IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.	Docket No. ARMY 20220223
Private (E-2) **OSCAR A. BATRES,** United States Army, Appellant	Tried at Fort Bragg, North Carolina, on 18 January, 27 January, 21 March, and 2–5 May 2022, before a general court-martial convened by Commander, 82d Airborne Division, Colonel Gregory B. Batdorff, Military Judge, presiding.

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

Assignments of Error[1]

I.

WHETHER THE MILITARY JUDGE ERRED BY ADMITTING SPC [redacted]'S 911 CALL

II.

WHETHER THE MILITARY JUDGE ERRED BY PROHIBITING APPELLANT FROM PRESENTING TEXT MESSAGES BETWEEN HIMSELF AND PFC [redacted] UNDER THE RULE OF COMPLETENESS

[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.

Panel No. 4

Statement of the Case

On 5 May 2022, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of sexual assault and one specification of assault consummated by battery, in violation of Articles 120 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 928 (2018) [UCMJ]. (R. at 1031; Charge Sheet).[2] The military judge sentenced appellant to confinement for forty-six months and a dishonorable discharge. (R. at 1069). On 10 August 2022, the convening authority took no action on the adjudged sentence. (Action). On 12 August 2022, the military judge entered judgment. (Judgment).

Statement of Facts

A. Appellant, SPC [redacted], and the victim celebrate Independence Day on 4 July 2021.

Appellant met Private First Class (PFC) [redacted] while waiting in line at a Fayetteville, North Carolina Walmart on 2 July 2021. (R. at 535). Over the next two days, the two spent time together and developed a sexual relationship. (R. at 535–36).

On 4 July 2021, PFC [redacted] met appellant at a party at Specialist (SPC) [redacted]'s house on Fort Bragg. (R. at 538). Private First Class [redacted] did not know anyone at the party other than appellant. (R. at 538). Appellant and PFC [redacted] also

[2] The panel acquitted appellant of one specification of Article 120, UCMJ. (R. at 1031).

met SPC [redacted] at the party. (R. at 538, 571). After a few hours, appellant and PFC [redacted] went to another party at the barracks room of PFC [redacted] and PFC [redacted], friends of appellant who were at SPC [redacted]'s party and were also unknown to PFC [redacted]. (R. at 540, 573). While at the barracks, appellant and PFC [redacted] had sex in PFC [redacted]'s room. (R. at 540, 676). Before they finished having sex, SPC [redacted] and PFC [redacted] came into the room. (R. at 541, 574). Specialist [redacted] closed the door and he and PFC [redacted] walked out. (R. at 575). Appellant and PFC [redacted] then dressed and left the barracks with SPC [redacted], PFC [redacted], and PFC [redacted] to watch fireworks at another location on post. (R. at 542, 575).

After thirty or forty-five minutes at the fireworks show, appellant, PFC [redacted], SPC [redacted], PFC [redacted] and PFC [redacted] returned to SPC [redacted]'s house to retrieve PFC [redacted]'s identification card and hire a taxi into Fayetteville to go to a club. (R. at 544, 576). Appellant and PFC [redacted] separated from the other three as they went to get PFC [redacted]'s card. (R. at 576). While PFC [redacted] was retrieving her card from her car, she and appellant began to have consensual sex, with appellant standing behind her as she leaned against the driver's side of her car. (R. at 548).

B. Appellant and SPC [redacted] sexually assault PFC [redacted].

Specialist [redacted] approached the car while appellant and PFC [redacted] were having sex. (R. at 549, 577). He "kind of hesitated" and turned to walk away before appellant "called him back and told him to join." (R. at 549, 564, 578).

Private First Class [redacted] turned around towards appellant and said "I did not ask for this. I did not agree to this." (R. at 549, 569). Appellant grabbed her face, "aggressive[ly] squeez[ing]" it, and told her to shut up while continuing to penetrate her from behind.[3] (R. at 549, 569). Appellant told PFC [redacted] to "take it" and forced PFC [redacted]'s head and mouth down onto SPC [redacted]'s penis.[4] (R. at 550, 579, 650). Private First Class [redacted] could hear appellant and SPC [redacted] talking and telling each other to put her into the backseat of her car. (R. at 550). Once SPC [redacted] placed PFC [redacted] on her back in the backseat, SPC [redacted] got on top of her "and proceeded to have sex with her." (R. at 551, 581). Specialist [redacted] could see that she was crying and heard her say that "this is not what she wanted," but he continued to have sex with her until he ejaculated.[5] (R. at 581–82, 642).

C. Private First Class [redacted] discovers appellant and SPC [redacted] sexually assaulting PFC [redacted].

When appellant, SPC [redacted], and PFC [redacted] did not return from retrieving PFC [redacted]'s card after about thirty minutes, PFC [redacted] and PFC [redacted] went to look for them. (R. at 667, 871). As PFC [redacted] approached PFC [redacted]'s car, he discovered SPC [redacted] laying on top of PFC [redacted] in the back seat. (R. at 668).

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[3] This conduct formed the basis for Specification 1 of Charge I (Article 120, UCMJ) and The Specification of Charge II (Article 128, UCMJ). (Charge Sheet).
[4] This conduct formed the basis for Specification 3 of Charge I (Article 120, UCMJ). (Charge Sheet).
[5] This conduct formed the basis for Specification 2 of Charge I (Article 120, UCMJ), for which appellant was acquitted. (Charge Sheet).

Private First Class [redacted] tapped on SPC [redacted]'s shoulder and asked him when the taxi was going to arrive. (R. at 668). After about five seconds, SPC [redacted] got out of the car and pulled up his pants, and then started to cry and said "I'm sorry. Hit me." (R. at 669). Private First Class [redacted] then saw appellant go to the back of the car where PFC [redacted] was and lean into the car. (R. at 669, 686). His pants were pulled down to his ankles and "[i]t looked like he was going for a stroke." (R. at 669, 687). Private First Class [redacted] went over to appellant and "pulled his shoulder." (R. at 670). Appellant and SPC [redacted] were telling PFC [redacted] to hit them and call the police. (R. at 670). Shortly afterwards, SPC [redacted] and appellant walked "about 15 meters" away from everyone at the car and called 911. (R. at 583).

Additional facts are incorporated below.

Assignment of Error I

WHETHER THE MILITARY JUDGE ERRED BY ADMITTING SPC [redacted]'S 911 CALL

Additional Facts

A. The government moves to preadmit the 911 recording in its entirety.

On 18 January 2022, the government charged appellant *inter alia* with two specifications of sexual assault against PFC [redacted] with SPC [redacted]'s penis.[6] (Charge Sheet).

On 10 March 2022, the government filed a motion in limine to preadmit the recorded 911 call made by SPC [redacted] and appellant immediately following their sexual assault of PFC [redacted]. (App. Ex. IV). In relevant part, the government argued that the entirety of the call—including the statements made by SPC [redacted]—were excluded from the prohibition against hearsay under Military Rule of Evidence (Mil. R. Evid.) 801(d)(2)(B). (App. Ex. IV).

B. The 21 March 2022 pretrial motions hearing.

On 21 March 2022, the military judge held a pretrial motions hearing to consider the government's motion. (R. at 11–54). After listening to the recording, and hearing the government's argument, he denied the government's motion to

[6] Specification 2 of Charge I alleged that appellant committed a sexual act upon PFC [redacted] by penetrating her vulva with SPC [redacted]'s penis without her consent; Specification 3 of Charge I alleged that appellant committed a sexual act upon PFC [redacted] by penetrating her mouth with SPC [redacted]'s penis without her consent. (Charge Sheet). The panel acquitted appellant of Specification 2. (R. at 1031).

admit the entirety of the recording as appellant's adopted admission of SPC [redacted]'s statements:

> Just anyone with any degree of common sense having heard the recording knows that [appellant] didn't adopt everything that was said therein.
> . . . .
> . . . I disagree [that appellant was a consistent participant throughout the statement].

(R. at 32).

Following an unexpected recess later that day, the military judge returned to the issue:

> I listened to [the recording] again during this last recess. The court does agree that there are likely contained in that recording adopted admissions made by the accused. However, the overall tenor and much, if not most, of the substance of that recording though are Specialist [redacted]'s own statements that were not explicitly adopted by the accused. I don't find that there was an adoption and agreement to all his statements by silence.

(R. at 100).

When the government persisted in its argument that the surrounding circumstances of the call supported appellant's adoption of SPC [redacted]'s statements, the military judge ordered the parties to make and agree on a transcript of the call:

> I see that method as striking a good balance because I do agree that there's some things in there that I . . . find the accused adopted. But I also find that there's some stuff that's prohibited by [Mil. R. Evid.] 403.

(R. at 103).

The military judge directed the government to make a transcript, for the defense to "annotate any objections, much like we do errata for the transcript in a record of trial," and to provide the updated transcript to the judge to "assist [him] in providing parties with guidance with respect to what is allowed and what is not allowed to be presented to the factfinder during the course of the trial." (R. at 105).

C. The 9 April 2022 pretrial motions hearing.

On 9 April 2022, the parties held a second motions hearing to litigate the supplemental motions related to the government's continuing efforts to pre-admit the entire 911 call. (R. at 129–184; App. Ex. IV-B–F). The military judge called SPC [redacted] to testify at the hearing to explore the surrounding circumstances of the call and to see if the witness could resolve two annotated lines of the errata in the 911 call transcript. (R. at 131–32).

Specialist [redacted] testified that he called 911 from his cell phone, that the phone was on speaker during the call, and that appellant was "[a]bout two to three paces away from [him]" during the entirety of the call. (R. at 139). Specialist [redacted] testified that he had "no doubt" that appellant could hear everything that both he and the 911 operator said during the call. (R. at 139). An enhanced version of the 911 recording was played for SPC [redacted] during his examination by

the military judge, and he was asked to follow along with the recording on the agreed upon transcript with the two disputed lines redacted. (R. at 140–42, 154–55).

The parties agreed that the statements made by appellant during the call were admissible as a statement by an opposing party under Mil. R. Evid. 801(d)(2)(A). (R. at 164, 185–86). Appellant nevertheless maintained his objection to admission of the entirety of the recording under Mil. R. Evid. 403:

> But Specialist [redacted]'s own 911 statements are too damaging and prejudicial to [appellant's] fair trial in asking that the court allow factfinders to hear that 911 call as if it was [appellant's]. . . . There's a conflation that is already happening here. If we allow a factfinder to hear this 911 call, and just impute then every statement provided by SPC [redacted] onto the accused, we will fail our 403 analysis under that part.
> . . .
> . . . [W]e would ask that the court not allow the 911 to be played, because if we do, we have to splice out certain sections that would just be too confusing to the factfinder.

(R. at 169, 173).

The military judge ultimately found that "only certain parts of the statement in the 911 call were adoptively admitted, not its entirety." (R. at 175). However, the court ruled that the entirety of the recording would be admitted. To address appellant's Mil. R. Evid. 403 concerns, the military judge noted:

> [T]he court is more than confident that the court can and will draft a limiting instruction. The court will clearly explain to the members exactly what portions they can

> consider as it relates to the statements of the accused, which the counsel have agreed are clearly admissible. . . .
>
> I will, however, allow the playing of the 911 call during the course of the trial. . . . And I'll explain to them that they are not allowed to consider the statements of the 911 operator, the responding officer, or Specialist [redacted] for their truth, and that they're not to be considered as statements of the accused with a few exceptions where [appellant] does acknowledge or adopts what Specialist [redacted] says. And I'll make that very, very clear. I am one hundred percent confident that our members will be able to understand that and apply that limitation. I will explain that to them, and I will ask them if they can and will, in fact, apply the instruction as I read it to them.

(R. at 176–77).

The military judge also suggested that the members should have a copy of the transcript while the recording is played as further mitigation of appellant's Mil. R. Evid. 403 concerns, so that they might better distinguish between the voices on the recording and to ensure that the members "understand that the vast majority of what is said in there are statements by Specialist [redacted] that they cannot consider and cannot hold against [appellant]." (R. at 177–78, 180).

D. The military judge instructs the panel prior to publishing the audio recording of the 911 call.

Prior to publishing the 911 recording during the government's direct examination of SPC [redacted] at trial, the military judge instructed the panel as follows:

> [M]embers, you're about to hear an audio recording of a phone call made to Fort Bragg 911 on the morning of 5

> July 2021. During this call, you will hear statements from primarily three people, including: one, the 911 operator who took the call; two, [SPC [redacted]]; and three, [appellant]. Members, you may only consider the statements of the 911 operator for the limited purpose of providing context to the recording and not for the truth of the matters asserted. You may consider statements made by Specialist [redacted] for the truth of the matter asserted only if they were clearly adopted by the accused as his own statement. Statements made by Specialist [redacted] that the accused did not clearly adopt as his own may only be considered for the limited purpose of providing context to the recording and not for the truth of the matter asserted.
>
> Again, you have been provided a transcript of the recording to assist you in understanding what is being said on the recording and following my instructions.
>
> Can and will all members follow my instructions pertaining to this audio recording and the transcript thereof? If so, please raise your hand.

(R. at 587–88). All members responded in the affirmative. (R. at 588).

The military judge also provided the limiting instruction to the panel members prior to deliberation on findings. (R. at 976–77).

Standard of Review

This court reviews a military judge's decision to admit evidence for an abuse of discretion. *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *Id*. "This standard requires more

than just [this court's] disagreement with the military judge's decision." *United States v. Bess*, 75 M.J. 70, 73 (C.A.A.F. 2016) (citing *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015)).

When this court finds that a military judge admitted evidence in error, the government bears the burden of demonstrating that the admission of that evidence was harmless. *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*. (internal quotation marks omitted) (quoting *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019)). In conducting its prejudice analysis, 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." *Id*. (internal quotation marks omitted).

Law & Argument

The military judge did not abuse his discretion when he admitted the recording and transcript of SPC [redacted]'s 911 call to provide context to appellant's otherwise admissible statements and adoptions during the call. The military judge's findings of fact were not clearly erroneous, his decision was not influenced by an erroneous view of the law, and his limiting instruction adequately addressed appellant's concerns that the evidence would unfairly prejudice appellant or confuse the issues under Mil. R. Evid. 403.

A. The military judge correctly found that appellant adoptively admitted certain parts of SPC [redacted]'s statements to the 911 operator, and that the remainder of the recording provided necessary context for these and other statements.

Military Rule of Evidence 801(d)(2)(A) excludes from the rule against hearsay a statement offered against an opposing party made by the declarant in an individual or representative capacity. Military Rule of Evidence 801(d)(2)(B) excludes from hearsay a statement offered against an opposing party which the party "manifested that it adopted or believed to be true."

The foundation for admitting adoptive admissions requires "a showing that (1) the party against who it is offered was present during the making of the statement; (2) he understood its content; and (3) his actions or words or both unequivocally acknowledged the statement in adopting it as his own." *United States v. Datz*, 61 M.J. 37, 43 (citation omitted).

Here, the government and appellant agreed that no fewer than eighteen remarks attributable to appellant are discernable from the audio recording of the 911 call.[7] Appellant conceded that these statements were admissible under Mil. R. Evid. 801(d)(2)(A). (R. at 164, 185–86).

However, some of appellant's statements also constituted adoptive

[7] Lines 71, 91, 124, 166, 170, 197, 203, 208, 218, 224 and 250 contained wholly intelligible statements by appellant. (Pros. Ex. 3). Lines 111, 119, 135, 213, 236, 257 and 263 contained statements which were unintelligible, either in whole or in part. (Pros. Ex. 3).

admissions of SPC [redacted]'s statements, as the military judge explained:

> So for example, Specialist [redacted] on line 68 [of Pros. Ex. 3] says, "I don't want to be an asshole, and I felt like I did something wrong, that's why I called you guys," to which [appellant] responded, "we both did." . . . [L]ine 89, Specialist [redacted] asks [appellant], "How old is she, 22" And he says, "Yeah." Appellant responds, "Yeah." Clearly, he is involved in the conversation and engaged in the three-way conversation between Specialist [redacted] and the 911 operator at the time.
> . . . [L]ine 109. Specialist [redacted] says, "We've got—we've got to take accountability for our actions so—" and [appellant], without missing a beat, says, "Yeah, I know, but I know," and then there is something unintelligible.
>
> Moving further down, "It's okay, man. We fucked up. We did something we shouldn't have. We've got to take accountability for that shit. Okay?" [Appellant] responds with, "Yup."

(R. at 175–76).

While appellant argued that these were not clearly adoptive admissions, the military judge stressed (and appellant conceded) that the statements themselves were nevertheless admissible. (R. at 164, 184–86). The military judge observed, therefore, that "that's just the job of the factfinder, to figure out what weight, if any, to give to that and what meaning to attach to the [statements]." (R. at 167).

Ultimately the military judge allowed admission of the entirety of the 911 call to provide the necessary context for the panel members to make their determination of the weight, if any, to give appellant's statements in the recording:

> The other portions are only to provide context, because it wouldn't make any sense to provide them only with, "I

> don't want to be an asshole, and I felt like I did something wrong, that's why I called you guys." To which your client responds with, "We both did." That just wouldn't be helpful to the factfinder. That wouldn't provide any context. The other portions, the several minutes before your client starts to more actively engage, I will instruct them that that is only to provide for context as to what is going on, and context for the statements by your client, which we all agree, are admissible into evidence.

(R. at 184).[8]

B. The military judge properly considered and applied Mil. R. of Evid. 802 and 403.

Contrary to appellant's assertion on appeal that the military judge failed to conduct a Mil. R. of Evid. 403 analysis, the military judge took great pains to ensure that the appellant understood his ruling and the reasons for his ruling.

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[8] The military judge was correct to admit the evidence while leaving to the panel the determination of whether appellant *actually* adopted the statements. *See United States v. Robinson*, 275 F.3d 371, 383 (4th Cir. 2001). *Robinson*, which CAAF quoted favorably in *Datz*, says:

> When a statement is offered as an adoptive admission, the primary inquiry is whether the statement was such that, under the circumstances, an innocent defendant would normally be induced to respond, and whether there are sufficient foundational facts *from which the jury could infer* that the defendant heard, understood, and acquiesced in the statement.

Id. (quoting *United States v. Jinadu*, 98 F.3d 239, 244 (6th Cir. 1996)) (internal quotation marks omitted) (emphasis added); *see also United States v. Joshi*, 896 F.2d 1303, 1311 (11th Cir. 1990) ("[B]efore admitting a statement as an adoptive admission, the trial court must determine *whether a jury could reasonably find* that the defendant comprehended and acquiesced in the statement.") (emphasis added).

(Appellant's Br. 12)

Appellant argued at trial, and again on appeal, that the Mil. R. of Evid. 403 dangers of unfair prejudice, confusing the issues, and misleading the members substantially outweighed the probative value of SPC [redacted]'s statements reflected in the 911 call. (R. at 168; App. Ex. IV-C, App. Ex. V; Appellant's Br. 13). Appellant reiterated his concern that the panel would hear the recording and "impute … every statement provided by Specialist [redacted] onto [appellant]," thereby violating Mil. R. Evid. 403. (R. at 169). He asked the court, therefore, "not to allow the 911 tape to be played, because if we do, we have to splice out certain sections that would just be too confusing to the factfinder." (R. at 173).

When viewed from the military judge's perspective, the combination of the recording, transcript, and SPC [redacted]'s motions testimony confronted the military judge with some of appellant's statements which were plainly (or arguably) manifestations of an adoption of SPC [redacted]'s statements, as well as other statements, which would have been meaningless to the factfinder in the absence of the surrounding conversation with the 911 operator. By allowing admission of the entire recording, along with the stipulated transcript,[9] and crafting a robust limiting

[9] When appellant originally objected to the availability of the transcript during panel deliberations, the military judge asked "What's the harm in providing the transcript? If anything, I think it would help alleviate some of the 403 concerns." (R. at 180). He further stated that "To also address the defense's 403 concern, I am

instruction, the military judge addressed both the government and defense concerns:

> So I think allowing [the members] to hear the 911 call, accompanied by a copy of the transcript, along with the limiting instruction, addresses the needs of the government, and the rights of the government to present its case, and adequately addresses any 403 concerns raised by the defense.

(R. at 178).

The military judge arrived at his decision after considering multiple briefs from the parties, two motions hearings (the second of which included the testimony of SPC [redacted] as the court-martial's witness), stipulation of an accurate transcript of the recording, and extensive argument from both parties. The military judge's decision on the issue was well within the range of choices reasonably arising from the applicable facts and the law. Accordingly, this court should defer to his decision and leave it undisturbed.[10] *Frost*, 79 M.J. at 109.

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granting that part of the defense's request that the court prohibit the playing of the 911 call during opening statement." (R. at 181).

[10] Appellant cites to *United States v. Cass*, 127 F.3d 1218 (10th Cir. 1997) and *United States v. Brown*, 767 F.2d 1078 (4th Cir. 1985) for the proposition that "a limiting instruction is insufficient to remove the prejudicial effect of hearsay evidence that goes directly to guilt." (Appellant's Br. 9). Not only are these cases non-binding on this court, consideration of the facts of these cases reveals that they are also not instructive. Most importantly, the hearsay statements at issue in *Cass* and *Brown* were not offered to provide context to adopted admissions made contemporaneously by the defendant, as is the case here, and in fact did not involve adopted admissions at all.

C. Even if admission of the 911 call was error, the error was harmless.

Even if the military judge abused his discretion in allowing the government to admit the recording and transcript of the 911 call, the error was harmless and had no substantial influence on the panel's findings. The balance of the *Kohlbek* factors weigh heavily in favor of the government.

1. The government's case was strong.

The government's case against appellant was very strong. Because appellant, PFC [redacted], and SPC [redacted] all testified that appellant and PFC [redacted] were having consensual sex on her car immediately prior to the assault, the government had to prove that appellant committed his crimes against her after she withdrew her consent. The government offered ample evidence to this end for all of the charged offenses for which appellant was convicted.

The detailed testimony of the victim established that when appellant invited SPC [redacted] to join into their sexual encounter, she told him "I did not ask for this. I did not agree to this." (R. at 549). Instead of stopping immediately, appellant told her to "shut up," and forced her head onto SPC [redacted]'s penis while he continued to penetrate her vagina with his penis. (R. at 549). Specialist [redacted] corroborated the victim's testimony that he pushed her head towards her penis and told her something to the effect of "Take it. Touch it. Take it." (R. at 579, 656). He also confirmed that appellant remained standing behind her with his pants still

down while his SPC [redacted]'s penis was in PFC [redacted]'s mouth. (R. at 579–80). Appellant himself confirmed that he "was still inside of her" while she performed oral sex on SPC [redacted], and that he was "pretty much just encouraging them, like saying stuff like, you like that? You want it harder?" (R. at 914–15). Appellant acknowledged that PFC [redacted] could have said something to him when SPC [redacted] joined them, that he doesn't remember much because he was so "lost in the moment," and that he "might have encouraged" PFC [redacted] to "give SPC [redacted] a blow job" and "might have pushed her head down to SPC [redacted]'s penis." (R. at 928–29).

The government also offered the testimony of a third-party eyewitness in SPC [redacted], who testified that he saw appellant "lean in" to the car where PFC [redacted] lay, while his pants were pulled down to his ankles, and he appeared "like he was going in for a stroke," *after* SPC [redacted] got off of PFK [redacted]. (R. at 668–69). When a panel member asked appellant whether it was "possible [appellant and SPC [redacted]] took turns [having sex with PFC [redacted]] in the back seat," appellant answered, "Maybe, sir." (R. at 943). This qualified admission was particularly damning, given that the panel had already heard expert testimony that SPC [redacted]'s DNA was discovered on appellant's penis. (R. at 838, 851; App. Ex. XXIII).

Additionally, even in the absence of the 911 recording, there was

overwhelming evidence of appellant's consciousness of guilt. When he was confronted by PFC [redacted], he said at least five times "Hit me. Call the police on me." (R. at 670). When law enforcement arrived shortly after the assault, appellant told the responding officer "he fucked up and that he did it." (R. at 724–25). Finally, appellant texted an apology to PFC [redacted] the very next day. (R. at 552; Pros. Ex. 6).

2. The defense's case was weak.

Having already conceded that appellant had sex with PFC [redacted], that he invited SPC [redacted] to join them in the sex, that he was "encouraging" PFC [redacted] to give oral sex to SPC [redacted] while he continued to penetrate her from behind and "might have pushed her head down to SPC [redacted]'s penis," and that "maybe" he had sex with her after SPC [redacted] had already finished and SPC [redacted] was on the scene, appellant's defense hinged on his unpersuasive testimony that the encounter was entirely consensual until PFC [redacted] and PFC [redacted] arrived and he could see that the victim was "holding back tears." (R. at 917).

Appellant argues on appeal that the consensual and "intense and passionate" relationship between the appellant and the victim leading up to the sexual assault constitute the strength of his case at trial. (Appellant's Br. 14). He also points to the inconsistencies between SPC [redacted]'s trial testimony and the facts contained in his stipulation of fact pursuant to his own court-martial as a further testament to the

strength of his defense. (Appellant's Br. 14). The first argument is unavailing considering the brevity of the relationship prior to the assault and the multiple witnesses who testified to the victim's obvious distress following her assault. Moreover, the apparent inconsistency between SPC [redacted]'s testimony and his stipulation of fact was merely that in the latter he never specifically said that appellant made PFC [redacted]'s head make contact with his penis, while his trial testimony was that "he guided her head down […] towards [his penis]." (R. at 656, 659). Even assuming that this constitutes a diminishment of SPC [redacted]'s credibility, this hardly warrants a characterization of appellant's defense at trial as "strong."

3. The evidence was of relatively high materiality and strength, but not entirely to the prejudice of appellant.

The recording and transcript of the recording were material to the government's case insofar as they corroborated other witness's testimony that appellant appeared to be conscious of his guilt immediately following his assault of PFC [redacted]. In addition, because the recording allowed the panel to hear the entirety of the call firsthand, the strength of the evidence was undoubtedly high. However, the materiality and strength of this evidence cuts against a finding of prejudice given the unique facts of the case.

Appellant's statements on the recording were admissible at trial, either as a statement made in his own individual or representative capacity or as an adoption

of certain statements of SPC [redacted]. In either case, the surrounding context of the call was indispensable for the panel to determine under which alternative they were to consider appellant's statements. With the benefit of the entire recording, and the agreed-upon transcript, appellant was permitted to advance his preferred interpretation of appellant's role in the call, and whether his statements constituted his adopted admission or his disagreement with what SPC [redacted] was saying. During the motions hearing, the military judge also noted this opportunity:

> I understand your arguments that you are going to try to make. They are good ones with respect to well, what was he really admitting to? What was he really saying? But that's what counsel get paid to do. That's what you are trained to do. And so nothing that this court does will limit you in your ability to make that argument to the factfinder. … The statements made by your client during that 911 call he didn't have to make. There is no coercion. He wasn't forced. You'll be able to make the argument that he was drunk, if there was evidence to support that, and that they shouldn't be given much, if any, weight. That's an argument that you will be able to make, and I won't do anything to limit that argument or similar arguments.

(R. at 186–87).[11]

[11] While appellant advanced the ambiguity line of argument at the motions hearings, (R. at 30, 165–67), he only referenced the 911 evidence one time during closing argument, in the context of his mistake of fact defense: "And, members that puts the 911 call really into context, because the one thing, if you go back there and you relisten to this, you will hear Specialist [redacted] say over and over, I thought [I] had consent. I thought I had consent." (R. at 1005). Appellant also suggests on appeal that the recording reflected his disagreement with SPC [redacted]'s statements, rather than an adoptive admission. (Appellant's Br. 11).

Without the recording and transcript, appellant would have had to contend with whatever characterization of his statements—and the tenor of his statements— SPC [redacted] would have offered through testimony. In this sense, the relative materiality and strength of the evidence did not entirely accrue to the prejudice of appellant at trial.

For these reasons, even if the military judge allowed the 911 recording evidence in error, the error could not have had a substantial influence on the panel's findings and appellant is entitled to no relief.

Assignment of Error II

WHETHER THE MILITARY JUDGE ERRED BY PROHIBITING APPELLANT FROM PRESENTING TEXT MESSAGES BETWEEN HIMSELF AND PFC [redacted] UNDER THE RULE OF COMPLETENESS.

Additional Facts

During the government direct examination of Criminal Investigation Division (CID) Special Agent (SA) [redacted], the government sought to admit a report reflecting a text message from appellant to PFC [redacted] sent the day after the assault. (R. at 755; Pros. Ex. 6). The text message read:

> Hey, you probably want nothing to do with me and think I am scum and I should not be contacting you, but I am truly sorry for what happened. If I could go back and prevent it, I would. I never wanted to make you cry. I never wanted to put you through that. Saying sorry won't fix it now, but I don't know what to do.

(R. at 765; Pros. Ex. 6). Appellant objected to admission of the exhibit unless he was permitted to admit the rest of the text message exchanges between appellant and PFC [redacted] from the preceding three days under Mil. R. Evid. 304(h) and 106. (R. at 757; Def. Ex. A for Identification). Finding that neither the rule of completeness under Mil. R. Evid 304(h) nor the fairness requirement of Mil. R. Evid. 106 required admission of the text messages between appellant and PFC [redacted] prior to 5 July 2022, the military judge rejected appellant's request to have them admitted as Def. Ex. A for Identification on either ground. (R. at 762). The

government then admitted and published Pros. Ex. 6. (R. at 764).

Standard of Review

Appellate courts "review a military judge's decision to admit or exclude evidence for an abuse of discretion." *United States v. Rodriguez*, 56 M.J. 336, 342 (C.A.A.F. 2002) (internal citation omitted).

Law

Military Rule of Evidence 106 can be used to "complete" an accused's or any other witness's statement. The rule states that "[i]f 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 . . . that in fairness ought to be considered at the same time."

Military Rule of Evidence 304(h) states "[i]f only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce the remaining portions of the statement." Promulgation of the rule was designed to guard against the "manifest unfairness to an accused" if the prosecution were permitted "to pick out the incriminating words in [his] statement … and put them into evidence while at the same time excluding the remainder of the statement . . . in which the accused seeks to explain the incriminating passages." *Rodriguez*, 56 M.J. at 341 (internal citation omitted).

The *Rodriguez* opinion established in relevant part that Mil. R. Evid. 304(h)

"permits the defense to introduce the remainder of a statement to the extent that the remaining matter is part of the confession or admission or otherwise is explanatory of or in any way relevant to the confession or admission, even if such remaining portions would otherwise constitute inadmissible hearsay; and … requires a case-by-case determination as to whether a series of statements should be treated as part of the original confession or admission or as a separate transaction or course of action for purposes of the rule." *Id*. at 341–42.

Argument

A. The military judge did not err by excluding the text message exchanges between appellant and PFC [redacted] prior to 5 July 2021 because they constituted "separate transactions for the purposes of the rule."

Appellant argued at trial, and maintains on appeal, that the government "cherrypicked" a portion of "this long conversation that [appellant and PFC [redacted]] [had] been having for three days." (R. at 759). He argued that "without those other text messages, that text message [in Pros. Ex. 6] doesn't really make sense." (R. at 759). After reviewing the text messages and considering the eleven-hour gap between the last text message between appellant and PFC [redacted] and the apology text, the military judge explained his reasoning for disallowing the defense exhibit:

> Here's the court's definition of cherry-pick, when there is a single statement or interview and you pick one or two parts, usually those one or two parts that most support your side and only present that to the factfinder. That's cherry-picking. It's not cherry-picking when you have separate interviews, statements, text exchanges, that are separated

> by time and subject matter. That's not cherry-picking to exclude those other ones that are both separated by time and as I'm just now reviewing Defense Exhibit A for Identification more thoroughly, subject matter. Some of it has nothing to do with obviously the assault.

(R. at 762).

Defense Exhibit A contains 33 pages of text messages exchanged between appellant and PFC [redacted] beginning on 2 July 2021 and culminating in the final text from appellant to PFC [redacted] admitted by the government as Pros. Ex. 6. (Def. Ex. A for Identification). While the texts might arguably "show a much clearer picture of an intense and escalating relationship where both parties fully wanted to pursue a sexual relationship," they in no way "explain his apology." (Appellant's Br. 20–21). The texts almost exclusively concern what they are doing, when and where they are going to meet, and what they are going to do together, and are usually only a few words in length. (Def. Ex. A for Identification). There is simply no plausible way to interpret these short, flirty texts as "explanatory of or in any way relevant to" appellant's relatively lengthy and apparently heartfelt apology reflected in his final text to PFC [redacted].

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

For the reasons explained *supra*, pp. 18–21, the relative strengths of the government and defense cases strongly favor the government. In addition, the materiality of this evidence was vanishingly small. At best, the text message

evidence reflecting a budding, flirtatious relationship was cumulative to the testimony already provided by the witnesses who observed appellant and PFC [redacted] on 4 July 2021 (including PFC [redacted] and SPC [redacted]'s discovery of the two having sex in PFC [redacted]'s bedroom), as well as the testimony of appellant and the victim herself. Moreover, the text message evidence was quite weak, offering little illumination to either appellant's relationship with PFC [redacted] or his later apology. In sum, omission of this evidence could not have had "a substantial influence on the panel's findings." *Frost*, 79 M.J. at 111.

This court should affirm.

CONCLUSION

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

[redacted]
MAJ, JA
Appellate Government Counsel

[redacted]
MAJ, JA
Branch Chief, Government Appellate Division

[redacted]
JACQUELINE DeGAINE
LTC, JA
Deputy Chief, Government Appellate Division

CERTIFICATE OF SERVICE, U.S. v. BATRES (20220223)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on the 13th day of July, 2023.

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