

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Docket No. ARMY 202200117

Specialist (E-4)
JADE W. JOHNSON,
United States Army,
Appellant

Tried at Fort Hood, Texas, on
24 January, 14 February, and 9–12
March 2022, before a general
court-martial appointed by the
Commander, III Corps, Colonel
[REDACTED] and Lieutenant
Colonel [REDACTED], Military
Judges, presiding.

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

Assignments of Error¹

I.

**WHETHER THE MILITARY JUDGE ERRED IN
ADMITTING HEARSAY.**

II.

**WHETHER THE MILITARY JUDGE ERRED IN
ADMITTING A PORTION OF THE ALLEGED
VICTIM'S CID INTERVIEW.**

III.

**WHETHER THE MILITARY JUDGE'S PANEL
INSTRUCTIONS WERE ERRONEOUS.**

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 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.

Table of Contents

Table of Contents	ii
Table of Authorities	v
Statement of the Case	1
Statement of Facts	1
A. Appellant sexually abuses [REDACTED]	1
B. [REDACTED]'s outcry to CPL [REDACTED]	3
C. [REDACTED]'s outcry to SPC [REDACTED]	3
D. [REDACTED]'s outcry to SSG [REDACTED]	4
E. [REDACTED] seeks medical care following appellant's assault.	4
Assignment of Error I.....	5
Standard of Review	5
Law	5
Additional Facts	6
A. Appellant objects to CPL [REDACTED]'s testimony.....	6
B. Appellant objects to SPC [REDACTED]'s testimony.....	7
C. Appellant does not object to SSG [REDACTED]'s testimony.	8
Argument	9
A. The military judge properly admitted [REDACTED]'s excited utterance to CPL [REDACTED]	9
B. The military judge properly admitted [REDACTED]'s excited utterance to SPC [REDACTED]	13
C. The military judge properly admitted [REDACTED]'s excited utterance to SSG [REDACTED]	14

D. Assuming arguendo the military judge erred, appellant suffered no prejudice.	15
Assignment of Error II	19
Additional Facts	19
A. Pre-trial discussion of Pros. Ex. 72.	19
B. The government requests an evidentiary hearing on the exhibit prior to offering the evidence at trial.....	20
C. Appellant asks the military judge to reconsider his ruling.	22
D. The government introduces Pros. Ex. 72 through Special Agent SN.	22
E. Appellant revisits his Mil. R. Evid. 106 argument.....	22
Standard of Review	24
Law	24
A. Military Rule of Evidence 106 – Remainder of or related writings or recorded statements.....	24
B. Military Rule of Evidence 321 – Eyewitness identification.....	24
C. Military Rule of Evidence 401 – Test for relevant evidence.....	25
D. Military Rule of Evidence 402 – General admissibility of relevant evidence.....	25
E. Military Rule of Evidence 403 – Excluding relevant evidence for prejudice, confusion, waste of time, or other reasons.	25
Law and Argument	25
A. Military Rule of Evidence 321 does not preclude admission of video evidence of otherwise admissible photo lineup evidence.	25
B. Military Rule of Evidence 106 did not require admission of the victim’s entire CID interview.	27

Assignment of Error III.....	29
Additional Facts	29
A. Prior Inconsistent Statement Instruction Assignment of Error (Victim DS).....	29
1. Appellant attempts to impeach ■■■ concerning prior inconsistent statements she made to CID.....	29
2. ■■■ denies remembering making the prior inconsistent statement to CID. ...	30
3. Appellant elicits ■■■'s prior inconsistent statement from Special Agent ■■■.	31
4. Without objection, the military judge provides the limiting instruction for ■■■'s prior inconsistent statement.	31
B. Military Rule of Evidence 412 Instruction (Victim ■■■).....	32
Standard of Review	33
Law	33
A. Prior Inconsistent Statements.....	33
B. Waiver.	34
Argument	34
A. Appellant waived his objection to the prior inconsistent statement and past sexual behavior instructions.....	34
B. The military judge gave the proper prior inconsistent statement instruction because the victim's statement was not admitted without objection.....	35
C. The military judge gave the proper instruction concerning the prior sexual behavior of ■■■.	37
D. The cumulative error doctrine does not warrant relief.	39
CONCLUSION.....	41

Table of Authorities

United States Supreme Court Cases

<i>United States v. Hale</i> , 422 U.S. 171 (1975).....	37
---	----

Court of Appeals for the Armed Forces/Court of Military Appeals Cases

<i>United States v. Arnold</i> , 25 M.J. 129 (C.M.A. 1987)	6
<i>United States v. Banks</i> , 36 M.J. 150 (C.M.A. 1992)	40
<i>United States v. Campos</i> , 67 M.J. 330 (C.A.A.F. 2009).....	34
<i>United States v. Castillo</i> , 74 M.J. 39 (C.A.A.F. 2015).....	39
<i>United States v. Damatta-Olivera</i> , 37 M.J. 474 (C.M.A. 1993).....	33, 37
<i>United States v. Davis</i> , 79 M.J. 329 (C.A.A.F. 2020)	34
<i>United States v. Dollente</i> , 45 M.J. 234 (C.A.A.F. 1996).....	39, 40
<i>United States v. Donaldson</i> , 58 M.J. 477 (C.A.A.F. 2003)	5, 6, 10, 11, 12, 13
<i>United States v. Ediger</i> , 68 M.J. 243 (C.A.A.F. 2010).....	24
<i>United States v. Ellerbrock</i> , 70 M.J. 314 (C.A.A.F. 2011).....	5
<i>United States v. Feltham</i> , 58 M.J. 470 (C.A.A.F. 2003)	5
<i>United States v. Feltham</i> , 58 M.J. at 470 (C.A.A.F. 2003)	6
<i>United States v. Gray</i> , 51 M.J. 1 (C.A.A.F. 1999)	40
<i>United States v. Hale</i> , 78 M.J. 268 (C.A.A.F. 2019).....	33
<i>United States v. Henry</i> , 81 M.J. 91 (C.A.A.F. 2021).....	5, 6
<i>United States v. Kerr</i> , 51 M.J. 401 (C.A.A.F. 1999)	15
<i>United States v. Kohlbek</i> , 78 M.J. 326 (C.A.A.F. 2019)	15
<i>United States v. Matthews</i> , 53 M.J. 465, 471 (C.A.A.F. 2000).....	39
<i>United States v. Payne</i> , 73 M.J. 19 (C.A.A.F. 2014).....	33
<i>United States v. Pope</i> , 69 M.J. 328 (C.A.A.F. 2011)	40
<i>United States v. Smith</i> , 2 C.M.A. 440 (C.M.A.1953)	34
<i>United States v. Washington</i> , 80 M.J. 106, (C.A.A.F. 2020)	16
<i>United States v. White</i> , 69 M.J. 236 (C.A.A.F. 2010)	24

Service Court Cases

<i>United States v. Alsobrooks</i> , ARMY 20200598, 2023 CCA LEXIS 47 (Army Ct. Crim. App. 30 Jan. 2023) (mem. op).....	10
<i>United States v. Olson</i> , ARMY 20190267, 2021 CCA LEXIS 160 (Army Ct. Crim. App. 1 Apr. 2021) (mem. op.)	36

<i>United States v. Powell</i> , ARMY 20200006, 2022 CCA LEXIS 144 (Army Ct. Crim. App. 8 Mar. 2022)	33, 36
<i>United States v. Stanley</i> , 43 M.J. 671 (Army Ct. Crim. App. 1995)	16
<i>United States v. Trisler</i> , 25 M.J. 611 (A.C.M.R. 1987).....	33

Federal Court Cases

<i>United States v. Belfast</i> , 611 F.3d 783 (11th Cir. 2010).....	6
<i>United States v. Sepulveda</i> , 15 F.3d 1161 (1st Cir. 1993).....	40
<i>United States v. Thornton</i> , 1 F.3d 149 (3rd Cir. 1993).....	40

Uniform Code of Military Justice

Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2018)	1, 38
Article 59, Uniform Code of Military Justice, 10 U.S.C. § 859 (2018)	15

Military Rules of Evidence

Military Rule of Evidence 106.....	21, 23, 24, 27
Military Rule of Evidence 321.....	19, 22, 24, 25, 26
Military Rule of Evidence 401.....	25, 26
Military Rule of Evidence 402.....	25, 26
Military Rule of Evidence 403.....	22, 23, 25, 27
Military Rule of Evidence 412.....	32
Military Rule of Evidence 613.....	29
Military Rule of Evidence 801.....	5, 18, 28
Military Rule of Evidence 802.....	5, 28
Military Rule of Evidence 803.....	5, 28

Other Statutes, Regulations, and Materials

Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook (29 Feb. 2020)	33, 37
---	--------

Statement of the Case

On 11 March 2022, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920 (2018).² (R. at 813; Charge Sheet). The next day, the military judge sentenced appellant to confinement for nine months and a bad-conduct discharge. (R. at 871). On 31 March 2022, the convening authority disapproved the adjudged forfeiture of pay. (Action). On 7 April 2022, the military judge entered judgment. (Judgment).

Statement of Facts

A. Appellant sexually abuses [REDACTED].

In April 2021, [REDACTED] met appellee on Tinder. (R. at 386, 392). They communicated nearly every day for at least a week either via Tinder or Snapchat. (R. at 386–87, 389). Appellant asked [REDACTED] to send him nude photos multiple times, which she refused. (R. at 387).

On 21 April 2021, appellant invited [REDACTED] to his house just to “cuddle and watch movies.” (R. at 390–91.) The victim clearly communicated to appellant that she did not want to have sex. (R. at 391). She agreed to meet appellant just as friends, and appellant picked her up in his car around 2128. (R. at 391–92; Pros.

² The panel acquitted appellant of two specifications of sexual assault and one specification of abusive sexual contact. (R. at 813; Charge Sheet).

Ex. 30, p. 5). Once at appellant's home, appellant took ■■■ to his bedroom, took off his shirt, and laid down on his bed. (R. at 394). Appellant turned on a movie and ■■■ lay on the other side of the bed without touching appellant. (R. at 394).

Appellant put his hand around ■■■'s waist and pulled her back; ■■■ scooted away from appellant and he again pulled her back into a "spooning" position. (R. at 398, 434). Appellant then physically turned ■■■'s face towards him and forcefully kissed her, and she turned her head away. (R. at 399). Appellant started kissing ■■■ harder and more aggressively, even biting her lip. (R. at 399–400). Appellant wrapped his hand on ■■■'s throat and got on top of her. (R. at 400). She told appellant "no" and froze, but appellant continued kissing her and moved his hands down her chest to touch her breasts both over and under her bra.³ (R. at 400–02). Appellant then allegedly put his hand down ■■■'s pants, rubbed her vagina over her underwear, slipped his hand under her underwear, and digitally penetrated her vagina.⁴ (R. at 402). After appellant assaulted her, ■■■ got up off the bed and told appellant she wanted to leave. (R. at 402–03).

On the walk back to appellant's car, ■■■ realized she left her AirPods in appellant's room and went back to retrieve them. (R. at 403). Because it was a far

³ These acts constituted the basis for Specification 4 of The Charge, for which appellant was convicted. (Charge Sheet; R. at 813).

⁴ These acts constituted the basis for Specification 5 of The Charge, for which appellant was acquitted. (Charge Sheet; R. at 814).

walk back to ■■■'s friend's barracks where she was staying, and ■■■ did not have her credit card to pay for a taxi, she accepted a ride back from appellant. (R. at 404–05). Appellant repeatedly apologized to ■■■ in the car ride home, but ■■■ was scared and could only look out the window and say nothing. (R. at 405).

Appellant dropped off ■■■ at the barracks of her friend, Corporal (CPL) ■■■. (R. at 441).

B. ■■■'s outcry to CPL ■■■.

After appellant dropped ■■■ off at the barracks of her friend CPL ■■■, ■■■ testified that she “[stood] outside for a second and [took] a breather before I [went] upstairs.” (R. at 441). She was outside for approximately one minute. (R. at 441).

Once inside, CPL ■■■ observed ■■■ to be in a state of distress, testifying that “...myself and my friends all noticed that she seemed to be off, like her body language thing, like there's something wrong...like she was kind of shaken...” (R. at 471). Corporal ■■■ inquired what was wrong, and ■■■ began crying “uncontrollably,” and “the more that she spoke to [him] the more that the crying intensified[.]” (R. at 472). She seemed to be physically “shattered.” (R. at 472). ■■■ informed CPL ■■■ that she had been sexually assaulted. (R. at 478).

C. ■■■'s outcry to SPC ■■■.

After outcrying to CPL ■■■, ■■■ called her friend, Specialist (SPC) ■■■, who is a military police officer (MP). (R. at 479, 492). Specialist ■■■ described

her tone upon answering as “very upset[;] [s]he was crying at the time when I first answered...it was hard enough to where it’s hard to understand what she was trying to say.” (R. at 492). She told SPC [REDACTED] she was calling from a barracks and “insinuated” that she had been sexually assaulted. (R. at 497–48).

D. [REDACTED]’s outcry to SSG [REDACTED].

Staff Sergeant (SSG) [REDACTED] was the Charge of Quarters (CQ) Sergeant on duty at CPL [REDACTED]’s barracks that night. (R. at 500). [REDACTED] approached his desk and asked him if it was CQ. (R. at 501). After SSG [REDACTED] confirmed that he was the CQ Sergeant, [REDACTED] told him that she had been sexually assaulted. (R. at 501). As soon as [REDACTED] told him she had been assaulted, she “broke down,” “visibly shaking, crying,” and “[j]ust distraught essentially.” (R. at 501).

E. [REDACTED] seeks medical care following appellant’s assault.

Fort Hood paramedics responded to [REDACTED]’s sexual assault report shortly afterwards. (R. at 504). When they arrived, [REDACTED] was “crying and coughing, seemed really upset.” (R. at 504). The paramedics transported [REDACTED] to the hospital via ambulance, where she was admitted at 2356. (R. at 504; Pros. Ex. 46). At 0400, a sexual assault medical forensic examiner examined [REDACTED]. (R. at 521, 526).

Additional facts are incorporated below.

Assignment of Error I

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING HEARSAY.

Standard of Review

A military judge's ruling to admit or exclude an excited utterance is reviewed for an abuse of discretion. *United States v. Henry*, 81 M.J. 91, 95 (C.A.A.F. 2021) (quoting *United States v. Feltham*, 58 M.J. 470, 474–75 (C.A.A.F. 2003)). A military judge abuses his discretion if his findings of fact are clearly erroneous or if the military judge erroneously applies the law. *Id.* Findings of fact are reviewed under the clearly erroneous standard, and conclusions of law are reviewed de novo. *United States v. Ellerbrock*, 70 M.J. 314, 317 (C.A.A.F. 2011).

Law

Out-of-court statements offered by a party for the truth of the matter asserted constitute hearsay. Mil. R. Evid. 801(c). Courts-martial do not admit hearsay in the absence of an exception to this general rule against hearsay. Mil. R. Evid. 802.

A hearsay statement is admissible as an excited utterance under Mil. R. Evid. 803(2) if: “(1) the statement relates to a startling event; (2) the declarant makes the statement while under the stress or excitement caused by the startling event; and (3) the statement is spontaneous, excited or impulsive rather than the product of reflection and deliberation.” *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003) (cleaned up); *see also United States v. Arnold*, 25 M.J. 129,

132 (C.M.A. 1987). The last two requirements center on whether the declarant was under the stress or excitement caused by the startling event. *See United States v. Feltham*, 58 M.J. at 470, 475 (C.A.A.F. 2003) (“The critical determination is whether the declarant was under the stress or excitement caused by the startling event.”) (citation omitted). In assessing these last two requirements, military courts look to “the lapse of time between the startling event and the statement, whether the statement was made in response to an inquiry, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statement.” *Donaldson*, 58 M.J. at 483 (internal citations omitted).

“However, ‘[i]t is the totality of the circumstances, not simply the length of time that has passed between the event and the statement, that determines whether a hearsay statement was an excited utterance.’” *United States v. Henry*, 81 M.J. 91, 96 (C.A.A.F. 2021) (citing *United States v. Belfast*, 611 F.3d 783, 817 (11th Cir. 2010)). “The proponent of the excited utterance has the burden to show by a preponderance of the evidence that each element is met.” *Id.*

Additional Facts

A. Appellant objects to CPL [REDACTED]’s testimony.

At trial, appellant requested an Article 39(a) session to argue his hearsay objection to CPL [REDACTED]’s expected “excited utterance” testimony concerning [REDACTED]’s

outcry. (R. at 472). Appellant argued that because sufficient time had elapsed for ■■■ to drive from appellant's house across post to CPL ■■■'s barracks, and given that ■■■ took a one-minute breather before going inside, "[■■■] would not still be under the startling event at [that] point in time." (R. at 473). Specifically, appellant argued that "once people have had time to contemplate their actions that that is no longer the stress of the startling incident." (R. at 475).

In response, the military judge said "No, I don't think that's the bright line rule." (R. at 475). After hearing argument from the government, the military judge overruled the objection and moments later explained his reasoning:

I think there's significant case law out there that talks about an excited utterance. It does not require an unbroken chain of events['] support to be an excited utterance. And I think that's why I'm asking if there's case law that says otherwise. But there are numerous cases that cite to excited utterance where there's still not – there's no nexus anymore to the event, but they're still under the excitement or stress of that event.

(R. at 476–77).

B. Appellant objects to SPC ■■■'s testimony.

Appellant also lodged a hearsay objection when the government asked SPC ■■■ "[w]hat did ■■■ say to you when she was speaking with you?" (R. at 492). During the closed Article 39(a) hearing immediately following, appellant argued that ■■■'s statement to SPC ■■■ could not have been spontaneous, excited, or impulsive because "she's had time at this point to reflect and deliberate, both in her

own mind and with Corporal [REDACTED], and now she's calling a second party to do so again." (R. at 495). Appellant continued to characterize [REDACTED]'s interactions with both CPL [REDACTED] and SPC [REDACTED] as "deliberation," denying that her statement could have been spontaneous "[b]ecause she's had time to discuss it . . . [s]he's had time to think about it . . . [a]nd she's now seeking advice for her deliberations, her reflection." (R. at 495–496).

The government responded by reminding the military judge of the foundation laid for the excited utterance by SPC [REDACTED]'s earlier testimony:

[H]e could barely even understand her early on. It took him a time over the course of the conversation to even be able to understand what [REDACTED] was stating. . . . [REDACTED] was under the stress, the excitement. She was still upset enough that she was not able to fully even convey what it was about the event fully for him to understand what was going on, at least at the beginning of the phone conversation. . . . It's a statement about a startling event or condition made while the declarant was under the stress of that excitement, which is exactly what he just described for the court.

(R. at 496).

The military judge then overruled appellant's hearsay objection. (R. at 497).

C. Appellant does not object to SSG [REDACTED]'s testimony.

During its brief direct examination of SSG [REDACTED], the government asked the question: "What, if anything, stands out to you about that particular CQ shift [from 21 April 2021]?" (R. at 500). The witness responded:

I had a female that had approached my desk late that evening/early morning. She had shared with me that she had been a part of a sexual assault at which point I took the proper steps to ensure that the situation got taken care of.

(R. at 500–01).

Appellant did not object to the government’s question or SSG [REDACTED]’s answer and did not cross-examine SSG [REDACTED] at the conclusion of the government’s questioning. (R. at 500–502).

Argument

A. The military judge properly admitted [REDACTED]’s excited utterance to CPL [REDACTED].

Appellant argues on appeal that [REDACTED] outcry to CPL [REDACTED] was “the product of reflection and thoughtful deliberation as opposed to being spontaneous and impulsive.”⁵ (Appellant’s Br. 7) (quoting *United States v. Alsobrooks*,

⁵ Both at trial and on appeal, appellant seems to concede that [REDACTED]’s statement related to a startling event (*Donaldson* factor one). At trial, appellant denied that the statement was made while under the stress of excitement caused by the startling event (*Donaldson* factor two). (R. at 473). When later objecting to admission of the excited utterance to SPC [REDACTED], appellant emphasized *Donaldson* factor three: “The statement must be spontaneous, excited, or impulsive rather than the product of reflection or deliberation.” (R. at 494). Appellant even emphasized that:

With regard to the [third] prong, that is the issue that I’ve related most of the arguments to. [...] All of the arguments that I presented regarding the timing, the opportunities to discuss, to reflect, to seek advice, go to that [third] prong, that this statement must be spontaneous, excited, or

ARMY 20200598, 2023 CCA LEXIS 47, at *12 (Army Ct. Crim. App. 30 Jan. 2023) (mem. op)). However, appellant’s argument persists in the same misstatement of the law he advanced at trial; namely, that that if enough time elapses which *could* allow for reflection or deliberation, the statement at issue cannot have been “spontaneous, excited or impulsive.”⁶ *Donaldson*, 58 M.J. 477, 482 (C.A.A.F 2003). But there is no evidence in the record to suggest that ■ did reflect or deliberate on her accusation that appellant had assaulted her. To the contrary, ■’s reaction was precisely what one would expect from a victim of sexual abuse: immediate removal from the situation, flight to a safe environment, and confidence in trusted friends and authorities. Her statements, and her demeanor while delivering them, establish that she was still under the stress of the assault and were not the product of reflection or deliberation.

The gap in time between the assault and the outcry is also unhelpful to appellant’s argument. As the military judge correctly noted, “there’s no

impulsive, rather than a product of reflection and deliberation.

(R. at 495).

⁶ *E.g.*, “She has had an opportunity to ponder and to understand what she is going to say at this point,” (R. at 474); “She’s had time to reflect and come up with her --,” (R. at 474); “[O]nce people have had time to contemplate their actions that that is no longer the stress of the startling event,” (R. at 475); “[After ■ left appellant’s room and was waiting for him by his car], she had the time and the opportunity to reflect on what happened in appellant’s bedroom and ultimately remembered that her air pods were still there.” (Appellant’s Br. 7).

requirement [for a direct, unmediated nexus to the event] – the nexus as it is in a present sense impression.” (R. at 477). “A lapse of time between a startling event and an utterance, while a factor in determining whether the declarant was under the stress of excitement caused by the event, is not dispositive of that issue.”

Donaldson, 58 M.J. at 483 (cleaned up).

Here, the intervening time between the startling event (appellant’s sexual abuse of [REDACTED]) and the excited utterance to CPL [REDACTED] was in fact quite brief.⁷ Moreover, Appellant dropped [REDACTED] off at the barracks immediately before [REDACTED] told CPL [REDACTED] about her assault. (R. at 441). For those first few minutes after the assault, the immediate presence of appellant did not afford [REDACTED] an opportunity to fully process the scope of the trauma. While [REDACTED] testified that she “[stood] outside for a second and take a breather” before going inside the barracks, her demeanor, appearance, and the fact that she was crying too hard to be understood all show that [REDACTED] was still under the stress of the event when she told CPL [REDACTED] she was

⁷ The record is silent as to the exact duration of the trip from appellant’s house to CPL [REDACTED]’s barracks. However, appellant (who lived in Comanche Village) and CPL [REDACTED] (who lived in barracks) both lived on post, (R. at 392), and [REDACTED] testified that but for the cold weather she could have conceivably walked back to CPL [REDACTED]’s barracks. (R. at 404). Additionally, the record reflects that appellant picked up [REDACTED] at CPL [REDACTED]’s barracks no earlier than 2138, and that [REDACTED] was admitted to the hospital at 2356. (Pros. Ex. 30, p. 5; Pros. Ex. 46). Therefore, in less than these two-and-a-half hours, [REDACTED] traveled to-and-from appellant’s house; was sexually assaulted by appellant; outcried to CPL [REDACTED], SPC [REDACTED], and SSG [REDACTED]; called and was seen by paramedics, and was transported via ambulance to the hospital.

sexually assaulted.⁸ (R. at 441, 478–79). Thus, the second *Donaldson* factor was clearly met. *Donaldson*, 58 M.J. at 483.

Further, ██████'s statement to CPL ██████ was spontaneous; therefore, the third *Donaldson* factor is met. 58 M.J. at 483. ██████ was unable to articulate what had happened to her beyond just being sexually assaulted. (R. at 479). She merely blurted out what had just happened to her as she cried uncontrollably, rather than forming an entire thoughtful narrative. Her “shaken” and “shattered” demeanor—despite her earlier attempt to comport herself—strongly belie appellant’s argument that her outcry to CPL ██████ was “the product of reflection and thoughtful deliberation as opposed to being spontaneous and impulsive.” (Appellant’s Br. 7).

Accordingly, the military judge was well within his discretion when he

⁸ Appellant argues that “the military judge found that ██████ had collected herself before her statement to CPL ██████” (Appellant’s Br. 8). The military judge’s exact words occurred in the following exchange:

[ATC]: The question is whether she’s still under the stress of this. While she *tried to gather herself* to get back to the room, that doesn’t prevent this from being an excited utterance, given the way Corporal ██████ just described her demeanor as she was describing what had happened to her.

MJ: Counsel [to the ADC], I tend to agree that *while she may have collected herself* it’s not that she’s under the event, that she’s under- in a state of nervous excitement because of an event.

(R. at 474) (emphasis added). This hardly constitutes a finding by the military judge, and even if it does, the relevant finding would be that even if ██████ may have collected herself, she was “in a state of nervous excitement because of an event.” (R. at 474).

found that ■ was still under the excitement or stress of the assault and permitted ■'s excited utterance to CPL ■. (R. at 477).

B. The military judge properly admitted ■ excited utterance to SPC ■.

For the reasons articulated supra, ■'s excited utterance to SPC ■ satisfied *Donaldson* factors one and two because the statement related to a startling event and was made while ■ was still under the stress of excitement caused by the startling event. *Donaldson*, 58 M.J. at 482. Appellant argued at trial (or at least seemed to suggest) that the statement cannot have been spontaneous, excited or impulsive because the statement was offered in the context of seeking advice and was therefore the product of reflection and deliberation. (R. at 494–496).

Specifically, appellant argued that:

The fact that she's deliberating with Corporal ■ and Specialist ■ indicates that it's not a spontaneous statement [...] because she's had time to discuss it. She's had time to think about it. And she's now seeking advice for her deliberations, her reflection. I'm not saying that you can't ask for advice. I'm just saying that it tends to negate the fact that it's simply a spontaneous statement arising out of a startling event.

(R. at 495).

Appellant has misapplied the rule's requirements. Even if it is true that ■'s statements to SPC ■ constituted "deliberations" with him, her statements concerning the sexual assault she just experienced were not the *product* of those deliberations, as the rule is designed to guard against. In other words, even if this

court finds ■ was briefly deliberating—deciding what to do about what happened to her—with someone she believed might be able to help her, her statement that she was a sexual assault victim was not the *product* of that decision.

Moreover, the government provided ample foundational testimony to establish that ■ was still under the stress or excitement of the assault, and that her statements were spontaneous and unrehearsed. Specialist ■ testified that when ■ called him “[s]he was very upset” and “[s]he was crying at the time when I first answered.” (R. at 492). He explained that “[i]t was hard enough to where [it was] hard to understand what she was trying to say.” (R. at 492).

In light of the surrounding circumstances, ■ clearly was still under the stress of a startling event when she reported the sexual assault to SPC ■, and her statements were admissible as an excited utterance. *See Henry*, 81 M.J. at 96 (noting “[i]t is the totality of the circumstances, not simply the length of time that has passed between the event and the statement”) (internal quotations omitted).

C. The military judge properly admitted DS’s excited utterance to SSG ■.

As a preliminary matter, appellant did not object to SSG ■’s testimony concerning ■’s outcry at the CQ desk. (R. at 500). In any event, SSG ■’s testimony established that ■ was still “visibly shaking, crying,” and “[j]ust distraught essentially,” and her outcry qualified as an excited utterance

under these facts. (R. at 501).

D. Assuming arguendo the military judge erred, appellant suffered no prejudice.

A finding or sentence of 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. “For preserved nonconstitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings.” *Frost*, 79 M.J. at 111 (cleaned up). In determining the prejudice from an erroneous admission of evidence, the court weighs: “(1) the strength of the government’s case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.” *United States v. Kohlbeke*, 78 M.J. 326, 334 (C.A.A.F. 2019) (citing *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)). Here, even if this court determines the military judge erred in admitting testimony concerning ■■■’s outcries, appellant suffered no prejudice and is therefore not entitled to relief. A review of the record shows that all four *Kohlbeke* factors weigh against appellant. *Kerr*, 51 M.J. at 405.

First, the government’s case was strong. The victim’s credible testimony provided a detailed, vivid account of appellant’s actions while he assaulted her. (R. at 398–404). She recalled in detail how appellant abused her, including how he pulled her in towards him in the bed, how he aggressively kissed her, and how he

got on top of her and grabbed her throat so that she couldn't breathe, and how he groped her breasts. (R. at 398, 400, 402). She testified that she told him "no" when he was biting her lip and choking her. (R. at 403). An enlisted panel saw and heard her testimony, and the members after being properly instructed by the military judge deemed her credible on these allegations in the face of appellant's scrutiny at trial. *See United States v. Stanley*, 43 M.J. 671, 674 (Army Ct. Crim. App. 1995) (recognizing in the factual sufficiency context that where "witness credibility plays a critical role in the outcome of trial this court should hesitate to second-guess the trial court's findings").

Additionally, testimony from CPL [REDACTED], SPC [REDACTED], and SSG [REDACTED] regarding [REDACTED]'s demeanor after the assault further strengthened the government's case. (R. at 470–82; 491–99; 500–02); *see United States v. Washington*, 80 M.J. 106, 110 (C.A.A.F. 2020) (noting that the victim's demeanor after the sexual assault was powerful evidence of the appellant's guilt). These witnesses observed that [REDACTED] was "shaken," "crying uncontrollably," "shattered," "very upset," "visibly shaking, crying, and just distraught essentially." (R. at 471, 472, 492, 501). Taken together, this evidence overwhelmingly demonstrates the strength of the government case, such that any alleged error by the military judge pertaining to [REDACTED]'s statements to CPL [REDACTED], SPC [REDACTED], or SSG [REDACTED] would not have had a substantial influence on the findings.

Conversely, appellant's case was relatively weak and would not have been strengthened if [REDACTED] statements were not admitted. Appellant relied mostly on attacking [REDACTED]'s credibility, but this strategy proved ineffective as to the abuse allegations in the face of [REDACTED]'s quick report and seeking of medical care.

Finally, the quality and materiality of the testimony varied greatly between the witnesses. The victim's disclosure to CPL [REDACTED] that appellant assaulted her was of high quality but was incidental to the government's case. In fact, the government only referenced [REDACTED]'s statement to CPL [REDACTED] twice throughout the 30-pages of closing argument in the transcript.⁹ Further, given that the content of [REDACTED]'s outcry statement to CPL [REDACTED] contained no new information which the panel had not already heard from the more powerful direct-examination of [REDACTED] where she described the assault in detail—the inconsequential statement at issue was immaterial to the government's case.

While the quality and materiality of CPL [REDACTED]'s testimony was relatively strong in that it related to the victim's excited demeanor and statements made immediately following appellant's assault, the evidence provided by the other

⁹ "She talked to Corporal [REDACTED] explained some of it to him[.]" (R. at 761); "And you heard from Corporal [REDACTED], who is the first person that saw her after this. She walked past him and he immediately sees that something is wrong. She was shaken, crying intensely. He described her as shattered and crying uncontrollably. ... [S]he told [him] what happened, that she was sexually assaulted, barely able to get it out[.]" (R. at 767-68).

witness's testimony were orders of magnitude weaker.

Concerning SPC [REDACTED]'s testimony, appellant objected to the government's question "What did [REDACTED] say to you when she was speaking with you?" on the grounds that it called for hearsay. (R. at 492). The government responded, and the military judge accepted, that the answer would qualify as an exception to hearsay given the foundation laid by the government prior to the question. (R. at 496–97). However, SPC [REDACTED]'s answer that "[REDACTED] insinuated that she may have been sexually assaulted" may not implicate Mil. R. Evid. 801–803 at all as it is not obviously [REDACTED]'s "statement" under the rule.¹⁰ Specialist [REDACTED]'s answer reflected his interpretation of what she was implying in her words, but he "[couldn't] recall completely what she said [. . .] she said something that cued to me that she may have been sexually assaulted. I don't recall exactly her verbiage for that." (R. at 498).

Finally, [REDACTED]'s remarks to SSG [REDACTED]'s were similarly inconsequential, and as appellant notes on appeal, "[t]he defense did not object or question SSG [REDACTED]." (Appellant's Br. 5). The import of all these witnesses' testimony turned on their consistent description of the victim's demeanor in the moments immediately following appellant's assault, as reflected by the government's

¹⁰ "'Statement' means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." Mil. R. Evid. 801(a).

emphasis on this angle of their testimony in closing argument. Accordingly, any error in admitting the “excited utterances” had little bearing on the outcome of appellant’s court-martial.

Assignment of Error II

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING A PORTION OF THE ALLEGED VICTIM’S CID INTERVIEW.

Additional Facts

A. Pre-trial discussion of Pros. Ex. 72.

In a Rule for Courts-Martial 802 session held before the first day of trial, the government notified the court of its intent to enter a video exhibit (later admitted as Pros. Ex. 72) consisting of roughly six minutes of ■■■’s identification of appellant’s photograph during a “six pack identification procedure[,] or a photo lineup” during her 11 May 2020 Criminal Investigation Command (CID) interview. (R. at 289). The military judge summarized the session and the government’s description of the proffered exhibit:

[A CID agent] explains the process, walks [the victim] through it. At some point the two...CID agents, law enforcement agents, leave the room and the alleged victim is left alone. Two CID law enforcement agents return to complete the identification process.

(R. at 289–90). The military judge explained his understanding that the government was offering the exhibit under Mil. R. Evid. 321 (the rule governing eyewitness identification). (R. at 290). He expressed skepticism, however, that

this was a permissible ground for the portion of the video reflecting the victim's demeanor after the agents left the room and before they returned, because at that time "there [was] no lineup being conducted." (R. at 290). Nevertheless, the military judge took the matter under advisement and reserved ruling until a party attempted to admit the exhibit into evidence. (R. at 291).

B. The government requests an evidentiary hearing on the exhibit prior to offering the evidence at trial.

Before proffering a foundation for the evidence later during the trial, the government requested an Article 39(a) session to argue for its admissibility:

[T]he court is correct that the relevance of the video, the primary relevance is still the lineup that's conducted. [...] [But] [t]he significance as well is [REDACTED] response to it, including...even if not the entire timeframe in between, while she's in the room alone, but at least her immediate response after seeing [appellant's] photograph [in the lineup].

[...]

In this case the reason that it's pertinent, that immediate reaction after seeing ... the lineup is [REDACTED] has a clear, visceral reaction when she now sees [appellant], whom she only had this relatively brief encounter with on one single incident. She sees his photograph, as soon as the agents leave the room she has this visceral reaction as a result.

(R. at 548–49).

Appellant countered that the proposed evidence failed the Mil. R. Evid. 403 balancing test primarily because the evidence of her reaction to appellant would be cumulative to the panel's ability to view her reaction to appellant "in the courtroom

... throughout the course of her testimony.” (R. at 550).

After a lengthy discussion with the parties, the military judge pressed the defense on how the video evidence of the victim’s demeanor would be unfairly prejudicial, granting that her reaction in the video was subject to interpretation, noting “[t]he government is proffering they think it’s relevant because it shows her demeanor immediately after making a lineup identification. You can say its otherwise, but that’s an argument question versus a relevance question.” (R. at 555–56). Appellant insisted that “this [evidence] does not have probative value in light of what the panel has already been presented with.” (R. at 556).

After some further discussion, the military judge permitted the government to introduce only the portion of the video capturing the lineup procedure itself (to include when the agents return to the room for [REDACTED] to sign the photo of appellant as her identified assailant) and the moment immediately following the agents’ departure where “she removes her mask, has a reaction.” (R. at 562).

Appellant then moved the court to allow the entire 60 minutes of that CID interview (during which CID administered the identification procedure) under Mil. R. Evid. 106. (R. at 564). The military judge advised that he was not inclined to find that the rule of completeness required admission of the entire interview but would take the matter under advisement to allow the parties to research and argue the issue later should appellant wish to offer the evidence during his case-in-chief.

(R. at 566).

C. Appellant asks the military judge to reconsider his ruling.

After another government witness examination unrelated to the video evidence and a short recess for the government to prepare the exhibit and allow the defense to review the video, appellant urged the military judge to reconsider his ruling under Mil. R. Evid. 321. (R. at 575). Appellant argued that a plain language reading of the rule required admission of eyewitness identification evidence through witness testimony, and not through a video exhibit. (R. at 575–76). The military judge ultimately disagreed that Mil. R. Evid. 321 should be read to exclude otherwise admissible video evidence given the proper foundation. (R. at 580–81). He also took the opportunity to place his Mil. R. Evid. 403 analysis on the record, finding that the probative value of the evidence was not outweighed by the danger of unfair prejudice. (R. at 581).

D. The government introduces Pros. Ex. 72 through Special Agent [REDACTED].

Next, the government called CID Special Agent [REDACTED], who laid a proper foundation for Pros. Ex. 72 by explaining the process for the blind sequential photo lineup utilized in the video, how she and Special Agent [REDACTED] conducted that portion of the victim’s CID interview, the equipment used to record the interview, and her familiarity with the exhibit itself. (R. at 584–91).

E. Appellant revisits his Mil. R. Evid. 106 argument.

On the last day of trial, immediately prior to the government resting its case-

in-chief, appellant renewed his argument that the fairness requirement under Mil. R. Evid. 106 required the military judge to allow the entirety of [REDACTED] CID interview into evidence. (R. at 611). Appellant argued that it was not obvious that the victim's visible reaction while she was in the room alone following the lineup was not obviously triggered by seeing appellant's picture and could have been in reaction to other portions of the interview not captured by Pros. Ex. 72. (R. at 611–14).

Following argument from trial counsel, the military judge found “based on what the parties have presented to me, the court finds that the MRE 106 requirements do not require that the entire video be shown at the same time as a matter fairness.” (R. at 620–21). He explained that the lineup portion of the interview, which involved an agent who was otherwise uninvolved in the case, was a “clear and distinct” segment of the interview. (R. at 621). He also noted Mil. R. Evid. 403 raised a concern that introduction of the entire interview video might constitute an undue waste of time, and “probably wouldn’t come in the case in chief because not every portion [of] that interview would be relevant and would...cause the panel to spend considerable time parsing through potentially irrelevant or unnecessary matters that are contained in the video.” (R. at 622). He concluded the session by reminding the defense:

[T]hey have a case in chief. They can present relevant portions of any other interview. I looked at the defense

witness list. They seem to have all of the potential witnesses available to them. Everybody who was called yesterday was temporarily excused, so they would be available, as well, to provide further testimony.

(R. at 622).

Appellant did not offer any exhibits in his case-in-chief and did not question any of its witnesses concerning the photo lineup at issue. (R. at 691).

Standard of Review

A military judge's evidentiary rulings are reviewed for an abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010). To find an abuse of discretion, the court must find the military judge's action to be "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (citation omitted).

Law

A. Military Rule of Evidence 106 – Remainder of or related writings or recorded statements.

"If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part – or any other writing or recorded statement—that in fairness ought to be considered at the same time." Mil. R. Evid. 106.

B. Military Rule of Evidence 321 – Eyewitness identification.

The general rule under Mil. R. Evid. 321 states that "[t]estimony concerning a relevant out-of-court identification by any person is admissible, subject to an

appropriate objection under this rule, if such testimony is otherwise admissible under these rules.” Mil. R. Evid. 302(a).

C. Military Rule of Evidence 401 – Test for relevant evidence.

“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Mil. R. Evid. 401.

D. Military Rule of Evidence 402 – General admissibility of relevant evidence.

“Relevant evidence is admissible unless any of the following provides otherwise: (1) the United States Constitution as it applies to members of the Armed Forces; (2) a federal statute applicable to trial by courts-martial; (3) these rules; or (4) [the Manual for Courts-Martial].” Mil. R. Evid. 402(a). Irrelevant evidence is not admissible. Mil. R. Evid. 402(b).

E. Military Rule of Evidence 403 – Excluding relevant evidence for prejudice, confusion, waste of time, or other reasons.

“The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence.” Mil. R. Evid. 403.

Law and Argument

A. Military Rule of Evidence 321 does not preclude admission of video evidence of otherwise admissible photo lineup evidence.

Appellant argues that the term “testimony” in Mil. R. of Evid. 321 precludes

admission of video evidence of eyewitness identification. (Appellant’s Br. 14). As the military judge noted, this is an inaccurate reading of the rule. Agreeing with appellant that “testimony refers to a witness speaking about an event, or speaking about their observations,” the military judge observed that

Somebody’s going to have to introduce this evidence through testimony. It’s not going to walk itself into court. [...] So [the government] can provide testimony as to the identification process, and attached to that testimony will be evidence. It’s not precluded under the rules[.]

(R. at 578).

The crux of the government’s basis for admission of the evidence was that the victim’s reaction to the lineup was itself a part of the lineup procedure, notwithstanding the fact that neither agent was in the room at the time. In other words, the reaction evidence was admissible both because it was integral to the lineup procedure—and therefore admissible under Mil. R. Evid. 321—and also because it was admissible, relevant evidence under Mil. R. Evid 401 and 402.¹¹

¹¹ When explaining his reasons for limiting the video of the victim when left alone in the room after the lineup to only her immediate reaction after the agents left, and not the following sixteen minutes before the agents returned, the military judge explained:

And that’s what I’ll allow. I think at a certain point she’s not having a discernible reaction. That’s why I think it does certainly lose its probative value at that point. *This is solely on MRE 401.* I don’t know why she’s reacting anymore the way she is reacting. But the fact that she’s tempered her reaction after that, why it’s not relevant is

Moreover, Mil. R. Evid. 403 concerns did not require exclusion, all of which was captured by the military judge in his rulings on the record. (R. at 561, 622).

The demeanor evidence of ■■■'s reaction to identifying appellant in the photo lineup was relevant, probative, and admissible because it was helpful to the members in understanding the victim's testimony, in assessing her credibility, and because it tended to corroborate the victim's allegation that appellant assaulted her. While the demeanor evidence in the video was not favorable to appellant, the probative value of the evidence was not outweighed by any of the Mil. R. Evid. 403 factors and was otherwise admissible. Finally, because the military judge placed his reasoning on the record—to include his Mil. R. Evid. 403 analysis—his ruling is subject to greater deference from this court.

B. Military Rule of Evidence 106 did not require admission of the victim's entire CID interview.

Contrary to appellant's assertion that fairness required the judge to grant his request to admit the entire CID interview, his request was not reasonable. (Appellant's Br. 15). The roughly one-hour video of the interview contained prolonged footage of the victim sitting alone in the room prior to the lineup

also demonstrative of the fact that she had a reaction. Because she tempers it at some point, to the point that I no longer believe that's relevant for the fact finder to consider.

(R. at 566).

procedure and immediately following her post-lineup reaction before the agents returned. (R. at 619–20). Viewing these portions of the video would have undeniably wasted the panel’s time. (R. at 620, 622). Moreover, the verbal exchanges between Special Agent [REDACTED] and the victim in the video would have required some evidentiary basis for admission as exceptions to or exclusions from the rule against hearsay. Mil. R. Evid. 801–803.

Moreover, appellant was allowed—indeed, was *invited*—to introduce such portions of the CID interview he felt were admissible under the rules during his case-in-chief and elected to rely instead upon his blanket request for the entirety of the video on a vague, unarticulated notion of fairness. (R. at 622). He argues on appeal that “[w]ithout the complete recording appellant had nothing,” but he never even attempted to introduce video evidence of the victim (allegedly) “making clear she did not want to relive everything,” or “becoming so frustrated with the interviewer that she snapped at her,” or that “she was distraught throughout the entire interview.” (Appellant’s Br. 16). Appellant’s assignment of error is accordingly without merit.

Assignment of Error III

WHETHER THE MILITARY JUDGE’S PANEL INSTRUCTIONS WERE ERRONEOUS.

Additional Facts

Appellant’s assignment of error involves separate instructions related to his two separate victims.

A. Prior Inconsistent Statement Instruction Assignment of Error (Victim ■).

1. Appellant attempts to impeach ■ concerning prior inconsistent statements she made to CID.

During cross-examination of ■ during the government’s case-in-chief, the defense asked ■ if, after she told appellant she needed to leave, appellant looked shocked, asked why, and said, “I’m sorry, I thought we were going to do this.” (R. at 438). She denied this occurred. (R. at 438). Later, during appellant’s case-in-chief, appellant recalled Special Agent ■. (R. at 651). Appellant began to ask ■ about the victim’s CID interview, prompting the government to object under Mil. R. Evid. 613 because appellant had not properly confronted ■ with her CID interview. (R. at 653, 655). After a brief recess to review the transcript, the parties agreed that appellant had not yet confronted ■ with her CID interview. (R. at 658–59). However, the military judge overruled the government’s objection as premature. (R. at 660).

2. ■ denies remembering making the prior inconsistent statement to CID.

Appellant recalled ■ and asked her again about appellant's reaction after she was "in [his] room, on his bed, when she stood up." (R. at 668). The military judge then overruled the governments objection that the question had been asked and answered. (R. at 668). The victim then denied that appellant had said anything to her, confirmed that she had been interviewed by CID and had a chance to review the video of her interview, and then denied that she told CID that appellant said "Oh, okay. I'm sorry. I thought you wanted this. I thought we were going to." (R. at 669). Defense counsel and ■ then had the following exchange:

DC: You did not tell CID that?

■: Not that I can remember. No.

DC: No, you did not say that or no you cannot remember?

■: No, that I can't remember.

DC: Would reviewing your video help you remember?

■: No. I don't want to review it.

(R. at 669–70).¹²

The government then briefly cross-examined ■ about "why even reviewing [the interview video] recently doesn't quiet (sic) jog your memory with it?" (R. at

¹² During the government's case-in-chief, ■ also said that she did not really remember her interview with CID, despite having watched it recently. (R. at 427).

670). The victim explained that she was “trying to forget it and put it all behind [her].” (R. at 670). She also explained that she has had to talk about the assault a lot since the interview, does not remember every single time she’s had to talk about it, and wants to forget it. (R. at 670–71).

3. Appellant elicits ■■■’s prior inconsistent statement from Special Agent ■■■.

Next, appellant recalled Special Agent ■■■ and asked how ■■■ described appellant’s interaction with her after she got off of the bed. (R. at 672–73). Special Agent ■■■ testified that according to ■■■, “she had said that she didn’t want that and he apologized and said that he thought that she did or words similar to that.” (R. at 673). The government did not object to the question this time. (R. at 673).

4. Without objection, the military judge provides the limiting instruction for ■■■’s prior inconsistent statement.

During the military judge’s discussion with the parties concerning instructions, the government requested—and appellant agreed to—a prior inconsistent statement instruction for ■■■’s CID statement. (R. at 703–04). After providing the parties an opportunity to review the military judge’s proposed instructions, both parties confirmed that the instructions “were consistent with what the parties asked for” and that no further issues remained. (R. at 720).

The military judge instructed the panel that it could only consider ■■■’s prior

statement in determining whether to believe her in-court testimony. (R. at 739–40; App. Ex. XXV, p. 12).

B. Military Rule of Evidence 412 Instruction (Victim [REDACTED]).

The government charged appellant with sexual assault and abusive sexual contact against his wife, [REDACTED], during a single encounter in November 2019. (Charge Sheet).¹³ The defense introduced evidence that [REDACTED] often consented to having sex with appellant after he began touching her but after she had told him no. (R. at 337).

During the discussion concerning instructions, the military judge advised the parties he intended to provide an instruction regarding Mil. R. Evid. 412(b)(2) for the alleged offenses regarding [REDACTED]. (R. at 693). He provided the following instruction:

Past sexual behavior of sex offense victim. Evidence has been introduced indicating that [REDACTED] has engaged in past acts of consensual sexual behavior with the accused. This evidence should be considered by you on the issue of whether [REDACTED] consented to these sexual acts with which the accused is charged.

(R. at 740–41; App. Ex. XXV, p. 14).

¹³ These acts constituted Specification 2 (abusive sexual contact by touching the buttocks and breast of [REDACTED] with his hand) and Specification 3 (sexual assault by digitally penetrating [REDACTED]'s vulva) of The Charge. (Charge Sheet).

Standard of Review

“Whether a panel was properly instructed is a question of law reviewed de novo.” *United States v. Powell*, ARMY 20200006, 2022 CCA LEXIS 144, at *5 (Army Ct. Crim. App. 8 Mar. 2022) (citing *United States v. Hale*, 78 M.J. 268, 274 (C.A.A.F. 2019)). “Under a plain error analysis, the accused has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused.” *United States v. Payne*, 73 M.J. 19, 23–24 (C.A.A.F. 2014).

Law

A. Prior Inconsistent Statements.

Prior inconsistent statements are generally only admissible for impeachment purposes but “may be considered [as substantive evidence] for any relevant purpose” when “admitted without objection.” See Dep’t of Army, Pam. 27-9, Legal Services: Military Judges’ Benchbook, para. 7-11-1, n.2 (29 Feb. 2020) [Benchbook]; *United States v. Trisler*, 25 M.J. 611 (A.C.M.R. 1987) (holding hearsay admitted without objection allows the factfinder to give the natural probative value to the testimony). “The military judge has considerable discretion to determine if trial testimony is inconsistent with earlier assertions and to determine both admissibility and use of prior statements.” *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993).

B. Waiver.

Waiver is the intentional relinquishment or abandonment of a known right. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (cleaned up). Failure to object to the military judge’s instructions “waive[s] all objections [on appeal] to the instructions, including in regards to the elements of the offense.” *Id.* (citing *United States v. Smith*, 2 C.M.A. 440, 442 (C.M.A.1953)). The appellate court “cannot review waived issues at all because . . . it leaves no error for [the court] to correct on appeal.” *Id.* (citing *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009)).

Argument

A. Appellant waived his objection to the prior inconsistent statement and past sexual behavior instructions.

Appellant’s objections to the military judge’s prior inconsistent statement and past sexual behavior instructions were waived. *Davis*, 79 M.J. at 331. At trial, defense counsel had ample opportunity to object to the military judge’s instructions regarding these issues—yet when asked whether the instructions “were consistent with what the parties asked for” or whether “any issues remain[ed]”, counsel announced, “No, Your Honor.” (R. at 720). As a failure to object to the military judge’s instructions “waive[s] all objections [on appeal] to the instructions” this court cannot review this objection for the first time on appeal. *Id.*

B. The military judge gave the proper prior inconsistent statement instruction because the victim's statement was not admitted without objection.

Should this court decide to pierce waiver, there is nevertheless no error to correct on appeal with respect to the prior statement because the government *did* object to Special Agent SN's testimony concerning ■■■'s prior inconsistent statement. (R. at 653, 655). While it is true that military judge (correctly) overruled the objection as premature at the time, and while it is also true that the government did not object once appellant recalled Special Agent ■■■ after confronting ■■■ with the statement, it would not have made sense for the government to renew their objection on the agent's recall. Given the posture of the witness's testimony following the proper foundation laid by appellant following the original objection, further objection would have been pointless. In fact, the government accepted that the prior inconsistent statement was admissible, and accordingly requested the appropriate instruction. (R. at 703). Appellant has not offered—and the government is unaware—of any authority requiring a party to renew its objection under these circumstances in order to avoid admission of the statement substantively, and not merely for its impact on the evaluation of the witness's in-court testimony. This court's decision in *Powell* does not demand a different outcome, because unlike here the parties in *Powell* did not object to the prior inconsistent statements at *any* time during the merits portion of trial. 2022

CCA LEXIS, at *6 (“No one objected during the course of the entire trial to the admission of any prior inconsistent statements made by [the victim], appellant, or the other witnesses.”).

Even if this court looks to its broad plenary authority to review waived issues, this is not one of “those cases which have disadvantaged the accused in a manner that the CCA determined needs correction, or a court-martial in which the perception of unfairness in the trial may have the actual effect of undermining good order and discipline.” *United States v. Olson*, ARMY 20190267, 2021 CCA LEXIS 160, *10–11 (Army Ct. Crim. App. 1 Apr. 2021) (mem. op.) (cleaned up). Admission of ■■■’s statement for its impact on her credibility cannot impugn the fairness of appellant’s trial because appellant was not materially prejudiced by the instruction. Contrary to appellant’s assertion that appellant did not reference ■■■ prior statement during closing argument, he plainly did:

She denied the fact that she had previously told CID that [appellant] apologized and said [“]I’m sorry, I thought you were—you wanted this.[”]

(R. at 782). If anything, defense counsel’s argument mischaracterized ■■■’s statement as a flat denial, as the government noted during its rebuttal argument:

And even when she was testifying to, Defense said that she wasn’t willing to admit what she had said in her CID interview. That’s not what she said. She said she just didn’t—she didn’t remember. Even after reviewing the video, she didn’t remember. And we’ve already talked about why that’s not surprising that even after reviewing

her video last week, she wouldn't remember. So it's not that she denied and wasn't willing to admit that she said that. She just couldn't remember what all she said to CID.

(R. at 793). Far from “testif[ying] that [her] inconsistent statement [was] true and thus adopt[ing] it as part of [her] testimony,” ■■■ reiterated that she simply did not remember. (R. at 669–70); Benchbook, para. 7-11-1, n.2. This scenario is precisely what the general guidance for use of prior inconsistent statements is intended to do: to place the credibility of the witness into some doubt, but not to introduce a prior out-of-court statement into evidence substantively. *See Damatta-Olivera*, 37 M.J. at 477 (“Impeachment of a witness during cross-examination with a prior inconsistent statement is a tool of a skillful questioner and is recognized as a basic rule of evidence *to challenge the credibility of a witness*.”) (citing *United States v. Hale*, 422 U.S. 171 (1975)).

For these reasons, the military judge's prior inconsistent statement instruction was not given in error.

C. The military judge gave the proper instruction concerning the prior sexual behavior of ■■■.

On appeal, appellant argues that “the military judge told the panel to only consider [the prior sexual behavior of ■■■ evidence] for the sexual assault charge [and not the abusive sexual contact charge].” (Appellant's Br. 23). Appellant premises his argument on the fact that the military judge's instruction references

“these sexual acts with which the accused is charged,” with the implication that the abusive sexual contact charge was exempted from the instruction because the elements of abusive sexual contact refer to “sexual contact” and not “sexual acts.” (R. at 728). *See also* UCMJ art. 120(d). In support of his theory, he notes that appellant was acquitted of the sexual assault charge (Specification 3 of The Charge) but convicted of the accompanying abusive sexual contact charge (Specification 2 of The Charge). From these premises, appellant concludes that provided the “proper” instruction, “the panel would have acquitted appellant of the abusive sexual contact of [REDACTED].”¹⁴ (Appellant’s Br. 28).

Appellant does not provide this court with a more “proper” instruction, because one does not exist. Appellant concedes that “[t]he military judge’s instruction [was] admittedly in accordance with the Benchbook.” (Appellant’s Br. 23). Far from “improperly limit[ing] the panel’s ability to consider her possible consent only as to the charge of sexual assault[,]” the Benchbook instruction is sufficiently broad to capture both sexual assault and abusive sexual contact charges. The location of the instruction in the sequence of the military judge’s charge to the panel make this abundantly clear. This context includes the fact that the instruction is given separately and distinctly from the specific instructions

¹⁴ Notably, appellant was also acquitted of another abusive sexual contact charge against [REDACTED] (Specification 1 of The Charge), albeit for a different encounter. (Charge Sheet; R. at 813).

concerning the elements of the offenses, as where here the military judge concluded the elements instructions and introduced “some evidentiary instructions.” (R. at 734). Moreover, the instruction is captioned “past sexual behavior of sex offense victim” and refers to “past acts of consensual sexual behavior,” alerting the panel that similar sexual behavior, or “acts” between the accused and the victim are to be considered in this light.

“Court members are presumed to follow the military judge’s instructions.” *United States v. Matthews*, 53 M.J. 465, 471 (C.A.A.F. 2000). However, this legal presumption does not require this court to presume that panel members abandoned their common sense and adopt an unreasonably restrictive construction of an otherwise obvious instruction.

D. The cumulative error doctrine does not warrant relief.

Appellate courts can order a rehearing for an accumulation of errors not reversible individually. *United States v. Castillo*, 74 M.J. 39, 43 (C.A.A.F. 2015) (citing *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996)). Cumulative error analysis requires “considering each such claim against the background of the case as a whole, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the [trial] court dealt with the errors as they arose (including the efficacy—or lack

of efficacy—of any remedial efforts); and the strength of the government’s case.”¹⁵ *Dollente*, 45 M.J. at 242 (quoting *United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993)).

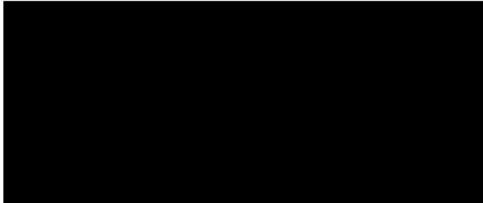
“The implied premise of the cumulative-error doctrine is the existence of errors, ‘no one perhaps sufficient to merit reversal, [yet] in combination [they all] necessitate the disapproval of a finding.’” *United States v. Gray*, 51 M.J. 1, 61 (C.A.A.F. 1999) (quoting *United States v. Banks*, 36 M.J. 150, 170-71 (C.M.A. 1992)); *see also United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011).

“Assertions of error without merit are not sufficient to invoke this doctrine.” *Gray*, 51 M.J. at 61. Because there is no merit to any of appellant’s assignments of error, “the errors, in the aggregate, do not come close to achieving the critical mass necessary to cast a shadow upon the integrity of the verdict.” *Sepulveda*, 15 F.3d at 1196.

¹⁵ Courts are far less likely to find cumulative error when a record contains overwhelming evidence of a defendant’s guilt. *United States v. Thornton*, 1 F.3d 149, 157 (3rd Cir. 1993).

CONCLUSION

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



CPT, JA
Appellate Attorney, Government
Appellate Division



Appellate Attorney, Government
Appellate Division



COL, JA
Chief, Government Appellate
Division

APPENDIX

United States v. Alsobrooks

United States Army Court of Criminal Appeals

January 30, 2023, Decided

ARMY 20200598

Reporter

2023 CCA LEXIS 47 *

UNITED STATES, Appellee v. Sergeant GEORGE E. ALSOBROOKS IV, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by [*United States v. Alsobrooks*, 2023 CAAF LEXIS 151 \(C.A.A.F., Mar. 16, 2023\)](#)

Prior History: [*1] Headquarters, U.S. Army Alaska. Joseph A. Keeler and Larry A. Babin, Jr., Military Judges. Lieutenant Colonel Meghan M. Poirier, Acting Staff Judge Advocate.

Counsel: For Appellant: Captain Sarah Bailey, JA (argued); Colonel Michael C. Friess, JA; Jonathan F. Potter, Esquire; Major Christian E. DeLuke, JA; Captain David D. Hamstra, JA (on brief and reply brief).

For Appellee: Captain Lisa Limb, JA (argued); Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Pamela L. Jones, JA; Captain Andrew M. Hopkins, JA (on brief).

Judges: Before WALKER, HAYES, and PARKER, Appellate Military Judges. Judge HAYES and Judge PARKER concur.

Opinion by: WALKER

Opinion

MEMORANDUM OPINION

WALKER, Senior Judge:

Appellant asserts that the military judge erred in: (1) admitting the victim's statement to a male friend that appellant raped her as both an excited utterance and a prior consistent statement; and (2) by admitting the victim's description of the assault provided to a sexual assault nurse examiner.¹ We hold that the military judge abused his discretion in admitting the victim's statement to a male friend as an excited utterance and in admitting the victim's statement about the sexual assault provided to the sexual [*2] assault nurse examiner, but find that these errors were harmless.

BACKGROUND

Appellant's sexual assault of the victim unraveled his own romantic relationship with his girlfriend Ms. MS, as well as the victim's close bond with Ms. MS. By early 2019, the victim had developed a close friendship with Ms. MS to the point she frequently spent the night at Ms. MS's home. In April 2019, Ms. MS began dating appellant, at which point he was introduced to the victim. By June 2019, the three of them were all living in Ms. MS's home.

When the victim was not spending the night at Ms. MS's home, she was staying with SGT JK in his barracks room, a soldier with whom she had a non-exclusive romantic relationship. The victim and SGT JK began dating in January 2019. A few

¹ We have also given full and fair consideration to the other assignment of error and the matters appellant personally submitted pursuant to [*United States v. Grostefon*, 12 M.J. 431 \(C.M.A. 1982\)](#). None of these issues warrant discussion or relief.

months later, SGT JK broke off the relationship so he could focus on his military career, but the two of them remained close friends that were emotionally and romantically involved with one another. While not in an exclusive dating relationship, SGT JK and the victim frequently spent time together. They also agreed that if either of them became interested in someone else then they would disclose that to one another. However, the victim [*3] admitted during her testimony that she was not always forthright with SGT JK when he inquired about her involvement with other men.

Over time, appellant and the victim's friendship grew closer. In the fall of 2019, appellant was gone for several weeks attending training. During that time, appellant and the victim began texting more frequently and they became good friends. Their communications would often focus on appellant's relationship with Ms. MS. The day before appellant was scheduled to return from training, the victim texted him and informed him that she had something important to tell him in person. The day after appellant returned from training, appellant texted the victim to confirm whether she was available to talk. When the victim indicated she was at Ms. MS's house, appellant arrived shortly thereafter at approximately 1400 as he was eager to find out what she needed to tell him. The victim then informed appellant that Ms. MS had been unfaithful while he was away at training. Enraged by this information, appellant turned red and ran out of the bedroom. When he returned to the bedroom, the victim disclosed more details about Ms. MS's activities while he was away. Appellant [*4] paced through the home and began punching walls. Upon returning to the bedroom, appellant demanded that the victim have sex with him as a means to exact revenge on Ms. MS and threatened to break everything in the home if she refused.

When the victim rejected appellant's demands to have sex, he forced himself on her. Appellant climbed into bed with the victim and tried touching and kissing her despite her continued protests and

covering herself with a blanket. Appellant eventually physically overpowered the victim, removed her underwear, and penetrated her vagina with his penis. The victim placed her arms over her face so she didn't have to look at appellant while she was being sexually assaulted. Appellant then told the victim to put her arms down and that if she acted as if she liked it, then it would go faster. When it was over, appellant immediately apologized to the victim and offered to help her financially since she was unemployed at the time. After the victim showered, appellant pushed for more details about Ms. MS's activities while he was gone. Appellant left the home shortly thereafter, leaving the victim in disbelief that appellant had just assaulted her and confused about [*5] what to do about it. While the victim was alone in the home, a female friend of hers stopped by for a short time to pick up a car seat. The friend observed that the victim appeared shaken and solemn and appeared as if she had been crying. She also noticed that the victim's speech was sporadic and somewhat incoherent. The victim did not disclose that she had just been sexually assaulted.

After appellant left Ms. MS's home, he caught up with Ms. MS and the two of them drove around and discussed the state of their relationship. They returned to the home that evening. Upon their return, appellant, Ms. MS, and the victim went to the grocery store together and then returned to the house to make dinner. Ms. MS and the victim made dinner together during which time, Ms. MS expressed confusion about how appellant learned of her being unfaithful to him. The victim did not share with Ms. MS that she was the one who informed appellant about Ms. MS's activities while he was gone, because she did not want to reveal that she had broken Ms. MS's trust. The three of them ate dinner together after which the victim left and went to SGT JK's barracks room. At this point, several hours had passed since the [*6] sexual assault and SGT JK noticed that the victim was quiet and not her normal self when she arrived. Thinking that the victim likely had something she needed to discuss, he advised the victim that they

would not go out as planned but could stay in his room and just talk. A few hours later, after encouragement from SGT JK, the victim became emotional, was physically shaking and sobbing and could barely get out the words when she disclosed to SGT JK that appellant had sexually assaulted her earlier that day. While hesitant at first, the following morning the victim went to the hospital because she "wanted to go make a report." At the emergency room, the victim reported the assault but did not identify appellant and refused to file a police report or submit to a sexual assault forensic examination.

Within forty-eight hours after the sexual assault, the victim reported the assault to law enforcement and underwent a sexual assault forensic examination. The evening after the incident, the victim disclosed the assault to Ms. MS. Furious, Ms. MS contacted appellant. Soon thereafter, appellant began calling and texting the victim. At that point, the victim went back to the hospital to report [*7] the sexual assault. The victim testified at trial that she returned to the hospital because that was "what I needed to do was file a report and that's why [I] was there" and that she decided to complete a sexual assault examination because "I knew that was something that needed to be done, part of the process of a sexual assault" and so she could "get the process started." While at the hospital the second time, the victim submitted to a sexual assault forensic examination. During the examination, the victim described the details of the assault, which the nurse documented in a written report. The following day, the victim contacted civilian law enforcement and reported the sexual assault and thereafter provided a statement to Army Criminal Investigation Command (CID).

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of communicating a threat and one specification of sexual assault in violation of [Articles 115](#) and [120, Uniform Code of Military Justice](#), [10 U.S.C. §§915, 920 \(2018\)](#) [UCMJ]. The panel sentenced appellant to a dishonorable

discharge, confinement for sixty-six months, reduction to the grade of E-1, forfeiture of all pay and allowances, and a reprimand.

LAW AND DISCUSSION

*A. The Victim's [*8] Disclosure to SGT JK Did Not Qualify As An Excited Utterance*

Appellant asserts that the military judge abused his discretion in admitting the victim's disclosure of the sexual assault to SGT JK as an excited utterance. We agree but find that appellant did not suffer any prejudice because the statement was properly admitted as a prior consistent statement.

"We review a 'military judge's ruling admitting or excluding an excited utterance [for] an abuse of discretion.'" [United States v. Henry, 81 M.J. 91, 95 \(C.A.A.F. 2021\)](#) (quoting [United States v. Feltham, 58 M.J. 470, 474-75 \(C.A.A.F. 2003\)](#)). A military judge abuses his discretion if his findings of fact are clearly erroneous or if the military judge erroneously applies the law. *Id.*

Military Rule of Evidence [Mil. R. Evid.] 803(2) provides that a "statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused[.]" is not hearsay. Our superior court noted, "[t]he implicit premise [of the exception] is that a person who reacts 'to a startling event or condition' while 'under the stress of excitement caused' thereby will speak truthfully because of a lack of opportunity to fabricate." [Henry, 81 M.J. at 96](#) (cleaned up). For a statement to qualify as an excited utterance: (1) the event prompting the statement must be startling; (2) the declarant makes the [*9] statement while under the stress of the excitement caused by the event; and, (3) the statement must be "spontaneous, excited or impulsive rather than the product of reflection and deliberation." [United States v. Donaldson, 58 M.J. 477, 482 \(C.A.A.F. 2003\)](#) (cleaned up). In assessing the last two requirements, courts look to "the lapse of time between the startling event and the statement,

whether the statement was made in response to an inquiry, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject-matter of the statement." Donaldson, 58 M.J. at 483 (cleaned up). It is the "totality of the circumstances, not simply the length of time that has passed between the event and the statement, that determines whether a hearsay statement was an excited utterance." Henry, 81 M.J. at 91 (cleaned up).

There is no dispute that the sexual assault was a startling event for the victim. Therefore, we will focus our analysis on the other two Donaldson factors. We find that the military judge did not abuse his discretion in finding that the victim's disclosure to SGT JK was made while under the stress of the excitement caused by the sexual assault. The victim testified that in the hours after the sexual assault she felt disgusted, violated, [*10] lost, and confused about what happened and conflicted about whether to report the sexual assault. She testified that she just "wanted to act normal and carry on like nothing happened." Given the victim's state of mind to act normal until she could process the trauma of what had occurred, it was not surprising that she did not disclose the sexual assault to her girlfriend when she stopped by the house soon after the assault to pick up a car seat. The girlfriend observed, however, that the victim looked defeated, her eyes were puffy as if she had been crying, she seemed shaken, and her speech was sporadic and incoherent.

The victim also testified that while driving to the grocery store with appellant and Ms. MS, her mind was focused on the sexual assault and she was "trying to figure out what to do." When the victim finally arrived at SGT JK's, several hours after the sexual assault, he noticed that she was "super quiet," "very upset," "crying" and not her normal energetic and happy self. It was immediately obvious to SGT JK that the victim was under stress and had something on her mind that she needed to discuss with him. When the victim finally disclosed

to SGT JK that the appellant [*11] had sexually assaulted her, she was "shaking," "sobbing," and "could barely get her words out."

We acknowledge that, "[t]here is a difference between the stress or excitement caused by the original event and that caused by the trauma of having to retell what happened after initially calming down" and "[o]nly the former is admissible as an excited utterance." United States v. Green, 50 M.J. 835, 840 (Army Ct. Crim. App. 1999). In this case, however, it was clear that the victim was visibly upset and under stress when she arrived at SGT JK's and during the few hours she remained silent before disclosing the assault to SGT JK. This evidence supported the military judge's conclusion that the victim was still under the stress of excitement of the sexual assault prior to exhibiting the trauma of recounting the assault to SGT JK. Additionally, her extremely emotional demeanor as she was attempting to describe the event seemed indicative to the military judge that she was reacting to the extreme stress of the event itself, not the retelling of it. Given the testimony of both the victim and SGT JK, the military judge's finding that the victim was still under the stress of the excitement of the sexual assault was well within his discretion, under the totality [*12] of the circumstances analysis that is required.

We do hold, however, that the military judge abused his discretion in determining that the victim's statement to SGT JK was spontaneous or impulsive. In fact, the military judge failed to even address this Donaldson factor in his ruling. Given the military judge's failure to place this analysis on the record, less deference will be accorded to him. United States v. Flesher, 73 M.J. 303, 312 (C.A.A.F. 2014). The evidence elicited at trial demonstrated that the victim's statement was the product of reflection and thoughtful deliberation as opposed to being spontaneous and impulsive. First, we note that several hours passed between the sexual assault and the victim's disclosure to SGT JK. As appellant aptly asserts, "[a]s a general proposition, where a statement relating to a startling

event does not immediately follow that event, there is a strong presumption against admissibility under M.R.E. 803(2)." [*Donaldson*, 58 M.J. at 484](#) (citing [*United States v. Jones*, 30 M.J. 127, 129 \(C.M.A. 1990\)](#)). Indeed, the lapse of time coupled with the totality of the circumstances leads to the determination that the victim's statement was not spontaneous.

During the several hours that passed between the assault and the victim's disclosure to SGT JK, the victim met with a girlfriend to exchange a car seat, went grocery [*13] shopping with Ms. MS and appellant, and prepared dinner alone with Ms. MS. The facts demonstrate that the victim had multiple opportunities to disclose the sexual assault prior to her disclosure to SGT JK, and consciously chose not to do so upon deliberate reflection. Furthermore, the victim testified that she spent a significant amount of time reflecting on the assault and deliberating over whether to report it. She testified that there were many moments at various points in time prior to her disclosure to SGT JK in which she internally struggled with the trauma of the assault, whether she should report the sexual assault, and the impact her reporting would have on various relationships in her life. When she arrived at SGT JK's barracks, she did not disclose to him immediately. Rather, she remained quiet and introspective on whether she should just say nothing. SGT JK testified that he informed the victim that she could talk to him about anything and attempted to make her comfortable since she appeared distraught. It was only after a few hours of reflection and deliberation that the victim finally disclosed to SGT JK that appellant assaulted her.

Based upon the evidence elicited at [*14] trial, we find that the victim's disclosure to SGT JK was neither spontaneous nor impulsive and thereby fails the third [*Donaldson*](#) factor for qualifying as an excited utterance. Thus, the military judge erred in admitting the victim's statement to SGT JK that appellant had raped her as an excited utterance. Since we conclude that the victim's statement to SGT JK was admissible on another basis, we will

not evaluate whether this error prejudiced appellant.

B. The Victim's Disclosure to SGT JK Qualified As A Prior Consistent Statement

Appellant also asserts that the military judge abused his discretion in admitting the victim's disclosure of the sexual assault to SGT JK as a prior consistent statement because he misapplied the law. While we agree with appellant that the military judge erred as to the basis for the victim's statement qualifying as a prior consistent statement, we nonetheless find that the statement qualified as a prior consistent statement.

We review a military judge's decision to admit evidence under an abuse of discretion standard. [*United States v. Finch*, 79 M.J. 389, 394 \(C.A.A.F. 2020\)](#) (quoting [*United States v. Frost*, 79 M.J. 104, 109 \(C.A.A.F. 2019\)](#) (cleaned up)).

Generally, an out of court statement offered for its truth is inadmissible as hearsay. Mil. R. Evid. 802. Military Rule of Evidence 801(d)(1)(B) provides, however, that a prior consistent [*15] statement is not hearsay if: (1) the declarant testifies and is subject to cross-examination about the prior statement; (2) the prior statement is consistent with the declarant's testimony; and (3) the statement is either (i) offered to rebut a charge of recent fabrication or recent improper influence or motive or (ii) is offered to rehabilitate the declarant's credibility when it has been attacked on another ground. [*Finch*, 70 M.J. at 394-95](#). In the case where the prior statement is offered to rebut a recent motive to fabricate or improper influence, then it "must precede any motive to fabricate or improper influence that it is offered to rebut. . . ." [*Frost*, 79 M.J. at 110](#). In cases where there are multiple motives to fabricate or improper influences, the prior statement need only precede the one it is offered to rebut. *Id.*

Our superior court has held that the phrase "when attacked on another ground" refers to grounds other

than recent fabrication or an improper influence or motive for testifying as specified in the preceding subpart, Mil. R. Evid. 801(d)(1)(B)(i). [*Finch*, 70 M.J. at 395](#). Although the rule itself does not specify what types of attacks a prior consistent statement may be used to rebut under this provision, the Drafter's Analysis lists "charges of inconsistency [*16] or faulty memory" as two examples. *Id.* (citing Mil. R. Evid. 801(d)(1)(B) analysis at A22-61 (2016)). Further, our superior court also held that the prior consistent statement used to rehabilitate a witness's credibility attacked on "another ground" must "actually be relevant to rehabilitate the witness's credibility on the basis on which he or she was attacked." [*Finch*, 79 M.J. at 396](#).

The victim's disclosure to SGT JK was properly admitted as a prior consistent statement, although the military judge erred as to the grounds upon which the statement qualified as a prior consistent statement. The victim's statement that appellant had raped her satisfied the first two threshold requirements for admissibility as a prior consistent statement in that the victim testified at trial and was subject to cross-examination and her statement to SGT JK was consistent with her testimony at trial. Our analysis thus focuses on whether the victim's statement either: (1) properly rebutted a charge of recent fabrication or recent improper influence; or (2) rehabilitated her credibility after she was "attacked on another ground." Mil. R. Evid. 801(d)(1)(B)(i),(ii). Trial defense counsel asked the victim several questions about SGT JK's involvement in her decision to go report the sexual [*17] assault both at the hospital and to law enforcement. These questions suggested that SGT JK pressured the victim to report the sexual assault. In his ruling, the military judge properly recognized that the defense cross-examined the victim about her hesitancy to report the sexual assault to law enforcement and SGT JK's role and influence in convincing the victim to do so. Yet, the military judge ruled that the victim's statement was admissible because her credibility had been "attacked on another ground" and thereby analyzed

the statement's admissibility under the wrong prong of Mil. R. Evid. 801(d)(1)(B). The prior statement that she was assaulted was inadmissible under Mil. R. Evid. 801(d)(1)(B)(ii) because the military judge's stated "other ground" of attack was her lack of memory as to specific details of the assault, and her prior statement to SGT JK that she was assaulted is not relevant to rehabilitate her credibility on that basis.

Given the additional thrust of the victim's cross-examination in which the defense attempted to have the factfinder infer that the allegation was false and resulted from pressure by SGT JK, the military judge should have analyzed the admissibility of the statement as to whether it rebutted a charge of recent [*18] fabrication or recent improper influence. We find that the victim's statement to SGT JK was admissible under this prong of Mil. R. Evid. 801(d)(1)(B) given the defense's cross-examination of the victim and given that her statement to SGT JK that she was assaulted predated his alleged improper influence to make a report. [*Finch*, 79 M.J. at 395-96](#). Thus, while we find that the military judge erred as to the basis for which the victim's statement could be admitted as a prior consistent statement, we affirm the military judge's ruling because the statement was admissible as a prior consistent statement to rebut a charge of improper influence by SGT JK. *See United States v. Norwood*, 81 M.J. 12, 18 (C.A.A.F. 2021) ("[W]e affirm a military judge's ruling when 'the military judge reached the correct result, albeit for the wrong reason.'" (cleaned up)).

C. The Victim's Description of the Sexual Assault to a Sexual Assault Nurse Examiner Was Improperly Admitted Under the Medical Exception to Hearsay

At trial, the government presented the testimony of a sexual assault nurse examiner (SANE) who performed a sexual assault forensic examination on the victim. The SANE testified that after ensuring the victim was medically stable to participate in the examination, she obtained a medical history from

the [*19] victim for purposes of guiding the physical examination. The medical history included the victim providing details about the sexual assault which the SANE documented in a written report. Over defense objection, the military judge admitted the portion of the SANE's report that documented the victim's description of the sexual assault to the SANE during the sexual assault forensic examination. We agree with appellant that the military judge erred in admitting the victim's description of the sexual assault to the SANE because it did not satisfy the requirements for admission under the medical exception to hearsay in accordance with Mil R. Evid. 803(4).

"We review a military judge's decision to admit evidence for an abuse of discretion." United States v. Cucuzzella, 66 M.J. 57, 59 (C.A.A.F. 2008) (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." Donaldson, 58 M.J. at 482 (citing United States v. Humpherys, 57 M.J. 83, 90 (C.A.A.F. 2002)).

Hearsay statements made to medical personnel for the purposes of medical diagnosis or treatment are admissible even though the declarant is available to testify. Mil. R. Evid. 803(4). Statements offered under Mil. R. Evid. 803(4) must be "made for the purposes of medical diagnosis or treatment" and "the patient must make the statement with [*20] some expectation of receiving medical benefit for the medical diagnosis or treatment that is being sought." Donaldson, 58 M.J. at 485 (cleaned up). Whether a statement falls within this hearsay exception depends upon the subjective state of mind or motive of the patient coupled with the patient's expectation that providing truthful information will assist the patient in being healed. *Id.* (internal quotation marks and citations omitted). "A military judge's determination that a patient made a statement for the purpose of medical diagnosis or treatment out of an expectation of receiving medical benefit is a question of fact that we review for clear error." Donaldson, 58 M.J. at

485.

In this case, the military judge's factual finding that both the victim and the SANE testified that the victim "clearly went [to the hospital] for medical purposes, for medical treatment, and then, subsequent to that was the forensic exam" was clearly erroneous and not supported by the evidence at trial. The victim testified that she went to the hospital because she wanted to make a report and create a record that she had informed law enforcement about the sexual assault. She stated on the record that she initially went to the hospital because she "wanted [*21] to go make a report." At the emergency room, the victim reported the assault but did not identify appellant and refused to file a police report or submit to a sexual assault forensic examination. The victim testified that she returned to the hospital the following day because that was "what I needed to do was file a report and that's why I was there" and that she decided to complete a sexual assault examination because "I knew that was something that needed to be done, part of the process of a sexual assault" and so she could "get the process started." If the victim had wanted to obtain the benefit of medical treatment, she would likely have sought that treatment the first time she visited the hospital, but she did not avail herself of a medical evaluation on either visit to the hospital. Rather, the victim's own testimony was that she went to the hospital and submitted to a forensic examination for purposes of reporting the sexual assault and starting the process.

The SANE testified that there is both a medical and a forensic aspect to the sexual assault forensic examination. While the SANE explained that her primary role in the examination is medical, it is not the SANE's state of [*22] mind that is at issue in evaluating whether the victim's statements satisfied the medical exception to hearsay. When asked about the victim's motive for agreeing to the examination, the SANE refused to speculate as to the victim's motive for wanting a forensic examination and stated the motive "would be patient-dependent." In fact, when pressed by the

military judge as to the primary purpose of the victim's examination, the SANE replied "[w]ell, you'd have to ask her. I have patients choose to do a medical forensic exam for a variety of reasons . . . so, I can really only speak to what my role is in that." In determining whether statements to a medical provider are admissible under Mil. R. Evid. 803(4), the declarant's subjective state of mind is critical. Here, as appellant points out, the victim's motivation in requesting the forensic examination was for purposes of creating an official record of her allegation and preservation of evidence. Neither the testimony of the victim nor the SANE supported the military judge's finding that the victim's motive for submitting to the forensic examination was for purposes of medical diagnosis or treatment and thus, was clearly erroneous. Therefore, we find that [*23] the military judge abused his discretion in admitting the victim's description of the sexual assault provided to the SANE.

D. Appellant Was Not Prejudiced

When this court concludes that a military judge erroneously admitted evidence, then we must determine whether the government has satisfied its burden in demonstrating that the error was harmless. [*Finch*, 79 M.J. at 398](#) (citations omitted). Nonconstitutional evidentiary errors, such as in this case, require that we evaluate "whether the error had a substantial influence on the findings." *Id.* (cleaned up). In analyzing whether the appellant suffered prejudice, we must weigh: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." [*United States v. Kohlbeek*, 78 M.J. 326, 334 \(C.A.A.F. 2019\)](#) (cleaned up).

We hold that appellant was not prejudiced by the erroneous admission of the victim's statement to the SANE. The government's case was strong given the victim's testimony of the sexual assault. The victim provided credible and detailed testimony about the

sexual assault. She also provided a reasonable explanation for not disclosing the assault to her best friend Ms. MS in the immediate aftermath, [*24] because she knew the disclosure would reveal the victim's betrayal of her best friend by informing appellant that Ms. MS had cheated on him. A friend of the victim who stopped by the house only a few hours after the assault described her as looking "defeated" and her eyes appeared puffy as if she had been crying and her speech was initially incoherent. The testimony of SGT JK about the victim's emotional state when he saw her only hours after the assault, along with the victim's disclosure about the assault, further strengthened the government's case. The defense's cross-examination of the victim highlighted the defense theory that the victim lied about a consensual sexual encounter in order to protect her relationship with SGT JK. However, both the victim and SGT JK testified that they were not in an exclusive relationship at the time of the sexual assault and the victim testified that she was never romantically interested in appellant. The victim's description of the sexual assault to the SANE was not of central importance to the government case, but merely affirmed the testimony the victim had already provided. We also find that the one-page summary of the assault provided to the [*25] SANE was consistent with the victim's testimony and was not relied upon to provide details that were not otherwise provided by the victim herself at trial. Given the overall strength of the government's case and the lack of materiality of the victim's statement to the SANE, we find that the erroneous admission of the excerpt of the SANE report was harmless.

CONCLUSION

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

Judge HAYES and Judge PARKER concur.

United States v. Olson

United States Army Court of Criminal Appeals

April 1, 2021, Decided

ARMY 20190267

Reporter

2021 CCA LEXIS 160 *; 2021 WL 1235923

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

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by

[*United States v. Olson*, 2021 CAAF LEXIS 536, 2021 WL 2323771 \(C.A.A.F., May 27, 2021\)](#)

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

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

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

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

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

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

Opinion by: WALKER

Opinion

MEMORANDUM OPINION

WALKER, Judge:

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

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications [*2] of rape, one specification of assault consummated by battery, and one specification of making a false official statement, in violation of [Articles 120](#), [128](#), and [107](#), Uniform

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

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

Code of Military Justice, [10 U.S.C. §§ 920, 928](#), and [907 \(2016\)](#) [UCMJ].³ The military judge sentenced appellant to a dishonorable discharge, confinement for eight years, total forfeiture of pay and allowances, and reduction to the grade of E-1.

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

I. BACKGROUND

A. Events Leading to the Charges

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

While walking back to her barracks room, a boisterous group of people who "looked like they had been drinking" caught SPC [TEXT REDACTED BY THE COURT] attention. In particular, SPC [TEXT REDACTED BY THE COURT]

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

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

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

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

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

B. Reporting the Assault and the Law Enforcement Investigation

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

Specialist [TEXT REDACTED BY THE COURT] was never able to identify her assailant. She was unable to identify him in a photo line-up and did not know his name. During the investigation, appellant was identified as a potential suspect [*6] based upon SPC [TEXT REDACTED BY THE COURT] description of the general location of the barracks room where the assault occurred. In July 2018, law enforcement questioned appellant about the night of the sexual assault. Appellant stated he could not recall what he had been doing that night but he "may have been camping or hanging with friends." Appellant denied he knew SPC [TEXT REDACTED BY THE COURT] and denied having

any sexual encounters in January. Appellant consented to a search of his barracks room in which law enforcement located an X-box, a black and gold flag, and Christmas lights in his roommate's bedroom.⁴ Law enforcement also obtained key card entry logs from appellant's barracks building. The key entry log confirmed that on the morning of 14 January 2018, appellant's key card unlocked the front courtyard room door at approximately 0131 and opened his barracks room door at 0134. The investigation also revealed that appellant called SPC [TEXT REDACTED BY THE COURT] on her cell phone between 0200 and 0230 on the morning of the sexual assault. Oddly, SPC [TEXT REDACTED BY THE COURT] testified that she did not believe that she had exchanged phone numbers with the male she assisted [*7] the night of the assault and that she could not recall whether they exchanged personal information such as names, ranks, or units of assignment.

C. Appellant's Polygraph Examination and Admissions

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

During appellant's post-polygraph interview, which

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

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

II. LAW AND DISCUSSION

A. Unreasonable Multiplication of Charges

For the first time on appeal, appellant asserts that

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

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

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

unpersuasive and determine that his case is not one in which we should exercise our unique authority.

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

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

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

We next address appellant's claim that the military judge erred in admitting testimony of the victim's virginity at the time of the sexual assault, in order

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

A decision to admit evidence is reviewed for an abuse of discretion.⁵ [*United States v. McCollum*, 58 M.J. 323, 335 \(C.A.A.F. 2003\)](#) (citations omitted). We review a military judge's findings of fact under a clearly erroneous standard and her conclusions of law de novo. [*United States v. Ellerbrock*, 70 M.J. 314, 317 \(C.A.A.F. 2011\)](#) (citing [*United States v. Roberts*, 69 M.J. 23, 26 \(C.A.A.F. 2010\)](#)).

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

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

of the proffered evidence outweighs the danger of unfair prejudice, it is admissible[.]").

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

The military judge abused her discretion in allowing the admission of evidence of the victim's virginity in contravention of Mil. R. Evid. 412(a), which prohibits evidence regarding a victim's sexual predisposition. Military Rule of Evidence 412 is designed to protect a victim from humiliating and embarrassing questions and to "preclude introduction of evidence as to the victim's reputation for chastity or evidence of specific [*15] sexual acts" unless required by the limited prescribed exceptions. [United States v. Sanchez, 44](#)

[M.J. 174, 178 \(C.A.A.F. 1996\)](#). We do not agree with the government's argument that the victim's virginity is not evidence of sexual predisposition. The choice *not* to engage in sexual intercourse is as much a sexual predisposition as someone who has particular sexual proclivities. See [United States v. Bird, 372 F.3d 989, 995 \(8th Cir. 2004\)](#) ("[T]estimony of the prosecuting witness's virginity is inadmissible under [Federal Rule of Evidence 412](#)"). Moreover, by its plain text, Mil. R. Evid. 412 applies equally to the government as it does to an accused. Consequently, if an accused is prohibited from presenting evidence of a victim's lack of chastity to prove consent, it stands to reason that the government should not be able to assert the victim's chastity, in and of itself, as a means to prove lack of consent. See [Bird, 372 F.3d at 995](#) (citation omitted) ("If the defendant in such a case is prohibited from playing on the potential prejudices of a jury by introducing evidence of the alleged victim's promiscuity, the government should also be forbidden to play on potential prejudices by introducing evidence of the alleged victim's chastity.").

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

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

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

diagnosed with the condition prior to the sexual assault. The fact that she was actually a virgin at the [*18] time she was assaulted is not relevant to her having contracted a sexually transmitted disease that could have been transmitted by sexual contact not involving actual intercourse, as testified to by medical professionals during the trial.⁸

Even assuming evidence of the victim's virginity was not barred by Mil. R. Evid. 412 and had some logical relevance under Mil. R. Evid. 401, it still should have been excluded on the basis of legal relevance under Mil. R. Evid. 403 because whatever probative value it had was substantially outweighed by the danger of unfair prejudice. Here, the military judge did not conduct the required Mil. R. Evid. 403 analysis prior to admitting this evidence because she erroneously concluded that the defense withdrew its objection. Therefore, we are unable to afford the deference we would normally afford to a military judge who articulates on the record a proper Mil. R. Evid. 403 balancing. See [United States v. Flesher, 73 M.J. 303, 312 \(C.A.A.F. 2014\)](#); [United States v. Benton, 54 M.J. 717, 725 \(Army Ct. Crim. App. 2001\)](#). Evidence of the victim's virginity was unduly prejudicial based on how it was elicited and how it was leveraged by trial counsel. The government elicited evidence of the victim's virginity by inquiring about her emotional state after the assault, which did not relate to any fact of consequence on the merits of the case. The government then took that [*19] irrelevant evidence and used it as a means of bolstering the victim's credibility as to her testimony that she did not consent. Trial counsel did so by arguing that it was unreasonable that she would have consented since she was a virgin and that she must have contracted herpes from appellant because the sexual assault was her "first and only sexual encounter." The victim's status as a virgin is

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

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

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

no more relevant to consent than the sexual orientation with which a person identifies is relevant to consent. [*United States v. Grant*, 49 M.J. 295, 297 \(C.A.A.F. 1998\)](#) (holding that the victim's sexual orientation as a homosexual was inadmissible because it was irrelevant as to the issue of consent).

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

C. Admission of Evidence of Sexually Transmitted Disease

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

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

The admissibility of evidence is dependent upon the evidence being both logically relevant (Mil. R.

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

Evid. 401 and 402) and legally relevant (Mil. R. Evid. 403). United States v. Bailey, 55 M.J. 38, 40 (C.A.A.F. 2001) (citations omitted). Relevant evidence is that which has "any tendency" to make a fact that is "of consequence in determining the action" more or less probable than it would be without the evidence. Mil. R. Evid. 401(a)—(b). We recognize that the standard of whether evidence is relevant is a low threshold. United States v. White, 69 M.J. 236, 239 (C.A.A.F. 2010) (citing United States v. Reece, 25 M.J. 93, 95 (C.M.A. 1987)). Even if relevant, the military judge may exclude evidence if its probative value is substantially outweighed by the danger of "unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." Mil. R. Evid. 403. The term "unfair prejudice" in the context of Mil. R. Evid. 403 "speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." United States v. Collier, 67 M.J. 347, 354 (C.A.A.F. 2009) (quoting Old Chief v. United States, 519 U.S. 172, 180, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997)). Military Rule of Evidence 403 addresses "prejudice to the integrity of the trial process, not prejudice to a particular party or witness." *Id.*

During the victim's direct examination, the government attempted to elicit testimony [*23] that she was diagnosed with HSV a few weeks after being sexually assaulted. The defense objected to any evidence of the victim's sexually transmitted infection (STI) as irrelevant under Mil. R. Evid. 401 and 403. The defense argued that evidence of the victim's STI could not be linked to appellant since there were two types of the HSV and medical professionals never identified from which type of herpes the victim suffered, nor could the government present evidence of how and when the victim contracted HSV. As such, the defense asserted any such evidence of the victim's STI was irrelevant, misleading, and unduly prejudicial. The government argued that evidence of the victim's diagnosis of HSV, coupled with evidence that

appellant had been diagnosed with HSV months after the sexual assault, was relevant to the government's burden to prove penetration. The government conceded that it could not specifically link the victim's HSV to appellant, other than she was diagnosed with it after the sexual assault, but that this deficiency went to the weight to be given the evidence and not its admissibility.

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

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

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

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

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

We also find the evidence of the victim and appellant being diagnosed with HSV is not legally

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

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

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

D. Admission of Appellant's Polygraph Results

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

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

Military Rule of Evidence 707(a) provides, "[n]otwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence." Holding that the concerns about the scientific unreliability of a polygraph examination was the clear target of the rule, *Kohlbeek* addressed only the third category of evidence concerning "any

reference to an offer to take, failure to take, or taking of a polygraph examination." [*Id.* at 331-32](#). In *Kohlbeek*, our Superior Court determined that despite the expansive proscriptive language, the third portion of the rule does not categorically prohibit the admission of evidence regarding "the facts and circumstances surrounding a polygraph examination to explain the reason or motivation for a confession." [*Id.* at 332](#). *Kohlbeek* does not mandate the admission of this third category of polygraph evidence, but rather leaves it to military judges to "exercise their discretion in deciding whether to admit evidence regarding the facts and circumstances surrounding a polygraph [*30] examination to explain the reason or motivation for a confession." *Id.*

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

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

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

examination and the admission of any evidence of the results of the polygraph examination.

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

At trial, SA [TEXT REDACTED BY THE COURT] testified about his interview of appellant and some of the admissions appellant made during the interview. The government specifically elicited testimony from SA [TEXT REDACTED BY THE COURT] that, during the initial portion of the

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

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

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

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

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

Q: Did [appellant] express surprise or disbelief when you informed him of the results of the test?

A: He did not.

Q: Did he make any faces or throw up his hands, 'I can't believe it' or anything like that?

A: He did not.

Q: Now I want to be clear, even after you informed [*35] him the results of the test, you didn't tell him, did you, that he must have raped [SPC [TEXT REDACTED BY THE COURT]]?

A: I did not say that.

Q: Did you tell him that you still did not know what happened in that room?

A: I made it clear to him that I didn't know for sure what happened in that room, but I could not believe at this point what his explanation was, that he didn't know her and that sex did not occur.

Neither Mil. R. Evid. 707 nor *Kohlbeke* permitted this line of testimony, specifically questions and answers clearly implying that appellant failed the polygraph examination. While the government's questions did not specifically elicit the polygraph examination results, they certainly did so by implication. Furthermore, the government elicited testimony from SA [TEXT REDACTED BY THE COURT] that he no longer believed appellant after

reviewing the polygraph results, thereby creating the inference that in SA [TEXT REDACTED BY THE COURT] opinion, the polygraph results were reliable. This type of evidence is contrary to both Mil. R. Evid. 707 and *Kohlbeke*, which clearly prohibit evidence of the results of the polygraph examination and the opinions of the polygraph examiner. We find the admission of such evidence at trial [*36] even more troubling given that the government was the proponent of the evidence, over defense objection. Cf. *United States v. Sharp, ARMY 20190149, 2020 CCA LEXIS 310* (Army Ct. Crim. App. 10 Sep. 2020) (mem. op.) (finding no error in the erroneous admission of polygraph evidence in part because the appellant affirmatively waived the issue by acquiescing in the admission of the polygraph evidence for strategic reasons). We find that the military judge abused her discretion and erred in allowing the government to elicit testimony regarding appellant's polygraph results and the polygraph examiner's opinion about appellant's credibility based upon the polygraph results.

E. Prejudice

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

The "findings or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." *UCMJ art. 59(a)*. The government bears the burden of demonstrating that the error from the erroneous admission of evidence is harmless. [*37] *Frost, 79 M.J. at 111*. "For [preserved] nonconstitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings." *Id.* (quoting *Kohlbeke, 78 M.J. at 334*). We review de novo the prejudicial effect of an erroneous evidentiary

ruling. [*Kohlbeek*, 78 M.J. at 334](#). We do so by considering: (1) the strength of the government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. *Id.*

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

the government effectively assailed appellant with his own words.

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

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

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

¹⁴ There were some substantive differences between the victim and appellant's account of their interaction and the sexual assault: (1) appellant insisted he and the victim "made out" before entering his barracks room; (2) appellant admitted he digitally penetrated the victim which she never disclosed to law enforcement; and (3)

appellant stated he was initially on top of the victim and could not penetrate her at which point he turned her around and penetrated her from behind.

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

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

Putting aside the erroneously admitted evidence, the military judge, sitting as trier of fact, properly considered SPC [TEXT REDACTED BY THE COURT] credible testimony about the nonconsensual sexual assault, appellant's admissions about nonconsensual penile and digital penetration, and the peripheral corroborative

evidence discussed above. For these reasons, we conclude the materiality and the quality of the erroneously admitted evidence was, on balance, inconsequential compared to the properly admitted evidence.

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

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

III. CONCLUSION

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

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

End of Document

United States v. Powell

United States Army Court of Criminal Appeals

March 8, 2022, Decided

ARMY 20200006

Reporter

2022 CCA LEXIS 144 *; 2022 WL 702904

UNITED STATES, Appellee v. Specialist
DANNIE L. POWELL, JR., United States Army,
Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, 7th Infantry Division. Joseph A. Keeler, Military Judge. Colonel Rebecca K. Connally, Staff Judge Advocate.

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

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

Judges: Before BURTON,¹ FLEMING, and PARKER, Appellate Military Judges.

Opinion by: FLEMING

Opinion

MEMORANDUM OPINION

FLEMING, Judge:

Appellant claims the military judge erred in his instruction to the panel regarding prior inconsistent statements. For the reasons set forth below, we agree, and grant relief in our decretal paragraph.²

¹ Senior Judge Burton took final action in this case prior to her retirement.

² We have given full and fair consideration to appellant's other

BACKGROUND

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault in violation of [Article 120](#), Uniform Code of Military Justice, [10 U.S.C. § 920 \(2016\)](#) [UCMJ].³ The panel sentenced appellant to a dishonorable discharge, confinement for forty-eight months, reduction to the grade of E-1, total forfeitures, and a reprimand.

The victim, (hereinafter "[TEXT REDACTED BY THE COURT]"), met appellant at a music festival. They exchanged cellphone numbers and [*2] maintained friendly communications via text message. [TEXT REDACTED BY THE COURT] felt some romantic interest in appellant and agreed to meet him in person later that month. [TEXT REDACTED BY THE COURT] testified she told appellant that she was not interested in sexual intercourse and he appeared to respect her boundaries.

About a week after the music festival, appellant and [TEXT REDACTED BY THE COURT] met again in-person. Appellant drove [TEXT REDACTED BY THE COURT] to his friend's house for a party, where they spent the evening with approximately five other people. Multiple witnesses testified [TEXT REDACTED BY THE COURT]'s interactions with appellant were light hearted and

assigned errors, as well as those personally asserted pursuant to [United States v. Grostefon, 12 M.J. 431 \(C.M.A. 1982\)](#), and determine they warrant neither discussion nor relief.

³ The panel acquitted appellant of one specification of wrongful use of a controlled substance in violation of Article 112a, UCMJ.

romantic during the party. Most of the partygoers were drinking alcoholic beverages. Further, [TEXT REDACTED BY THE COURT] testified she and appellant ingested methylenedioxymethamphetamine, more commonly known as "molly," during the party.

[TEXT REDACTED BY THE COURT] testified that at some point during the party, she began experiencing blurred vision, weakness, and an inability to move her body. Appellant took [TEXT REDACTED BY THE COURT] to a guest bedroom where she thought she could rest. [TEXT REDACTED BY THE COURT] testified appellant began undressing himself. She told him she did not want anything to happen but appellant removed her pants and penetrated her vagina with his penis.. testified she did not consent to the sexual act and she screamed loudly, in an effort to obtain help from the other party-goers. Appellant, however, did not stop the sexual intercourse. [TEXT REDACTED BY THE COURT] testified she went unconscious and later awoke in a different sexual position before blacking out again.

At trial, multiple prior inconsistent statements from [TEXT REDACTED BY THE COURT] and other witnesses were admitted. For example, the day after the incident, [TEXT REDACTED BY THE COURT] sought medical treatment. She did not report using drugs or alcohol to the emergency room staff, nor did she mention losing consciousness. RR, [TEXT REDACTED BY THE COURT]'s friend, testified [TEXT REDACTED BY THE COURT] told RR that [TEXT REDACTED BY THE COURT] and appellant were heavily making out and they attended the party to engage in sexual activity. [TEXT REDACTED BY THE COURT] told RR when appellant fingered her vagina, she thought to herself that she did not really want to have sex, but she was not sure [*4] if she verbally relayed that information to appellant. During cross-examination, RR clarified that [TEXT REDACTED BY THE COURT] did not know if she ever told appellant she wanted to stop the sexual conduct. Neither the government nor the

defense objected to the introduction of these and multiple other prior inconsistent statements.⁴

After the parties rested, the government requested an instruction regarding prior inconsistent statements with respect to [TEXT REDACTED BY THE COURT], appellant, and other witnesses. The defense objected, stating "I don't object to the court giving the general instruction. But it would be commenting on the credibility of the witness for the court to identify [each] ... witness." Ultimately, the panel was instructed, without further objection from either side, that:

You have heard testimony that before this trial that [TEXT REDACTED BY THE COURT], AO, BD, appellant, KR, and Specialist JM made statements that may have been inconsistent with their testimony here in court. If you believe that an inconsistent statement was made, you may consider the inconsistency in deciding whether to believe the witnesses in court testimony.

You may not consider [*5] that earlier statement as evidence of the truth of the matter as contained in the prior statement. In other words, you may only use it as one way of evaluating the witness's testimony here in court. You cannot use it as proof of anything else.

For example, if a witness testifies in court that

⁴The parties at trial and the appellate counsel in their briefs consistently used the terminology "prior inconsistent statements" to describe the witnesses' testimony so, for consistency purposes, we will continue to use that terminology. We pause to note, however, in our experience, this terminology is usually a phrase of art utilized to describe testimony that was initially *objected to* at trial which the military judge ultimately ruled was admissible *as*: (1) impeachment evidence with the singular non-substantive purpose of exploring the witnesses' credibility; or (2) substantive evidence meeting the rigorous non-hearsay qualifications under Military Rule of Evidence [Mil. R. Evid.] 801(d)(1)(A) (emphasis added). *See* Mil. R. Evid. 801(d)(1)(A) (requiring, prior to admission, the following: the witness testify at trial, the witness' prior statement "be given under penalty of perjury at trial, hearing, or other proceeding or in deposition," the witness' prior statement be inconsistent with the witness' trial testimony, and the witness be subject to cross-examination about the prior statement).

the traffic light was green, and you heard evidence that the witness made a prior statement that the traffic light was red, you may consider that prior statement in evaluating the truth of the in court testimony. You may not, however, use the prior statement as proof that the light was red.

LAW AND DISCUSSION

The sole issue is whether the panel was properly instructed regarding prior inconsistent statements. They were not.

Whether a panel was properly instructed is a question of law reviewed de novo. [*United States v. Hale*, 78 M.J. 268, 274 \(C.A.A.F. 2019\)](#). "Under a plain error analysis, the accused 'has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused.'" [*United States v. Payne*, 73 M.J. 19, 23-24 \(C.A.A.F. 2014\)](#). Prior inconsistent statements are generally only admissible for impeachment purposes but "may be considered [as substantive evidence] for any relevant purpose" when "admitted without [*6] objection." See Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 7-11-1, n.2 (10 Sep. 2014) [Benchbook]; [*United States v. Trisler*, 25 M.J. 611 \(A.C.M.R. 1987\)](#) (holding hearsay admitted without objection allows the factfinder to give full probative value to the testimony).

No one objected during the course of the entire trial to the admission of any prior inconsistent statements made by [TEXT REDACTED BY THE COURT], appellant, or the other witnesses. All prior inconsistent statements were admitted without limitation and, therefore, were substantive evidence. Although it is arguable whether the initial defense objection preserved a non-waived error for appeal, we determine such a debate is not relevant because we find the military judge committed plain error by providing, in contrast to a correct legal

instruction, a 360 degree completely erroneous instruction—that all the witnesses' prior inconsistent statements were limited in purpose to only determining witness credibility and "could not be use[d] as proof of anything else." We pause now to provide the sample instruction that appropriately addresses the nature of the admitted prior inconsistent statements:

You have heard evidence that before this trial (state [*7] the name of the witness(es)) made (a) statement(s) that may be inconsistent with his/her/their testimony here in court. I have admitted into evidence (testimony concerning) the prior statements(s) of (state the name of the witness(es)). You may consider (that statement) (these statements in deciding whether to believe (that witness's) (these witnesses') in-court testimony.

You may also consider (that statement) (these statements) along with all the other evidence in this case.

(For example if a witness testified in court that the traffic light was green and you heard evidence that the witness made a prior statement that the traffic light was red, you may consider the prior statement as evidence that the light was, in fact, red, as well as to determine what weight to give the witness's in-court testimony.)

Benchbook, para. 7-11-1, n.2.

We recognize the government counsel was the genesis for the instructional error by requesting a limiting instruction as to the prior inconsistent statements. However, the military judge possessed a duty to provide appropriate legal instruction to aid the panel in deliberations. See, e.g., [*United States v. Killion*, 75 M.J. 209 \(C.A.A.F. 2015\)](#). The military judge's explicit erroneous instruction to consider numerous [*8] amounts of admitted substantive evidence for impeachment purposes only misled the panel, and we presume the panel members followed the military judge's erroneous instruction. See [*United States v. Matthews*, 53 M.J. 465, 471 \(C.A.A.F. 2000\)](#).

We must now consider any resulting prejudice to appellant and whether an erroneous evidentiary instruction, a non-constitutional error, had a "substantial influence on the members' verdict in the context of the entire case." United States v. Steen, 81 M.J. 261, 263 (C.A.A.F. 2021) (citations omitted); United States v. Harrow, 65 M.J. 190, 200 (C.A.A.F. 2007). "A finding or sentence of 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." United States v. Berry, 61 M.J. 91, 97 (C.A.A.F. 2007) (citing Article 59(a), UCMJ). In determining the prejudice, we weigh "(1) the strength of the government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." United States v. Berry, 61 M.J. at 98 (internal citations omitted).

The corroborating evidence in this case was not strong. It was, as these cases are commonly referred to, a she said/he said case. [TEXT REDACTED BY THE COURT] testified the sexual incident was non-consensual and appellant testified it was consensual. The lay witnesses, who were mostly party-goers, were generally consistent in describing [*9] appellant and [TEXT REDACTED BY THE COURT] as engaging in friendly and flirtatious interactions prior to the alleged incident. No one else was in the guest bedroom at the time of the incident and none of the other multiple party-goers testified to hearing [TEXT REDACTED BY THE COURT] scream. Although the forensic results of a SAFE examine generally corroborated the occurrence of sexual intercourse, which appellant readily conceded, [TEXT REDACTED BY THE COURT]'s trial testimony as to her non-consent, and incapacitation, was undoubtedly the lynchpin in securing appellant's conviction.

As to the materiality and quality of the evidence in question, numerous prior inconsistent statements from [TEXT REDACTED BY THE COURT] were admitted during trial and the panel was advised that none of them were to be considered as substantive

evidence. As to her incapacity [TEXT REDACTED BY THE COURT] admitted she did not tell medical personnel she was intoxicated, from either alcohol or "molly" usage at the time of the assault. [TEXT REDACTED BY THE COURT] initially testified she had previously articulated her unwillingness to have sexual intercourse with appellant, prior to meeting him on the night of [*10] the incident, and she screamed for appellant to stop the sexual conduct, in an attempt to get help from the other party-goers. [TEXT REDACTED BY THE COURT]'s friends, however, testified for the government that [TEXT REDACTED BY THE COURT] was interested in appellant and intended to engage in at least some sexual activity, and that [TEXT REDACTED BY THE COURT] could not recall verbalizing any non-consent when appellant attempted to move from digital penetration to full sexual intercourse.

Based on the nature of this case, we find the erroneous instruction prejudiced appellant and had a substantial influence on the members' verdict in the context of the entire case.

CONCLUSION

The findings of guilt and sentence are SET ASIDE. A rehearing may be ordered by the same or a different convening authority.

Senior Judge BURTON and Judge PARKER concur.

End of Document

CERTIFICATE OF SERVICE, U.S. v. JOHNSON (20220117)

I certify that a copy of the foregoing was sent via electronic submission to the
Defense Appellate Division at [REDACTED]
[REDACTED] on the 9th day of June, 2023.

[REDACTED]
Senior Paralegal Specialist
Government Appellate Division
[REDACTED]
Fort Belvoir, VA 22060-5546
[REDACTED]
[REDACTED]