unrelated argument [hereinafter "LD statement"].

After reviewing the Slate notes in their entirety, the military judge found:

> They contain[ed] inculpatory material. They also contain[ed] material favorable to the defense that [*6] the government was required to disclose to the defense under RCM 701(a)(6) at a minimum with respect to sentencing. The government intentionally withheld this material in a good faith but mistaken belief that it did not need to be disclosed to the defense. There was not intentional prosecutorial misconduct.

The military judge did not find any specific prejudice to appellant from the untimely disclosure because the Slate notes were "not inconsistent with Dr. Grieger's testimony" and "after having read the interview notes, his diagnosis would not change . . . ." Nevertheless, to cure any potential prejudice "that could be caused if one were to infer from the cross-examination that [appellant] recently [feigned] the symptoms of delusional disorder and to ameliorate any harm otherwise caused by the government's untimely disclosure," the military judge fashioned the following remedy:

> [T]he court grants the defense wide latitude to recall Dr. Grieger and to go into [appellant's] specific instances of behavior, history, and events that support or are consistent with delusional disorder. The government will not be permitted to cross-examine Dr. Grieger on these matters. The government will not be permitted to [*7] present any evidence in rebuttal of Dr. Grieger's testimony. The government will be allowed to cross-examine and rebut the testimony of any other experts the defense chooses to call, and the court will also give an instruction to the members.
>
> . . . .
>
> Now, let me be clear with counsel just in case there is any ambiguity, which I do not think there is. Just so there is no mistake; Defense, if you call any other experts other than Dr. Grieger, even if they testify to the same thing that Dr. Grieger testifies to, the government is going to be allowed to cross-examine them or to put on rebuttal testimony to those experts witnesses. My ruling goes simply to Dr. Grieger, and I am also going to allow you, Defense, when you put Dr. Grieger back on, when I said "wide latitude," I will also allow you to ask leading questions.

At the close of the defense case but before government's rebuttal, the military judge expanded her previous remedy to preclude the government from calling two additional witnesses "because they specifically were witnesses that had been interviewed by Garland Slate, your investigator, that you had for quite some time and did not disclose because you misidentified that you were [*8] supposed to disclose that information." She also limited the testimony of the remaining government witnesses about the victims' character for peacefulness. The military judge, however, denied the defense motion to strike Ms. Cathy Rassmussen's testimony about appellant's character for peacefulness. In short, the military judge did "not believe that it [was] a necessary remedy for the government's failure to timely disclose Mr. Slate's interview notes that Ms. Rassmussen's testimony with regard to character for peacefulness be stricken." Instead, she found there were several instances in appellant's testimony that she believed "placed his character for peacefulness at issue" and the government was "entitled to rebut not only specific evidence that defense introduces but also any reasonable inferences which may be drawn from such evidence."

Regarding the LD statement, the military judge found trial counsel's late disclosure of the potential impeachment evidence "was grossly negligent" and a *Brady* violation. Although she concluded the alleged specific instance of misconduct in the LD statement was inadmissible under Military Rule of Evidence [hereinafter Mil. R. Evid.] 403 and Mil. R. Evid. 404(b), the military judge stated [*9] it was potential support for "opinion [or] reputation testimony of the victim's character trait for violence . . . ." Defense counsel again moved the military judge to declare a mistrial, but the military judge denied the request. As a lesser remedy for the untimely disclosure, the military judge offered to strike Dr. Grieger's testimony about appellant's delusion disorder,

which would allow the defense to pursue a self-defense strategy without reference to appellant's mental health. After weighing the strategic implications of the lesser remedy, defense counsel declined.

2. Appellate Review of Judicial Remedies

On appeal, this court reviews questions regarding discovery requirements de novo. However, we review the sufficiency of judicial remedies crafted to cure discovery violations for an abuse of discretion. *Stellato, 74 M.J. at 480*. Neither the government nor appellant challenges the military judge's findings regarding the asserted discovery violations. Instead, the parties disagree about the sufficiency of the military judge's remedies. After a careful review of the record, we find the military judge did not abuse her discretion in crafting remedies for the disclosure violations.

As an initial matter, we [*10] note the high standard before declaring a mistrial: "when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." R.C.M. 915(a). Because a mistrial is such an "unusual and disfavored" remedy, it "should be applied only as a last resort to protect the guarantee for a fair trial." *United States v. McFadden, 74 M.J. 87, 89 (C.A.A.F. 2015)* (internal quotation marks and citation omitted). *See* R.C.M. 915(a) discussion ("The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons."). Thus, when a military judge determines the extreme remedy of a mistrial is unwarranted, appellate courts will not reverse this decision absent "findings of fact [that] are clearly erroneous, . . . an erroneous view of the law, or the military judge's decision . . . is outside the range of choices reasonably arising from the applicable facts and the law." *Stellato, 74 M.J. at 480* (internal quotation marks and citation omitted).

Here, appellant's speculation that the government "took affirmative steps to shape [the] evidence *before* it made any disclosures" fails to meet the high standard for discounting the military judge's [*11] findings of gross negligence as opposed to intentional misconduct. In addition, appellant's speculation that he would have pursued a different trial strategy had the LD statement been timely disclosed similarly fails to meet this high standard. *See Trigueros, 69 M.J. at 610* (finding the government's nondisclosure harmless beyond a reasonable doubt after rejecting appellant's speculative claim that absent the nondisclosure he "would have altered his pretrial strategy"). As is the case here, when a military judge "is satisfied that the Government has not engaged in intentional misconduct . . . and concludes that an instruction will cure the potential error, such a procedure is 'preferred.'" *United States v. Garces, 32 M.J. 345, 349 (C.M.A. 1991)* (citations omitted). Accordingly, we find no abuse of discretion when the military judge determined the circumstances in this case failed to justify such an extreme remedy.

Looking next to the remedies proposed and implemented, we find they sufficiently cured any potential prejudice from the untimely disclosures. "As a general matter, when an appellant has demonstrated error with respect to a *Brady* nondisclosure, the appellant is entitled to relief only if there is a reasonable probability that there would have been a different [*12] result at trial had the evidence been disclosed." *Trigueros, 69 M.J. at 609* (citing *United States v. Santos, 59 M.J. 317, 321 (C.A.A.F. 2004)*). Appellant asserts the untimely disclosure of the investigator statements withheld evidence that supported Dr. Grieger's conclusion that appellant suffered from a delusional disorder. As a remedy, the military judge permitted defense to recall Dr. Grieger to give unchallenged expert testimony. The military judge also offered the defense an opportunity to strike Dr. Grieger's testimony and essentially present a classic self-defense argument to the panel without reliance on a mental health diagnosis. This multifaceted remedy along with the late but prefindings disclosure of the Slate notes and LD statement sufficiently cured any potential prejudice from the untimeliness of the government's disclosure.

Even assuming the military judge abused her discretion in crafting lesser remedies by refusing to strike Ms. Rasmussen's testimony or admit the LD statement, we find no prejudice because of the overwhelming evidence of appellant's guilt in this case. Appellant's murders of SSG DD and SGT WD were immediately detected. Appellant's murder of SSG DD was preceded and followed by incriminating statements. Appellant screamed, "I'm going [*13] to kill you" before firing his rifle, and admitted "I did it so what" immediately afterwards. Eye witnesses saw appellant continue his attack on SSG DD under circumstances precluding any colorable claim of self-defense, which included shooting SSG DD while he was running away from appellant. The physical evidence also corroborated appellant's admissions and eyewitness testimony. Accordingly, even if we assume the military judge erred in crafting a sufficient remedy for constitutional discovery violations,

the circumstances did not warrant a mistrial and the refusal to strike Ms. Rasmussen's testimony or admit the LD statement was harmless beyond a reasonable doubt.

B. Evidentiary Ruling by Military Judge

"'A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion.'" *United States v. Bowen, 76 M.J. 83, 87 (C.A.A.F. 2017)* (citation omitted). "'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.'" *Id.* (citation omitted). Thus, "[t]he abuse of discretion standard calls 'for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. Baker, 70 M.J. 283, 287 (C.A.A.F. 2011)* (citation [*14] omitted).

If this court finds an abuse of discretion, it then reviews de novo the prejudicial effect of the ruling—whether the evidence substantially influenced the findings or sentence. *Bowen, 76 M.J. at 87*; *United States v. Griggs, 61 M.J. 402, 410 (C.A.A.F. 2005)*. Prejudice from an erroneous evidentiary ruling is evaluated by weighing "(1) the strength of the [g]overnment'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. Roberson, 65 M.J. 43, 47-48 (C.A.A.F. 2007)* (internal quotation marks and citations omitted).

"'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Mil. R. Evid. 801(c). Normally, hearsay is not admissible absent an exception. Mil. R. Evid. 802. As a hearsay exception, a witness may offer testimony concerning:

> A statement of the declarant's then existing *state of mind*, emotion, sensation, or physical condition (such as intent, plan motive, design, mental feeling, pain, and bodily health), *but not including a statement of* memory or *belief to prove the fact* remembered or *believed* unless it relates to the execution, revocation, identification, or terms of declarant's will.

Mil. R. Evid. 803(3) (emphasis added).

In this case, defense counsel sought [*15] to elicit on cross-examination testimony from SSG MM as follows:

> Q: [Appellant] asked to leave your platoon because everyone was out to get him. *Isn't that true*?
> ATC3: Objection. Hearsay.
>
> CDC: It's not offered for the truth of the matter asserted. It's offered for his *state of mind*.
> MJ: Sustained.
> CDC: Sustained, Your Honor?
> MJ: Yeah. The objection is sustained. Give me an exception to hearsay.
>
> CDC: It's not offered for the truth of the matter asserted. It's offered as to *what my client believed* his then present sense.
> MJ: Your client's present sense impression?
> CDC: Is a description of what he said -- why he said it.
>
> MJ: Not in the *form* of that question. Sustained.

(emphasis added). In response to trial counsel's objection to hearsay, defense counsel offered three distinct theories of admissibility.[2] First, defense counsel claimed the statement "was not offered for the truth of the matter asserted[,]" which places the statement outside the definition of hearsay. Second, defense counsel offered the "state of mind" exception under Mil. R. Evid. 803(3). Third, defense counsel asserted the "present sense" impression exception under Mil. R. Evid. 803(1).

Here, the military judge identified the *form* of the question as requiring a hearsay [*16] exception because it elicited an out-of-court statement by asking whether it was *true*. If the focus of the question was merely whether appellant asked SSG MM to leave the platoon, it was non-hearsay because SSG MM, as the declarant testifying at trial, could only assert as fact that appellant asked to be transferred. If, however, the focus

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[2] We recognize defense counsel's discussion of hearsay, in the rush of trial, contained an element of imprecision. Claiming a statement was made as a "present sense" impression is not the same as claiming it is "not offered for the truth of the matter asserted." Similarly, "state of mind" is not part of the "present sense impression" exception; it is part of the "then existing mental, emotional, or physical condition" exception. Hearsay exceptions are based on specific indicia of reliability (e.g., made as a present sense impression, made while under the excitement of an event, made for the purpose of medical treatment, etc.), which justify the admission of a statement for the truth of the matter asserted notwithstanding the general prohibition against hearsay. Here, we resolve this imprecision by addressing the theories of admissibility as being offered in the alternative.

of the question was on the truth of the substance of appellant's belief (i.e., everyone was out to get him), then the state of mind exception could not apply to prove the fact believed nor would it qualify as a present sense impression. Accordingly, the military judge did not err in requiring a hearsay exception or at least a clarification regarding the form of the question.

After sustaining the objection, defense counsel attempted to rephrase the question to SSG MM as follows:

> Q. Did [appellant] tell you why he wanted to leave the unit?
> ATC3: Objection. Hearsay and relevance.
> CDC: Your Honor, this witness was asked repeatedly about counseling [appellant]. As you pointed out -- yes, Your Honor. Once the government has opened that door, I'm allowed to explore it.

At this point, the military judge excused the members for an *Article 39(a)*, UCMJ, session. [*17] Then, defense counsel continued with his relevance arguments concerning the "rule of completeness" under Mil. R. Evid. 304(h)(2) and whether trial counsel "opened the door" during direct examination. The military judge rejected both of defense counsel's relevance arguments. First, the military judge found the rule of completeness did not apply because trial counsel had not offered an admission or confession from appellant during the counseling sessions. The rule of completeness is only triggered after "part of an alleged admission or confession is introduced against the accused . . . ." Mil. R. Evid. 304(h)(2). Second, because trial counsel did not introduce the substance of any statement from the counseling sessions, trial counsel had not "opened the door" to cross-examination about the substance of those conversations.

After the military judge rejected the arguments above, defense counsel continued his argument as follows:

> CDC: This witness testified that my client left first platoon and went to second platoon. The reason why he left is not offered for the truth of the matter asserted. It's offered for what my client believed the reason he wanted this transfer. It's a statement of his state of mind, Your Honor, not the fact that [*18] everyone was out to get [appellant] because we don't believe that's true, but [appellant] stated that he believed that to be true and it's not hearsay. It's not offered for the truth of the matter asserted, it's offered to demonstrate what my client's state of mind was when he was transferred from one platoon to the other at his own request.
> . . . .
> CDC: It's relevant to my client's mental state, which is admissible -- which will be -- which we have an expert witness to testify about, and it's not offered for the truth of the matter asserted, therefore it is not hearsay. It is relevant and it is admissible and therefore should be admitted. It tends to prove a fact of consequence to the case, my client's state of mind.
> MJ: I got your theory of relevance. Again, confusion on theory of relevance and theory of admissibility. Your theory of admissibility is ----
> CDC: Not offered for the truth of the matter asserted, therefore it is non-hearsay.
>
> MJ: *Then why are you offering it*?
>
> CDC: Because it tends to prove my client's state of mind. It's not offered to show that everyone was out to get him. It's offered to show that [appellant] believe[d] that and it demonstrates that this is a matter that had come up [*19] long before the shooting, therefore it takes away the argument that we created some sort of defense.
> MJ: I don't understand that.
> CDC: That our expert basically cooked this up without having a factual basis for it, Your Honor.
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> MJ: *But we haven t heard any expert testimony or anything. There's never been -- there has not been an attack or anything as to your expert's testimony that you may have "cooked this up." Your expert hasn't even testified. We're on the prosecution's case in direct*.
> CDC: I understand. I understand that. So, we're establishing why this witness testified my client went from one platoon to the other. It was at his request and it was for -- he stated the reason. It's not offered for the truth of the matter asserted. It's offered to show my client's state of mind at the time, Your Honor. It is non-hearsay. That's why it is admissible. It is relevant because it does tend to show my client's state of mind.
> . . . .
> MJ: Your objection is sustained. Call the members back in.
> CDC: Objection to that ruling, Your Honor.
> MJ: I understand.

(emphasis added). Based on defense counsel's clarification, we agree the question called for either non-

hearsay regarding what appellant said or state-of-mind [*20] evidence regarding what appellant believed. What remains unexplained is a relevant basis for asking this question *at this point of the trial*. Bolstering the defense expert's testimony was premature during the government's case-in-chief because the expert's testimony had not been offered, much less attacked. Evidence must be relevant to be admissible whether it is non-hearsay or hearsay under an established exception. It is not enough for evidence to be *potentially* relevant if and when expected testimony is offered and attacked. Therefore, the military judge did not err when sustaining the government's objection on the basis of relevance.[3]

Moreover, even if relevant, the probative value of appellant's desire to transfer to another unit two years before killing SSG DD and SGT WD is marginal at best. Thus, appellant was not prejudiced by the military judge's ruling. First, as noted above, the government's case was strong because of the testimonial and physical evidence in this case. Second, the defense's case was weak, particularly in light of appellant's admissions. Third, the materiality of SSG MM's expected response was low because it was cumulative of the same evidence presented [*21] to the panel later in the trial, most directly during appellant's testimony.[4] Its materiality was also low because, as defense counsel repeated multiple times, SSG MM's testimony was not offered for the truth that anyone was actually out to get appellant. It was merely offered for the assertion that appellant believed people were out to get him prior to the murders. Fourth, the quality of the evidence was relatively low, particularly when compared to the relatively high-quality expert testimony that was admitted about appellant's delusional disorder. Therefore, any error in the military judge's hearsay analysis was harmless in light of the strength of the government's case, the weakness of the defense's case, and because the evidence in question was immaterial and of relatively low quality.

C. Ineffective Assistance of Counsel

The *Sixth Amendment* guarantees an accused the right to the effective assistance of counsel. *United States v. Gooch, 69 M.J. 353, 361 (C.A.A.F. 2011)* (citing *United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001)*). To establish his counsel was ineffective, appellant "must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green, 68 M.J. 360, 361-62 (C.A.A.F. 2010)* (citing *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*). Although appellate courts review both prongs of the *Strickland* analysis de novo, "[j]udicial scrutiny [*22] of counsel's performance must be highly deferential." *Strickland, 466 U.S. at 689*. *See United States v. Akbar, 74 M.J. 364, 379 (C.A.A.F. 2015)*; *United States v. Mazza, 67 M.J. 470, 474 (C.A.A.F. 2009)*. Accordingly, we do not assess counsel's actions through the distortion of hindsight; rather we consider counsel's actions in light of the circumstances of the trial and under the "strong presumption that counsel's conduct falls within the wide range of professional assistance . . . ." *Strickland, 466 U.S. at 689*.

In the context of counsel's pretrial preparation, the Supreme Court has held:

> [the] strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, *counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary*. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

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[3] While the military judge later explained the basis of her ruling as the inapplicability of Mil. R. Evid. 803(3), this explanation was part of her larger analysis that if the statement was not offered for the truth it was irrelevant. Even assuming, *arguendo*, the military judge erred in her analysis, she reached the correct result in sustaining the objection because SSG MM's response was irrelevant at this point in the trial. Accordingly, we can still affirm the military judge's ruling on appeal. *See United States v. Carista, 76 M.J. 511, 515 (Army Ct. Crim. App. 2017)* (explaining the "tipsy coachman" doctrine as a basis for appellate courts to affirm a trial court ruling that reaches the right result for the wrong reasons so long as there is any basis that would support the judgement in the record).

[4] For example, in his sworn testimony, appellant confirmed he switched platoons at his own request in March 2008. He also described a situation when he felt vindicated even though other members of his unit "always laughed at [him] and thought [he] didn't know what [he] was . . . talking about . . . ." In addition, he admitted to telling SGT Christopher Muse that he was afraid every noncommissioned officer was out to get his rank.

Id. at 690-91 (emphasis added). Similarly, our superior court has echoed the need for deference by explaining: [*23] "'[appellate courts] address not what is prudent or appropriate, but only what is constitutionally compelled.' The Supreme Court has 'rejected the notion that the same [type and breadth of] investigation will be required in every case.'" *Akbar, 74 M.J. at 380* (citations omitted).

Moreover, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland, 466 U.S. at 691*. "[T]he purpose of the effective assistance guarantee of the *Sixth Amendment* is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial." *Id. at 689*. "Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Id. at 691-92*.

1. Ginn *Analysis*

Here, appellant was represented at trial by one civilian defense counsel and two military defense counsel. On appeal, appellant claims he received ineffective assistance from his trial defense team because they failed to investigate and use the potentially exculpatory information he gave them. Specifically, appellate [*24] alleges he "provided his defense team with viable evidence that SSG [DD] and SGT [WD] had previously threatened [him] because [he] had uncovered their illegal activity." In support of his claim, appellant offers his own sworn affidavit, which includes proffers of expected testimony from other witnesses and references to supporting documentation. However, appellant—both personally and through appellate defense counsel—did not provide this court with affidavits from the witnesses whose testimony he proffered nor did he include any of the supporting documents he referenced in his affidavit. The sworn affidavits from the trial defense team dispute appellant's factual allegations. Ordinarily, this would present conflicting affidavits requiring a hearing under *United States v. DuBay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967)*. *United States v. Ginn, 47 M.J. 236, 242-43 (C.A.A.F. 1997)*. Applying the first, second and fourth *Ginn* principles, however, we are convinced a post-trial evidentiary hearing is unwarranted. *See id. at 248*.

First, we disregard all "speculative or conclusory observations" in appellant's affidavit. *See id.* ("[I]f the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis."). Instead, we look only at those factual [*25] allegations in appellant's affidavit that he is competent to offer. For example, appellant proffers the testimony of several individuals and further claims his counsel failed to contact these potentially favorable witnesses. While appellant is competent to state as fact that he *relayed* these proffers to his counsel, appellant—without supporting affidavits or similar proof from each witness—can only speculate regarding the substance of their testimony and whether they were contacted by his counsel. *See, e.g., United States v. Loving, 64 M.J. 132, 150-52 (C.A.A.F. 2006)* (finding "a potentially meritorious claim of ineffective assistance of counsel arising from his trial defense counsel's failure to conduct a reasonable investigation" after the petitioner "filed voluminous unrebutted affidavits" and other "documentary evidence to support his assertion"). Without affidavits from potential witnesses stating they were not contacted by the defense team or similar evidence, we have no way to assess how appellant is competent to state as fact what his defense team did or failed to do while he was in pretrial confinement.

Second, we further disregard those portions of appellant's affidavit where "the appellate filings and the record as a whole 'compellingly [*26] demonstrate' the improbability of those facts . . . ." *Ginn, 47 M.J. at 248*. For example, appellant alleges SSG JJ "was ordered to destroy [him]" even though SSG [JJ] told appellant "how professional [appellant] was." Appellant claims his "defense team did not pursue this, and SSG JJ was not cross examined about this." However, SSG JJ was cross-examined at trial and testified appellant was a poor performer with a bad attitude.

Third, we also disregard the asserted facts in appellant's affidavit that, even if true, are irrelevant. *See id.* ("[I]f the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on that basis."). For example, appellant cites his defense counsel's failure to obtain copies of unrelated complaints made to an inspector general's office and an unnamed congressional representative's office. Even if his speculation is correct, appellant would not be entitled to relief because his defense counsel failed to obtain an unrelated complaint protesting events "at the Special Warfare School" or requesting a transfer "out of

Fort Stewart."

2. Deficiency Analysis

After stripping from appellant's [*27] affidavit all allegations that are speculative, conclusory, irrelevant, and compellingly contradicted by the record and appellate filings, what is left is a series of non-specific proffers appellant claims to have made to his defense counsel. Accepting as fact that appellant made each of these remaining proffers to his defense counsel, our task is to determine whether counsel exercised reasonable professional judgement in response to these proffers. This task does not involve picking which proffers counsel should have investigated or presented at trial. Instead, we focus on whether the investigation supporting counsel's pretrial preparation and trial performance strategy was itself reasonable. *See Wiggins v. Smith, 539 U.S. 510, 522-23, 534-35, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)* (limiting the scope of appellate review of counsel's pretrial preparation to the same reasonableness standard used in *Strickland* to assess counsel's trial performance).

In this case, we find the trial defense team completed sufficient pretrial investigation and analysis to justify our deference to their tactical and strategic decisions. Notwithstanding appellant's speculation about what his counsel failed to do, defense counsel's sworn affidavits recounting their pretrial efforts remain unrebutted [*28] by competent evidence. Among the clearest examples of the reasonableness of counsel's pretrial investigation is their treatment of appellant's self-defense claim. When appellant presented a self-defense theory that included an alleged conspiracy involving a secret organization within the unit known as the "black masons," defense counsel did not reflexively dismiss his account as fanciful or contrived. Instead, defense counsel, among other things, "interviewed nearly every soldier in [appellant's] platoon. No one admitted they had heard of the 'black masons.'" After an exhaustive investigation, it was not unreasonable for the defense team to conclude they were spending "valuable time trying to corroborate a conspiracy that was simply not there."

Moreover, counsel had the expert assistance of a psychiatrist and forensic psychologist, among other experts, during their pretrial investigation. Both of these experts examined appellant and concluded he "suffered from 'Delusional Disorder' characterized by non-bizarre delusions based on paranoia that led to a 'perfect storm of events' on the night of the shootings." Importantly, this diagnosis did not lead counsel to disregard appellant's proffers [*29] without investigation. Instead, it helped explain why the majority of appellant's proffers could not be corroborated. Under these circumstances, defense counsel executed a trial strategy that placed appellant's diagnosis before the panel at trial. This was done in an apparent attempt to recast any perceived inaccuracies in appellant's testimony as the product of a disorder, not dishonesty. Without considering the outcome, we find this strategy was reasonable under the circumstances based on sufficient pretrial investigation. Accordingly, we conclude appellant has failed to meet his burden to show deficient performance or preparation by his trial defense team.

3. Prejudice Analysis

Even assuming deficient preparation or performance by counsel, it is important to again note the overwhelming evidence of appellant's guilt in this case. Appellant's murders of SSG DD and SGT WD were immediately detected. Appellant's murder of SSG DD was preceded and followed by incriminating statements (e.g., screaming, "I'm going to kill you" before firing his rifle, and "I did it so what" immediately afterwards). Eyewitnesses saw appellant continue his attack on SSG DD under circumstances precluding any [*30] colorable claim of self-defense (e.g., shooting him six times while he was running away from appellant before collapsing on the ground and pleading for appellant to stop). The physical evidence corroborated appellant's admissions and eyewitness testimony (e.g., ballistic evidence matched appellant's rifle to the gunshot wounds to SSG DD and SGT WD, and the twenty-seven spent cartridges recovered from the scene).

Even accepting as true appellant's speculative and uncorroborated account of a "black masons" conspiracy, none of his allegations help justify the use of deadly force on the night of the offenses. Conversely, many of appellant's assertions undercut his claim of self-defense. For example, appellant claims members of his unit retaliated against him for his knowledge of and refusal to participate in their illegal activity. However, appellant cites being placed "on KP duty[,]" his "TA 50 going missing, vandalism, personal property being stolen, and similar activities" as instances of "retribution" by members of his unit. What remains unexplained is how relatively low-level "retribution" on previous occasions would help appellant justify his use of deadly force at the time of the [*31] offenses. Appellant does

not argue, much less prove, he had a reasonable apprehension that death or grievous bodily harm arising from prior instances of KP duty or missing TA 50. Instead, the full weight of his self-defense claim depends on the events just prior to the shootings, and not on the collateral issues appellant cites as instances of deficient pretrial investigation. Accordingly, appellant's assertion that his defense counsel provided ineffective assistance lacks merit.

CONCLUSION

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

Judge CELTNIEKS and Judge BURTON concur.

CERTIFICATE OF SERVICE, U.S. v. HENDERSON (20210543)

I hereby certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] on the 3rd day of May, 2023.

[redacted]

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