

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Docket No. ARMY 20220166

Private (E-2)
BRYAM G. NIEVES VELE
United States Army,
Appellant

Tried at Fort Bliss, Texas, on 31
March 2022 and 1 April 2022, before
a general court-martial convened by
Commander, 1st Armored Division,
Colonel Robert L. Shuck, Military
Judge, presiding.

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

Assignment of Error I¹

**THE APPELLANT'S CONVICTIONS FOR RAPE
AND SEXUAL ASSAULT ARE FACTUALLY
INSUFFICIENT.**

Assignment of Error II

**WHETHER THE MILITARY JUDGE ABUSED HIS
DISCRETION WHEN HE EXCLUDED EVIDENCE
UNDER MIL. R. EVID. 412.**

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

Assignment of Error III

**WHETHER DEFENSE COUNSEL'S
REPRESENTATION DENIED APPELLANT
EFFECTIVE ASSISTANCE OF COUNSEL?**

Assignment of Error IV

**WHETHER AN ACCUMULATION OF ERRORS
DEPRIVED THE APPELLANT OF A FAIR TRIAL?**

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Statement of the Case

On 1 April 2022, the military judge, sitting as a general court-martial, convicted appellant, contrary to his pleas, of one specification of rape and one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2019) [UCMJ]. (R. at 563; Statement of Trial Results [STR]). The military judge sentenced appellant to confinement for fourteen years and a dishonorable discharge.¹ (R. at 624; STR). On 19 April 2022, the military judge entered judgment. (Judgment). On 14 April 2022, the convening authority disapproved a request for deferment of automatic forfeitures and took no action on the findings or the sentence. (Action).

Statement of Facts

A. The background of the relationship between SPC [REDACTED] and appellant.

On 18 September 2020, appellant and Specialist (SPC) [REDACTED] met on a dating application called Grindr. (R. at 188–89). Appellant and SPC [REDACTED] were active-duty service members stationed at Fort Bliss but in different units. (Pros. Exs. 1, 2). After meeting on the dating application, the two continued to communicate on

¹ Appellant was sentenced as follows: “To be reduced to the grade of E-1; [t]o forfeit all pay and allowances; and [f]or Specification 1: To be confined for fourteen years, and [f]or Specification 2: To be confined for fourteen years; and [t]o receive a Dishonorable Discharge. The period of confinement [to] be served concurrently.” (R. at 624). The military judge conditionally dismissed Specification 2 upon the completion of appellate review. (R. at 563).

Instagram, through text message, through phone calls, and in-person over the course of approximately three weeks. (R. at 189–90, 228). Over that time, appellant and SPC [REDACTED] developed a romantic relationship, but they had not determined whether they were exclusive or just casually dating. (R. at 192).

B. The day of the rape.

On 13 October 2020, SPC [REDACTED] made plans to meet appellant at his barracks room. (R. at 191). These plans and SPC [REDACTED]'s arrival at appellant's barracks room were corroborated by contemporaneous Instagram messages, which were translated from Spanish to English. (Pros. Ex. 3, 4). SPC [REDACTED] told appellant that he would come over, but that he had an upset stomach from food that he had eaten earlier that day. (R. at 191). On cross examination, SPC [REDACTED] stated that he told appellant about his upset stomach over text message but agreed that he had not provided those text messages to the government, because they never asked for them. (R. at 280, 298).

SPC [REDACTED] went to appellant's room because he wanted to discuss the nature of their relationship. (R. at 192). Appellant was not open with his roommate about his sexuality, so SPC [REDACTED] came over when appellant's roommate was at the gym. (R. at 192). SPC MFG knew the roommate was not present because appellant told him he was at the gym, his light was off, his door was closed, and there was no sound coming from the room. (R. at 193). At this time, appellant's unit was

preparing to go to the field for a training exercise, and the entire unit was under orders to quarantine. (R. at 194).

When SPC [REDACTED] arrived, appellant ushered him into his bedroom and the two began to talk about their relationship. (R. at 196). In the midst of this conversation, appellant approached SPC MFG with an erection. (R. at 197). SPC [REDACTED] told appellant, “Stop” and “We need to talk.” (R. at 197). Appellant replied, “What more do we need to talk about?” SPC [REDACTED] reiterated that if appellant was going to act like that, then he was “going to get up and . . . [go] back to [his] room.” (R. at 197). When SPC [REDACTED] stood up to leave, appellant sat down and told him to sit on his lap. (R. at 197). SPC [REDACTED] sat on appellant’s lap, and appellant began talking and biting SPC [REDACTED]’s arm. (R. at 198). Appellant then picked up SPC [REDACTED] and carried him to appellant’s bed. (R. at 235). At this point, the encounter was consensual. (R. at 235).

C. Appellant raped SPC MFG.

Once appellant had SPC [REDACTED] on the bed, he began “grinding” on SPC [REDACTED]. (R. at 198). SPC [REDACTED] was positioned on his stomach, while the accused was on top of him in a push-up position. (R. at 198). SPC [REDACTED] told appellant numerous times “Don’t put it in,” while he clenched his buttocks. (R. at 198). Appellant then used saliva as a lubricant and penetrated SPC [REDACTED]’s anus from this position. (R. at 198). SPC [REDACTED] screamed, “Ow!” and told appellant to “Get off

of me.” (R. at 198). Appellant did not immediately stop and continued to thrust himself inside of SPC [REDACTED]. (R. at 198–99).

When SPC [REDACTED] told appellant to get off, appellant used his chest to apply pressure to SPC [REDACTED]’s back. (R. at 199). SPC [REDACTED] was pinned down but still attempted to physically resist appellant by moving his arm and hips and clenching his buttocks. (R. at 199). According to their enlisted record briefs, appellant outweighed SPC [REDACTED] by twenty-four pounds.² (Pros. Ex. 1, 2). While this occurred, SPC [REDACTED] said “Ow” and “get off,” to which appellant replied, “be quiet.” (R. at 200). Appellant eventually stopped penetrating SPC [REDACTED] and laid next to him on his side. (R. at 270). Appellant had his arm around SPC [REDACTED]’s neck and his hand on his hip. (R. at 270). Appellant asked SPC [REDACTED], “Do you want me to finish?” SPC [REDACTED] tried to get off the bed, but appellant would not let release his grip around appellant’s neck. (R. at 271). At this point, SPC [REDACTED] stopped resisting. (R. at 271). Appellant rolled him onto his stomach, grinded his penis on SPC [REDACTED], and eventually penetrated him again. (R. at 272). “[SPC [REDACTED]] was screaming, ‘Ow. Get off,’ and [appellant was] telling [him], ‘Shh. Be Quiet.’” (R. at 272). SPC [REDACTED] resisted by clenching his buttocks and moving his hips. (R. at 200, 272). Appellant eventually exclaimed, “Ow. You are hurting

² Although appellant states in his brief the difference was only twelve pounds, this appears to be a miscalculation. (Appellant’s Br. 9 (citing R. at 223)).

me,” and stopped. (R. at 200, 272). Appellant again asked, “Do you want me to finish?” (R. at 274). SPC [REDACTED] then told appellant that he had hemorrhoids, appellant got off the bed, and SPC [REDACTED] immediately got dressed and got off the bed. (R. at 275).

D. The aftermath.

SPC [REDACTED] left appellant’s room and walked back to his barracks. (R. at 206). He was in pain and had injuries from the assault. (R. at 207). SPC [REDACTED] outcried to his immediate supervisor, Sergeant (SGT) [REDACTED], the very next day. (R. at 207). Sergeant [REDACTED] directed SPC [REDACTED] to speak with SPC [REDACTED] advocate, Sergeant First Class (SFC) [REDACTED], and SPC [REDACTED] filed a report with him that same day. (R. at 208–09).

On 17 October 2020, appellant reached out to SPC [REDACTED] via text message and said in Spanish, “Are you still mad?”; “Don’t be mad.”; and “I just wanted to say I am sorry for what happened.” SPC [REDACTED] replied in English, “It took you till now to say something.” Appellant replied in Spanish, “I hope you can forgive me and that we can still continue to be friends.” (Pros. Ex. 4). On 20 October 2020, appellant said in English and Spanish, “Sorry if I hurt you, Sorry for everything. Take care.” (Pros. Ex. 4). The Spanish translator, SFC [REDACTED], testified that the word used by appellant, “danar,” is normally used to describe physically hurting someone rather than causing emotional pain. (R. at 168).

Assignment of Error I

THE APPELLANT’S CONVICTION FOR RAPE AND SEXUAL ASSAULT ARE FACTUALLY INSUFFICIENT.

Standard of Review

Questions of legal and factual sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for a factual sufficiency review by this court is “whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt.” *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (cleaned up) (quoting *Oliver*, 70 M.J. at 68). This court takes “a fresh, impartial look at the evidence,” applying “neither a presumption of innocence nor a presumption of guilt.” *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The degree of deference this court affords the trial court for having seen and heard the witnesses will often reflect the materiality of witness credibility to the case. *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015).

Law and Argument

Appellant’s convictions are factually sufficient. SPC [REDACTED]’s testimony was credible and corroborated by text messages, an immediate outcry, appellant’s apologies, and evidence of appellant’s propensity to commit rape. In contrast, the

defense's theories at trial were weak and contradicted by text messages and testimonial evidence presented at trial.

A. SPC [REDACTED]'s testimony alone was sufficient to sustain a finding of guilt.

A victim's testimony alone, when credible, can be sufficient to sustain a conviction beyond reasonable doubt. *United States v. Ryan*, 21 M.J. 627, 632 (A.C.M.R. 1985); *United States v. Coover*, No. ACM 39848, 2021 CCA LEXIS 355, at *38 (A.F. Ct. Crim. App. 21 Jul. 2021) ("At trial, [the victim's] testimony alone was sufficient to establish proof of the two elements necessary for the charge."). SPC [REDACTED]'s testimony provided evidence of every element of rape and sexual assault.³ SPC [REDACTED] identified the appellant as his assailant. (R. at 188). It was undisputed that on 13 October 2020, SPC [REDACTED] was in appellant's barracks room. (R. at 190–91). Appellant ignored both SPC [REDACTED]'s unequivocal verbal and physical expressions of non-consent and used force to overcome SPC [REDACTED]'s will when he penetrated SPC [REDACTED]'s anus with his penis. (R. at 197–200).

³ As charged in this case, the elements of rape and sexual assault without consent, respectively, are that a person "commits a sexual act upon another person by using unlawful force against that other person; or . . . without the consent of the other person." UCMJ art. 120(a)(1), (b)(2)(A). A sexual act is defined as the penetration, however slight, of the penis into the . . . anus" *Id.* at 120(g)(1)(A).

B. SPC ██████'s testimony proved that appellant used unlawful force and did not have a reasonable mistake of fact as to consent.

Unlawful force is “the use of physical strength or violence as is sufficient to overcome, restrain, or injure a person.” UCMJ, art. 120(g)(4)(B). Appellant asserts that there was insufficient evidence to sustain this element of the offense. (Appellant’s Br. 12). Appellant seeks to distinguish his case from *United States v. Norris*, ARMY 20160262, 2018 CCA LEXIS 447, at *8 (Army Ct. Crim. App. 14 Sep. 2018) and analogize it to *United States v. Soto*, ACM 38422, 2014 CCA LEXIS 681, at *15 (A.F. Ct. Crim. App. 16 Sep. 2014). This argument is misguided. The facts of appellant’s case are far more analogous to *Norris*.

In *Norris*, this court found that the weight of appellant, a much bigger man than the victim, when applied to her chest and hips sufficient to prevent her from pushing him off of her constituted sufficient force to overcome the victim as required to meet the elements of rape. This court distinguished *Norris* from *Soto* by finding that in *Soto* the government failed to sufficiently detail the victim’s nonconsent, the evidence was ambiguous regarding when and for how long the rape occurred, and the victim’s fear related to getting in trouble for an inappropriate relationship, not fear of the appellant.

In *Soto*, the Government elicited three primary pieces of evidence about the charged act: “1) [The victim] told the appellant, ‘No, I’m not ready’ at some point after the appellant began his advances; 2) [the victim] pushed the appellant while

he was on top of her in an unsuccessful attempt to get the appellant off her; and 3) [the victim] was afraid during the encounter.” *Soto*, 2014 CCA LEXIS 681, at *11–12. The court found that “testimony on each point was extremely brief and left several questions unanswered.” *Id.* at *12. In the present case, like *Norris*, SPC MFG: 1) clearly verbalized that he did not consent (R. at 198); 2) screamed in pain during the rape (R. at 200); 3) was twenty-four pounds lighter than the appellant (R. at 223); 4) described the weight of appellant’s chest on his back (R. at 199); and 5) described the pressure of the appellant’s arm around his throat when he tried to get away. (R. at 271).

Unlike *Soto*, SPC [REDACTED] did not use ambiguous terms that require elaboration. 2014 CCA LEXIS 681, at *12. SPC [REDACTED] testified appellant used sufficient force to “pin” him to the bed and overcome SPC [REDACTED] “clenching” his buttocks.⁴ (R. at 198–99). SPC [REDACTED] described the weight of appellant’s chest on his back (R. at 199) and the amount of force used during the penetrative act: “I felt like he was ripping my insides. . . . It hurt, sir. Like, really bad . . . to the point where I screamed, ‘Ow.’” (R. at 202). Contrary to appellant’s assertion, he and SPC [REDACTED] were separated by twenty-four pounds and appellant had his arm around SPC [REDACTED]’s throat during the brief period when he was not anally penetrating him.

⁴ The government used a demonstrative to illustrate this evidence for the factfinder. (Pros. Ex. 21).

(Appellant’s Br. 12; R. at 223). The encounter ended because SPC [REDACTED] was able to physically resist, and “[move his] hips back and forth.” (R. at 199–200, 202–03).

C. The evidence proved that appellant did not have a reasonable mistake of fact negating his guilt beyond a reasonable doubt.

SPC [REDACTED]’s testimony about his actions before and during the rape dispelled any defense that there was a reasonable mistake of fact as to consent and showed that appellant used unlawful force. SPC [REDACTED] testified that he was clear with appellant that he did not want to have sex and he just wanted to talk. (R. at 190, 192, 197). Appellant nevertheless approached SPC [REDACTED] with an erection and attempted to “mess around” with SPC [REDACTED]. (R. at 197). Although SPC [REDACTED] consented to certain activities prior to the rape, SPC [REDACTED] was clear that he did not want to be penetrated by appellant. (R. at 198). SPC [REDACTED] was open that he and appellant had a romantic relationship; thus, it was reasonable that they would be intimate. (R. at 196–97). A consensual moment of intimacy, such as sitting on one’s lap or kissing, however, does not equate to consent to anal sex.

It was unreasonable for appellant to assume that SPC [REDACTED] sitting on his lap, kissing, or allowing appellant to carry him to the bed, constituted consent for sexual intercourse, considering SPC [REDACTED]’s unambiguous statements to appellant that he did not consent to anal penetration. *See Davis*, 75 M.J. at 545 (finding that the appellant’s honest belief was not sufficient for an instruction where no

evidence that appellant's belief was reasonable was introduced). In other words, even if appellant had a reasonable mistake of fact as to consent up until the point of penetration, SPC [REDACTED]'s words and actions after appellant attempted to initiate sex, were unambiguous.

Appellant's characterization of SPC [REDACTED]'s testimony as corroboration for his reasonable mistake of fact as to consent defense is unpersuasive. (Appellant's Br. 10–11). Appellant argues that SPC [REDACTED]'s testimony merely “depict[s] a couple where one party is more interested in sexual intercourse than the other.” (Appellant's Br. 11). Appellant argues that this is supported by SPC [REDACTED]'s testimony that “appellant stopped when told to get off.” (Appellant's Br. 10).

However, this argument ignores the next line of testimony from SPC [REDACTED]: “Q. Okay so the two of you were laying on your side? A. Yes. But he had his arm around my neck, and his hand on my hip.” (R. at 270). “Q. He wasn't applying pressure or anything, correct? A. He was. But when I tried to, like, get up off the bed, he wasn't letting me go. . . . I tried to get up, and he would keep getting tighter.” (R. at 271). This testimony clearly supported the element of unlawful force. *See Manual for Courts-Martial, United States* (2019 ed.), [MCM] pt. IV, para. 60.g. (“The term ‘force’ means . . . (B) the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or (C) inflicting physical harm sufficient to coerce or compel submission by the victim.”);

e.g. United States v. Brooks, 79 M.J. 501, 510 (Army Ct. Crim. App. 2019) (finding that “grabbing [the victim’s] head and forcing her mouth onto [appellant’s] penis with his hand” was factually sufficient to establish unlawful force); *United States v. Codymiles*, 2023 CCA LEXIS 154, at *21–22 (N.M. Ct. Crim. App. 5 Apr. 2023) (detailing a summary of instances that constituted “unlawful force”).

Appellant did not stop when SPC ██████ said, “no,” “[d]on’t put it in,” and “ow, get off,” but only once SPC ██████ fought him off. (R. at 200, 274–75). SPC ██████ described being “pinned down” by appellant’s chest and physically struggling to resist appellant. (R. at 199). This testimony cannot fairly be described merely as “one party [being] more interested in sexual intercourse than the other.” (Appellant’s Br. 11). SPC ██████ described a forceful rape. (R. at 199). Defense counsel argued that some of SPC ██████’s statements and actions were inconsistent with a forceful rape, and the factfinder—who had the opportunity to see and hear the witnesses—found otherwise. So, too, should this court.

D. SPC MFG’s immediate outcry and demeanor corroborated his account of the rape.

SPC ██████’s immediate outcry weighs in favor of his credibility. *See Davis*, 75 M.J. at 546 (finding the victim’s testimony credible despite inconsistencies in part because of her immediate outcry). SPC ██████’s account was corroborated by the fact that he immediately outcried to his supervisor, SGT ██████, and the victim

advocate, SFC AB. (R. at 207–08). A victim’s demeanor close in time to an assault is indicative of the reliability of the statement. *Cf. United States v. Feltham*, 58 M.J. 470, 475 (C.A.A.F. 2003) (analyzing the factors of an excited utterance). Sergeant [REDACTED] testified that the day after the rape, she noticed SPC [REDACTED] looked “very sad” and “like he had been crying.” (R. at 304). Based on what SPC [REDACTED] told her, SGT [REDACTED] referred him to SFC [REDACTED]. (R. at 305–06). Sergeant [REDACTED] testified that she knew SPC [REDACTED] well, and he had a character for truthfulness, and was not spiteful. (R. at 306–07).

Sergeant First Class [REDACTED] testified that when SPC [REDACTED] spoke to him the day after the rape, he appeared “very quiet and timid” and that he was “under a lot of distress.” (R. at 312). Based on this conversation, SFC [REDACTED] advised SPC [REDACTED] regarding restricted and unrestricted reporting of sexual assault. (R. at 312). Approximately one week later, SPC [REDACTED] came back to SFC [REDACTED] and changed his report to “unrestricted,” which initiated CID’s investigation. (R. at 313). The timing of his report predates any alleged motive to fabricate based on his conversation with SPC [REDACTED] on 17 October 2020. (R. at 213).

E. Appellant’s text message apologies corroborate SPC [REDACTED]’s account.

An appellant’s admissions and evidence of consciousness of guilt are highly probative. *See United States v. Gomez*, No. 201600331, 2018 CCA LEXIS 167, at *36–37 (N.M. Ct. Crim. App. 4 Apr. 2018) (finding that the appellant’s apology

was evidence of his consciousness of guilt and that it weighed heavily on the court's determination that the conviction was factually sufficient). The text messages leading up to the rape between appellant and SPC [REDACTED] make clear that SPC [REDACTED] was in appellant's barracks room on 13 October 2020. (Pros. Exs. 3, 4). Appellant's multiple apologies sent through text message three days after the rape show appellant's consciousness of guilt. (Pros. Ex. 3, 4). Appellant's statement, "Are you still mad?" corroborates that there was an altercation. (Pros. Ex. 4).

The defense's theory that SPC [REDACTED] fabricated the rape allegations because appellant ended the relationship with SPC [REDACTED] when he found out he was married was not supported by the evidence introduced at trial. (R. at 523). There was no testimony admitted that SPC [REDACTED] and appellant discussed SPC [REDACTED]'s prior marriage on 13 October 2020. (R. at 421, 427). The only evidence substantively admitted regarding the marriage was the testimony of SPC [REDACTED] that he told appellant about his impending divorce the first day they met, several weeks prior to the assault. (R. at 210–11). Ultimately, this explanation for appellant ending the relationship was unreasonable, and unsupported by any evidence.

Appellant's multiple apologies strongly suggest consciousness of guilt for rape rather than feeling bad for justifiably ending a three-week relationship. (Pros. Ex. 3) ("I just wanted to say I am sorry for what happened;" "I hope you can forgive me and we can still continue to be friends;" and "Sorry if I hurt you, Sorry

for everything. Take care.”). Additionally, SFC [REDACTED]’s translation was probative of the fact that when appellant apologized for hurting SPC [REDACTED], he was apologizing for causing him physical, not emotional pain. (Pros. Ex. 3; R. at 168, 184).

F. Appellant’s prior rape of PFC [REDACTED] was probative of appellant’s propensity to commit sexual offenses.

The government introduced evidence that appellant had a propensity to commit rape. (R. at 332–56). In May of 2021, appellant had a similar encounter with Private First Class (PFC) [REDACTED]. (R. at 333). Private First Class [REDACTED] was a young, male enlisted soldier at Fort Bliss who met appellant on the same dating application as SPC [REDACTED] (Grindr). Like SPC [REDACTED], PFC [REDACTED] and appellant’s conversation migrated to Instagram messaging, and PFC [REDACTED] eventually met appellant at his barracks room. (R. at 333–34). Private First Class [REDACTED] entered a dark barracks room and began to engage in consensual sexual activity with appellant. (R. at 338). However, PFC [REDACTED] revoked consent when anal sex became too painful. (R. at 338). Like SPC [REDACTED], PFC [REDACTED] was positioned on his stomach with appellant straddling him from behind. He exclaimed “no” and told appellant that “it hurt,” and tried to “fight” appellant off, but appellant overcame him with force. (R. at 199–201, 338–41). Appellant texted PFC [REDACTED] apologizing for his actions after the rape. (R. at 345).

There was no evidence that SPC [REDACTED] and PFC [REDACTED] knew each other, coordinated their stories, or ever met prior to the start of the court-martial

proceedings. (R. at 351). The defense argued that PFC [REDACTED]'s motive to fabricate was to avoid a hazing ritual on his birthday, but this theory was contradicted by the evidence. (R. at 516). Importantly, PFC [REDACTED] willingly remained in the field at the National Training Center with his unit after reporting the rape to his supervisor, SGT [REDACTED]. (R. at 348). This directly undercut any assertion that PFC [REDACTED] was trying to get away from his unit based on discrimination or hazing.

When the underlying conduct of Mil. R. Evid. 413 evidence is “strikingly similar” to the charged acts, the “evidence [is] highly probative.” *See United States v. Essary*, ARMY 20170556, 2019 CCA LEXIS 325, at*10 (Army Ct. Crim. App. 9 Aug. 2019); *United States v. Hoffmann*, No. 201400067, 2018 CCA LEXIS 326, at *13 (N.M. Ct. Crim. App. 9 Jul. 2018); (*compare* R. at 198–202, *with* R. at 338). Both victims were positioned on their stomachs, with appellant straddling them from behind, both exclaimed “no” and told appellant that “it hurt,” and tried to “fight” appellant off, but appellant overcame them with force. (R. at 199–201, 338–41). Appellant texted both men apologizing for his actions after the rape. (R. at 345). The similarity of the acts, combined with the fact that there was no evidence that the two victims had coordinated their stories or knew one another (R. at 351), was probative of appellant’s propensity to commit rape, which the factfinder can and should consider in determining whether appellant raped SPC [REDACTED] in this case.

G. The defense’s case did not create reasonable doubt.

“It is axiomatic in the context of factual sufficiency, that the evidence need not be free of conflict or that every minor conflict in the evidence be resolved.” *United States v. Whigham*, 72 M.J. 653, 662 (Army Ct. Crim. App. 2013). Like in *Whigham*, trial defense counsel solely offered inconsistencies as to insignificant details, such as where appellant’s hands were when he consummated the rape (an observation that would be difficult to make when SPC [REDACTED] was on his stomach and being raped), whether SPC [REDACTED] mentioned his hemorrhoids on direct examination rather than cross examination, and similar details that do not create reasonable doubt. (R. at 517, 519, 520–21).

In sum, appellant’s theories as to his innocence—that no sexual intercourse occurred, but if it did, there was a reasonable mistake of fact as to consent (R. at 525)—were contradicted and overcome by SPC [REDACTED]’s testimony (R. at 197–207), his immediate outcry (R. at 302, 312), appellant’s apologies (Pros. Ex. 3, 4), and the appellant’s propensity to commit similar acts (R. at 338).

Assignment of Error II

**WHETHER THE MILITARY JUDGE ABUSED HIS
DISCRETION WHEN HE EXCLUDED EVIDENCE
UNDER MIL. R. EVID. 412.**

Standard of Review

This court reviews a military judge’s Mil. R. Evid 412 ruling for an abuse of discretion. *United States v. Ellebrock*, 70 M.J. 314, 317 (C.A.A.F. 2011). “A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect.” *United States v. Olson*, 74 M.J. 132, 134 (C.A.A.F. 2015); *see also United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)) (the challenged action must be “arbitrary, fanciful, clearly unreasonable,” or “clearly erroneous”). “In deciding whether a military judge has abused his discretion in establishing evidentiary limits, [this court] should not ask whether [it] would have made the same decision if presiding over the trial; such an approach would deprive the trial judge of the deference required by the standard of review.” *United States v. Yopez*, ARMY 20210236, 2023 CCA LEXIS 12, at *4 (Army Ct. Crim. App. 2023) (citing *Erikson*, 76 M.J. at 235).

Law

The purpose of Mil. R. Evid. 412 is to “shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to [sexual offense prosecutions].”⁵ Prior to the rape-shield

⁵ *MCM*, Analysis of the Military Rules of Evidence app. 22 at A22-35 (2008 ed.); *see also United States v. Banker*, 60 M.J. 216, 219 (C.A.A.F. 2004) (noting that

laws, “defense lawyers were permitted great latitude in bringing out intimate details about a rape victim’s life. Such evidence quite often serves no real purpose and only results in embarrassment to the rape victim and unwarranted public intrusion into her private life.” *United States v. Sanchez*, 44 M.J. 174, 178 (C.A.A.F. 1996) (quoting 124 Cong. Rec. 34912 (1978)).

“[T]rial judges retain wide latitude . . . to impose reasonable limits on . . . cross-examination based on concerns about, among other things . . . interrogation that is repetitive or only *marginally relevant*.” *United States v. Gaddis*, 70 M.J. 248, 256 (C.A.A.F. 2011) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)) (first alteration in original) (internal quotation marks omitted) (emphasis added). Under this exclusionary rule, a proponent must meet the burden to show that an exception prevails. *Id.* at 251–52; *United States v. Banker*, 60 M.J. 216, 223 (C.A.A.F. 2004); *United States v. Savala*, 70 M.J. 70, 72 (C.A.A.F. 2011). In *Ellerbrock*, the CAAF emphasized that when determining if evidence is relevant, “common sense is the guiding principle” and further observed that “determinations of relevancy must be based on personal experience, general knowledge, and understanding of human conduct and motivation. 70 M.J. at 319.

Mil. R. Evid. 412 was intended to encourage victim cooperation in courts-martial and to prevent embarrassment, invasion of privacy, and the infusion of sexual innuendo into the factfinding process).

When an appellant seeks the admission of evidence under the constitutional exception, a military judge must still determine whether the probative value is substantially outweighed by a danger of unfair prejudice. *Gaddis*, 70 M.J. at 256; Mil. R. Evid. 412(c)(3), 403.

Argument

The military judge's ruling appropriately excluded evidence that was, at best, marginally relevant, and, at worst, a fabrication that would only serve to confuse the issues and waste time. The military judge's ruling properly reasoned that defense failed to establish by a preponderance of the evidence that appellant or SPC [REDACTED] understood the disputed term⁶ to mean anything other than its normal definition. Additionally, even if this term had its proffered meaning, the probative value of the evidence was substantially outweighed by the dangers of confusing the issues, causing a trial within a trial, and wasting time under Mil. R. Evid. 403.

A. Defense counsel failed to establish a material fact at issue by a preponderance of the evidence.

“To overcome the prohibition of Mil. R. Evid. 412, the defense must establish a foundation demonstrating constitutionally required relevance, such as ‘testimony proving the existence of a sexual relationship that would have provided significant evidence on an issue of major importance to the case.’” *United States*

⁶ See R. at 86–98 (sealed) for a description of the disputed term that was subject of the Mil. R. Evid. 412 hearing.

v. Carter, 47 M.J. 395, 396 (C.A.A.F. 1998). The attenuated nature of this evidence, combined with a lack of testimony supporting appellant's proffer, made this evidence irrelevant under Mil. R. Evid. 401. Additionally, appellant's proffer for admission of the evidence failed to meet the threshold of a preponderance of evidence in accordance with R.C.M. 905(c)(1). (App. Ex. XXXVIII, p. 16 (sealed)).

"As a matter of burdens, we note it is incumbent on the defense to show the proffered evidence is relevant" *United States v. Grimes*, ARMY 20100720, 2014 CCA LEXIS 63, at *12 (Army Ct. Crim. App. 31 Jan. 2014) (citing *Dowling v. United States*, 493 U.S. 342, 351, n.3 (1990)). No evidence was introduced that SPC [REDACTED]'s use of the term had the meaning that appellant asserted it did at the Article 39(a)—in fact, just the opposite. (App. Ex. XXXVIII, p. 16 (sealed)). Moreover, appellant did not testify, nor did he introduce an affidavit, as to his or SPC [REDACTED]'s subjective belief that the term meant anything other than its normal definition. (R. at 86–98 (sealed)).

Rather, defense introduced testimony of a third party, who had no relation to the case, to testify that the term *generally* had an alternative meaning. (R. at 86–98 (sealed)). However, this testimony did nothing to prove that either appellant or SPC [REDACTED] ascribed that particular meaning to the term. (R. at 86–98 (sealed)). Thus, the military judge correctly reasoned that there was insufficient evidence

presented to make this evidence relevant. (App. Ex. XXXVIII, p. 20 (sealed)); *see Carter*, 47 M.J. at 397 (holding that the military judge did not abuse his discretion by excluding evidence under Mil. R. Evid. 412 unless the defense could produce testimony from the witness who provided the basis for SPC [REDACTED]'s motive to fabricate). As this court found in *Grimes*, the military judge correctly reasoned that “the defense [failed to] establish an adequate foundation that the alleged ‘other sexual behavior’ occurred.” 2014 CCA LEXIS 63, at *12.

B. The military judge’s ruling appropriately limited the defense from introducing marginally relevant and highly prejudicial evidence.

Even if the military judge were to give defense counsel’s proffer sufficient weight to overcome the burden of proof, he properly reasoned that the probative value of the evidence was greatly outweighed by the danger of unfair prejudice. (App. Ex. XXXVIII, p. 20 (sealed)). It was not clearly unreasonable or erroneous for the military judge to reason that the timing and quality of evidence weighed against its probative value. (App. Ex. XXXVIII, p. 20 (sealed)). The military judge reasoned that an alleged victim’s state of mind or appearance prior to meeting up with an accused has little probative value as to whether that alleged victim later consented to sexual relations. (App. Ex. XXXVIII, p. 20 (sealed)).

Any effort to prove this matter up at trial would have confused the issues and wasted the court’s time. Mil. R. Evid. 403; *see Grimes*, 2014 CCA LEXIS 63, at *22–23 (“[E]ven if this evidence has some logical relevance, that marginal

relevance is substantially outweighed by the danger of a trial within a trial comparing the previous sexual movements and positions with the sexual assault at issue.”). Therefore, the contested evidence was not constitutionally required, did not qualify under any other exception, and was properly excluded.

C. Even if the evidence was constitutionally required, any error was harmless beyond a reasonable doubt.

In assessing harmlessness, this court applies the five *Van Arsdall* factors: (1) the importance of the testimony; (2) whether the testimony was cumulative; (3) the presence or absence of corroborating or contradictory evidence on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution's case. *Ellerbrock*, 70 M.J. at 320 (citing *Del. V. Van Arsdall*, 475 U.S. 673, 684 (1986)).

1. The alleged evidence was of minimal importance and cumulative.

Here, the evidence was of minimal “importance” and “cumulative.” *Id.* First, whether SPC [REDACTED] would have consented to sexual relations prior to arriving in appellant’s barracks room was not material. (R. at 192; Pros. Ex. 5). The record is clear that SPC [REDACTED] and appellant were involved in a romantic relationship prior to 13 October 2020. (R. at 192; Pros. Ex. 5). The purpose of cross-examining SPC [REDACTED] on the use of the term was to establish that SPC [REDACTED] consented or appellant had a reasonable mistake of fact as to consent. (Appellant’s Br. 18). Appellant was able to make a showing for this argument without this evidence. (R. at 525–

26). Both through SPC [REDACTED]'s testimony that there was a consensual romantic relationship leading up to the assault and that SPC [REDACTED] consented to certain acts immediately prior to the rape. (R. at 189, 191–93, 235, 269–70, 516). Like *Gaddis*, appellant was able to present his theory of the case—that SPC [REDACTED]'s conduct immediately preceding the rape created a reasonable mistake of fact as to consent in appellant's mind. 70 M.J. at 257; (R. at 525–27). The factfinder would not have received a “significantly different impression” of SPC [REDACTED]'s credibility or of appellant's alleged belief had the defense been able to cross-examine SPC [REDACTED] on this topic. *Id.*

2. The alleged meaning of the term was unsupported by evidence.

Importantly, there was no evidence for appellant's assertion that the appellant or SPC [REDACTED] understood that the term had the meaning appellant proffered. Analogous to *Carter* and *Grimes*, appellant did not testify at trial or during the Mil. R. Evid. 412 motion. 47 M.J. at 397; 2014 CCA LEXIS 63, at *25–26. On the other hand, SPC [REDACTED]'s statements expressly contradicted any such assertion. (R. at 86–98 (sealed), App. Ex. XXXVIII (sealed)). Even if appellant had been able to cross examine SPC [REDACTED] on this topic, the record indicates that they would have been stuck with SPC [REDACTED]'s answer—the term had its normal meaning. (R. at 86–98 (sealed); App. Ex. XXXVIII (sealed)).

3. The extent of the evidence for the cross-examination otherwise permitted.

Defense was able to cross examine SPC [REDACTED] on consensual sexual activity that immediately preceded the rape. (R. at 235, 269–70). SPC [REDACTED] admitted on direct and cross that everything leading up to penetration was consensual. (R. at 197–98, 235). Although, there was little evidence to speak of outside of a three-week relationship, defense was otherwise given wide latitude on cross examination (R. at 224–39, 270–95) and the government’s objections under Mil. R. Evid. 412 were otherwise overruled (R. at 270).

4. The overall strength of the government’s case.

Overall, the government’s case was strong for all of the same reasons discussed *supra* with respect to Assignment of Error I. Defense’s theories as to appellant’s innocence were contradicted by SPC [REDACTED]’s credible testimony. (R. at 197–207). SPC [REDACTED]’s immediate outcry and demeanor (R. at 302, 312), appellant’s apologies (Pros. Ex. 3, 4), and the appellant’s propensity to commit similar acts (R. at 338), proved that the offense occurred beyond a reasonable doubt. Accordingly, this court should conclude that even if this evidence was constitutionally required, the *Van Arsdall* factors weigh in favor of the government, and any error was harmless beyond a reasonable doubt.

Assignment of Error III

WHETHER DEFENSE COUNSEL’S REPRESENTATION DENIED THE APPELLANT EFFECTIVE ASSISTANCE OF COUNSEL?

Standard of Review

This court reviews allegations of ineffective assistance of counsel de novo.

United States v. Furth, 81 M.J. 114, 117 (C.A.A.F. 2021).

Law & Argument

Military courts evaluate ineffective assistance claims using the Supreme Court’s framework from *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.*

“Under *Strickland*, an appellant bears the burden of demonstrating that (a) defense counsel’s performance was deficient, and (b) this deficient performance was prejudicial.” *Id.* (quoting *Strickland*, 466 U.S. at 687).

“With respect to the first prong of this test, courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.” *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) (quoting *Strickland*, 466 U.S. at 689, 694). This presumption can be rebutted by “showing specific errors that were unreasonable under prevailing

professional norms.” *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001) (citations omitted).

“[A]s to the second prong, a challenger must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.” *Captain*, 75 M.J. at 103. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 M.J. at 694. In other words, “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 112 (2011). “The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686.

A. Defense counsel were not ineffective for failing to compel text messages.

Defense counsel provided reasonable professional assistance as contemplated in *Cueto* by requesting all text messages between appellant and SPC [REDACTED] that were in possession of the government. *Id.*; (App. Ex. V, p. 14). Defense moved to compel the messages between appellant and SPC [REDACTED] from 1 September to 30 October 2020, but the request was denied. (R. at 22; App. Ex. V, p. 31). At the motions hearing all parties agreed that the messages were not in

possession of the government, and thus, disclosure could not be compelled under Mil. R. Evid. 701 or 304(d).⁷ (R. at 22; *contra* Appellant's Br. 26).

There was no indication that every Instagram message between appellant and SPC [REDACTED] from the inception of their relationship on 23 September 2020 (several weeks prior to the rape) was relevant or necessary; thus, they were not subject to production. (R. at 22); *see* Mil. R. Evid. 703(e)(1–2) (“[A] party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process.”). Defense had access to all the messages the government had access to, including text messages that went back to the inception of appellant and victim's relationship. (Pros. Ex. 3, 5).

Appellant was unable to show at trial—or now on appeal—that additional messages that *may* have existed were necessary;⁸ merely that they *could* have been relevant to impeach SPC [REDACTED] on whether he told appellant his stomach hurt in texts that the government recovered—a collateral matter. (Appellant's Br. 26).

Appellant cites no competent authority for the proposition that the defense was entitled to every message, on every application, between an accused and a

⁷ Appellant's argument that Mil. R. Evid. 304(d) applies is without merit. There is no evidence that SPC [REDACTED]'s statements about his stomach hurting had any relevance or relation to appellant's apologies, but rather was only being introduced to impeach SPC [REDACTED]. *See Rodriguez*, 56 M.J. at 342 (explaining the differences between Mil. R. Evid. 106 and 304(h)).

⁸ “[E]vidence is necessary . . . when it would contribute to a party's presentation of the case in some positive way on a matter in issue.” R.C.M. 703(f)(1), Discussion.

complaining witness leading up to the date of a crime. Because defense counsel exercised reasonable diligence to acquire all messages, and there is no indication that other messages that may have existed were material to appellant's case, no error exists for this court to correct. Moreover, appellant cannot show prejudice because such a motion would have been futile and had no impact on the outcome of the trial.

B. Defense counsel were not ineffective for failing to motion the military judge to reconsider his ruling under Mil. R. Evid. 106 and 304(h).

“Rule 106 applies only to evidence that ‘ought in fairness to be considered contemporaneously’ with the proponent's evidence and does not necessarily require that the entire document be admitted into evidence.” *United States v. Rodriguez*, 56 M.J. 336, 340 (C.A.A.F. 2002). Appellant asserts that counsel were ineffective when they failed to ask the military judge to reconsider his ruling at trial under Mil. R. Evid. 106 or 304(h); however, appellant fails to cite any authority that such a motion under these circumstances would have been successful or appropriate. (Appellant's Br. 27). Fundamentally, these are rules governing the evidence to be admitted at trial, and wholly unrelated to production requests. *Compare* Mil. R. Evid. 106, 304(h), *with* R.C.M. 703(e)(2), (f). A motion under Mil. R. Evid. 106 or 304(h) may have applied to evidence that was in possession of either party and related to an accused's confession, but those factors were not present here.

In *Rodriguez*, the CAAF held: “Although the latter statements may rebut, explain, or modify the content of his earlier statements, they are not admissible under the rule of completeness because they were not part of the same transaction or course of action.” 56 M.J. at 342. The message about SPC ██████’s stomach hurting presumably occurred hours earlier, after SPC ██████ had lunch, and was completely unrelated to appellant’s subsequent apology. (R. at 190, 280). Unlike *Rodriguez*, there is not even any indication that SPC ██████’s statement provided *any* context to appellant’s subsequent admissions. 56 M.J. at 342; 2018 CCA LEXIS 517, at *42. Rather, the absence of the earlier statements⁹ merely rebutted SPC ██████’s assertion on cross-examination that he told appellant over Instagram messaging that his stomach hurt. (R. at 280).

Here, there was no risk that introducing Pros. Ex. 3 without the preceding messages, would create a “misleading impression” under Mil. R. Evid. 106, or that SPC ██████’s statement from earlier in the evening—specifically that he told appellant his stomach hurt—somehow precluded [appellant] from completing the content of *his* statements. *Rodriguez*, 56 M.J. at 342; *see* Mil. R. Evid. 304(h).

The thrust of appellant’s argument relies upon authorities and case law that have to

⁹ The government never sought to introduce any conversations or messages between appellant and SPC MFG outside of what was in Pros. Ex. 3 and 5. Although defense attempted to impeach SPC MFG about whether he ever told appellant his stomach hurt in prior messages from earlier that day (R. at 280–81), this line of questioning was brought up by defense not the government.

do with an appellant's confession and are distinguishable. (Appellant's Br. 27). Even if this court finds that such a motion could have been successful, the notion that counsel were *deficient* for failing to consider such an attenuated tactic is without merit.

C. Defense were not ineffective for failing to have witnesses ready for live testimony at an Article 39(a).

Appellant asserts that trial defense counsel was deficient by assuming they could rely on their proffer rather than having witnesses available for live testimony at the Article 39(a) proceeding. (Appellant's Br. 27–28). When a military judge makes a ruling on preliminary matters such as the production of witnesses, “the military judge is not bound by evidence rules, except those on privilege.” Mil. R. Evid. 104.

It is not uncommon for the military judge or the appellate courts to rely on a proffer from defense in these proceedings. *See United States v. Shelton*, 62 M.J. 1, 3–4 (C.A.A.F. 2005) (relying on trial defense counsel's proffer to determine that although the “modest threshold required for production of witnesses under R.C.M. 703” were met, their nonproduction was harmless beyond a reasonable doubt); *see also United States v. Breeding*, 44 M.J. 345, 351 (C.A.A.F. 1996). In this case, defense provided a proffer, along with their motion to compel witness production, which laid out why each witness was relevant and necessary to their case. (App. Ex. VII, VIII). Defense was prepared to argue the contents of that motion but did

not have live witnesses available to support their proffer. (R. at 29) (“[D]efense believed it could stand on its proffer, based on the type of denials.”) (cleaned up). Even if this showed a lack of preparedness, defense’s mistaken belief that they could rely on their proffer certainly did not constitute ineffectiveness.

Importantly, there was no impact on the proceeding. The result of defense’s alleged deficiency was the mere delay of the motion hearing on this issue. (R. at 81). Defense called the witnesses at that later hearing, and the military judge granted or denied the witnesses based on the evidence presented. (R. 102–43). If the court finds that the first prong of *Strickland* was met overcoming the “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance,” appellant still cannot show that this deficiency resulted in prejudice. 466 U.S. at 689. Appellant must demonstrate “a reasonable probability that, but for counsel’s [deficient performance], the result of the proceeding would have been different.” *Datavs*, 71 M.J. at 424 (quoting *Strickland*, 466 U.S. at 694).

D. Defense were not deficient for failing to make a *Houser* motion in response to the government’s cross-examination of SA BH.

The government’s impeachment of SPC [REDACTED]’s testimony through the cross examination of SA [REDACTED] did not require the opinion of an expert because he relied on rational perception rather than “scientific . . . or other specialized knowledge.” Mil. R. Evid. 701. During defense’s merits case they called SPC [REDACTED], appellant’s roommate, to impeach SPC [REDACTED] by stating that he did not hear any noise coming

from appellant's room on 13 October 2020. (R. at 395). Specialist [REDACTED] stated he could normally hear appellant speaking in a "regular tone" to his parents on the phone through the walls. (R. at 394).

Defense later called SA [REDACTED], one of the lead investigators on the case. In an apparent attempt to impeach the government's investigation, they asked what type of "investigatory work" he did on this case and whether he collected any "physical evidence." (R. at 432). Agent [REDACTED] responded that he did collect some physical evidence and conducted "some sound tests as well." (R. at 432).

On cross-examination, the government asked SA [REDACTED] about these sound tests and whether SA [REDACTED] had measured the thickness of the walls (R. at 439), whether he could hear the government counsel banging on the walls (R. at 440), or the government paralegals speaking in "normal conversational tone." (R. at 444). At this point, SA [REDACTED] did not give an "opinion," but merely testified on a matter which he had personal knowledge of in accordance with Mil. R. Evid. 601, 602. (R. at 443–44). Nothing in the record suggests that these perceptions were based on "scientific, technical, or other specialized knowledge," but rather simple observations—whether he could hear sounds or observe how thick a wall was. Mil. R. Evid. 702(a); (R. at 439, 444).

Plainly speaking, lay testimony about whether a person could hear sounds or measure a wall does not require an expert opinion, and any motion for such would

have been without merit. *Contra United States v. Houser*, 36 M.J. 392, 398 (C.A.A.F. 1993) (analyzing the subject matter of expert testimony regarding the interplay of *post-traumatic stress disorder and rape trauma syndrome*). Because the subject matter of SA [REDACTED]'s testimony was a far cry from what an expert would normally be required for, defense was not deficient in failing to make this motion.¹⁰ *Compare Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142–45 (1999) *with R.* at 439–44.

Even if this court were to find that defense was deficient for failing to make this motion, appellant failed to show any prejudice as a result. *Infra*, AE III, para. 5. SPC [REDACTED]'s testimony was that although he could hear appellant speaking in a “regular tone” to his parents, he neither heard, nor saw anyone on 13 October 2020, but we know that SPC [REDACTED] was in appellant's room. (R. at 394–95, 401). Thus, even if the military judge accepted defense counsel's theory of the case—there was merely a conversation or a consensual sexual encounter on 13 October 2020—he would still be unable to reconcile that account with SPC [REDACTED]'s testimony. (R. at 522–26).

¹⁰ Appellant asserts that his counsel seemed “surprised” by this testimony and were thus deficient for not objecting based on a discovery violation. (Appellant's Br. 30). However, appellant provides no citation for any assertion that counsel were surprised by this evidence or that there was a discovery violation. (Appellant's Br. 30). Any such argument is mere speculation and without merit.

Ultimately, SPC [REDACTED]'s testimony was completely contradicted by the text messages, defense's theory of the case, and diminished by his motive to avoid repercussions for breaking quarantine. (R. at 391–92). For the aforementioned reasons, appellant can show no prejudice from his counsel's alleged deficiencies on this matter.

E. The cross examination was not beyond the scope of direct.

When defense sought to impeach the government's investigation of appellant by asking SA [REDACTED] about the nature of his investigation, they opened the door to questions about the specifics of his investigation on cross examination. (R. at 432) (SA [REDACTED] testifying about conducting "sound tests" as part of his investigation in response to defense counsel's questions on direct). One of defense's theories was that the government failed to conduct a thorough investigation into either the allegations of PFC [REDACTED] or SPC [REDACTED]. (R. at 517, 536).

Even if this line of questioning did eventually go beyond the scope of direct examination, there was no prejudice to appellant. Contrary to appellant's argument, this was proper rebuttal evidence. (*See* Appellant's Br. 29–31). Thus, the only advantage to this otherwise admissible evidence would be that the government was able to ask leading questions. However, it is clear from the record that SA [REDACTED] had no issue asserting himself on the stand or correcting either government or defense counsel. (R. at 433, 435, 437, 440, 446, 448). Thus, any

assertion that his testimony would have materially differed if the government asked more open-ended questions is speculative.

Importantly, even if this court were to find that defense was deficient for failing to keep out this entire line of questioning, there would be no impact on the trial proceedings. Defense acknowledged at trial the low probative value of this evidence. (R. at 545–46). The relevance of SA [REDACTED]’s testimony was solely to impeach SPC [REDACTED]—testimony that in of itself was largely irrelevant. *Supra* AE III, para. D; (R. at 506). Even if the military judge completely disregarded the government’s cross examination of SA [REDACTED], SPC [REDACTED]’s testimony would have a low probative value based on the evidence introduced at trial. (Pros. Ex. 3, 20; R. at 476).

F. There was no prejudice to appellant.

Appellant relies on *United States v. Cueto* for the proposition that “[p]erhaps in a rare case an attorney’s overall performance could be deficient even though the attorney did not make specific errors.” (Appellant’s Br. 24) (quoting 82 M.J. 323, 331 (C.A.A.F. 2022); *but see United States v. Hall*, 455 F.3d 508, 520 (5th Cir. 2006) (noting “ineffective assistance of counsel cannot be created from the accumulation of acceptable decisions and actions”); *see also Becker v. Luebbers*, 578 F.3d 907, 914 n.5 (8th Cir. 2009) (noting that even if some aspect of counsel’s performance was deficient, prejudice must be limited to constitutionally defective

aspects of representation). While relying on dicta, appellant asks this court to sidestep the safeguards put in place by the Supreme Court in *Strickland* and find that this is one of those “rare cases” where an appellant warrants relief without specific assertions of deficiency causing prejudice. (Appellant’s Br. 24–25). This argument is misguided. *Cueto* stood for the proposition that “[i]n determining whether an attorney's conduct was deficient we do not simply ask whether the attorney did everything possible that posed little or no risk to the client, [but rather] whether counsel's conduct falls within the wide range of reasonable professional assistance.” 82 M.J. at 329 (quoting *United States v. Scott*, 81 M.J. 79, 84 (C.A.A.F. 2021) (internal citations omitted)).

Assignment of Error IV

WHETHER AN ACCUMULATION OF ERRORS DEPRIVED THE APPELLANT OF A FAIR TRIAL?

Appellant asserts that an accumulation of errors “by the defense counsel, the military judge, the alleged victim, and the trial counsel combined have deprived the Appellant of a fair trial.” (Appellant’s Br. 33). Other than mentioning his defense counsel’s “overall performance,” appellant does not state explicitly which errors should be considered in this court’s analysis for cumulative error. (Appellant’s Br. 32–33). However, even assuming that the military judge abused his discretion when he failed to consider the Mil. R. Evid. 412 matters and defense counsel was deficient, appellant still was not deprived of a fair trial.

A. The exclusion of Mil. R. Evid. 412 evidence.

The Mil. R. Evid. 412 evidence had little probative value, even if the military judge were to consider it. *Supra* AE II, para. 2. Sexually suggestive actions of a victim or appellant hours before an alleged rape, even if they are part of the *res gestae* of the offense, have little probative value regarding the issue of consent to sexual relations. *See United States v. Gaddy*, ARMY 20150227, 2017 CCA LEXIS 179, at *6–7 (Army Ct. Crim App. 20 Mar. 2017) (“That someone may have agreed to dance in a provocative manner is not highly probative as to whether they agreed to sexual intercourse or whether an accused actually and reasonably believed he had consent.”). This is especially true considering the circumstances of the rape (R. at 199–204) and where appellant was convicted of using unlawful force. (R. at 563). Therefore, any exclusion of such evidence was harmless beyond a reasonable doubt.

B. Defense counsel’s overall performance was not deficient.

Appellant asks this court to consider a series of alleged minor errors that reflected on counsel’s “overall performance.” (Appellant’s Br. 24). Appellant draws on dicta from *Cueto* when asking this court to find defense counsel deficient in one of these “rare case[s]” contemplated by the CAAF. *Cueto*, 82 M.J. at 331. At best, appellant points to errors that are the product of “human fallibility,” rather than “a long series of questionable omissions by counsel due to a lack of

conscientious effort.” *Id.* Even in the aggregate, it simply cannot be said that the alleged deficiencies were “so serious that counsel was not functioning as the ‘counsel’ guaranteed . . . by the Sixth Amendment.” *Strickland*, 466 U.S. at 687.

Furthermore, appellant fails to show how any of the alleged deficiencies alone, or together, impacted the outcome of his trial. The alleged deficiencies in “pretrial preparedness” (i.e. failing to compel the production of text messages or have live witnesses prepared to testify at an Article 39(a)) did not result in the exclusion or inclusion of any material evidence of which appellant claims prejudiced his case. (Appellant’s Br. 25).

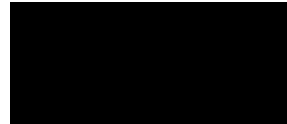
The alleged tactical deficiencies during trial amounted to, at best, the inclusion of inadmissible impeachment evidence of SPC [REDACTED]. (Appellant’s Br. 29–32). As discussed *supra*, SPC [REDACTED]’s testimony had little probative value. His testimony was not only contradicted by the text messages (R. at 389) and defense’s theory of the case (R. at 522–24), but it was diminished by his own motives to fabricate. (R. at 391–92). The alleged errors in this case, both on their own and when considering their cumulative effect, do not amount to the deprivation of a fair trial. This court should affirm the findings and sentence.

Conclusion

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



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APPENDIX

United States v. Coover

United States Air Force Court of Criminal Appeals

July 21, 2021, Decided

No. ACM 39848

Reporter

2021 CCA LEXIS 355 *; 2021 WL 3083647

UNITED STATES, Appellee v. Tyler D. COOVERT, Airman First Class (E-3), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by [United States v. Coover, 2021 CAAF LEXIS 957, 2021 WL 5832352 \(C.A.A.F., Nov. 1, 2021\)](#)

Petition for review filed by [United States v. Coover, 2021 CAAF LEXIS 948, 2021 WL 5828589 \(C.A.A.F., Nov. 1, 2021\)](#)

Motion granted by [United States v. Coover, 2021 CAAF LEXIS 1013, 2021 WL 5828931 \(C.A.A.F., Nov. 22, 2021\)](#)

Review denied by [United States v. Coover, 2022 CAAF LEXIS 7 \(C.A.A.F., Jan. 5, 2022\)](#)

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Charles G. Warren. Sentence: Sentence adjudged on 4 October 2019 by GCM convened at Grand Forks Air Force Base, North Dakota. Sentence entered by military judge on 22 November 2019: Dishonorable discharge, confinement for 2 years and 6 months, forfeiture of all pay and allowances, and reduction to E-1.

Coover v. United States, 81 M.J. 223, 2021 CAAF LEXIS 315, 2021 WL 1916257 (C.A.A.F., Apr. 9, 2021)

Counsel: For Appellant: Major Alexander A. Navarro, USAF; Carol A. Thompson, Esquire.

For Appellee: Lieutenant Colonel Matthew J. Neil, USAF; Major Jessica L. Delaney, USAF; Mary Ellen Payne, Esquire.

Judges: Before MINK, KEY, and ANNEXSTAD, Appellate Military Judges. Judge ANNEXSTAD delivered the opinion of the court, in which Senior Judge MINK and Judge KEY joined.

Opinion by: ANNEXSTAD

Opinion

ANNEXSTAD, Judge:

A general court-martial composed of officer members convicted Appellant, contrary to his pleas, of one specification of sexual assault in violation of [Article 120, Uniform Code of Military Justice \(UCMJ\), 10 U.S.C. § 920](#).¹ The court-martial sentenced Appellant to a dishonorable discharge, confinement for two years and six months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority took no action on the findings or sentence.

¹ Appellant also pleaded not guilty to two additional specifications of sexual assault in violation of [Article 120, UCMJ](#). The first specification was dismissed without prejudice after arraignment but before trial, and Appellant was found not guilty of the second specification. Both specifications referred to 2018 offenses, *Manual [*2] for Courts-Martial, United States* (2016 ed.) (2016 MCM)). Appellant was convicted of a sexual assault that occurred after 1 January 2019 and elected to be tried by the sentencing rules in place prior to 1 January 2019. Unless otherwise noted all references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

Appellant raises four issues for our consideration: (1) whether trial defense counsel were ineffective for failing to move to suppress Appellant's statement to Air Force Office of Special Investigations (AFOSI) agents and for failing to adequately cross-examine the victim;² (2) whether trial counsel committed prosecutorial misconduct by introducing and arguing irrelevant information and improperly appealing to the members' emotions to convict Appellant; (3) whether Appellant's conviction is legally and factually sufficient; and (4) whether the military judge abused his discretion by failing to conduct an in-camera review on a motion to compel production under Mil. R. Evid. 513. Following our initial review of this case we specified a fifth issue for consideration: (5) whether Appellant is entitled to appropriate relief because the convening authority failed to act on Appellant's request for deferment of his reduction in rank as required by Rule for Courts-Martial (R.C.M.) 1103(d)(2).

With respect to issue (4), we have carefully considered Appellant's contentions and find it does not require further discussion or warrant relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987). Finding no error materially prejudicial [*3] to a substantial right of Appellant, we affirm the findings and sentence.

I. BACKGROUND

On 29 January 2019, LS and KS drove to a house occupied by Senior Airman (SrA) NM. LS and KS had been friends since the summer of 2018. Appellant and SrA NM were friends, and at that time, Appellant was staying at SrA NM's house. All four individuals knew each other and had spent time together at a local bar the previous weekend. Appellant had previously commented to KS that he

thought LS was "cute." He had also mentioned to SrA NM that he found LS attractive and was interested in her. KS and LS intended to "hang out" with Appellant and SrA NM that night, but did not intend to spend the night.

Over the course of the evening the group sat around a table talking and playing drinking games. As KS testified, the "point" of the drinking game was to "drink more often." All four individuals consumed alcohol throughout the night. LS estimated that over the course of the night she had anywhere from three to eight drinks. The group was interacting and drinking for about four to five hours. At one point during the evening Appellant asked LS out on a date. LS told Appellant that she would be willing to go out [*4] with him.

Later in the evening SrA NM and KS spent time with each other in SrA NM's bedroom, leaving Appellant and LS in the living room. When they returned to the living room, Appellant and LS were still sitting at the table. Eventually, SrA NM and KS went back to his bedroom to sleep. SrA NM woke up about two hours later and started to walk to the living room to turn off the television. He was stopped in the hallway by Appellant, who told him to "go back to sleep" or he "was going to ruin this for him." SrA NM went back to his bedroom and went to sleep.

Appellant and LS continued to hang out and talk in the living room. LS was on her phone, texting a friend. Appellant eventually told LS to get off of her phone. LS testified that she stayed on her phone because she "didn't want a reason to get any closer" to Appellant and wanted to maintain a physical distance. Appellant became a little more aggressive and "snippy" and made a few snide remarks about LS being on her phone. At one point Appellant told LS that she "wasn't a celebrity" and that "there wasn't that many people she needed to talk to."

LS was mostly texting with her ex-boyfriend, EW. They had an on-again, off-again relationship, [*5] and though they were not dating at this time, LS wanted to return to having a relationship with EW.

² Portions of the trial transcript, appellate exhibits, and briefs addressing issues (1) and (4) were sealed pursuant to R.C.M. 1113. These portions of the record and briefs remain sealed, and any discussion of sealed material in this opinion is limited to that which is necessary for our analysis. *See* R.C.M. 1113(b)(3).

In one text to EW, LS told him that she was uncomfortable, and she wanted EW to pick her up. In another text to EW, LS stated that she was scared and shared her location so he knew where she was. LS was also sending EW quotes of things Appellant was saying to her. For instance, she told EW that Appellant had said to her "If you ignore me one more time, I am going to do what I want." After a while, LS told Appellant that she wanted to go home. Appellant began bargaining with LS, telling her that if she put down her phone for two minutes, he would drive her home. At this point in the night, LS was feeling scared and out of control. Appellant was being verbally aggressive with her, and she was in an unfamiliar house. LS acknowledged that although she was scared and uncomfortable, Appellant had not done anything physical toward her at that point, but had just expressed anger generally.

LS eventually put her phone down and moved over to the couch next to Appellant to watch television. Appellant then kissed LS on the cheek a few times. LS did not reciprocate initially. Her initial response [*6] was to start crying, and she testified that she had tears running down her face. Appellant's only reaction was to tell her that "it's fine." At one point, LS did kiss Appellant back, hoping that would make him stop. Appellant then pulled her pants down while still telling her that she "was fine." LS later told the police there was a point when Appellant was holding her down, and she was telling him "no," that she did not like what he was doing, but Appellant continued to say she was "fine." Appellant then pulled down his own pants, and inserted his penis into LS's vagina. Appellant began thrusting, while LS cried and remained motionless. At some point, while Appellant's penis was still in LS's vagina, he asked her why she was crying. Appellant then continued to thrust for some amount of time, at least 15 seconds but no more than a few minutes, before he stopped, got off of LS, and put his pants back on. LS immediately texted EW, "F[**]k you he just raped me."

Appellant then drove LS to her mother's house. During the car ride, Appellant took out his phone and told LS that people had "tried to get him in trouble with this type of thing before" so he needed to record her saying that she [*7] had consented to having sex with him. LS testified that she was scared and panicked, and told him that they could talk about it when they were both sober, LS went into her mother's house and immediately told her mother what had happened. LS's mother then called the police.

At about 0430 that morning, a civilian police officer, PE, received a dispatch to respond to a report of a sexual assault. PE reported to LS's mother's house, where he found LS sitting on the bathroom floor, distraught and crying. PE was wearing a body camera that recorded his interactions with LS.³ PE testified that when he first made contact with LS she was crying so hard that it was difficult for her to form words to respond to his questions. Eventually LS reported that Appellant had sexually assaulted her and she and the officer agreed that she should go to the hospital. The officer told her to bring her cell phone and the clothes she was wearing to the hospital, and he took pictures of the text messages between LS and EW that were on her phone.

At the hospital, LS met with a sexual assault nurse examiner, KM. KM conducted a sexual assault forensic examination (SAFE) on LS. The SAFE included taking swabs of LS's [*8] neck, the outer area around her vagina, her vaginal wall, and her cervix. The swabs were then provided to law enforcement for deoxyribonucleic acid (DNA) testing. At trial, KM was recognized as an expert in the field of sexual assault forensic examination, and she testified that when she first came into contact with LS that LS was very "upset" and "tearful." KM also noted that LS had mascara running down her face.

Meanwhile, after dropping LS off at her mother's

³The bodycam video was admitted into evidence as Prosecution Exhibit 2 and was played for the members at trial.

house, Appellant returned to SrA NM's house and knocked on the door to SrA NM's bedroom. When KS answered the door, Appellant said that he needed to talk to her. KS followed Appellant to the living room, where Appellant told KS that he had driven LS somewhere, and that she seemed upset. He stated that LS had been crying. He told KS that he and LS had been kissing, but did not say anything about having sex with her. He then asked KS if she knew why LS would have been upset. Appellant told KS that he had recorded LS in the car, though he did not explain why. Around the time that LS was with police, Appellant also sent a message to LS through Instagram, a social media application, asking her why she would not talk to him.

Later [*9] that morning, after KS left, Appellant spoke with SrA NM about the night. He told SrA NM that he and LS had been making out when she started crying and "got hysterical" about her mother's illness. Appellant said that after LS became upset, they stopped what they were doing and he drove her home. Appellant indicated to SrA NM that he had been hoping to have sex with LS, but did not say that they had. At trial, SrA NM opined, based on their friendship, that if Appellant had sex with LS, Appellant would have told him.

On 22 March 2019, Appellant was interviewed by AFOSI Special Agent (SA) TW. After waiving his rights, Appellant made the following statement concerning his interaction with LS:

[LS] and her friend came over. We invited them to come over and have some drinks. They come over [sic], and we played some like drinking games, like Kings Cup and stuff like that. And as the night went on, a couple of hours I would say we played. And then [SrA NM] and the girl that he invited went off to his room. And me and [LS] hung out there by ourselves for a little while. We drank a little more and watched some TV. We started kissing and stuff like that, and things were progressing. And then as [*10] we were kissing, things

heated up like they do when you are kissing and stuff like that, some clothes started to come off. And then, before anything like actually got going, like she started crying and mentioned something I think about her mom, and then asked if I could take her home.

At trial the Government called LS's ex-boyfriend EW and her former roommate PB as witnesses. Both testified that LS is an honest and truthful person. Additionally, the Government presented testimony from DD, a forensic DNA examiner from the United States Army Criminal Investigation Laboratory. DD was recognized as an expert in the field of DNA analysis. DD stated that he performed the DNA analysis on the swabs taken from LS at the hospital and also analyzed swabs collected from Appellant. DD stated that he used the YSTR DNA test which detected a male DNA profile on the vaginal swabs. DD testified that Appellant could not be excluded from the male DNA profile discovered on the outer vaginal swab, the vaginal swab, or the cervical swab. He stated that the probability of a random male individual's DNA being present with that particular profile was one in 1,111 for caucasian individuals. DD testified that [*11] his findings were consistent with Appellant's penis penetrating LS's vulva.

At trial, Appellant was also charged with sexually assaulting another woman, Airmen First Class (A1C) SG. Appellant was acquitted of that offense.

II. DISCUSSION

A. Allegations of Ineffective Assistance of Counsel

Appellant alleges that he was denied effective assistance of counsel. He asks this court to consider two specific deficiencies in the performance of his trial defense counsel: (1) failure to move to suppress Appellant's statement to AFOSI agents, and (2) ineffective cross-examination of LS.

1. Law

The [*Sixth Amendment*](#)⁴ guarantees an accused the right to effective assistance of counsel. [*United States v. Gilley*, 56 M.J. 113, 124 \(C.A.A.F. 2001\)](#). We review allegations of ineffective assistance de novo. [*United States v. Gooch*, 69 M.J. 353, 362 \(C.A.A.F. 2011\)](#) (citing [*United States v. Mazza*, 67 M.J. 470, 474 \(C.A.A.F. 2009\)](#)). In assessing the effectiveness of counsel, we apply the standard set forth in [*Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 \(1984\)](#), and begin with the presumption of competence announced in [*United States v. Cronin*, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 \(1984\)](#). [*Gilley*, 56 M.J. at 124](#) (citing [*United States v. Grigoruk*, 52 M.J. 312, 315 \(C.A.A.F. 2000\)](#)). "Our scrutiny of a trial defense counsel's performance is 'highly deferential,' and we make 'every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate conduct from counsel's perspective at the time.'" [*United States v. Akbar*, 74 M.J. 364, 379 \(C.A.A.F. 2015\)](#) (omission in original) (quoting [*12] [*Strickland*, 466 U.S. at 689](#)).

We will not second-guess reasonable strategic or tactical decisions by trial defense counsel. [*Mazza*, 67 M.J. at 475](#) (citation omitted). "Defense counsel do not perform deficiently when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so." [*United States v. Datavs*, 71 M.J. 420, 424 \(C.A.A.F. 2012\)](#) (citing [*Gooch*, 69 M.J. at 362-63](#)). The burden is on the appellant to demonstrate both deficient performance and prejudice. *Id.* (citation omitted).

We consider the following questions to determine whether the presumption of competence has been overcome: (1) if an appellant's allegations are true, is there a reasonable explanation for counsel's

actions; (2) did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers; and (3) if defense counsel was ineffective, is there a reasonable probability that, absent the errors, there would have been a different result. [*United States v. Polk*, 32 M.J. 150, 153 \(C.M.A. 1991\)](#) (citations omitted); [*Gooch*, 69 M.J. at 362](#). Considering the last question, "[i]t is not enough to show that the errors had some conceivable effect on the outcome," instead it must be a "probability sufficient to undermine confidence in the outcome," including "a reasonable probability that, absent the errors, the factfinder would [*13] have had a reasonable doubt respecting guilt." [*Datavs*, 71 M.J. at 424](#) (internal quotation marks and citations omitted).

2. Analysis

In response to Appellant's assignment of error, we ordered and received declarations from both trial defense counsel.⁵ We have considered whether a post-trial evidentiary hearing is required to resolve any factual disputes between Appellant's assertions and his trial defense team's assertions. See [*United States v. Ginn*, 47 M.J. 236, 248 \(C.A.A.F. 1997\)](#); [*United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411, 413 \(C.M.A. 1967\)](#). We find a hearing unnecessary to resolve Appellant's claims. Considering these declarations along with the assertions Appellant makes in his assignment of error, we conclude that Appellant has not overcome the presumption of competence of his trial defense counsel.⁶ We examine each allegation in turn.

⁵ On 9 April 2021, the United States Court of Appeals for the Armed Forces denied Appellant's petition for extraordinary relief in the nature of writ of prohibition or, in the alternative, a writ of mandamus, seeking to prohibit this court from compelling affidavits from Appellant's trial defense counsel. See [*Coovert v. United States*, __ M.J. __, No. 21-0207, 81 M.J. 223, 2021 CAAF LEXIS 315 \(C.A.A.F. 9 Apr. 2021\)](#).

⁶ We considered the declarations to resolve this issue pursuant to [*United States v. Jessie*, 79 M.J. 437, 442 \(C.A.A.F. 2020\)](#) (observing a Court of Criminal Appeals is allowed to accept affidavits "when necessary for resolving claims of ineffective assistance of trial defense counsel . . . when those claims and issues are raised by the

⁴ [*U.S. CONST. amend. VI*](#).

a. Motion to Suppress

Appellant specifically asserts that he did not provide a voluntary and knowing waiver to his rights under Article 31, UCMJ, [10 U.S.C. § 831](#), and claims his counsel were deficient in failing to move to suppress his statement to AFOSI agents. Appellant claims he was prejudiced because his statement "played a crucial role in the government's case." Appellant's lead defense counsel, Major (Maj) NL, explained in his declaration that this was not a failure, but "a strategic and tactical choice," [*14] and he elaborated on the rationale behind the decision:

Besides [Appellant]'s statement to [AFOSI], there was no other statement from him regarding what occurred on the night in question between him and [LS]. Given the swift report to police and the compelling "body-cam" footage of [LS], we felt strongly that [Appellant] was going to have to get his version of events in front of the panel in some form or another. This conclusion left us with only two viable defense options in our opinion: 1. Move to suppress [Appellant]'s [AFOSI] statement and recommend that he take the stand and testify as to the events in question; or 2. Allow his [AFOSI] statement to be admitted, frame it as a general denial of any wrongdoing, and argue the reasonable inference from [Appellant]'s statement "before anything *like* actually got going" is that what he meant was that the sex did not last very long.

Maj NL, further explained that their trial strategy also had to account for the fact that Appellant was being "accused by not one, but two women on two separate occasions." He also explained that factoring into their "calculus was the military judge's ruling that he would allow the Government to argue a 'common [*15] scheme' theory between the two allegations despite our objection." Therefore, Maj NL stated that it was his

professional recommendation that Appellant "not testify in the case due to what would likely be a withering crossexamination wherein trial counsel would try to link commonalities between the two women and catch [Appellant] in an untenable position."

Maj NL also discussed that they were well aware that DNA evidence would likely "be admitted" and that the Government was likely "to argue that [Appellant's AFOSI] statement was contradicted by the DNA evidence." Maj NL stated that it was his position the Appellant's statement would only be contradicted by the DNA evidence if it was assumed that Appellant's statement was in fact a categorical denial that no sex had occurred between him and LS, which he believed was not the case. We note that Maj NL argued consistent with this position during his findings argument.

In sum, Maj NL explained:

Our decision regarding the use or suppression of [Appellant's AFOSI] statement, whether or not he should testify, and the interplay of these considerations with the DNA evidence were all part of a deliberate trial strategy that we believed gave [Appellant] [*16] the best chance to prevail at trial.

Finally, Maj NL states that this strategy was discussed with Appellant and that he "wholeheartedly" agreed. This assertion finds some support in the record. We note that after the Government rested, the military judge conducted an [Article 39\(a\), UCMJ, 10 U.S.C. § 839\(a\)](#), session with Appellant. There he specifically advised Appellant regarding his right to testify and Appellant acknowledged on the record that he understood his right to testify and stated that it was his decision to "not testify, sir."

Because trial defense counsel articulated strategic reasons for not moving to suppress Appellant's statement to AFOSI that are objectively reasonable, it is unnecessary to discuss the merits, or lack thereof, of such a motion, had one been made. We

record but are not fully resolvable by the materials in the record").

will not second guess the trial defense strategy. Mazza, 67 M.J. at 475 (citation omitted). We evaluate defense counsel's performance not by the success of their strategy, "but rather whether counsel made . . . objectively reasonable choice[s] in strategy from the alternatives available at the [trial]." United States v. Dewrell, 55 M.J. 131, 136 (C.A.A.F. 2001) (quoting United States v. Hughes, 48 M.J. 700, 718 (A.F. Ct. Crim. App. 1998)) (additional citation omitted), *aff'd*, 52 M.J. 278 (C.A.A.F. 2000). There are reasonable explanations for trial defense counsel's actions and advice, and their individual and combined [*17] level of advocacy on Appellant's behalf was not "measurably below the performance ordinarily expected of fallible lawyers." Polk, 32 M.J. at 153. We also note that Appellant was acquitted at trial of a second sexual assault specification, so the strategy employed by the defense team was partially successful. We conclude Appellant has failed to meet his burden to demonstrate deficient performance.

b. Cross-examination of LS

Appellant next claims his trial defense counsel should have more thoroughly cross-examined LS about a statement that she made to KN, namely, that EW was "crazy" and that she said "no" to Appellant out of fear of EW. Appellant alleges that this additional avenue of cross-examination would have shored up an argument that he and LS engaged in consensual sex, and that shortly after inserting his penis into her vagina, LS "began to freak out that somehow, someday, EW would find out that she was having sex with another guy."

Maj NL explained that their cross-examination strategy of LS

was designed to simultaneously achieve two related goals: synching [Appellant]'s version of events as told to the [AFOSI] as closely as possible with [LS's] version of events; and establishing that the sexual encounter [*18] between [Appellant] and [LS] began

consensually and was terminated when she suddenly and unexpectedly began crying or that [Appellant] at least held a reasonable mistake of fact as to [LS's] consent during their encounter.

He further explained that:

Our tactic was not to make [LS] appear as though she was scared or frightened of EW in any way, which is what her statement about him being "crazy" and having to say "no" appeared to imply. Rather our intent was to portray [LS] as the one who was unstable and obsessed to the point of fabricating a sexual assault claim to keep EW in her life.

Finally, Maj NL stated that they were able to establish during the course of the trial that LS and EW did "rekindle their relationship after the alleged sexual assault with [Appellant], making it appear as though her plan that night had worked." Again we do not second-guess reasonable strategic or tactical decisions of trial defense counsel. Mazza, 67 M.J. at 475 (citation omitted). There are reasonable explanations for trial defense counsel's actions and advice, and their individual and combined level of advocacy on Appellant's behalf was not "measurably below the performance . . . [ordinarily expected] of fallible lawyers." [*19] Polk, 32 M.J. at 153 (alteration and omission in original) (citation omitted). Accordingly, we conclude Appellant has failed to meet his burden to demonstrate deficient performance.

B. Prosecutorial Misconduct

Appellant also alleges that the trial counsel committed multiple acts of misconduct when he "sought and introduced irrelevant evidence for the sole purpose of inflaming the emotions of the members," while "simultaneously disparaging" Appellant's "credibility." Specifically, Appellant argues that trial counsel erred when he questioned LS about her counterintuitive behavior on the night of the assault and her level of intoxication. Appellant also alleges that trial counsel erred by

improperly asking members to put themselves in LS's position, improperly vouching for LS's credibility by stating that she "wasn't lying," and improperly disparaging Appellant by calling him a liar. Appellant contends that he was prejudiced by the misconduct and asks that we set aside his conviction. We disagree.

1. Additional Background

Appellant highlights portions of the trial as evidence of trial counsel's alleged prosecutorial misconduct.

a. Evidence of LS's Counterintuitive Behavior and Intoxication

During cross-examination, [*20] trial defense counsel elicited multiple different actions that LS could have taken on the night of the assault to escape Appellant. For instance, in response to questions on cross-examination, LS acknowledged that she could have called a taxi or ride service, could have gone to another room to call the police, or could have just left the house. On redirect examination, trial counsel then asked LS why she did not leave the situation when she was feeling uncomfortable. LS testified that she was "scared" and reacted differently than she thought she would have reacted. Trial counsel then elicited from LS her perception of how she had previously thought she would have reacted to being assaulted and how that compared to her actual reaction. LS answered: "Polar opposite. I did exactly what I didn't think I would do. I totally froze. I thought I would be able to scream and fight back, but I was scared and embarrassed and defenseless." Trial defense counsel did not object to this line of questioning, nor did they ask LS any further questions during re-cross-examination.

b. Placing Factfinder in Victim's Position

Appellant also highlights two portions from trial

counsel's closing argument where [*21] he contends trial counsel improperly asked panel members to put themselves in LS's position:

At this point, [LS] is crying. At first, she tears up and then starts crying, tears running down her face. She doesn't want to be a part of what's going on. She is ashamed. She's embarrassed. She's defeated, is what she tells you on the stand. And she also tells you essentially, she's crying because in that moment in time, that moment that her parents had talked to her about, as a female, the moment that her mom and dad told her to be aware of everything going on. In that moment, regardless of all of those conversations that she has had, regardless of all of those thoughts she's given about how she would respond in that situation, she betrayed herself by responding polar opposite. Think about that feeling. Is there a right way to respond when someone takes the stand and tells you that that's why they respond?

Trial counsel later argued:

[LS] let [EW] know [that she was raped] in the text, and was there some anger here? Absolutely, there was some anger there, and she explained that to you all. She told you why she was angry. She was angry at the situation. She was angry in how she responded, and [*22] that anger came out towards [EW]. Not in a sense of trying to make him jealous. Not in a sense of trying to guilt trip him, but in a sense, at that point of being scared and being angry about what had happened to her. And I'm sure that you all can relate. There are times in life when things happen to us, a bad day at work, a bad day somewhere, a bad day with the kids, and your anger, well caused by work, or by the kids or by something else comes out on someone else. Someone, who did not cause that anger. That's human response is what that is.

c. Improper Vouching

Appellant also highlights the following portion of trial counsel's closing argument where he argues trial counsel improperly vouched for LS:

We also heard about a neck swab being taken, based on what [LS] was saying and we hear from [DD] why he tested the three swabs that he tested, because those are the most internal swabs. The important thing about the SAFE examination is this though, it is entirely voluntary, right? That's what we heard. [LS] is young. She's intoxicated. How big of a risk is it to take that SAFE kit? How big of a risk is it to take the SAFE kit if you are making all this up, when it's explained to you beforehand [*23] with [sic] going to be done to you. When it is explained to you beforehand why things are going to be done to you. How much of a risk is that if you are lying?

It was a risk for her, members, because she wasn't lying. She wasn't lying, because we heard from [DD].

d. Disparaging Appellant

Appellant also highlights the following portion of trial counsel's rebuttal argument to show he was disparaged when trial counsel called him a liar:

[M]embers, you have heard someone lie in this courtroom over the last couple of days. You have absolutely heard someone lie about the offenses before you over the last couple of days. Members, you can know that person lied by looking at all the evidence that has been presented to you through the lens of a common plan that has been brought before you, and I want to be very clear about this common plan.

....

Members, the person who has lied to you in this court-martial, the person who you have heard lie in this court-martial, is [Appellant]. We are going to talk about that in a few minutes. We are going to talk about that lie and what it means, and what the law tells you regarding that lie.

2. Law

We review claims of prosecutorial misconduct and improper argument [*24] de novo; when no objection is made at trial, the error is forfeited, and we review for plain error. United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019) (citation omitted). The burden of proof under plain error is on the appellant, who must establish "(1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the [appellant]." United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005) (citation omitted).

"Trial prosecutorial misconduct is behavior by the prosecuting attorney that 'oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" Id. at 178 (quoting Berger v. United States, 295 U.S. 78, 84, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)). "Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996) (citing Berger, 295 U.S. at 88) (additional citation omitted).

In presenting argument, trial counsel may "argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000) (citation omitted). Trial counsel may strike hard but fair blows, but may not "inject his personal opinion into the panel's deliberations, inflame the members' passions [*25] or prejudices, or ask them to convict the accused on the basis of criminal predisposition." United States v. Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017) (citations omitted). In determining whether trial counsel's comments were fair, we examine them in the context in which they were made. Gilley, 56 M.J. at 121 (citations omitted). We do not "surgically carve out a portion

of the argument with no regard to its context." [Baer, 53 M.J. at 238](#) (internal quotation marks omitted).

In assessing prejudice from improper argument, we analyze three factors: (1) the severity of the misconduct; (2) the measures, if any, adopted to cure the misconduct; and (3) the weight of the evidence supporting the conviction. [Sewell, 76 M.J. at 18](#) (citing [Fletcher, 62 M.J. at 184](#)). To determine the severity of the misconduct, we apply a five-factor test:

- (1) the raw numbers—the instances of misconduct as compared to the overall length of the argument[;]
- (2) whether the misconduct was confined to the trial counsel's rebuttal or spread throughout the findings argument or the case as a whole;
- (3) the length of the trial;
- (4) the length of the panel's deliberations[;]
- and (5) whether the trial counsel abided by any rulings from the military judge.

[Fletcher, 62 M.J. at 184](#) (citation omitted).

A conviction will be overturned only "when the trial counsel's comments, taken as a whole, were [*26] so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone." *Id.* In assessing prejudice, the lack of a defense objection is "'some measure of the minimal impact' of a prosecutor's improper comment." [Gilley, 56 M.J. at 123](#) (quoting [United States v. Carpenter, 51 M.J. 393, 397 \(C.A.A.F. 1999\)](#)).

It is improper to ask panel members to put themselves in the victim's place. [Baer, 53 M.J. at 238](#). This is referred to as the "Golden Rule." *Id.* However, it is not improper to ask the members to consider or imagine the victim's pain, terror, or anguish. *Id.*

Trial counsel may not personally vouch for a witness, and the "use of personal pronouns in connection with assertions that a witness was correct or to be believed" is improper. [Fletcher, 62 M.J. at 180](#) (citation omitted). While it is improper

for trial counsel to provide personal bolstering, there is no prohibition against arguing that a witness testified credibly. See [United States v. Chisum, 75 M.J. 943, 953 \(A.F. Ct. Crim. App. 2016\)](#) (holding that "marshalled evidence" in closing argument to support the government's claim that a witness told the truth, was proper argument), *aff'd*, [77 M.J. 176 \(C.A.A.F. 2018\)](#).

Disparaging comments are improper "when they are directed to the defendant himself." [Fletcher, 62 M.J. at 182](#). However, there is a distinction between comments that serve as "a personal attack on the defendant" and those [*27] which are "a commentary on the evidence." [Id. at 183](#).

3. Analysis

a. Evidence of LS's Counterintuitive Behavior and Intoxication

Appellant contends that trial counsel erred by eliciting irrelevant testimony from LS concerning how she reacted to being sexually assaulted by Appellant. Since trial defense counsel did not object, we review trial counsel's actions for plain error. We are not persuaded by Appellant's arguments that trial counsel's actions were improper. First and foremost, there is nothing impermissible with a victim discussing or explaining her personal reaction to the events leading up to, during, or after being sexually assaulted. In this case, LS was merely explaining the evidence of the case, which included events that occurred before, during, and after the assault.

Additionally, even if this evidence was questionable, trial defense counsel opened the door to this line of questioning. As noted above, trial defense counsel, during cross-examination, had LS confirm that she could have reacted differently when she felt uncomfortable. Specifically, trial defense counsel had LS acknowledge that she could have called a cab, or the police, or just left the house. As the Government argues, [*28] this line

of questioning by trial defense counsel was at least implying that because LS could have avoided Appellant in any number of different ways that she must have consented to the sexual activity. It was only in response to trial defense counsel's questions that trial counsel asked LS why she responded the way she did and if her response was different than the way she thought she would have reacted.

It is well-settled law under the invited response doctrine that the Government is not prohibited "from offering a comment that provides a fair response to claims made by the defense" in argument. United States v. Carter, 61 M.J. 30, 33 (C.A.A.F. 2005) (citations omitted). This same doctrine also applies to the presentation of evidence. See Gilley, 56 M.J. at 120-22. We see no obvious error in trial counsel eliciting testimony from LS about why she reacted the way she did and explaining that her behavior was different than how she thought she would have reacted, especially after the Defense attacked her credibility on precisely those grounds. At the very least, LS's testimony provided a fair response to a claim made by trial defense counsel. We also disagree with Appellant's assertion that only an expert witness can testify on counterintuitive behavior. Certainly [*29] a victim of sexual assault is permitted to discuss the surrounding circumstances regarding how she reacted to being sexually assaulted and whether it was consistent with how she thought she would have reacted. This was fair commentary on the evidence, and therefore trial counsel did not err in soliciting this testimony.

Appellant also argues that it was error for trial counsel to admit evidence concerning LS's intoxication on the night of the assault. Appellant contends that this evidence was not used as circumstantial evidence of LS's lack of consent and was only used to "evoke impermissible sympathy for [LS]." Specifically, Appellant points to the Government's theme at trial: "intoxication, isolation and initiation [of sexual intercourse]." Additionally, Appellant points to the fact that the Government's opening statement and closing argument were

"peppered with references to [LS]'s level of intoxication and how that level should be considered by members." As our court has recently held, evidence of intoxication is relevant as one of the "surrounding circumstances" to determine whether an individual consented. See United States v. Williams, No. ACM 39746, 2021 CCA LEXIS 109, at *55 (A.F. Ct. Crim. App. 12 Mar. 2021), rev. granted, 81 M.J. 338, 2021 CAAF LEXIS 595 (C.A.A.F. 25 Jun. 2021). As both Appellant and LS had consumed alcohol on [*30] the night of the assault, LS's level of intoxication is relevant as part of the surrounding circumstances of this case. Likewise, we find no error in the presentation of this evidence and therefore no prosecutorial misconduct.

b. Placing Factfinder in Victim's Position

Appellant contends that trial counsel made a prohibited "Golden Rule" argument when he asked the members during his closing argument to "[t]hink about that feeling." Trial defense counsel did not object to this argument, and thus we review trial counsel's statement for plain error. We are not persuaded that trial counsel violated the prohibition against invoking the "Golden Rule." Trial counsel did not explicitly ask the panel members to put themselves in the position of LS. Instead, we construe his comments to be an argument that LS's counterintuitive actions were not evidence of her consent. Stated another way, trial counsel did not ask the members how they would have behaved in that situation, he asked them not to judge LS based on how she behaved.

As to the second portion of trial counsel's closing argument highlighted by Appellant, where trial counsel stated, "And I'm sure you all can relate," we again find no plain [*31] error. Trial counsel again did not so much ask the members to stand in LS's position as he asked them to draw upon their common experience in assessing LS's credibility. It is well established that "members are expected to use their common sense in assessing the credibility

of testimony as well as other evidence presented at trial." United States v. Frey, 73 M.J. 245, 250 (C.A.A.F. 2014) (citations omitted). Counsel are permitted to "ask the members to draw on ordinary human experience" in their argument. United States v. Stargell, 49 M.J. 92, 94 (C.A.A.F. 1998). Trial counsel here provided commentary on the evidence properly before the members, in particular the testimony from LS, and then asked the members to look at their own human experience and to apply their common sense in evaluating her testimony. Appellant has not shown plain error.

c. Improper Vouching

Appellant alleges that trial counsel improperly vouched for LS's credibility by stating that she "wasn't lying." Since trial defense counsel did not object, we review this statement for plain error. We disagree with Appellant's contention and find only proper argument.

To place this statement in its proper context, Appellant made clear at trial that his theory of the case was that LS had fabricated the entire allegation. The Government, [*32] on the other hand, sought to defend LS's credibility by pointing to evidence supporting her initial report of the assault. The statement highlighted by Appellant was in a portion of trial counsel's argument rebutting Appellant's theory by highlighting indications that LS had been telling the truth all along. Trial counsel's rebuttal argument was based on evidence that the members heard regarding the fact that LS maintained her account despite the invasive nature of the SAFE exam, and also that the DNA evidence corroborated her account and testimony. This is a permissible way to orient the members to the evidence of the case that supported her testimony. At no time did trial counsel either improperly place the prestige of the Government behind LS, or make explicit personal assurances concerning LS's veracity. Trial counsel's credibility argument was based on evidence properly before the members and thus was fair argument for the

permissible purposes of explaining the evidence and rebutting Appellant's theory.

d. Disparaging Appellant

Appellant also contends that trial counsel improperly disparaged his character during closing argument by calling him a "liar." Since trial defense counsel [*33] did not object to this argument, we again review for plain error.

In the passage highlighted by Appellant's counsel, trial counsel first referred to the fact that someone "lied" and then later argued "the person who you have heard lie in this court-martial, is [Appellant]." We agree with our superior court that calling Appellant a liar is a "dangerous practice that should be avoided." Fletcher, 62 M.J. at 182 (quoting United States v. Clifton, 15 M.J. 26, 30 n. 5 (C.M.A. 1983)) However, the question is whether these comments rise to the level of plain error. We are not persuaded that these comments were so obviously improper as to merit relief.

Appellant's trial presented dueling theories and versions of events. Appellant's trial defense counsel took the position that LS had lied, while the Government took the position that Appellant had lied to SA TW. After making these statements, trial counsel proceeded to discuss the evidence, which he argued was sufficient for the members to conclude that Appellant's statement to SA TW was in fact not true. Trial counsel went on to argue that the members could take Appellant's statement to AFOSI and:

[B]utt it up against the other evidence, and you can determine whether or not he is lying. The government submits to you that absolutely [*34] the evidence suggests to you that he is. There is only one way to take, before anything, before anything actually like got going. There is only one way to take that, and that is this, my penis was never inside her.

Trial counsel again discussed Appellant's AFOSI

statement near his conclusion, and referred directly to the military judge's instruction on a false exculpatory statement in arguing that members could infer that Appellant's statement demonstrated consciousness of guilt. Placed in this context, we are convinced that trial counsel properly argued Appellant's out-of-court statements were not believable based on the evidence presented and did not commit prosecutorial misconduct by personally attacking Appellant. See *Fletcher*, 62 M.J. at 183. We also conclude that trial counsel did not commit plain error as alleged by Appellant, and are confident that the members convicted Appellant on the basis of the evidence alone. *Id.* at 184 (citation omitted).

C. Legal and Factual Sufficiency

Appellant contends that his convictions are both legally and factually insufficient. The crux of Appellant's argument focuses on his claim that LS was not a sufficiently credible witness. Specifically, Appellant argues that LS fabricated [*35] the allegation of sexual assault in order to gain the attention of her exboyfriend, EW, and that her allegation and testimony were deliberate lies to further this result. Appellant also argues that he had a reasonable mistake of fact as to LS's consent. We disagree.

1. Law

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted). In considering the record, we "may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." *Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1)*.

The test for factual sufficiency "is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," we are "convinced of the accused's guilt beyond a reasonable doubt." *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). "The term reasonable doubt, however, does not mean that the evidence must be free from conflict." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018)).

"In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of [*36] guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *Wheeler*, 76 M.J. at 568 (alteration in original) (quoting *Washington*, 57 M.J. at 399).

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). As a result, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (alteration in original) (citation omitted).

In order to prove the offense of sexual assault the Government was required to prove beyond a reasonable doubt two elements: (1) Appellant committed a sexual act upon LS; and (2) Appellant did so without her consent. See *Manual for Courts-Martial, United States* (2019 ed.) (MCM), pt. IV, ¶ 60.b.(2)(d).

The term "consent" means a freely given agreement to the conduct at issue by a

competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing [*37] another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.

MCM, pt. IV, ¶ 60.a.(g)(7)(A). "All the surrounding circumstances are to be considered in determining whether a person gave consent." *MCM*, pt. IV, ¶ 60.a.(g)(7)(C).

The defense of mistake of fact as to consent applied if Appellant, because of ignorance or mistake, incorrectly believed that LS consented to the sexual act. *See* R.C.M. 916(j)(1). In order to rely on mistake of fact as to consent as a defense, Appellant's belief must be reasonable under all the circumstances. *See id.*; *see generally United States v. Jones*, 49 M.J. 85, 91 (C.A.A.F. 1998) (quoting *United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995)). Once raised, the

Government bears the burden to prove beyond a reasonable doubt that the defense does not exist. R.C.M. 916(b)(1); *see also United States v. McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2019).

2. Analysis

We are convinced that Appellant's conviction of sexually assaulting LS is legally and factually sufficient. In assessing the legal sufficiency, we limited our review to the evidence produced at trial and considered it in the light most favorable to the Government. *See Robinson*, 77 M.J. at 297-98; *Dykes*, 38 M.J. at 272. We conclude that a rational factfinder could have found [*38] beyond a reasonable doubt the essential elements of Appellant's convicted offense, and that Appellant had no reasonable mistake of fact as to consent.

Furthermore, in assessing factual sufficiency, after weighing all the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are ourselves convinced of Appellant's guilt beyond a reasonable doubt. *See Reed*, 54 M.J. at 41.

In this case, there was sufficient evidence to establish the essential elements of sexual assault beyond a reasonable doubt. At trial, LS's testimony alone was sufficient to establish proof of the two elements necessary for the charge; LS testified that Appellant's penis penetrated her vagina, and that he took this action without her consent. There was also evidence presented that detailed LS's immediate report of the sexual assault to law enforcement. The members were able to view the body camera video taken from PE after he made initial contact with LS. This video showed LS visibly upset, and crying so hard she could barely answer PE's questions.

Additionally, the Government presented testimony from DD, a forensic DNA examiner, who performed the DNA analysis on the swabs taken from [*39] LS at the hospital and also analyzed swabs collected from Appellant. DD testified that his analysis detected a male DNA profile on the vaginal swabs taken from LS, and that Appellant could not be excluded from the male DNA profile discovered on the outer vaginal swab, the vaginal swab, or the cervical swab. DD testified that the probability of a random male individual's DNA being present with that particular profile was one in 1,111 for caucasian individuals. DD concluded his testimony by stating that his findings were consistent with Appellant's penis penetrating LS's vulva.

While Appellant argues that LS "voluntarily engaged in consensual sexual activity" with him in order to make EW jealous, he points to no evidence in the record to support that assertion. Additionally, as to LS providing false testimony to support her "plan," we only find evidence that contradicts this assertion. In fact, the panel members were able to observe not only LS's demeanor in court, but also

her demeanor on the bodycam video. Appellant's counsel were able to cross-examine LS and also heard testimony from two different witnesses that LS was an honest and truthful person. The panel also heard testimony from [*40] SrA NM and KS who corroborated LS's memory of the evening up until the point when they went to sleep. SrA NM and KS also corroborated Appellant's sexual interest in LS and the fact that Appellant denied having sex with LS. Such corroboration and consistency support LS's credibility and undermine the suggestion she fabricated her allegation of the assault. We conclude that there was sufficient evidence to establish proof of each element of the offense beyond a reasonable doubt.

As to Appellant's claim that he had a reasonable mistake of fact regarding LS's consent to the sexual act, we note that Appellant did not testify and therefore the only evidence supporting his subjective belief at trial was derived from his statements to KS, SrA NM, and SA TW. While Appellant admitted to kissing LS, he never admitted to having sex with LS, and he never claimed that he believed she consented to sex. By avoiding a discussion of sexual activity with KS and SrA NM, and by telling SA TW that "before anything like actually got going, like she started crying," Appellant's own words demonstrated that he did not reasonably believe that she consented to sexual penetration, and Appellant's misleading renditions [*41] of the events further demonstrate a consciousness of guilt on his part. Additionally, LS's testimony that Appellant kept trying to calm her down by telling her "it's fine" is evidence that he knew she was upset and was not consenting. Finally, the panel had before it evidence that Appellant told LS that he was going to record her stating that the sex was consensual. This again provides some evidence that Appellant was aware of the criminality of his actions. Not only did LS testify to her belief that Appellant had recorded her, but KS also testified that Appellant mentioned the recording. Taken together these facts provided additional evidence that Appellant did not have a reasonable mistake of fact, but in fact knew that LS

did not consent to the sexual activity.

In assessing legal sufficiency, we considered the evidence produced at trial in the light most favorable to the Government. In doing so, we conclude a rational factfinder could have found beyond a reasonable doubt all the elements to support Appellant's conviction for sexual assault. Furthermore, in assessing factual sufficiency, after weighing all the evidence in the record of trial and having made allowances for not having [*42] personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt. Therefore, we find Appellant's convictions both legally and factually sufficient.

D. Request for Deferment

On 12 October 2019, eight days after his court-martial concluded, Appellant submitted matters to the convening authority through his trial defense counsel. Specifically, Appellant requested that the convening authority both

defer the adjudged reduction in grade until action was taken on his case and waive the adjudged forfeitures at his new pay grade (E-1) until such "deferment/waiver" is rescinded or until entry of judgment by the military judge.⁷ On 16 October 2019, the base staff judge advocate recommended rejecting both the request for deferment of reduction in grade and waiver of the adjudged forfeitures. On 24 October 2019, the convening authority signed his Decision on Action memorandum that stated that he took "no action" on the findings or sentence and did not specifically address Appellant's deferment and waiver requests. The military judge signed the entry of judgment on

⁷We note that in the subject line of Appellant's clemency submission, he asked the convening authority to waive the automatic forfeitures of pay under [Article 58b\(b\), UCMJ, 10 U.S.C. § 858b\(b\)](#), for the benefit of his son. However, in the body of his request, he erroneously asked for waiver of adjudged forfeitures. Appellant was sentenced to adjudged forfeitures, but would be subject to automatic forfeitures by virtue of his sentence to both confinement and a punitive discharge.

22 November 2019.

The record also contains a memorandum from Staff Sergeant ADV, dated 31 January 2020. [*43] This memorandum stated that the convening authority's "decision to not act on deferment" was done via the convening authority's Decision on Action memorandum. We note that Appellant did not seek to address any potential errors in the action of the convening authority under R.C.M. 1104(b)(2)(B), or challenge whether the convening authority made a decision on deferment under R.C.M. 1103(d)(2). Appellant also did not allege error or assert any prejudice in his initial brief to this court concerning the convening authority's action or inaction on his request for deferment.

On 4 May 2021, we specified an issue on whether Appellant is entitled to appropriate relief for the convening authority's failure to act on Appellant's request for deferment of reduction in rank as required by R.C.M. 1103(d)(2). In response, the Government submitted a declaration, dated 17 May 2021, from Lieutenant General (Lt Gen) Timothy Haugh, the convening authority in Appellant's case.⁸ In the declaration, Lt Gen Haugh stated that after Appellant's court-martial, Appellant submitted a request for deferment of his adjudged reduction in grade and waiver of the adjudged forfeitures. Lt Gen Haugh explained that after consulting with his staff judge advocate and reviewing [*44] the materials submitted by Appellant, he denied both requests. Lt Gen Haugh further stated that he considered the standard for deferment under R.C.M. 1103 and determined Appellant failed to demonstrate that his interests "in deferral outweighed the community's interest in imposition of punishment on the effective date." He did not, however, assert he reduced his denial of Appellant's deferment request to writing at the time he made

his decision or offer any explanation as to why he did not do so. In Appellant's response to this issue, Appellant now contends that the convening authority erred because the Decision on Action memorandum was "not responsive" to his request for deferment. Appellant argues that he suffered prejudice in that he was deprived of his right to challenge the convening authority's denial under R.C.M. 1103(d)(2).

When a member requests deferment, he has the burden of showing that his interests and those of the community in granting the deferment outweigh the community's interest in imposing the punishment on its effective date. R.C.M. 1103(d)(2). The Rules for Courts-Martial list factors the convening authority may consider in acting on a deferment request, including the nature of the offense, the sentence, [*45] the effect a deferment would have on good order and discipline in the command, and the requesting member's "character, mental condition, family situation, and service record." *Id.* A convening authority's decision on a deferment request must be in writing, attached to the record of trial, and a copy must be provided to the appellant and the military judge. *Id.* Unlike decisions on deferment requests, there is no requirement for decisions on requests for waiver of automatic forfeitures to be in writing. [United States v. Edwards, 77 M.J. 668, 670 \(A.F. Ct. Crim. App. 2018\)](#); see also R.C.M. 1103(h).

We review a convening authority's decision on a deferment request for an abuse of discretion. R.C.M. 1103(d)(2); [United States v. Sloan, 35 M.J. 4, 6 \(C.M.A. 1992\)](#), overruled on other grounds, [United States v. Dinger, 77 M.J. 447 \(C.A.A.F. 2018\)](#). In reviewing challenges to deferment denials, we have not required convening authorities to provide in-depth analyses as to their rationale; instead, we have required them to simply identify the reasons for the denial. See, e.g., [United States v. Bell, No. ACM 39447, 2019 CCA LEXIS 293, at *5 \(A.F. Ct. Crim. App. 9 Jul. 2019\)](#) (unpub. op.). We have found error with respect to deferment denials when the convening authority advances no reason

⁸ Because the issue of the deferment request was raised in the record but was not fully resolvable by those materials, we have considered the declaration from Lt Gen Haugh as supplementing the record, consistent with [United States v. Jessie, 79 M.J. 437, 444 \(C.A.A.F. 2020\)](#).

for the denial at all. *See, e.g., United States v. Paulett, No. ACM 39268, 2018 CCA LEXIS 444, at *18 (A.F. Ct. Crim. App. 14 Sep. 2018)* (unpub. op.).

A convening authority's omission does not entitle Appellant to relief unless it materially prejudiced a substantial right. *United States v. Eppes, No. ACM 38881, 2017 CCA LEXIS 152, at *43 (A.F. Ct. Crim. App. 21 Feb. 2017)* (unpub. op.) (citing Article 59(a), UCMJ, *10 U.S.C. § 859(a)*), *aff'd*, *77 M.J. 339 (C.A.A.F. 2018)*. [*46] "[A]bsent credible evidence that a convening authority denied a request to defer punishment for an unlawful or improper reason, an erroneous omission of reasons in a convening authority's denial of a deferment request does not entitle an appellant to relief." *Id. at *43* (quoting *United States v. Zimmer, 56 M.J. 869, 874 (A. Ct. Crim. App. 2002)*).

Regardless of when the convening authority made his decision to deny Appellant's deferment request, he erred by not putting that decision in writing and by not serving it on either Appellant or the military judge as required by R.C.M. 1103(d)(2). Finding error, we turn our attention to whether the convening authority's error materially prejudiced any of Appellant's substantial rights.

We see no evidence in this case that Appellant was materially prejudiced by the convening authority's failure to put his decision in writing, or that the convening authority's denial was for an unlawful or improper reason. Here, despite having the opportunity, Appellant never sought judicial review of the convening authority's R.C.M. 1103(d)(2) decision via a R.C.M. 1104(b)(2)(B) post-trial hearing. Appellant's first and only mention of possible error or prejudice concerning the convening authority's action or inaction in this case was in his response brief to this court after we [*47] specified the issue. The convening authority's after-the-fact explanation for his denial balanced Appellant's interests against the severity of Appellant's crime and the effect of deferment on good order and discipline. Without the necessary

showing of prejudice, we conclude no relief is warranted. *See United States v. Jalos, No. ACM 39138, 2017 CCA LEXIS 607, at *5-6 (A.F. Ct. Crim. App. 5 Sep. 2017)* (unpub. op.) ("Even when there is error in the convening authority's action on a deferment request, relief is only warranted if an appellant makes a colorable showing of possible prejudice.").

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. *Articles 59(a)* and 66(d), UCMJ, *10 U.S.C. §§ 859(a), 866(d)*.

Accordingly, the findings and sentence are **AFFIRMED**.^{9, 10}

End of Document

⁹ We note the Statement of Trial Results in this case failed to include the command which convened the court-martial as required by Rule for Courts-Martial (R.C.M.) 1101(a)(3). Appellant has made no claim of prejudice, and we find none. *See United States v. Moody-Neukom, No. ACM S32594, 2019 CCA LEXIS 521, at *2-3 (A.F. Ct. Crim. App. 16 Dec. 2019)* (per curiam) (unpub. op.).

¹⁰ Although not raised by Appellant, we also note that the entry of judgment (EoJ) fails to document Appellant's deferment of reduction in grade request and the convening authority's action on Appellant's request as required by R.C.M. 1111(b)(3)(A), R.C.M. 1111(b)(3)(B). Appellant has not claimed any prejudice as a result of this error, and we find none. We direct the Chief Trial Judge, Air Force Trial Judiciary, to have a detailed military judge correct the EoJ accordingly, prior to completion of the final order under R.C.M. 1209(b) and Air Force Instruction 51-201, *Administration of Military Justice*, Section 14J (18 Jan. 2019).

United States v. Gaddy

United States Army Court of Criminal Appeals

March 20, 2017, Decided

ARMY 20150227

Reporter

2017 CCA LEXIS 179 *

UNITED STATES, Appellee v. Private First Class
TERRANCE L. GADDY United States Army,
Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by United States v. Gaddy, 2017 CAAF LEXIS 667 (C.A.A.F., July 10, 2017)

Prior History: [*1] Headquarters, 21st Theater Sustainment Command David H. Robertson, Military Judge. Colonel Jonathan A. Kent, Staff Judge Advocate.

Counsel: For Appellant: Lieutenant Colonel Charles Lozano, JA; Major Andres Vazquez, Jr., JA (on brief).

For Appellee: Colonel Mark H. Sydenham, JA; Major Cormac M. Smith, JA; Captain Cassandra M. Respos, JA (on brief).

Judges: Before MULLIGAN, FEBBO, and WOLFE, Appellate Military Judges.

Opinion

SUMMARY DISPOSITION

Per Curiam:

Accused of multiple instances of sexual crimes against four different victims, appellant entered mixed pleas.¹ He pleaded guilty to seven

specifications of sexual assault and one specification of indecent exposure. Contrary to his pleas, the military judge convicted appellant of rape.² On appeal we address two issues.

First, we decide whether our superior court's decision in United States v. Hills, 75 M.J. 350 (C.A.A.F. 2016), prohibits a fact-finder from considering propensity evidence stemming from charged offenses to which the accused pleaded guilty. We determine that *Hills* does not prohibit this use of propensity evidence.

Second, we address appellant's claim that the military judge erred when he excluded, pursuant to Military Rule of Evidence [hereinafter Mil. R. Evid.] 412, evidence that appellant and the victim of [*2] the rape offense were dancing provocatively immediately prior to the assault. We agree with appellant that the military judge erred, but find the error to be harmless.

LAW AND DISCUSSION

A. United States v. Hills and Guilty Pleas to Charged Offenses

We first address an issue raised personally by appellant.³ See United States v. Grostefon, 12 M.J.

(2012) [hereinafter UCMJ]. The indecent exposure specification alleged a violation of Article 120c, UCMJ.

² The military judge sentenced appellant to a dishonorable discharge and confinement for fourteen years. Pursuant to a pretrial agreement, the convening authority approved the punitive discharge and eight years of confinement.

³ The other matters personally raised by appellant merit neither

¹ The sexual assault and rape specifications each alleged a violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920

[431 \(C.M.A. 1982\)](#). Appellant, asserts that the military judge erred when he considered propensity evidence stemming from charged offenses in determining whether he was guilty of rape.

Prior to trial, the government filed a motion under Mil. R. Evid. 413 to admit appellant's propensity to commit sexual misconduct. The motion stated:

Although MRE 413 is most commonly applied to the introduction of uncharged sexual misconduct to show a propensity for charged sexual misconduct, the Rule also applies where all alleged sexual misconduct has been charged. 'The Government may not introduce similarities between a charged offense and prior conduct, *whether charged or uncharged*, to show modus operandi or propensity without using a specific exception within our rules of evidence, such as MRE 404 or 413.' [United States v. Burton, 67 M.J. 150 152 \(C.A.A.F. 2008\)](#) (emphasis added).

Relying on our superior court's decision in *Burton*, the military judge granted the government's motion. At trial, during the [*3] closing argument, the trial counsel specifically argued appellant's predisposition to sexually assault women:

The law says, you can look at the fact that he sexually assaulted these three other Soldiers and use that when deciding whether or not he's raped [BN]. You can consider the crime against [R], the crimes against [G] and the crime against [K] as propensity evidence. In fact, as this court is well aware, you may consider the evidence of the accused's other sexual offenses for their tendency to show propensity, predisposition, as well as its tendency to show his common plan: new Soldiers to the unit, people he's just met, and design; that he intended to rape Private [BN] and, as evidence of his motive to commit these offenses.

We find no error in either the trial counsel's argument or the military judge's determination that

propensity evidence was admissible in this case. In *Hills*, the Court of Appeals for the Armed Forces (CAAF) specifically exempted from their decision cases where "an accused has pleaded guilty or been found guilty" and that such evidence "can be admitted and considered under Mil. R. Evid. 413 to show propensity to commit the sexual assaults to which he pleaded not guilty. . . [*4] ." [75 M.J. at 354](#) (citing [United States v. Wright, 53 M.J. 476, 479 \(C.A.A.F. 2000\)](#)). Thus, we find that *Hills* did not prohibit the propensity evidence admitted in this case.

B. The Military Rule of Evidence 412 Ruling

Before trial, appellant filed a motion to admit evidence pursuant to Mil. R. Evid. 412. Specifically, appellant wanted to introduce evidence that, in the moments *immediately preceding the alleged assault*, appellant and Private BN had engaged in highly sexualized dancing that "simulated sex." At the closed Mil. R. Evid. 412 hearing, the defense called two witnesses to testify about what they had seen.⁴ The military judge ruled that the "defense is prohibited from soliciting testimony about [PFC BN] dancing with the accused in order to show her consent to sexual activity or that the accused had a mistaken belief that she was consenting to sexual activity." The military judge did not otherwise explain his ruling.

On appeal, appellant asserts that evidence of the highly sexualized dancing was constitutionally necessary to show his mistake of fact as to consent. This argument was not well developed at trial. To place a mistake of fact as to consent defense at issue, there must be some evidence appellant had a subjective belief the victim was consenting and

⁴Not surprisingly, the government not only disagreed that the evidence was admissible, but also disagreed that the sexualized dancing had taken place. At trial, for example, the government elicited that appellant had made a bet with one of the witnesses that he could have sex with the victim whom he had just met. Our job on appeal does not require us to resolve this factual dispute for purposes of evaluating the military judge's Mil. R. Evid. 412 ruling.

discussion nor relief.

such a belief was reasonable. An important purpose of [*5] the requirement for Mil. R. Evid. 412 motions practice, to include closed hearings, is to allow the offering party the opportunity to *fully* explain their theory of admissibility.

Nonetheless, we find the military judge's decision to exclude evidence of sexualized dancing to have been error because we find this evidence to fall outside of Mil. R. Evid. 412. Mil. R. Evid. 412(a)(1) prohibits evidence that "any alleged victim engaged in other sexual behavior." When conduct is inexorably intertwined with the alleged offense itself, it is not "other sexual behavior," but rather becomes part of the *res gestae* of the offense. That is, the testimony "was admissible as part of the same transaction as the assault." [*United States v. Peel*, 29 M.J. 235, 239 \(CAAF 1989\)](#).

Here the defense wanted to introduce evidence that the victim and appellant were "grinding" on each other in the moments before (in the defense theory) they engaged in consensual sexual intercourse. After the military judge's ruling, the defense had to explain the victim and appellant had engaged in consensual sexual intercourse without being able to explain what, in the defense theory, had led up to this encounter. In other words, deprived of this evidence, the defense case was forced to start mid-sentence. The defense was unable to position [*6] their evidence to comport with normal human experience. Accordingly, we do not see evidence of sexual behavior that is part of the *res gestae* of the offense to be "other sexual behavior" under Mil. R. Evid. 412. This rule does not exclude evidence of the offense itself, to include the appellant's version of what transpired during the transaction.

There are, of course, some caveats to our reasoning. First, our interpretation of Mil. R. Evid. 412(a)(1) is limited to interpreting what is meant by "other sexual behavior." Rule 412(a)(2) continues to prohibit evidence of a victim's sexual predisposition. Second, to say that evidence falls outside of Mil. R. Evid. 412 is not to say it is *per se* admissible. Other rules, to include Mil. R. Evid.

403, still operate to ensure overly prejudicial evidence is excluded from a court-martial. A military judge could tailor the scope of the testimony to prevent an overly prejudicial presentation.

Having found error, we next turn to whether appellant was prejudiced by the error. We find the error to have been harmless. First, any evidence of consent (or mistake of fact as to consent) stemming from dancing is weak. That someone may have agreed to dance in a proactive manner is not highly probative as to whether they agreed to sexual intercourse [*7] or whether an accused actually and reasonably believed he had consent. Second, we find the evidence of the assault given by the victim to be compelling, especially combined with her immediate reports of the assault. Finally, we consider appellant's separate plea to seven specifications of sexually assaulting three other soldiers. Appellant agreed as part of his pretrial agreement that the stipulation of fact he signed would be admissible during the merits portion of his trial. The stipulation also stated that the facts contained therein were admissible "at trial" even if "otherwise inadmissible." Appellant's sexual assault of the three other soldiers was factually similar in several aspects. When we consider all the evidence, to include the inference that appellant is predisposed to commit this offense, we find any evidentiary error to be harmless beyond a reasonable doubt. See [*United States v. Roberts*, 69 M.J. 23, 30 \(C.A.A.F. 2010\)](#).

CONCLUSION

The findings of guilty and sentence are **AFFIRMED**.

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United States v. Gomez

United States Navy-Marine Corps Court of Criminal Appeals

April 4, 2018, Decided

No. 201600331

Reporter

2018 CCA LEXIS 167 *; 2018 WL 1616633

UNITED STATES OF AMERICA, Appellee v.
GERARDO R. GOMEZ, Lance Corporal (E-3),
U.S. Marine Corps, Appellant

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

Subsequent History: Motion granted by [*United States v. Gomez*, 2018 CAAF LEXIS 320 \(C.A.A.F., June 4, 2018\)](#)

Motion granted by [*United States v. Gomez*, 2018 CAAF LEXIS 344 \(C.A.A.F., June 19, 2018\)](#)

Review denied by [*United States v. Gomez*, 2018 CAAF LEXIS 557 \(C.A.A.F., Aug. 22, 2018\)](#)

Prior History: [*1] Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Major M.D. Sameit, USMC. Convening Authority: Commanding General, 1st Marine Division (REIN), Camp Pendleton, CA. Staff Judge Advocate's Recommendation: Major M.J. Stewart, USMC.

Counsel: For Appellant: Lieutenant Commander William L. Geraty, JAGC, USN.

For Appellee: Lieutenant Commander Jeremy R. Brooks, JAGC, USN; Lieutenant Commander Justin C. Henderson, JAGC, USN.

Judges: Before HUTCHISON, PRICE, and FULTON, Appellate Military Judges. Senior Judge HUTCHISON and Judge FULTON concur.

Opinion by: PRICE

Opinion

PRICE, Judge:

Officer and enlisted members sitting as a general court-martial convicted the appellant, contrary to his pleas, of one specification of violation of a lawful general order, three specifications of sexual assault, and one specification of abusive sexual contact, in violation of [*Articles 92*](#) and [*120*](#), Uniform Code of Military Justice (UCMJ), [*10 U.S.C. §§ 892*](#) and [*920*](#).¹ The members sentenced the appellant to five years' confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed. [*2]

The appellant raises seven assignments of error (AOEs): (1) the government violated his due process right to notice when it charged him with sexual assault under a bodily harm theory, but convicted him under an incapable of consenting due to impairment by alcohol theory; (2) the term *incompetent* as applied at trial was unconstitutionally vague; (3) the military judge abused his discretion by admitting evidence of the alleged victim's alcohol consumption; (4) the

¹ Following announcement of the findings, the military judge ruled specifications 2-~~4~~ of Charge II constituted an unreasonable multiplication of charges and merged those specifications for findings and sentencing. Record at 548-50.

military judge abused his discretion by instructing the members on the alleged victim's competence and capacity to consent, after ruling that competence and capacity were not at issue, denying the appellant a fair trial; (5) the military judge erred by declining to provide a defense-requested instruction addressing the alleged victim's capacity to consent and the relevance of her intoxication; (6) the military judge improperly instructed the members on the alleged victim's competence and capacity to consent; and (7) the evidence is legally and factually insufficient to prove any violation of [Article 120](#), UCMJ.

Having carefully considered the record of trial, the parties' submissions, and oral argument, we conclude the findings [*3] and sentence are correct in law and fact and find no error materially prejudicial to the appellant's substantial rights.² [Arts. 59\(a\)](#) and 66(c), UCMJ.

I. BACKGROUND

RMR, a civilian, was staying with a friend, Mrs. U, and her husband LCpl U, near Camp Pendleton, California. When RMR found herself locked out of the Us' apartment she contacted the appellant, whom she knew through social media but had never met in person. The appellant picked up RMR and drove her onboard Camp Pendleton where they spent several hours together, first talking in his barracks room and later socializing with a group of Marines. The appellant asked RMR to spend the night with him, but she declined.

At approximately 1800, the appellant drove RMR to the Us' apartment and left to meet some friends. Over the next several hours, RMR and Mrs. U consumed half a bottle of vodka, and RMR also drank one beer. Between 2016 and 2335 the appellant and RMR exchanged over 100 text messages. During the text conversation RMR agreed to spend the night with the appellant in his

barracks room and said she was "[t]rying to get somewhat drunk but [kept] losing [her] drunk vibe."³ After consuming the vodka and beer, RMR exhibited signs [*4] of alcohol impairment and vomited in the Us' bathroom.

While the appellant was enroute to the Us' apartment, Mrs. U sent a text to the appellant telling him that RMR was drunk and impatiently awaiting his arrival. LCpl and Mrs. U told RMR it was a bad idea for her to leave the apartment, but RMR insisted that she was fine and that she wanted to go with the appellant. LCpl U testified that RMR decided on her own to leave with the appellant. When the appellant arrived at the Us' apartment shortly after midnight, Mrs. U helped RMR walk to his car, and LCpl U informed the appellant that RMR was pretty drunk.

The appellant drove RMR to his barracks, stopping several times along the way so she could vomit or spit. Due to her physical state, the appellant carried RMR from his car to his barracks room. RMR felt sick and went into the appellant's bathroom and laid on the floor and toilet. The appellant told RMR, "we're dudes—we pee everywhere[,] and she responded that she did not care because she needed to throw up.⁴ RMR then vomited in the appellant's toilet. The appellant told RMR she could not lie in his bed smelling like "throw-up," and encouraged her to take a shower.⁵

RMR testified that [*5] she was an inexperienced drinker and had limited recall of events after drinking at the Us' apartment. RMR's inability to remember the evening's events was consistent with alcohol-induced blackout as described by expert witnesses. She did not recall the content of many of the texts she exchanged with the appellant including her agreement to stay in his room or coordinating her pick-up from the Us' apartment

³ Prosecution Exhibit (PE) 4 at 9.

⁴ PE 12.

⁵ *Id.*

² We heard oral argument in this case on 31 October 2017 at the Georgetown University Law Center as part of our Outreach program.

because of her self-described intoxication. She also did not recall the circumstances surrounding her departure from the Us' apartment or how she got to the appellant's barracks room. She remembered vomiting into the appellant's toilet and recalled him saying "that [her] friend told him to shower me," which caused her to think something "wasn't right" because she had showered a few hours earlier.⁶

RMR also remembered being in the appellant's shower, seeing her feet while "bent over," with the appellant behind her "having sex with [her]."⁷ She testified she experienced difficulty moving and speaking but nudged or elbowed the appellant several times in an effort to get him to stop, and then told him "no."⁸ She also recalled being "laid down on [her] side," and feeling the appellant's [*6] fingers and then his penis inside her vagina.⁹ She testified that she "tried to get him to stop . . . with [her] arm again, tried to nudge, and then . . . after making a couple noises, like 'Uh-uh' . . . implying no, [she] finally said, 'No.'"¹⁰ She did not recall if he stopped after she said no but assumed he did.

While driving RMR back to the Us' apartment the next morning, the appellant said he wished he had "made better decisions that night."¹¹ RMR told Mrs. U that she had been sexually assaulted and reported the alleged offenses to the Naval Criminal Investigative Service (NCIS).

In cooperation with NCIS special agents, RMR engaged in a text-message conversation with the appellant. The appellant expressed regret throughout the conversation, texting, "Im so sorry of [sic] what happened that night," and "Im sorry

for having sex with you."¹² Later, in a phone conversation recorded by NCIS, the appellant again expressed regret to RMR, described how intoxicated she was, and admitted he had sex with her in the shower and on the bed. He also informed RMR he had performed oral sex on her, wore a condom only during sexual intercourse in the shower, and that he ejaculated while not wearing [*7] a condom. RMR had not recalled or reported the oral sex and did not know if the appellant had worn a condom or ejaculated.

The appellant was arraigned on eight sexual offenses, which essentially alleged the same four acts of sexual misconduct under two different theories of liability—incapability to consent due to impairment by alcohol and bodily harm. He was charged with three specifications of sexual assault in violation of [Article 120\(b\)\(3\)\(A\)](#) (penetration of RMR's vulva on three separate occasions when she was incapable of consenting due to impairment by alcohol), three specifications of sexual assault in violation of [Article 120\(b\)\(1\)\(B\)](#), UCMJ (penetration of RMR's vulva on three separate occasions by causing bodily harm), and two specifications of abusive sexual contact in violation of [Article 120\(d\)](#) (by placing his mouth on her vulva when she was incapable of consenting due to impairment by alcohol and by placing his mouth on her vulva, by causing bodily harm).¹³

Before the appellant entered pleas, the government withdrew and dismissed the four incapacity specifications. At an ensuing [Article 39\(a\)](#), UCMJ, hearing, the military judge questioned the trial counsel (TC) about the relevance [*8] of evidence of RMR's alcohol consumption. The TC responded that RMR's "level of intoxication is relevant to the matter of consent; not her capacity to consent, but whether or not she, in fact, did consent" to the three incidences of penetration.¹⁴ With respect to the aggravated sexual contact offense, RMR had no

⁶ Record at 194.

⁷ *Id.*

⁸ *Id.* at 195-97.

⁹ *Id.* at 198.

¹⁰ *Id.* at 199-200.

¹¹ *Id.* at 203.

¹² PE 3.

¹³ Charge Sheet.

¹⁴ Record at 36.

independent recollection of the appellant placing his mouth on her vulva. Thus the TC asserted that there was "potential to argue that [RMR] did not have capacity [to consent] and she was not competent for that sexual contact."¹⁵

The trial defense counsel (TDC) argued that RMR's actions demonstrated that she had the capacity to consent since she expressed a lack of consent through physical actions and by verbally saying "No."¹⁶ He then expressed concern that evidence of RMR's lack of memory "opens the door to capacity now becoming an argument" and that such an argument might mislead the members or cause them to conclude that RMR did not "have the capacity to consent."¹⁷ The TDC then argued that the government should be precluded from arguing competence and capacity.

Based on the TDC's concerns, the military judge substantially limited the TC's ability to argue that RMR did not have the [*9] capacity to consent. The military judge acknowledged that RMR's alcohol use was relevant to the issue of consent. But he reasoned that since the government would seek to prove that the appellant committed bodily harm in order to sexually assault RMR, and because the government had dismissed the specifications alleging that RMR was incapable of consenting due to alcohol, he "d[id] not find that competence and capacity [wa]s in issue" based upon the parties' proffers and the exhibits he had examined.

The military judge directed the government to "limit [its] argument to whether or not this was by bodily harm" and precluded argument "that [RMR] was not competent in this case."¹⁸ In response to a question from the TC, the military judge clarified that they were not to argue RMR lacked capacity

but could argue all the surrounding circumstances.

The defense theory at trial was that RMR was competent to engage in sexual activity and that she either consented to the alleged sexual activity or, as the result of a reasonable mistake of fact, the appellant believed she consented to the sexual activity.

Additional facts necessary to resolution of the AOE's are included below.

II. DISCUSSION

A. Due Process [*10] and notice

The appellant argues that his Due Process rights were violated when he was "convict[ed] of an offense that was different from the charged offense."¹⁹

1. Law

The [*Due Process Clause of the Fifth Amendment*](#) "requires 'fair notice' that an act is forbidden and subject to criminal sanction" before a person can be prosecuted for committing that act. [*United States v. Vaughan*, 58 M.J. 29, 31 \(C.A.A.F. 2003\)](#) (citing [*United States v. Bivins*, 49 M.J. 328, 330 \(C.A.A.F. 1998\)](#)). "The due process principle of fair notice mandates that an accused has a right to know what offense and under what legal theory he will be convicted." [*United States v. Tunstall*, 72 M.J. 191, 192 \(C.A.A.F. 2013\)](#) (citing [*United States v. Jones*, 68 M.J. 465, 468 \(C.A.A.F. 2010\)](#) (internal quotation marks and citation omitted)). "[T]he [*Due Process Clause of the Fifth Amendment*](#) also does not permit convicting an accused of an offense with which he has not been charged." *Id.* (quoting [*United States v. Girouard*, 70 M.J. 5, 10 \(C.A.A.F. 2011\)](#)) (alteration in original).

¹⁵ *Id.* at 36-37.

¹⁶ *Id.* at 37-38.

¹⁷ *Id.* at 38.

¹⁸ *Id.* at 38-39.

¹⁹ Appellant's Brief of 31 Mar 2017 at 17.

2. Analysis

The appellant argues he was charged with sexual assault and abusive sexual contact alleging bodily harm but prosecuted and convicted of those offenses under a different legal theory--that the putative victim was incapable of consenting due to impairment by alcohol. He asserts this violated his due process right to know what offense and legal theory of liability he had to defend against. We disagree and conclude the appellant was convicted of the offenses of which he was charged.²⁰

First, [*11] the appellant was informed of the sexual offenses charged and the applicable legal theory—bodily harm—and then convicted of those offenses. [Tunstall, 72 M.J. at 192](#).

He was charged with three specifications of violating [Article 120\(b\)\(1\)\(B\)](#), UCMJ—sexual assault by causing *bodily harm*—and one specification of violating [Article 120\(d\)](#), UCMJ—abusive sexual contact by causing *bodily harm*.

The sexual assault specifications alleged he penetrated RMR's vulva on two occasions with his penis and once with his finger "without her consent, by causing bodily harm to her, to wit: an offensive touching however slight."²¹ The abusive sexual contact specification alleged he "plac[ed] his mouth on [RMR's] vulva, without her consent, by causing bodily harm to her, to wit: an offensive touching

however slight."²²

Bodily harm is a defined term in the relevant punitive article, and it put the appellant on notice that the government would have to prove lack of consent;²³ that consent "means a freely given agreement to the conduct at issue by a competent person[;]"²⁴ and that "[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent[.]"²⁵ The specifications, therefore, provided the appellant notice [*12] that RMR's consumption of alcohol and level of intoxication were potentially relevant as "surrounding circumstances" in the court's determination of whether RMR consented to the sexual conduct in issue. In fact, prior to commencement of trial on the merits, the military judge explicitly (and correctly) found that "evidence that [RMR] was drinking is part of those surrounding circumstances and should be allowed in on the issue of consent."²⁶

The statutory definition of consent as "a freely given agreement to the conduct at issue by a competent person" provides notice that when the "bodily harm" alleged is the sexual act or contact, as in this case, the victim's "competence" is at

²⁰ See generally [United States v. Motsenbocker, No. 201600285, 2017 CCA LEXIS 539 at *19-23 \(N-M.Ct.Crim.App. 10 Aug 2017\)](#) (we found no merit in the appellant's argument that he was not on notice of what "he was required to defend against" where the government charged sexual assault by causing bodily harm and abusive sexual contact by causing bodily harm in violation of [Articles 120\(b\)\(1\)\(B\)](#) and [120\(d\)](#), UCMJ), rev. denied, 77 M.J. 266, [2018 CAAF LEXIS 129 \(C.A.A.F. Feb. 13, 2018\)](#).

²¹ Charge Sheet. [Article 120\(b\)\(1\)\(B\)](#), UCMJ, states "[a]ny person . . . who . . . (1) commits a sexual act upon another person by . . . (B) causing bodily harm to that other person . . . is guilty of sexual assault[.]"

²² Charge Sheet. [Article 120\(d\)](#), UCMJ, states "[a]ny person . . . who commits or causes sexual contact upon another person, if to do so would violate [subsection \(b\)](#) (sexual assault) had the sexual contact been a sexual act is guilty of abusive sexual contact[.]"

²³ Bodily harm means "any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact." [Art. 120\(g\)\(3\)](#), UCMJ.

²⁴ [Art. 120\(g\)\(8\)\(A\)](#), UCMJ. Consent means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.

²⁵ [Art. 120\(g\)\(8\)\(C\)](#), UCMJ (emphasis added).

²⁶ Record at 38.

issue.²⁷ The plain language of the statute provided the appellant fair notice of the offense and legal theory under which he was convicted. See [*United States v. Sager*, 76 M.J. 158, 161 \(C.A.A.F. 2017\)](#) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first cannon [of statutory interpretation] is also the last: judicial inquiry is complete.") (citation and internal quotation marks omitted).

Second, the appellant's argument that he was prosecuted under [*13] a legal theory that RMR was incapable of consenting due to impairment by alcohol is unsupported by the record.

The military judge precluded the TC from arguing incapacity, and the TC complied throughout the trial. The TC mentioned a "competent person" only once in his closing argument when he paraphrased the military judge's instruction and then immediately detailed the factual bases for determining that RMR did not consent to the sexual conduct. Rather than focus on RMR's ability—or lack of ability—to consent, he highlighted RMR's physical and verbal resistance: "We have physical resistance. We have a verbal, No, in this case. This is important."²⁸ Consistent with the military judge's limitation, the TC also discussed the circumstances surrounding RMR's refusal to consent. RMR was intoxicated, sick, and had difficulty moving and speaking. But he did not argue that RMR was incapable of consenting due to alcohol intoxication. He closed his argument with "There was never that agreement. She told him, No."²⁹

The only explicit reference to RMR's capacity, in argument, came from the TDC. In his opening the TDC stated: "And before I sit down, I want to emphasize this is not about capacity. As [*14] a

matter of law and fact, the complaining witness was capable of consenting. [The appellant] had a reasonable mistake based on all of the evidence that the complaining witness consented to sex."³⁰

In closing, the TDC argued:

Make no mistake members, [RMR is] not too drunk. That is not [an] issue before you. It's not — [an] issue. . . . it is not an element of the charges. . . . Don't be distracted by this red herring for one minute to think that the complaining witness lacked the capacity to participate in a sexual encounter that took place that night.³¹

The appellant contends the limited evidence almost certainly means his abusive sexual contact conviction was based upon an incapacity theory and that there is a "substantial possibility" he was also convicted of the three sexual assaults under this same incapacity theory.³² We disagree.

The limited evidence of which the appellant speaks is his admission to performing oral sex on RMR. His spontaneous, recorded admission was both credible and direct evidence this sexual contact occurred. In response to RMR's questions regarding what happened that night, the appellant admitted he did some "pretty crazy things like [placing his mouth on her vulva]." [*15]³³ After RMR expressed shock and disgust the appellant commented "you weren't the one doing it."³⁴ Significantly, the appellant did not claim or even imply RMR consented to the oral sex. Having listened to the recording of this exchange ourselves, we believe it likely that this evidence resonated with the members, particularly in light of the appellant's tone and self-absorbed focus on his thoughts, physical and sexual actions driven by his

²⁷ [Art. 120\(g\)\(8\)\(A\)](#), UCMJ.

²⁸ Record at 511.

²⁹ *Id.* at 512.

³⁰ *Id.* at 175-76.

³¹ *Id.* at 516.

³² Appellant's Brief at 18-19.

³³ PE 12.

³⁴ *Id.*

sexual desires, and the absence of any mention of RMR's consent or active participation in the sexual conduct. The effect of this evidence was undoubtedly amplified by the appellant's later remorse.

We likewise find the appellant's argument that the abusive sexual contact conviction raised a substantial possibility that he was also convicted of the three sexual assaults under this same incapacity theory to be contrary to the weight of the evidence.

Third, we are unpersuaded by the appellant's assertion that "when viewed together with the other enumerated theories of liability" within [Article 120](#), UCMJ, "the bodily harm theory of liability is more simply understood as applying to situations where a lack of consent can be shown by words, conduct, or circumstances [*16] not amounting to incompetence."³⁵ He argues the bodily harm theory of criminal liability "could be construed to encompass all theories of sexual assault since all types of sexual assault involve a lack of consent, i.e., a 'bodily harm'" and argued his more narrowed interpretation "produces the greatest harmony and . . . the least inconsistency."³⁶ The appellant's premise is flawed. "Lack of consent" is not an element in all sexual assaults under [Article 120\(b\)](#), UCMJ.³⁷

³⁵ Appellant's Brief at 22.

³⁶ *Id.*

³⁷ See [United States v. Riggins](#), 75 M.J. 78, 84 (C.A.A.F. 2016) ("[l]ack of verbal or physical resistance or submission resulting from . . . placing another person in fear [necessary to prove violation of [Article 120\(b\)\(1\)\(A\)](#)] does not constitute consent. . . . the fact that the Government was required to prove a set of facts that resulted in [the victim's] *legal inability to consent* was not the equivalent of the Government bearing the affirmative responsibility to prove [the victim] *did not, in fact, consent*") (alteration in original) (citation, internal quotation marks, and footnote omitted). See also *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9, ¶ 3-45-14 at 577, Note 9 (10 Sep 2014) ("Evidence of consent. Generally, the elements of an [Article 120\(b\)](#) offense require the accused to have committed sexual conduct "by" a certain method Accordingly, evidence that the alleged victim consented to the sexual conduct may be relevant to negate an element, even though lack of consent may not be a separate element.").

Fourth, "the manner in which the case was contested diminishes any argument that Appellant was not on notice as to what he had to defend against." [United States v. Oliver](#), 76 M.J. 271, 275 (C.A.A.F. 2017). The appellant's trial strategy focused on RMR's pre-sexual encounter behavior, memory gaps and discrepancies attributable to alcohol intoxication, the potential for her unintentional memory creation, and, alternatively, the appellant's alleged mistake of fact as to consent. Like the appellant in [Oliver](#), the appellant cannot argue he was not on notice that the victim's competence was at issue in the case. *Id.* ("Whether abusive sexual contact or wrongful sexual contact, Appellant knew which [*17] part of the body he was alleged to have wrongfully touched [as] his theory throughout the court-martial was [consent]"); see also [Tunstall](#), 72 M.J. at 197 (no prejudice where accused actually defended against both theories in the terminal element of [Article 134](#), UCMJ).

The TDC was aware of the distinction among lack of consent, competence, and capacity. That he convinced the military judge to preclude the government from arguing capacity and competency with respect to the abusive sexual contact offense—an offense RMR could not even recall—further erodes his claim that he lacked notice. The TDC disclosed his awareness of these key distinctions in this colloquy while discussing instructions:

MJ: So you knew the whole time that I was going to be reading the law and the definition of consent, that only a competent person could give consent.

DC: We would agree, Your Honor. I don't know how that changes our detrimental reliance on the government's position at the beginning of the case though.³⁸

The TDC was aware that the government was required to prove lack of consent beyond a reasonable doubt and that "all the surrounding circumstances [we]re to be considered in

³⁸ Record at 413.

determining whether [RMR] gave consent[.]" [Art. 120\(g\)\(8\)\(C\)](#), [*18] UCMJ. He was also aware that RMR's alcohol consumption was a key surrounding circumstance and recognized that her competence was implicated by the relevant statutory definitions.

We are satisfied that the appellant received the requisite due-process notice of the elements he was required to defend against at trial. The specifications alleged nonconsensual sexual acts—insertion of his penis or fingers into RMR's vulva—and nonconsensual sexual contact—placing his mouth on RMR's vulva. The appellant received "fair notice" and knew both the offense and under what legal theory he was tried and convicted. [Tunstall](#), 72 M.J. at 192.

B. Instructions

The appellant asserts three separate instructional errors by the military judge. First, the military judge erred by declining to provide a defense-requested instruction addressing RMR's capacity to consent and the relevance of her intoxication. Second, the military judge abused his discretion by instructing the members on RMR's competence and capacity to consent, after ruling that competence and capacity were not an issue, denying the appellant a fair trial. Third, the military judge improperly instructed the members on RMR's competence and capacity to consent. We disagree. [*19]

1. Defense-requested instruction

The appellant argues that the novel instruction his counsel requested at trial was correct and necessary, and the military judge erred by refusing to give it.

a. Law

"While counsel may request specific instructions . . . the [military] judge has substantial discretionary power in deciding on the instructions to give." [United States v. Carruthers](#), 64 M.J. 340, 345

([C.A.A.F. 2007](#)) (quoting *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993) (additional citations omitted)). "[A] military judge's denial of a requested instruction is reviewed for abuse of discretion." [Id. at 345-46](#) (citations omitted). "We apply a three-pronged test to determine whether the failure to give a requested instruction is error: (1) [the requested instruction] is correct; (2) it is not substantially covered in the main [instruction]; and (3) it is on such a vital point in the case that the failure to give it deprived [the accused] of a defense or seriously impaired its effective presentation." [Id. at 346](#) (quoting [United States v. Gibson](#), 58 M.J. 1, 7 (C.A.A.F. 2003) (additional citation and internal quotation marks omitted) (alterations in original)). "All three prongs must be satisfied for there to be error." [United States v. Bailey](#), 77 M.J. 11, 14 (C.A.A.F. 2017) (citation omitted).

b. Analysis

The TDC requested the military judge instruct the members that:

[T]he question of [RMR's] capacity to consent is not before you. [*20] Put another way the government concedes that [RMR] had the capacity to consent despite her possible intoxication.

Persons who have consumed an intoxicant, such as alcohol, often exercise free will and make conscious decisions for which they are legally responsible. This is true even if the person does not later recall making the decision or if they later regret the decision. . . .

Evidence of intoxication in this case has been admitted merely on the question of whether the complainant consented, or the accused had a reasonable belief that she consented, and for its impact upon her memory. . . .³⁹

The requested instruction is not a correct statement of law or fact and thus fails the first prong of the [Carruthers](#) test. Specifically, the language that

³⁹ Appellate Exhibit (AE) XX.

"[RMR's] capacity to consent is not before you . . . [and] . . . the government concedes that [RMR] had the capacity to consent despite her possible intoxication" does not comport with the relevant statutory language or the facts of this case. Our conclusion is grounded in the definition of "bodily harm," which requires proof of lack of consent, and the definition of "consent," which "means a freely given agreement to the conduct at issue by [*21] a competent person." These two statutory definitions implicate the putative victim's "competence" in the sexual assault and abusive sexual contact specifications alleged here.⁴⁰ The appellant's assertion that the government conceded RMR's capacity to consent is also inaccurate. Before voir dire, the TC asserted his belief that capacity was relevant to the aggravated sexual contact offense, "due to [RMR's] lack of memory, there is the potential to argue that she did not have capacity and she was not competent for that sexual contact."⁴¹ Indeed, the military judge cited the absence of governmental concession as a reason for not providing the defense-requested instruction—"given that the government is not conceding on the issue of competence within the definition of consent, I am not going to give your instruction."⁴²

We conclude the remainder of the defense-requested instruction was substantially covered in the military judge's instructions, and that his declination to give any portion of the proposed instruction did not deprive or seriously impair any defense. *Carruthers*, 64 M.J. at 346. The appellant has therefore failed to satisfy any of the three prongs of the *Carruthers* test. *Bailey*, 77 M.J. at 14.

Accordingly, we conclude the military [*22] judge was well within his discretion when he declined to give the defense requested instruction.

⁴⁰ Charge sheet.

⁴¹ Record at 37.

⁴² *Id.* at 418.

2. Competence and capacity-to-consent instructions

The appellant argues the military judge abused his discretion by instructing the members on RMR's competence and capacity to consent, after ruling that competence and capacity were not at issue, and that the instructions provided by the military judge on capacity and consent were inaccurate and incomplete. We disagree.

a. Law

"Whether a panel was properly instructed is a question of law which we review *de novo*." *United States v. Mott*, 72 M.J. 319, 325 (C.A.A.F. 2013) (citations and internal quotation marks omitted). "The military judge has an independent duty to determine and deliver appropriate instructions." *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008) (citation omitted). In this regard, the military judge bears the primary responsibility for ensuring the members are properly instructed on the elements of the offenses raised by the evidence, "as well as potential defenses and other questions of law." *Id.* (citations and internal quotation marks omitted).

Where there is no objection to an instruction at trial, we review for plain error. *United States v. Robinson*, 77 M.J. 294, 2018 CAAF LEXIS 184 at *12-13, (C.A.A.F. Mar. 26, 2018). "[The appellant] bears the burden of establishing: (1) there is error; (2) the error is clear or obvious; [*23] and (3) the error materially prejudiced a substantial right." *Id.* at *13 (citing *United States v. Davis*, 76 M.J. 224, 230 (C.A.A.F. 2017)). "To establish plain error, 'all three prongs must be satisfied.'" *Id.* (quoting *United States v. Gomez*, 76 M.J. 76, 79 (C.A.A.F. 2017) (additional citation omitted)). "The third prong is satisfied if the appellant shows 'a reasonable probability that, but for the error [claimed], the outcome of the proceeding would have been different.'" *Id.* (quoting *United States v. Lopez*, 76 M.J. 151, 154 (C.A.A.F. 2017)).

b. Analysis

The appellant argues that he detrimentally relied on

the government's concession and the military judge's ruling that competence and capacity were not at issue. He contends the military judge's decision to instruct the members on RMR's competence and capacity to consent violated his due-process right to a fair trial. He also asserts that the instructions provided by the military judge were inaccurate and incomplete because the instructions failed to identify the condition that could have rendered RMR incompetent to consent and also failed to provide the scienter⁴³ necessary to discourage arbitrary or discriminatory enforcement. We disagree.

First, the military judge did not finally rule, nor did the government concede, that competence and capacity were not at issue.

The military judge's ruling was limited to precluding [*24] the government from arguing competence and capacity and not a final ruling that competence and capacity were not at issue in this case.⁴⁴ We understand the military judge's ruling in the context in which it was made—following the government's dismissal of the incapacity offenses and prior to trial on the merits and based on proffers by the parties, review of available documents, and abbreviated argument. The ruling cannot be fairly taken to be a legally dubious alteration of the remaining offenses, all of which implicated the "freely given agreement to the conduct at issue by a competent person." [Art. 120\(g\)\(8\)\(A\)](#), UCMJ. If, as the appellant implies without citation to authority, this preliminary order was not subject to modification by the military judge, it would be contrary to the "law of the case doctrine"⁴⁵ as well as the military judge's "primary

responsibility for ensuring the members are properly instructed" on matters *raised by the evidence*. [Ober](#), 66 M.J. at 405 (emphasis added) (citation and internal quotation marks omitted). The appellant's argument also ignores a military judge's explicit authority to change "a ruling made by that or another military judge in the case except a previously granted [*25] motion for a finding of not guilty, at any time during the trial." RULE FOR COURTS-MARTIAL (R.C.M.) 801(e)(1)(B), MANUAL FOR COURTS-MARTIAL (MCM), UNITED STATES (2012 ed.). To the extent the TDC thought that he had convinced the military judge to remove part of the statutory definition of *consent* from the trial, he cannot claim unfair surprise at the military judge's decision to ultimately adopt a correct view of the law—one that the TDC seemed to share—particularly when the TDC was responsible, in part, for introduction of evidence that placed RMR's competence in issue.⁴⁶

Nor did the government concede that competence and capacity were not at issue. To the contrary, the TC argued capacity and consent were potentially relevant to the abusive sexual contact specification since RMR had no independent recollection of the appellant performing oral sex on her. And the military judge acknowledged the government had not conceded this issue when he declined to provide the defense-requested instruction discussed above.

Second, the military judge's instructions on capacity and consent were accurate and consistent with the statutory definition of consent,⁴⁷ and the

omitted).

⁴⁶ Record at 366-67, 381, 442; AE XIX.

⁴⁷ Record at 496-97 ("[T]he government also has the burden to prove beyond a reasonable doubt that [RMR] did not consent to the physical acts. 'Consent' means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. . . . Lack of consent may be inferred based on the circumstances. All the surrounding circumstances are to be considered in determining whether a person gave consent or whether a person did not resist or cease [sic] to resist only because of another

⁴³ "The terms 'scienter' and 'mens rea' are often used interchangeably." [United States v. Haverty](#), 76 M.J. 199, 204, n.7 (C.A.A.F. 2017).

⁴⁴ Record at 36-39.

⁴⁵ [United States v. Ruppel](#), 49 M.J. 247, 253 (C.A.A.F. 1998) (In military jurisprudence the "law of the case [doctrine] only applies to final rulings and does not restrict a military judge's authority or discretion to reconsider and correct an earlier trial ruling.") (citation

definition of key terms in *United States v. Pease*.⁴⁸

After the military judge [*26] declined to give the defense-requested instruction that RMR's capacity to consent was not an issue for the members to decide, the TDC acknowledged that he wanted the military judge to provide the "*Pease* definitions."⁴⁹ Because the TDC did not object to the draft instructions provided for his review by the military judge, or to the instructions ultimately given to the members, we review for plain error.⁵⁰

The statutory definition of consent is "a freely given agreement to the conduct at issue by a competent person."⁵¹ Therefore, "[a] full definition of consent includes [the] definition of competence to consent." *United States v. Long*, 73 M.J. 541,

person's actions. A sleeping, unconscious, or incompetent person cannot consent to a sexual act. The government has a burden to prove beyond a reasonable doubt that the consent to the physical acts did not exist. . . . Consent means a freely given agreement to the conduct at issue by a competent person. A competent person is simply a person who possesses the physical and mental ability to consent. An incompetent person is a person who lacks either the mental or physical ability to consent. To be able to freely give an agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question, then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person.

A person is incapable of consenting when she lacks the cognitive ability to appreciate the sexual conduct or the physical or mental ability to make and communicate a decision about whether she agrees to the conduct."). See also *Art. 120(g)(8)(A)-(C)*.

⁴⁸ 75 M.J. 180, 185 (C.A.A.F. 2016) (approving definitions of three *Article 120*, UCMJ, terms including: (1) "competent person as a person who possesses the physical and mental ability to consent;" (2) "incompetent person as one who lacks either the mental or physical ability to consent due to a cause enumerated in the statute," and (3) "incapable of consenting as lack[ing] the cognitive ability to appreciate the sexual conduct in question or [lacking] the physical or mental ability to make and to communicate a decision about whether they agreed to the conduct") (citations and internal quotation marks omitted).

⁴⁹ Record at 418-19.

⁵⁰ *Id.* at 491.

⁵¹ *Art. 120(g)(8)(A)*, UCMJ.

545 (A. Ct. Crim. App. 2014) (citations omitted).⁵²

As a result, we find no error with the military judge's decision to instruct the members regarding what constitutes a "competent person" for purposes of defining consent, nor do we find error in the instructions provided.

Significantly, the military judge's instructions neither transformed the charged specifications into *Article 120(b)(3)(A)*, UCMJ, specifications nor alleviated the government's affirmative responsibility to prove beyond a reasonable doubt that RMR did not, in fact, consent. The military judge instructed the members that the government had the [*27] burden to prove beyond a reasonable doubt that RMR did not consent at least three times. "Absent evidence to the contrary, [we] may presume that members follow a military judge's instructions." *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000) (citations omitted).

Third, the appellant failed to establish that the instructions provided by the military judge were inaccurate, incomplete or constituted plain error.

Even if we were to assume without deciding that any instruction should have identified the condition that rendered RMR incompetent to consent and should also have required that the appellant "knew or reasonably should have known" of that condition, and that the military judge erred in failing to so instruct, the appellant has not established plain error. Specifically, the appellant has not met his burden of showing "a reasonable probability that, but for the [errors claimed], the outcome of the proceeding would have been different." *Lopez*, 76 M.J. at 154 (citation and internal quotation marks omitted).

It is uncontroverted that prior to engaging in the charged sexual misconduct the appellant: knew RMR had consumed enough alcohol to render her

⁵² In *Long*, the military judge instructed the members that "[c]onsent means words or overt acts indicating a freely given agreement to the sexual conduct by a competent person." 73 M.J. at 543.

very drunk; knew she was sick and vomited more than once due to the alcohol she consumed; and knew she was [*28] so physically impaired by the alcohol she consumed that she had to be carried to his barrack's room. It is also uncontroverted that the appellant performed oral sex on RMR and that RMR had no independent recollection of that sexual contact. Therefore, if the military judge had instructed the panel members on the presumed appropriate listed condition and mens rea, the panel would have found that RMR was severely impaired by alcohol, and that the appellant knew of this impairment prior to engaging in the charged sexual conduct.

The appellant failed to demonstrate "a reasonable probability that, but for [the the military judge's failure to instruct on the specific condition that caused RMR's incompetence and the mens rea requirement], the outcome of the proceeding would have been different." *Id.* Because the appellant failed to establish the required prejudice, we conclude that the military judge did not plainly err in instructing the members.

We find no error, and certainly no plain error, in the military judge's instructions or in his decision to use the *Pease* instruction to further explain to the members what constitutes a competent person.

C. Vagueness

The appellant argues, as applied [*29] in this case, the term *incompetent* was unconstitutionally vague because it neither provided him notice of the prohibited conduct nor defined a standard of guilt that avoids arbitrary enforcement.

The government avers that the TDC waived any objection to the definition of *incompetent* when he requested and received the *Pease* instruction. The government argues that even absent waiver the appellant is entitled to no relief as the CAAF has endorsed the definition in *Pease*, and the appellant identified no binding authority in support of the proposition that an ordinary person cannot

understand that definition. We agree the appellant is entitled to no relief.

1. Law

"Due process requires fair notice that an act is forbidden and subject to criminal sanction." [*Vaughan*, 58 M.J. at 31](#) (citation and internal quotation marks omitted). "It also requires fair notice as to the standard applicable to the forbidden conduct." *Id.* (citing [*Parker v. Levy*, 417 U.S. 733, 755, 94 S. Ct. 2547, 41 L. Ed. 2d 439 \(1974\)](#)). "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." [*Parker*, 417 U.S. at 757](#) (citation and internal quotation marks omitted). "In determining the sufficiency of the notice a statute must of necessity [*30] be examined in the light of the conduct with which a defendant is charged." *Id.* (citation and internal quotation marks omitted). The CAAF has found such notice in the Manual for Courts-Martial, federal law, state law, military case law, military custom and usage, and military regulations. [*Vaughan*, 58 M.J. at 31](#).

2. Analysis

The appellant avers that the term *incompetent* is unconstitutionally vague because it neither provided him notice of the prohibited conduct nor defined a standard of guilt that avoids arbitrary enforcement. He argues, even assuming the Government could prosecute bodily harm on a theory of incompetence due to intoxication, that [*Article 120\(b\)\(1\)\(B\)*](#) fails to delineate the applicable standard for whether a person is competent to consent.

Bodily harm in this case is a nonconsensual sexual act or contact, where consent means a freely given agreement to the conduct at issue by a competent person. At trial, the military judge instructed on the meaning of both an "incompetent person" and a "competent person" in accordance with *Pease*.

Between the two instructions, the military judge provided the members a reasonably understandable standard for determining whether a person is competent to consent [*31] to sexual conduct.

We find the appellant's arguments that the term *incompetent* is void for vagueness unconvincing. The appellant was on reasonable notice that his conduct was subject to criminal sanction. This issue is without merit.

D. Legal and factual sufficiency

The appellant avers the evidence is both legally and factually insufficient to prove any of the charged sexual offenses or, alternatively, that the evidence is factually insufficient to overcome his reasonable mistake of fact as to consent. Specifically, he alleges there is no evidence that RMR communicated, through words or conduct, a lack of consent prior to the sexual activity, nor are there words, conduct, or circumstances sufficient to show the appellant had reason to believe that RMR was not consenting to the sexual activity. We disagree.

We review for both legal and factual sufficiency *de novo*. [*United States v. Washington*, 57 M.J. 394, 399 \(C.A.A.F. 2002\)](#) (citing [*United States v. Cole*, 31 M.J. 270, 272 \(C.M.A. 1990\)](#)); see also Art. 66(c), UCMJ. When reviewing for legal sufficiency, we ask whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt. [*United States v. Turner*, 25 M.J. 324, 324-25 \(C.M.A. 1987\)](#) (citing [*Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 \(1979\)](#)). In evaluating factual sufficiency, we determine whether, [*32] after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. [*Id.* at 325](#).

The appellant was convicted of sexually assaulting

RMR by penetrating her vulva with his penis twice, once in the shower and moments later on his bed, and penetrating her vulva with his finger on his bed. He was also convicted of abusive sexual contact for placing his mouth on her vulva. A conviction for each sexual offense required proof beyond a reasonable doubt of the alleged sexual act or contact and that the act or contact was without RMR's consent.

1. Evidence of the sexual acts and sexual contact

The evidence that the appellant committed the alleged sexual acts and sexual contact is overwhelming and undisputed.

RMR testified the appellant penetrated her vulva with his penis in the shower and then penetrated her vulva with his finger and penis on his bed. Her testimony was corroborated, in part, by the appellant and by forensic evidence. The appellant admitted penetrating RMR's vulva with his penis in the shower and on his bed, and performing oral sex on RMR during the NCIS-recorded phone [*33] conversation with RMR and apologized for having sex with RMR during that call and on other occasions. In addition, his DNA, including spermatozoa found on swabs taken from RMR's vagina, and his semen DNA, found in her underwear, corroborated penile penetration.

The appellant is the sole source of evidence that he placed his mouth on RMR's vulva. During the recorded phone conversation he informed RMR that he "did some pretty crazy things" like performing oral sex on her, commenting that it was his "first time."⁵³ We are convinced beyond a reasonable doubt that the appellant committed the charged sexual acts and sexual contact.

2. Evidence of bodily harm and lack of consent

We find beyond a reasonable doubt that each sexual

⁵³ PE 12.

act and contact constituted "bodily harm" and that RMR did not consent to the sexual conduct at issue.

First, RMR's testimony that she expressed her lack of consent through words and conduct is credible, notwithstanding her limited memory. Her testimony that she remembered being bent over in the shower with the appellant behind her, penetrating her vagina with his penis was consistent with his admission of engaging in intercourse in the shower. Her recollections of experiencing [*34] difficulty moving and speaking and having to concentrate to move her arm and speak were consistent with her level of intoxication. We find her testimony that she tried to nudge or elbow the appellant, then stood up, turned around, and said "No," compelling and consistent with the type of traumatic memories often recalled in such circumstances, according to expert testimony. Likewise, we find her testimony about being "laid down on [her] side," feeling the appellant's fingers and then his penis inside her vagina, and trying to get him to stop first using her arms and then saying "No," consistent with her level of intoxication and also consistent with the type of traumatic memories often recalled in such circumstances.⁵⁴

Second, we find RMR's testimony that she did not consent to the sexual acts or contact credible and corroborated, in part, by the appellant's statements.

Notably, in three conversations with RMR after the charged misconduct, the appellant made no claim that she consented to the sexual conduct. Instead, he admitted engaging in the charged sexual acts, evaded or provided unconvincing answers to RMR's probing questions, and repeatedly apologized.

While driving RMR back [*35] to the Us' apartment the morning after the charged misconduct and after RMR acknowledged that she was "mad" at the appellant, he said, "he just wishes

he made better decisions that night."⁵⁵ In a later text conversation, the appellant neither disputed RMR's claim that he knew she was not interested in sexual activity nor claimed that she consented. When RMR asked how he could justify undressing her and putting her in the shower without her consent, he unconvincingly replied, "I was drunk I liked you idk (sic) I thought you were thinking the same as me that's why I'm saying I'm sorry . . . Truth you were drunk so was I okay[.]"⁵⁶ During that conversation, the appellant said he was sorry at least five times and after additional prompting texted, "I'm sorry for having sex with you."⁵⁷

Several weeks later, the appellant repeated this pattern in the NCIS-recorded phone conversation. He admitted to committing the sexual acts and again apologized to RMR with no claim that she consented. He also provided new insight into what he did and why. When RMR asked why he had sex with her in the shower when she was "super drunk" and smelled of vomit, he answered, "you were cleaning yourself — such a turn [*36] on — that's a turn on yeah."⁵⁸ In response to RMR's questions regarding what happened that night, the appellant admitted he did some "pretty crazy things like [performing oral sex on her]."⁵⁹ RMR had not recalled or reported the oral sex. The recording of this entire exchange is particularly significant evidence.

We find the absence of any assertions or plausible evidence of consent in these last two recorded conversations significant as they followed RMR's representations that she was blacked out due to alcohol intoxication and could not remember details of what happened. We also find the appellant's repeated apologies evidence a consciousness of

⁵⁴ Record at 198-200.

⁵⁵ *Id.* at 203.

⁵⁶ PE 3 at 4-5.

⁵⁷ *Id.* at 6.

⁵⁸ PE 12.

⁵⁹ *Id.*

guilt. See [United States v. Quichocho, No. 201500297, 2016 CCA LEXIS 677](#), unpublished op. (*N-M. Ct. Crim. App.*, 29 Nov 2016).

3. Mistake of fact as to consent

After careful review of the evidence, we are convinced beyond a reasonable doubt that the appellant did not honestly hold the mistaken belief that RMR consented, and even if he did, any such mistaken belief was not objectively reasonable. See *R.C.M.* 916(j)(1).

In conclusion, we find RMR's testimony to be credible, consistent even through the crucible of extensive cross-examination, and corroborated by other evidence. The appellant's admissions that he committed the [*37] two charged acts of penile penetration and oral sex, and his later remorse evidencing his consciousness of guilt weigh heavily in our determination.

Based on the record before us, and considering the evidence in the light most favorable to the government, a reasonable fact finder could have found all the essential elements of the charged offenses beyond a reasonable doubt. [Turner, 25 M.J. at 324](#). After weighing all the evidence and recognizing that we did not see or hear the witnesses, we are also convinced that the appellant is guilty beyond a reasonable doubt. [Id. at 325](#).

E. Erroneous admission of evidence

The appellant avers the military judge abused his discretion by admitting evidence of RMR's consumption of alcohol.

"Where an appellant has not preserved an objection to evidence by making a timely objection, that error will be forfeited in the absence of plain error." [United States v. Brooks, 64 M.J. 325, 328 \(C.A.A.F. 2007\)](#) (citing MILITARY RULE OF EVIDENCE 103(d), MCM, UNITED STATES (2016 ed.)). "A timely and specific objection is required so that the

court is notified of a possible error, and so has an opportunity to correct the error and obviate the need for appeal." [United States v. Knapp, 73 M.J. 33, 36 \(C.A.A.F. 2014\)](#) (citation and internal quotation marks omitted). The appellant "has the burden of establishing (1) error that is (2) clear or obvious [*38] and (3) results in material prejudice to his substantial rights." *Id.* (citing [Brooks, 64 M.J. at 328](#)).

The appellant did not object to the evidence of RMR's consumption of alcohol. In fact, the TDC acknowledged the relevance of this evidence. The relevance of RMR's consumption of alcohol to each sexual offense alleged is readily manifest in this case. See [Art. 120\(g\)\(8\)\(B\)](#), UCMJ ("[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent"); See also [United States v. Clifton, 35 M.J. 79, 81 \(C.A.A.F. 1992\)](#).

There was no error, much less plain error, in admitting evidence of RMR's consumption of alcohol.

III. Conclusion

The findings and sentence, as approved by the CA, are affirmed.

Senior Judge HUTCHISON and Judge FULTON concur.

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United States v. Grimes

United States Army Court of Criminal Appeals

January 31, 2014, Decided

ARMY 20100720

Reporter

2014 CCA LEXIS 63 *; 2014 WL 448412

UNITED STATES, Appellee v. Specialist
WILLIAM J. GRIMES, United States Army,
Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by *United States v. Grimes*, 2014 CAAF LEXIS 489 (C.A.A.F., Apr. 10, 2014)

Review denied by *United States v. Grimes*, 2014 CAAF LEXIS 829 (C.A.A.F., Aug. 11, 2014)

Prior History: [*1] Headquarters, V Corps.
Wendy P. Daknis, Military Judge, Colonel Flora D.
Darpino, Staff Judge Advocate.

Counsel: For Appellant: Captain Brian D. Andes,
JA (argued); Colonel Patricia A. Ham, JA; Major
Jacob D. Bashore, JA; Captain John L. Shriver, JA
(on brief).

For Appellee: Captain Chad M. Fisher, JA
(argued); Lieutenant Colonel James L. Varley, JA;
Captain Chad M. Fisher, JA; Major James E.
Ewing, JA (on brief).

Judges: Before KERN, ALDYKIEWICZ, and
MARTIN, Appellate Military Judges. Judge
ALDYKIEWICZ concurs. KERN, Senior Judge,
dissenting.

Opinion by: MARTIN

Opinion

MEMORANDUM OPINION

MARTIN, Judge:

A general court-martial composed of officer and enlisted members convicted appellant, contrary to his pleas, of one specification of rape in violation of Article 120(a), Uniform Code of Military Justice, 10 U.S.C. § 920 (2006 & Supp. II 2009), amended by 10 U.S.C. § 920 (2012) [hereinafter UCMJ] . The panel sentenced appellant to a dishonorable discharge, confinement for three years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the dishonorable discharge, thirty-three months of confinement, and reduction to the grade of E-1.

Appellant's case is now before this court [*2] for review under *Article 66, UCMJ*. Of appellant's two assignments of error, one merits discussion, but neither merit relief.¹ This assignment of error relates to the military judge's denial of the defense motion to admit evidence of other sexual conduct by the victim. *See* Military Rule of Evidence [hereinafter Mil. R. Evid.] 412. We conclude the military judge did not abuse her discretion by excluding the Mil. R. Evid. 412 evidence.

BACKGROUND

Appellant and the victim, Specialist (SPC) MT, were both assigned to the same military police company and lived in the same barracks in Germany. Specialist MT arrived at the unit in July 2009, and appellant immediately befriended her. Their relationship progressed quickly and they had

¹ We have also considered those matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and we find they warrant no discussion or relief.

three to four consensual sexual encounters over the summer, with the last being on 26 August 2009, SPC MT's birthday. By that time, both appellant and SPC MT started dating other people, and they agreed that they should just be friends. Although they continued to speak, exchange text [*3] messages, flirt, and kiss, they no longer maintained a sexual relationship.

Testimony also revealed that SPC MT's boyfriend did not care for appellant and did not want SPC MT to continue her friendship with appellant. Specialist MT used a false name in her cellular phone contact list for appellant in order to hide the fact that she was communicating with appellant from her boyfriend.

All but one of the consensual sexual encounters occurred before morning physical training (PT) formation in appellant's barracks room. Due to time constraints, SPC MT characterized the sex as "pretty much rough and fast." She further testified that she was up against the wall or face down, and appellant penetrated her vagina from behind. On at least one occasion, SPC MT told appellant "no," prior to the intercourse, but stated that she did not mean it, and said it in a moaning, heat of the moment, type of way. During the course of their sexual relationship, appellant would send a text message to SPC MT in the early morning hours prior to PT formation, inviting her to his room to "talk." In this context, SPC MT stated that "talk" was a euphemism for sex.

During one of the earlier sexual encounters, appellant [*4] invited SPC MT over to his barracks room in the evening to watch movies. Specialist MT spent the evening in appellant's room, and although they engaged in consensual sexual intercourse, SPC MT did not characterize this instance as rough or fast. Instead, as she started to fall asleep while watching a movie, appellant touched and caressed her, she awakened, and they had sex.

On 7 October 2009, appellant and SPC MT exchanged over fifty text messages throughout the

day. Specialist MT stated that at least one of the text messages could have stated "we could talk," or words to that effect. They also discussed the fact that they would have time to talk after her boyfriend left for training. Her boyfriend departed for training on 6 October 2009. After the duty day, SPC MT returned to her room to shower. Appellant visited with her in her room and they talked. She told him she intended to take a sleeping pill and go to bed early. He left, and she took the sleeping pill and dozed off as she watched a movie. Specialist MT's roommate had duty as charge of quarters, and they agreed to leave the door unlocked so that the roommate could come and go into the room quietly throughout the night. Appellant, [*5] who lived in the same barracks, returned to the unlocked room to borrow something and left. A little while later, SPC MT awoke to appellant tugging at her pajama pants. She told him to "knock it off," assuming he was teasing her when he remarked "do you know what I could do to you right now?" Specialist MT then went back to sleep on her back. She woke up feeling herself being turned from her back to her stomach, and then felt her chest being pushed against the bed. She then felt herself being penetrated from behind. Specialist MT testified that she felt confused and a lot of pressure on her back so that she could not move. Specialist MT stated that she said "No. Stop. Knock it off. Quit it. Get off me." She started to cough and gag and the penetration stopped. Specialist MT stated that she rolled over and realized the person behind her was the appellant. He then asked her "Why do you always got to fight me?" SPC MT responded "because I can." Appellant then left the room.

SPC MT called several family members asking for their advice on how to proceed. She then sent a text to appellant accusing him of rape. In a series of fairly incriminating text messages, appellant apologized for his [*6] behavior, but stopped short of admitting his actions constituted rape. Specialist MT reported the incident to her chain of command the next morning.

SPC MT deleted many of the text messages

between herself and appellant and the forensic examiner was unable to recover the deleted messages. She explained that her prepaid cell phone did not have a large memory, and she periodically was required to purge her old messages. The forensic examiner also testified that this phone had a flash memory that only held a limited amount of data, and it is common for a user to be required to purge messages periodically. Specialist MT did, however, save the messages from later in the afternoon of 7 October, through the morning of 8 October 2009.

The defense made several pre-trial motions, including a motion under Mil. R. Evid. 412(b), notifying the court of their intent to offer evidence of SPC MT's sexual behavior. They specifically requested that the military judge allow the following evidence regarding the prior, sexual relationship between appellant and SPC MT:

1. SPC MT and appellant had consensual, rough sex on multiple prior occasions in which she was face down and he penetrated her vagina from [*7] behind;
2. During these consensual sexual encounters, SPC MT sometimes used the word "no" when she actually meant "yes";
3. During these consensual, rough sexual encounters, SPC MT "weaseled away" and "moved herself";
4. Appellant and SPC MT often used the word "talk" as a euphemism for sex, and earlier in the day of the alleged rape, SPC MT and appellant agreed to "talk" later that evening; and
5. During the motion hearing, the defense also requested the military judge allow evidence of SPC MT's dating relationship with another soldier.

The military judge conducted a closed hearing and afforded the victim the opportunity to attend in accordance with Mil. R. Evid. 412(c). Specialist MT attended the hearing and testified. Appellant did not testify on the motion or during the merits

portion of the court-martial.

After the hearing, and well before trial, the military judge provided extensive written findings of fact and conclusions of law, carefully parsing out which evidence could be introduced by the defense, and which would be barred by Mil. R. Evid. 412:

1. Evidence of prior sessions of consensual, rough sex with appellant (also referred to as "common practice of movements and positions") [*8] were not relevant to whether appellant mistakenly believed that SPC MT consented to sexual intercourse and was not admissible.
2. Evidence that SPC MT had previously told appellant "no" in the course of their consensual sexual encounter was relevant, material, and favorable to the defense and was admissible.
3. Evidence that SPC MT "weaseled away" and "moved herself" during consensual sexual encounters was not admissible because the defense failed to establish the factual foundation for this evidence, and mischaracterized SPC MT's Article 32 testimony.
4. Evidence that appellant and SPC MT often used the word "talk" to mean get together to have intercourse was relevant, material, and favorable to the defense and was admissible to show both consent and mistake of fact as to consent.
5. Evidence that SPC MT had a dating relationship with another soldier was admissible because there was no discussion of sexual details that would implicate Mil. R. Evid. 412, and was admissible under Mil. R. Evid. 608(c).

The military judge revisited her pretrial ruling during the trial and supplemented and revised the ruling during subsequent [Article 39\(a\)](#), [UCMJ](#) sessions.

LAW

"[E]vidence offered by the accused [*9] to prove the alleged victim's sexual predispositions, or that she engaged in other sexual behavior, is inadmissible, except in limited contexts. [Mil. R. Evid.] 412(a)—(b). The rule is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to [sexual offense prosecutions]. " [*United States v. Ellerbrock*, 70 M.J. 314, 317-318 \(C.A.A.F. 2011\)](#) (quoting [*United States v. Gaddis*, 70 M.J. 248, 252 \(C.A.A.F. 2011\)](#)) (third alteration in original) (internal quotation marks omitted). However, Mil. R. Evid. 412(b) provides several exceptions to this general rule of inadmissibility:

(b) *Exceptions.*

(1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which [*10] would violate the constitutional rights of the accused.

The rule further prescribes the procedure by which the military judge must evaluate the proffered evidence. See Mil. R. Evid. 412 (c)(2). After conducting a closed hearing, the military judge must determine whether the evidence meets one of the stated exceptions. See Mil. R. Evid. 412(c)(3). Relevant evidence is any evidence that has "any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence." [Mil. R. Evid.] 401.

If evidence is material and relevant, then it

must be admitted when the accused can show that the evidence is more probative than the dangers of unfair prejudice. See [Mil. R. Evid.] 412(c)(3). Those dangers include concerns about "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." [*Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 \(1986\)\]](#) .

[*Ellerbrock*, 70 M.J. at 318-19.](#)

While cross examination of a witness is a critical component of an accused's [*Sixth Amendment*](#) right to confrontation, "an accused is not simply allowed 'cross examination that is effective in whatever way, and to whatever [*11] extent, the defense might wish.'" [*Id.* at 318](#) (quoting [*Van Arsdall*, 475 U.S. at 679 \(1986\)](#)). "'Trial judges retain wide latitude' to limit reasonably [an accused's] right to cross examine a witness 'based on concerns about . . . harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" [*Id.*](#) (quoting [*Michigan v. Lucas*, 500 U.S. at 149 \(1991\)](#)) (internal quotations omitted).

"We review a military judge's ruling on whether to exclude evidence pursuant to [Mil. R. Evid.] 412 for an abuse of discretion. [*United States v. Roberts*, 69 M.J. 23, 26 \(C.A.A.F. 2010\)](#). Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed de novo." [*Id.* at 317.](#)

DISCUSSION

In the military judge's written ruling entitled, *Essential Findings of Fact, Conclusions of Law, and Ruling on Defense Notice of Intent to Introduce Evidence Under Mil. R. Evid. 412*, the military judge outlined the exceptions to the rule. First, the judge addressed the exception regarding specific instances of sexual behavior by the alleged victim with respect to the accused in accordance with Mil.

R. Evid. 412 (b)(1)(B). The judge [*12] also discussed the exception when evidence is otherwise constitutionally required under Mil. R. Evid. 412(b)(1)(C). The judge noted that evidence must be relevant, material, and favorable to the defense. See e.g. [United States v. Williams, 37 M.J. 352, 359 \(C.A.A.F. 1993\)](#). Additionally, the evidence must be relevant to the defense's theory of the case. See [United States v. Velez, 48 M.J. 220, 228 \(C.A.A.F. 1998\)](#). Finally, the defense must establish an adequate foundation that the alleged "other sexual behavior" occurred. See [United States v. Carter, 47 M.J. 395 \(C.A.A.F. 1998\)](#). The judge's ruling is not a denial of admissibility because of the danger of unfair prejudice to the alleged victim's privacy.²

Specialist MT provided sworn testimony affirming most of the assertions made by the defense in their Mil. R. Evid. 412 motion, and the military judge found that the factual foundation was established for all but one act of sexual behavior by SPC MT. Specifically, the military judge found that although the defense asserted that SPC MT "weaseled away" or "moved herself" during prior consensual sexual intercourse with appellant, in actuality, SPC MT testified that it was not a routine practice for her to move away from appellant during intercourse, but she had the freedom to move *if* she felt uncomfortable and needed to reposition herself.

The military judge ruled that the defense could offer evidence of SPC MT's prior consensual sexual relationship with appellant, including evidence that she previously told appellant "no" when she actually meant "yes" during intercourse, and that it was common practice during their sexual relationship to use the code word "talk" when they

actually intended to have sexual intercourse. The military judge also ruled the [*14] defense could introduce evidence that SPC MT was in a dating relationship with another soldier at the time of offense. The judge denied the defense motion to introduce further details of the sexual relationship, to include any mention of "common practice of movements and positions," and found this aspect of their sexual relationship was not relevant to whether appellant was mistaken as to her consent to sexual intercourse on the evening in question.

After the court-martial began, and the parties developed the evidence further, the defense counsel raised the Mil. R. Evid. 412 issue on other occasions and asked for clarification. First, after the government completed their direct examination of the victim, the defense requested the military judge reconsider her ruling regarding prior sexual positions between appellant and SPC MT. Specifically, the defense asked if they could cross-examine SPC MT on whether or not the particular position alleged was substantially similar to their previous sexual positions. The military judge ruled that the sexual position during previous sexual encounters was not relevant. Later, after the victim completed her testimony and panel members raised questions [*15] regarding whether the prior sex was "rough" or "gentle," the judge revisited her earlier ruling and determined that she would not allow evidence that the victim characterized some of the previous sexual encounters as "rough." However, the military judge did allow the question of regarding whether or not SPC MT resisted during previous sexual encounters. In so doing, the military judge distinguished resistance from forcefulness, and during an [Article 39\(a\), UCMJ](#) session, reiterated her earlier ruling that relevant Mil. R. Evid. 412 evidence was limited to what occurred prior to the actual penetration and intercourse.

As a matter of burdens, we note it is incumbent on the defense to show the proffered evidence is relevant. See [Dowling v. United States, 493 U.S. 342, 351 n.3, 110 S. Ct. 668, 107 L. Ed. 2d 708](#)

²During the motion session and Article 39(a) sessions during trial, both the defense counsel and trial counsel mentioned the victim's privacy concerns, either directly or indirectly, on several occasions. However, the military judge never stated that her decision was based on anything other than relevance or lack of factual foundation. See [United States v. Gaddis, 70 M.J. 248 \(C.A.A.F. 2011\)](#); [United States v. Ellerbrock, 70 M.J. 314 \(C.A.A.F. 2011\)](#) (expressing concern that the balancing [*13] test from Mil. R. Evid. 412(c)(3) overemphasizes the victim's right to privacy over the constitutional protections provided to an accused).

(1990). Further, "as a rule of exclusion, the burden of demonstrating why the general prohibition of Mil. R. Evid. 412(a) should [be] lifted" is on appellant. *Roberts, 69 M.J. at 27*; see Mil. R. Evid. 412(c). In *Ellerbrock*, our superior court reminded us that when determining if evidence is relevant, "common sense is the guiding principle" and further observed that "determinations of relevancy must be based on 'personal [*16] experience, general knowledge, and understanding of human conduct and motivation.'" *Ellerbrock, 70 M.J. at 319* (quoting 1 Kenneth S. Broun, et al., *McCormick on Evidence* § 185 (6th ed. 2006)).

In this case, the only evidence the military judge had before her was the sworn testimony of the victim, SPC MT. Appellant did not testify at trial, nor did he testify for the purposes of the Mil. R. Evid. 412 motion hearing.³ As such, he did not provide any additional support for the assertion that sexual position was relevant to SPC MT's consent to engage in sexual activity or was relevant to his mistake of fact as to her consent. While defense counsel argued that the "panel would be predisposed to believe that rough sex from behind, along with 'weaseling away' and saying 'no' are the hallmarks of a non-consensual sexual encounter," the evidence presented never supported how specific details of the common positions used in previous consensual sexual encounters related to consent for the charged incident.⁴

³ The appellant provided a signed, unsworn statement in camera and under seal in support of his motion to sever this case from similar charges against other alleged victims. In the document, [*17] he asserted that he intended to testify that based on their previous sexual relationship, he believed that SPC MT wanted to engage in sexual intercourse with him on the evening in question, and that she displayed behaviors that were consistent with prior sexual intercourse, "which consisted generally of rough sex." The defense never linked this document to the Mil. R. Evid. 412 motion, and the military judge never referenced the document in her Mil. R. Evid. 412 rulings.

⁴ The dissent argues that through the victim's testimony, the government made relevant the sexual positions during prior sexual encounters between SPC MT and appellant. However, the dissent fails to acknowledge the government must prove the essential elements of the charged offense. Here, appellant was charged with

The evidence before the panel consisted of testimony that prior sexual encounters, all occurring on or before 26 August 2009, occurred in appellant's barracks room, the victim fully consented to sex and, in fact, went to his room for the express purpose of having sex. Specialist MT testified that she was fully awake during those earlier instances of sexual intercourse. Furthermore, all of those occasions started with kissing, and all but one of those encounters occurred in the morning before first formation. Appellant never asserted how the facts and behaviors leading up to the point of alleged consent for the charged incident were similar to the previous encounters. Instead, the undisputed evidence relating to the evening of 7 October 2009 was that the victim was tired after a long duty day and had clearly stated she was not interested in sexual activity with appellant on that night. She told him she took [*19] a sleeping pill in order to help her sleep, and he told her to "sleep well," and left the room.⁵ She fell asleep in her own room, in her own bed, at night. Finally, unlike every other prior consensual sexual encounter, t

rape by force. The government must describe the force with sufficient specificity to meet its burden. There is no evidence the government overplayed their hand or otherwise overemphasized the position of the victim and the appellant such that it necessitated a discussion by the defense of the specific details of their previous, consensual sexual meetings. Indeed, if the mere mention of how an accused used [*18] force in order to penetrate a victim opened the door to all the particulars of prior sexual relationships, it would completely eviscerate the rationale for Mil. R. Evid. 412, and more importantly, the applicability of Mil. R. Evid. 401, 403, and 412 to sexual assault prosecutions.

⁵ Evidence at trial showed that the victim was prescribed 50 milligrams of Trazodone, a commonly prescribed sleeping aid for soldiers. An expert for the defense testified that unlike other sleeping [*20] aids, Trazodone does not cloud the user's mental state, instead it only makes the user drowsy. The expert further testified that based on the type of medication and dosage ingested, the victim should have been able to awaken without difficulty and it should not have prevented her from understanding the nature of the alleged interactions with appellant on the night in question. Therefore, while the fact that the victim ingested a sleeping pill was important to the government's argument that she did not consent to sex with appellant on the evening in question, the sleeping aid was not used to demonstrate incapacitation by the victim. Additionally, the record is devoid of any argument by trial counsel that this is anything other than a rape by force as charged.

here was no kissing or any other foreplay prior to the sexual intercourse. All the remaining evidence that supported the defense theory regarding SPC MT's sexual behavior as it related to her consent to begin or continue sexual activity was admitted through the victim and was before the panel. This evidence was very damaging to the government case and included information that earlier in the day, they had texted about the possibility of "talking later," they texted about having time to talk after her boyfriend left for training; the fact that her boyfriend had, in fact, left the previous day for training; that she sometimes said "no" when she meant "yes" during sex ; and earlier that evening, he attempted to pull down her pants and she said "knock it off," and pushed him away .

In short, the military judge allowed the defense to admit all the Mil. R. Evid. 412 evidence up to the point of actual penetration and intercourse. Regarding the earlier instances of sexual conduct, the military judge found the details of their intimate relations after consent had been established were simply not relevant. This was not a static decision that ignored the presentation of evidence - the military judge made the initial [*21] Mil. R. Evid. 412 ruling, then reevaluated and modified her earlier ruling as the case progressed and the relative importance of such evidence emerged. *See Ellerbrock, 70 M.J. at 323* (Baker, J., dissenting).

Relevancy is a low standard, and we recognize that another military judge may have reached a different conclusion. However, "the abuse of discretion standard calls 'for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. Baker, 70 M.J. 283, 287 (C.A.A.F. 2011)*; *see also United States v. Rhodes, 61 M.J. 445, 457 (C.A.A.F. 2005)* (Crawford, J., concurring in part and dissenting in part) (noting that a split on an issue indicates that reasonable judicial minds can disagree but that simple disagreement is not sufficient to overturn a military judge's decision). We believe the military judge's decision in this case was fully consistent

with the judge's duty to serve as a "gatekeeper deciding first whether the evidence is relevant . . .". *Roberts, 69 M.J. at 27* (quoting *Banker, 60 M.J. at 224*). Under the facts and circumstances of this case, we find that the military judge did not abuse [*22] her discretion. The central issue for the trier of fact, was resolving whether there was consent, lack of consent, or mistake of fact as to consent. As the gatekeeper, the military judge correctly ruled the intimate details of the prior sexual relationship between appellant and SPC MT past the point of consent were not relevant.

Because the military judge decided this issue on logical relevance grounds, she did not reach the balancing test of Mil. R. Evid. 403. We have considered the entire record and conducted a de novo review. *UCMJ art. 66(c)*. We are convinced that even if this evidence has some logical relevance, that marginal relevance is substantially outweighed by the danger of a trial within a trial comparing the previous sexual movements and positions with the sexual assault at issue. *See United States v. Berry, 61 M.J. 91, 97 (C.A.A.F. 2005)* (holding that the military judge must consider the "possible distraction of the fact-finder that might result from admission of the testimony."). As noted above, the movements and positions at issue, those occurring on or before 26 August 2009 and that related to the charged offense, are quite distinct by time, location, and circumstances [*23] - to say nothing of the consciousness of SPC MT. As such, this dispute would distract the members by confusing the issues.

Assuming *arguendo* that the military judge abused her discretion by excluding evidence pursuant to Mil. R. Evid. 412, and assuming the evidence of sexual positions and characterization of the sex as "rough and fast" were relevant and material;⁶ and

⁶The test for materiality is a multi-factored test that evaluates "the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which the issue [*24] is in dispute; and the nature of the other evidence in the case

the evidence was constitutionally required, we must then determine whether the military judge's error was harmless beyond a reasonable doubt. Ellerbrock, 70 M.J. at 320 (citing United States v. Moran, 65 M.J. 178, 187 (C.A.A.F. 2007)). In assessing harmlessness, we apply the five Van Arsdall factors: (1) the importance of the testimony; (2) whether the testimony was cumulative; (3) the presence or absence of corroborating or contradictory evidence on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution's case. *Id.* (citing Van Arsdall, 475 U.S. at 684).

First, we note the only issues in this case were whether SPC MT consented or appellant was mistaken as to her consent. Her testimony was clearly important to the government case. There was no other eyewitness testimony to the incident. As such, this factor weighs in favor of finding harm. As to the second factor, the testimony would have been cumulative. There were many questions by defense concerning the victim's behavior in regards to the prior consensual sexual encounters. This factor also relates to factor four, in that the military judge allowed a tremendous amount of detailed cross-examination of the victim regarding the previous occasions of sex with appellant. There was no contradictory testimony regarding SPC MT's version of events — appellant did not testify at trial [*25] nor did he testify for the purposes of the Mil. R. Evid. 412 motion. There were, however, several pieces of corroborating testimony including DNA evidence which confirmed sexual intercourse (but not force), the testimony of SPC MT's supervisor regarding her initial report of the offense, the testimony of the same supervisor where appellant denied any sexual activity, and the arguably inculpatory texts from appellant to SPC

MT after the incident. Finally, the last factor weighs in favor of the government, as the government had a strong case and a strong victim. The details of her testimony were consistent, she openly admitted to the previous sexual encounters with appellant, and provided evidence that on this occasion she did not consent to sex and clearly manifested her lack of consent to appellant. Accordingly, we conclude that the Van Arsdall factors weigh in favor of the government, and any error is harmless beyond a reasonable doubt.

CONCLUSION

On consideration of the entire record, the assignments of error, and the matters raised by appellant pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982), the findings of guilty and the sentence are AFFIRMED.

Judge [*26] ALDYKIEWICZ concurs.

Dissent by: KERN

Dissent

KERN, Senior Judge, dissenting:

I respectfully dissent. With the low threshold for relevance under Military Rule of Evidence [hereinafter Mil. R. Evid.] 412 as highlighted by the majority, I conclude that the military judge erred by excluding evidence pertaining to prior consensual sexual encounters between appellant and Specialist (SPC) MT. During a motions hearing regarding the admissibility of evidence pertaining to prior consensual sexual activity between SPC MT and appellant, SPC MT testified that on previous occasions she and appellant had three to four other consensual sexual encounters. She further described some of these encounters as rough and fast sex in which she was face down on her stomach and he was on top. Moreover, on at least one occasion, SPC MT told appellant "no" but did not mean it. During the government case-in-chief,

pertaining to the issue." Banker, 60 M.J. at 222 (quoting United States v. Colon-Angueira, 16 M.J. 20, 26 (C.M.A. 1983)). We note that since the military judge based her decision on relevance, she was not required to assess materiality and balance the probative value of the evidence with the danger of unfair prejudice. Mil. R. Evid. 412(c)(3).

SPC MT testified that during the alleged sexual assault in question, the appellant turned her from her back to her stomach and then penetrated her from the rear. Since the body positions of the sexual act in question could be considered non-traditional and were similar to body positions in their prior sexual encounters, I [*27] find that they were relevant to the issue of whether it was more or less likely that SPC MT consented to the sexual act and that appellant had a reasonable mistake of fact as to whether SPC MT consented to the act.

The government needed only to present evidence of vaginal penetration by force to meet its elemental burden for the charged offense. However, when SPC MT testified during the government case-in-chief concerning the alleged sexual assault, she provided evidence describing appellant's and her body positions. She described being flipped over to a face down position and being penetrated from behind, unlike a traditional missionary position. Although I believe the evidence of the body positions of the prior sexual incidents was relevant before that point, which would have allowed the defense to raise it during their cross examination, it became even more relevant once the government introduced this evidence of the body positions during the alleged assault. I cannot imagine that the description of the position of the bodies and penetration from the rear was not relevant to the panel and did not inform them in their evaluation of the defenses of consent and reasonable mistake of [*28] fact of consent. Moreover, without knowledge that prior sexual activity between appellant and SPC MT included sex while SPC MT was face down on her stomach, the panel was left with the impression that this alleged sexual assault was the first time sex between the two occurred in this type of sexual position and inflated this position as an attack from behind with SPC MT in a defenseless position. This impression makes it less likely SPC MT would either consent or that appellant would have reasonable mistake of fact on whether she would consent to activity in that manner. As such, I find that this information was relevant, and the judge erred by preventing

appellant from garnering information during cross examination of SPC MT that she and appellant had rough fast sex on prior occasions while she was in a face down position.

I am also not persuaded by the majority's suggestion that appellant needed additional support, such as his testifying, in order to make the issue of sexual movements and positions relevant to the defenses of consent or reasonable mistake of fact as to consent. Specialist MT testified during the motion hearing that the prior sexual encounters included rough fast sex [*29] while she was in a face down position and this evidence was uncontroverted. For the reasons stated above, I find this evidence on its own to be relevant to the aforementioned defenses.

After getting past the low relevance hurdle, I also conclude that this information would have been admissible under a Mil. R. Evid. 412 analysis as either an exception under Mil. R. Evid. 412(b)(1)(B) or because it was material and its exclusion was prejudicial. See [*United States v. Gaddis*, 70 M.J. 248 \(C.A.A.F. 2011\)](#); [*United States v. Ellerbrock*, 70 M.J. 314 \(C.A.A.F. 2011\)](#). As for materiality, this evidence goes right to the heart of appellant's consent and reasonable mistake of fact defenses. In addition, my assessment of the *Van Arsdall* factors finds, with the possible exception of cross-examination otherwise permitted, all factors side with appellant. [*Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 \(1986\)](#). In particular, I disagree with the majority that this was a strong case. Without a confession or physical evidence corroborating nonconsensual sexual activity, this was not a strong case for the government.

Finding the military judge abused her discretion by excluding relevant, material evidence and [*30] that the exclusion was prejudicial to the appellant, I would set aside the findings of guilty to The Charge and its Specification.

United States v. Hoffmann

United States Navy-Marine Corps Court of Criminal Appeals

July 9, 2018, Decided

No. 201400067

Reporter

2018 CCA LEXIS 326 *; 2018 WL 3340941

UNITED STATES OF AMERICA, Appellee v.
MATTHEW P. HOFFMANN, Corporal (E-4), U.S.
Marine Corps, Appellant

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

Prior History: [*1] Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Lieutenant Colonel Keith A. Parrella, USMC. Convening Authority: Commanding General, II Marine Expeditionary Force, Camp Lejeune, North Carolina. Staff Judge Advocate's Recommendation: Major Kara J. Zummo, USMC.

United States v. Hoffmann, 74 M.J. 542, 2014 CCA LEXIS 883 (N-M.C.C.A., Dec. 11, 2014)

Counsel: For Appellant: Commander Donald R. Ostrom, JAGC, USN; Captain Thomas Friction, USMC.

For Appellee: Major Brian L. Farrell, JAGC, USN; Lieutenant Megan Marinos, JAGC, USN; Captain Sean M. Monks, USMC.

Judges: Before GLASER-ALLEN, HUTCHISON, and SAYEGH, Appellate Military Judges. Senior Judge HUTCHISON and Judge SAYEGH concur.

Opinion by: GLASER-ALLEN

Opinion

GLASER-ALLEN, Chief Judge:

A panel of officer members sitting as a general court-martial convicted the appellant, contrary to his pleas, of indecent liberties with a child and child enticement, in violation of Articles 120 and 134, Uniform Code Military Justice (UCMJ), 10 U.S.C. §§ 920 and 934.¹ The members sentenced the appellant to ten years' confinement, reduction to paygrade E-1, total forfeiture of pay and allowances, and a dishonorable discharge. The CA approved seven years' confinement, reduction to paygrade E-1, total forfeiture of pay and allowances, and a dishonorable discharge. With the [*2] exception of the discharge, the convening authority (CA) ordered the approved sentence executed.

The appellant avers six assignments of error (AOE):²

(1) the military judge abused his discretion by admitting propensity evidence under Military Rule of Evidence (Mil. R. Evid.) 414, MANUAL FOR COURTS-MARTIAL (MCM), UNITED STATES (2012 ed.);

(2) the military judge erred when he failed to instruct the members on the government's burden to prove the uncharged offenses occurred by a preponderance of evidence;³

¹ The members acquitted the appellant of attempted sodomy of a child.

² The AOE's have been renumbered for ease of discussion.

³ This supplemental AOE was filed prior to our 21 February 2018 oral argument held at George Washington University Law School.

(3) the military judge erred when he did not extend his ruling that Colonel (Col) W was disqualified from providing input on the Article 34 letter as staff judge advocate to include other areas of pretrial advice;

(4) the military judge should have recused himself;

(5) the appellant's sentence is inappropriately severe and highly disparate from a closely related case;⁴ and

(6) there is error requiring corrective action in the appellant's Report of Results of Trial due to an incorrect Defense Incident-Based Reporting System (DIBRS) code.⁵

Having carefully considered the record of trial and the parties' submissions, we are convinced that the findings and the sentence are correct in law and fact [*3] and find no error materially prejudicial to the substantial rights of the appellant. [Arts. 59\(a\)](#) and 66(c), *UCMJ*.

I. BACKGROUND

This case is before us for a second time. On 23 August 2013, the appellant was convicted of offenses involving "Ryan" and possession of child pornography.⁶ On 18 February 2016, our superior court set aside the findings and sentence, dismissing the child pornography charges with prejudice and authorizing a rehearing on the

charges involving Ryan.⁷

In April 2011, a man in a silver sport utility vehicle (SUV) with a yellow New York license plate drove by Ryan, a 13-year-old boy, several times while Ryan was walking home from school. On the third pass, the man pulled up and asked Ryan if he wanted a "quickie."⁸ Ryan declined, and the man asked if Ryan knew what a "quickie" was. Ryan said "no," and the man drove around the block again. The man drove up to Ryan a fourth time and asked, "[a]re you sure," and "[y]ou'll like it."⁹ Ryan again declined and ran home. He immediately reported the incident and provided a description of the vehicle to the local Jacksonville, North Carolina Police Department. Police were unable to locate the SUV driver at that time.

In September [*4] 2011, a man in a light colored SUV slowly drove by Alex, a 13-year-old boy, while he was walking home from school on board Camp Lejeune, North Carolina. On the first two passes, Alex noticed the man was wearing a desert camouflage uniform and making a gesture with his hand that Alex took to indicate fellatio. The third time the man drove by, he made the same gesture and asked Alex if he wanted to go for a ride. Alex declined, and the man drove away.

Also in about September 2011, a man in a silver SUV drove by Pete, a 10-year-old boy, while he was walking home from school on board Camp Lejeune. Pete noticed the man drove by making a similar indecent gesture to indicate fellatio. Pete noticed the SUV had a yellow license plate and spare wheel on the back, and the male driver was wearing a green military undershirt.

In November 2011, Alex saw the SUV that had approached him in September in the same vicinity of Camp Lejeune while he was walking home from school. He took a picture of it and immediately

⁴ Raised pursuant to [United States v. Grostefon](#), 12 M.J. 431 (C.M.A. 1982).

⁵ In accordance with our recent decision in [United States v. Baratta](#), 77 M.J. 691, 695 (N-M. Ct. Crim. App. 2018), we summarily reject the appellant's final AOE as the Report of Results of Trial in this case accurately reflects the findings and sentence. ("[DIBRS codes] are neither findings nor parts of a sentence, thus we do not have the authority to act upon them.") *Id.* at 695 (citing [Article 66\(c\)](#), *UCMJ*). See [United States v. Clifton](#), 35 M.J. 79 (C.M.A. 1992).

⁶ [United States v. Hoffmann](#), 74 M.J. 542 (N-M. Ct. Crim. App. 2014). He was acquitted of similar offenses involving "Alex" and "Pete." All names are pseudonyms.

⁷ [United States v. Hoffmann](#), 75 M.J. 120 (C.A.A.F. 2016).

⁸ Record at 423-26.

⁹ *Id.*

called his mother, who promptly drove to his location. While returning home, Alex and his mother passed the SUV and began following it. A high speed chase ensued, but Alex's mother was unable [*5] to keep up with the SUV. She noticed the SUV was a "RAV4" with a hard case on the spare tire and yellow New York license plate.¹⁰

Pete's mother observed the on-base car chase, wrote down the SUV's license plate number, and provided it to Alex's mother.¹¹ Alex's mother called her husband with the description of the car and the license plate number. He was working on Camp Lejeune, and soon thereafter he located the SUV, followed it to a work site, and notified base police. Minutes later security arrived, identified the vehicle as belonging to the appellant, entered the appellant's workplace, and took the appellant into custody.

While the Naval Criminal Investigative Service (NCIS) was investigating the September and November on-base incidents involving Alex and Pete, they notified local police and became aware of the April off-base incident involving Ryan. Now having a suspect, the Jacksonville Police Department conducted a photographic line-up with Ryan, who identified the appellant with "95 percent certainty" as the man driving the SUV who enticed him.¹²

II. DISCUSSION

A. Uncharged propensity evidence

The appellant argues the military judge erred when admitting uncharged propensity evidence of [*6] his prior acquittals under MIL. R. EVID. 414 by improperly conducting the MIL. R. EVID. 403

balancing test. We disagree.

1. Admissibility of uncharged misconduct

Three Military Rules of Evidence generally govern the relevance and admissibility of evidence of conduct already litigated in a prior court-martial. *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997); *United States v. Hicks*, 24 M.J. 3, 8 (C.M.A. 1987). First, "[e]vidence 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. "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. "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." MIL. R. EVID. 404(b)(1). But "[t]his evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident" MIL. R. EVID. 404(b)(2).

In *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989), the Court of Military Appeals articulated a three-part [*7] test for the admissibility of uncharged misconduct under MIL. R. EVID. 404(b), including prior misconduct of which the accused was acquitted:

1. Does the evidence reasonably support a finding by the court members that the appellant committed prior crimes, wrongs, or acts?
2. What "fact . . . of consequence" is made "more" or "less probable" by the existence of this evidence?
3. Is the "probative value . . . substantially

¹⁰ *Id.* at 318.

¹¹ The license plate number recorded by Pete's mother nearly matched the appellant's plate number, with the exception of one letter. Record at 361-62.

¹² Record at 390, 441; Prosecution Exhibit 4, 5.

outweighed by the danger of unfair prejudice"?

Id. at 109 (citations omitted).

When an accused has been acquitted of conduct the government seeks to present as evidence in a subsequent case, the acquittal is a factor in the test for admissibility. "The fact of the prior acquittal may diminish the probative value of the evidence, however, and should be considered by the military judge when determining whether 'probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" *Hicks*, 24 M.J. at 8-9 (citing to MIL. R. EVID. 403) (additional citations omitted). An accused also has the right to prove that he or she was previously acquitted of the acts admitted into evidence under [*8] MIL. R. EVID. 404(b). *United States v. Cuellar*, 27 M.J. 50, 56 (C.M.A. 1988).

2. MIL. R. EVID. 414.

We review the admissibility of evidence under MIL. R. EVID. 414 for an abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Hurtado*, No. 201500051, 2016 CCA LEXIS 112, at *5-6, unpublished op. (N-M. Ct. Crim. App. 29 Feb 2016) (quoting *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010)), rev. denied, 76 M.J. 348 (C.A.A.F. 2017).

MIL. R. EVID. 414 permits the military judge to admit evidence that the accused committed "any other offense of child molestation" and "may be considered on any matter to which it is relevant." MIL. R. EVID. 414. Thus, "inherent in [MIL. R. EVID. 414] is a general presumption in favor of admission." *United States v. Berry*, 61 M.J. 91, 95

(C.A.A.F. 2005) (citation omitted).¹³

Here the military judge combined his MIL. R. EVID. 414 propensity and MIL. R. EVID. 404(b) uncharged misconduct analysis into a single ruling for efficiency. The same acquittal evidence was at issue under both evidentiary rules, and the MIL. R. EVID. 414 requirements incorporate the key aspects of the MIL. R. EVID. 404(b) test.

3. MIL. R. EVID. 414 threshold requirements

Before admitting evidence under MIL. R. EVID. 414, three initial threshold requirements must be met: (1) the accused is charged with an offense of child molestation within the meaning of MIL. R. EVID. 414(d); (2) the proffered evidence is that the appellant committed another offense of child molestation within [*9] the meaning of MIL. R. EVID. 414(d); and (3) the proffered evidence is logically relevant under both MIL. R. EVID. 401 and 402. *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013) (citations omitted). To meet the second requirement, the military judge must conclude that the members "could find by [a] preponderance of the evidence that the offenses occurred[.]" *United States v. Wright*, 53 M.J. 476, 483 (C.A.A.F. 2000) (citing *Huddleston v. United States*, 485 U.S. 681, 689-90, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988)).

The military judge found the threshold requirements were met both on the record and in his written ruling. Regarding the first two prongs,

¹³The *Berry* court was specifically dealing with MIL. R. EVID. 413, but the court's analysis applies to both MIL. R. EVID. 413 and 414. See *United States v. Tanner*, 63 M.J. 445, 448-49 (C.A.A.F. 2006) (noting the similar legislative history with MIL. R. EVID. 413, its "companion rule," and finding that MIL. R. EVID. 414, like MIL. R. EVID. 413, establishes a presumption in favor of admissibility of evidence of prior similar crimes in order to show predisposition to commit the designated crimes); *United States v. Luna*, No. 201500423, 2017 CCA LEXIS 314, at *13-18, unpublished op. (N-M. Ct. Crim. App. 9 May 2017), *aff'd*, 77 M.J. 198, 2018 CAAFL EXIS 65 (C.A.A.F. Jan. 10, 2018) (summary disposition) (analyzing propensity evidence admitted under MIL. R. EVID. 414 using the same standards applied to MIL. R. EVID. 413).

he noted that during an [Article 39\(a\), UCMJ](#), session, the defense conceded that the first two requirements under MIL. R. EVID. 414 were met "since at least one of the charged allegations, as well as the uncharged misconduct, fall within the definition of 'child molestation' under [MIL. R. EVID.] 414(d)."¹⁴ The military judge was satisfied that Alex and Pete's expected testimony was sufficient to meet the preponderance standard, explaining that "the government offered documentary evidence in support of their response to this motion including statements and depositions from all three minors, as well as statements from [Alex's] and [Pete's] parents."¹⁵ He found that based on this evidence, the members could find by a preponderance of the evidence that the offenses alleged by Alex and Pete occurred [*10] and were committed by the appellant—despite the prior acquittals.

This evidence not only met the first two prongs of the MIL. R. EVID. 414 threshold requirements, but also the first prong of the *Reynolds* MIL. R. EVID. 404(b) test. Recognizing this overlap in the admissibility tests, the military judge found the MIL. R. EVID. 414 third threshold prong of logical relevance mirrored the second *Reynolds* prong regarding facts of consequence. He determined the acquittal evidence met both requirements:

Additionally, this evidence may be relevant for its tendency to show motive, intent, common scheme or plan, or absence of mistake. Moreover, this evidence also provides the members with an understanding as to what the accused meant by "a quickie" since he made a hand gesture associated with fellatio when allegedly soliciting [Alex] and [Pete]. Finally, the evidence provides a complete picture as to

how law enforcement first came to suspect the accused.¹⁶

Thus, the military judge concluded the evidence met all three MIL. R. EVID. 414 threshold requirements as well as the first two prongs of the *Reynolds* test.

4. MIL. R. EVID. 403 balancing test and the *Wright/Berry* factors

Once the evidence meets the three threshold requirements under MIL. R. EVID. 414, "the military judge is constitutionally [*11] required to also apply a balancing test under [MIL. R. EVID.] 403" to determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. [Solomon, 72 M.J. at 179-80](#) (citing [Berry, 61 M.J. at 95](#)). When conducting this balancing test, "the military judge should consider the following non-exhaustive factors:"

- (1) strength of proof of the prior act (*i.e.*, conviction versus gossip);
- (2) probative weight of the evidence;
- (3) potential for less prejudicial evidence;
- (4) distraction of the factfinder;
- (5) time needed for proof of the prior conduct;
- (6) temporal proximity;
- (7) frequency of the acts;
- (8) presence or lack of intervening circumstances; and
- (9) the relationship between the parties.

[Id. at 180](#) (citing [Wright, 53 M.J. at 482](#)). This analysis of the MIL. R. EVID. 403 factors also encompasses the third prong of the *Reynolds* MIL. R. EVID. 404(b) test.

If the "balancing test requires exclusion of the evidence, the presumption of admissibility [that is inherent within MIL. R. EVID. 413] is overcome."

¹⁴ Appellate Exhibit (AE) XLVII at 3 n.4. *See also* Record at 159-60. The military judge went on to note that MIL. R. EVID. 414(d)(2)(A) and (G) define "child molestation" as "any conduct prohibited by Article 120 and committed with a child, or an attempt to engage in [said conduct] MIL. R. EVID. 414." AE XLVII at 3 n.5 (internal quotation marks omitted)

¹⁵ AE XLVII at 3.

¹⁶ *Id.* at 4.

Berry, 61 M.J. at 95 (citing *Wright*, 53 M.J. at 482-83). "When a military judge articulates his properly conducted [MIL. R. EVID.] 403 balancing test on the record, the decision will not be overturned absent a clear abuse of discretion." *Solomon*, 72 M.J. at 180 (citing *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000)).

a. Strength of proof of the prior act (i.e., conviction versus gossip)

In his written [*12] findings addressing the first *Wright* factor, the military judge held the members could find the offenses alleged by Alex and Pete occurred by a preponderance of the evidence and that their anticipated in-court testimony and sworn depositions were more than mere gossip. He acknowledged that the appellant was acquitted of the conduct at his first trial, that the boys were and would be subject to "stringent defense questioning during sworn depositions," would again be subject to cross-examination, and recognized that admission of this evidence was not barred by the prior acquittals.¹⁷

We agree. The preponderance of evidence standard in this factor is a much lower showing than the beyond a reasonable doubt standard considered by the members at the first trial. The trial judge carefully weighed the acquittals, the additional evidence provided on the motion, and the necessary crucible of cross-examination in the rehearing.

b. Probative weight of the evidence

In addressing the probative weight of the evidence, the military judge stated that the evidence was probative "not only to the accused's propensity to engage in this conduct, but also as to motive, intent, common scheme or plan, or absence [*13] of mistake" related to the MIL. R. EVID. 404(b) test.¹⁸ He also noted it was important for the members so they would understand what the appellant meant by "a quickie" and how the appellant came to the

attention of law enforcement.¹⁹ Further, he concluded that the probative weight was heightened by the similarities to the charged offense. All three alleged victims were young boys approached by a man driving a silver or light colored SUV while walking home alone home from school. The driver solicited sexual acts using hand gestures and verbal comments while driving by them.

We agree with the military judge's assessment of the probative value of this evidence. The conduct during the three incidents was strikingly similar, making the evidence highly probative, but not unfairly prejudicial.²⁰ This type of evidence is exactly what MIL. R. EVID. 414 was intended to admit. Though uncharged misconduct at this trial, it also demonstrates permissible government theories of culpability. The members were informed of the prior acquittals and properly instructed on how to use the evidence for propensity and motive, intent or common scheme consideration.

c. Potential for less prejudicial evidence; distraction of the factfinder; time [*14] needed for proof of the prior conduct

Like the first two *Wright* factors above, we agree with the military judge's conclusion that there was no less prejudicial evidence. Like the military judge, we find distraction to the factfinder and time needed to prove the prior conduct to be linked since the primary consideration for both was Alex's and Pete's testimony. The judge noted in his ruling that he was sensitive to overuse of evidence of the prior acquittals and would limit distraction through tailored examinations and limiting instructions. He followed through on this commitment at trial, ensuring a minimum amount of time was focused on propensity and providing limiting instructions during both the testimony and in his final instructions.

¹⁷ AE XLVII at 4.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See *United States v. Oakley*, No 201200299, 2015 CCA LEXIS 154, at *33-34 (N-M. Ct. Crim. App. 21 Apr 2015).

The unique facts of this case also properly allowed the prior acquittal evidence under MIL. R. EVID. 404(b). While the trial counsel did discuss the three boys in his opening statement and closing argument, his theme was focused much more on opportunity, modus operandi, and pattern of the appellant's behavior given the similarities of the encounters rather than propensity. The appellant contends that this government emphasis was unfairly prejudicial, but his defense theory [*15] of **misidentification actually made the pattern theme** under MIL. R. EVID. 404(b) arguably more relevant to the members than the same information admitted as propensity evidence. The evidence did not inflame the members or cause confusion, rather it highlighted the three incidents for the members to consider along with the rest of the evidence.

d. Temporal proximity; frequency of the acts; presence or lack of intervening circumstances; relationship between the parties

Concerning these *Wright* factors, the military judge's written findings noted that Alex and Pete made allegations days apart and approximately five months after the charged misconduct. There were no intervening circumstances that would diminish the probative value of the evidence, and the parties were not related. The military judge concluded that these factors weighed in favor of admission.

Again, we agree. The temporal proximity is highly probative given their similarities but not unfairly so.

We find that the military judge properly conducted the MIL. R. EVID. 403 balancing test and neither erred nor abused his discretion by admitting the prior acquittals under either MIL. R. EVID. 414 or 404(b). His measured analysis on the record and in his written ruling was reasonable and not [*16] clearly erroneous. The similarities between the two incidents from the prior trial provided a strong nexus to the charged offenses, and the military judge exercised appropriate sensitivity to the

acquittal evidence.²¹ He ensured the members were aware of the acquittals in his instructions (over government objection) and limited questioning as appropriate to avoid undue delay and confusion of the members.

B. Military judge's instructions

The appellant next claims the military judge erred by failing to instruct the members that they were required to find the uncharged propensity misconduct occurred by a preponderance of the evidence. We disagree.

1. The instruction

The military judge relied in part on [*United States v. Williams*, 75 M.J. 621 \(A. Ct. Crim. App. 2016\)](#)²² in determining that "the military judge does not have to instruct that the members find by preponderance of the evidence that the propensity evidence did or did not occur pursuant to [MIL. R. EVID.] 413 or 414[.]"²³ After informing defense counsel that he intended to use the defense's proposed limiting instruction except for that sentence, he asked if the defense agreed to the limiting instruction. The trial defense counsel replied:

DC: With the one strike, yes, sir.

²¹ See [*United States v. Griggs*, 51 M.J. 418, 420 \(C.A.A.F. 1999\)](#) (prior acquittal evidence is not per se barred as evidence of prior acts); [*United States v. James*, 63 M.J. 217, 221 \(C.A.A.F. 2006\)](#) (no temporal limitation on the admissibility of specific uncharged child molestation misconduct; it can be prior or subsequent to the charged acts as MIL. R. EVID. 414 evidence admissibility should be liberally construed); and [*United States v. Morrison*, 52 M.J. 117, 122-23 \(C.A.A.F. 1999\)](#) (where evidence is offered to show modus operandi, there must be a high degree of similarity between the extrinsic offense and the charged offense).

²² The case was reversed and remanded in light of [*United States v. Hills*, 75 M.J. 350 \(C.A.A.F. 2016\)](#) due to charged propensity misconduct which is not the issue in the present case. [*United States v. Williams*, 75 M.J. 430 \(C.A.A.F. 2016\)](#).

²³ Record at 490.

MJ: No objections to any [*17] other aspect of it?

DC: No, sir.²⁴

Before their deliberations on findings, the military judge instructed the members concerning their use of the uncharged acquittal evidence. They could consider the uncharged sexual misconduct pursuant to MIL. R. EVID. 414, as evidence of the appellant's propensity to commit the charged sexual misconduct, and pursuant to MIL. R. EVID. 404(b), as evidence of the appellant's identity, motive or common scheme or plan:

You heard evidence that the accused may have committed other offenses upon [Alex] and [Pete]. The accused is not charged with these other offenses and was previously acquitted of these offenses at a prior proceeding. You may, however, consider the evidence of those offenses involving [Alex] and [Pete] for its bearing on any matter to which it is relevant in relation to the charged offenses. You may consider the evidence related to [Alex] and [Pete] for its tendency, if any, to show the accused's propensity or predisposition to engage in similar offenses, as well as its tendency, if any, to establish among other possible things, identity, motive, or common scheme or plan. You may not, however, convict the accused solely because you believe he committed these other offenses, or solely [*18] because you believe the accused has a propensity or predisposition to engage in similar acts. In other words, you cannot use this evidence to overcome a failure of proof in the government's case, if you perceive any to exist.²⁵

2. The law

"Whether a panel was properly instructed is a

question of law we review de novo." *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008) (citation omitted). Whether an appellant has waived an issue is a question of law we review de novo. *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017) (citation omitted).

"Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (citations and internal quotation marks omitted). When an appellant has "intentionally waive[d] a known right at trial, it is extinguished and may not be raised on appeal." *Id.* Forfeited objections to evidence are reviewed for plain error, which exists where: (1) an error was committed; (2) the error was plain, clear, or obvious; and (3) the error resulted in material prejudice to substantial rights. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007) (citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998)).

Here the appellant concedes he did not object to the instructions at trial but argues the plain error standard applies.²⁶ Assuming without deciding that the appellant forfeited, rather than waived, [*19] his right to object to the military judge's instructions, we find no error.

3. Plain error analysis

The appellant contends that the military judge's instructions should have contained the following language: "[t]his evidence may have no bearing on your deliberations *unless you first determine by a preponderance of the evidence, that is more likely than not, these uncharged offenses occurred.*"²⁷

The military judge discussed the defense's request

²⁴ *Id.* at 518.

²⁵ *Id.* at 615.

²⁶ *United States v. Davis*, 76 M.J. 224, 229 (C.A.A.F. 2017).

²⁷ Appellant's Supplemental Brief of 16 Feb 2018 at 3 (emphasis added) (citing Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at ¶ 7-13-1 (20 Mar 2015)).

to specifically instruct the members regarding their determination of whether the uncharged propensity offenses occurred and by what standard. However, he believed procedurally the initial requirement had been fulfilled once he made the admissibility analysis under MIL. R. EVID. 414 and explained to the members that the appellant had been acquitted of those offenses.²⁸ Although he partially relied on *Williams*, he also compared the requested instruction to more traditional uncharged misconduct instructions under MIL. R. EVID. 404(b). He noted the members are generally permitted to give their own assignment of weight to uncharged MIL. R. EVID. 404(b) evidence once the judge has properly determined admissibility.

In post-*Hills* courts-martial, military judges no longer allow charged evidence to act as propensity [*20] evidence for other charged offenses.²⁹ While *Hills* focused on charged misconduct establishing propensity evidence for other charged misconduct—which is not the issue here—the instructions were found to be confusing in part due to similar language the appellant now suggests was missing in his case. We recognize that the charged propensity evidence at issue in *Hills* carried a much greater risk of muddled instructions than what the appellant proposed here regarding uncharged misconduct, but he offers no authority for his position that the military judge must instruct the members using the preponderance standard.³⁰

²⁸ Record at 490, 522, 615.

²⁹ *Hills*, 75 M.J. at 357 ("Quite simply, we hold not only that charged offenses are not properly admitted under M.R.E. 413 to prove a propensity to commit the charged offenses, but also that the muddled accompanying instructions implicate 'fundamental conceptions of justice' under the *Due Process Clause* by creating the risk that the members would apply an impermissibly low standard of proof, undermining both 'the presumption of innocence and the requirement that the prosecution prove guilt beyond a reasonable doubt,' *Wright*, 53 M.J. at 481."

³⁰ *United States v. Schroder*, 65 M.J. 49, 54, 56 (C.A.A.F. 2007) (finding the military judge is not "required to disaggregate the [414] instruction" and that a MIL. R. EVID. 414 instruction must state "the introduction of such propensity evidence does not relieve the government of its burden of proving every element of every offense

Accordingly, we find that the military judge did not commit error, and certainly not plain or obvious error, when instructing the members on how to use the uncharged misconduct evidence as both uncharged misconduct and propensity evidence. Notably, after our superior court's decision in *Hills*, the Military Judge's Benchbook was revised and the language instructing the members to determine by "a preponderance of the evidence, that is more likely than not, these uncharged offenses occurred" was omitted.³¹

This revision brought the Benchbook instructions into alignment with those applicable [*21] in the Article III federal courts.³² The military judge's instruction—over government objection—reminding the members that the appellant was acquitted of the uncharged misconduct/propensity evidence ensured that the members understood the rules of its use, the presumption of innocence on the charged offenses, and the requirement that the prosecution prove guilt beyond a reasonable doubt.³³ The appellant was charged with three offenses but convicted of two—which reinforces our belief that the members understood and properly followed the judge's instructions.

C. Improper referral

In his third AOE, the appellant argues the military judge erred when he failed to preclude Col W, the staff judge advocate (SJA), from participation in

charged. Moreover, the factfinder may not convict on the basis of propensity evidence alone"). We note both of these requirements were contained in the military judge's instructions here.

³¹ See Dept. of the Army Pamphlet 27-9 at 1105-1106 (10 Sep. 2014, 20 Mar. 2015, and Feb. 2018). This instruction is commonly referred to by practitioners as "7-13-1. Other Crimes, Wrongs, or Acts Evidence." Although the Benchbook is not legally binding, it does highlight military justice practitioners' commonly held beliefs on the state of the UCMJ.

³² *Huddleston*, 485 U.S. at 690 (a trial court "simply examines all the evidence in that case and decides whether a jury could reasonably find the conditional fact . . . by a preponderance of the evidence").

³³ The appellant does not claim prejudice and we agree there is none.

areas of pretrial decision-making, and that such an error resulted in the improper referral of the appellant's charges to general court-martial. We disagree.

Article 34, UCMJ, and *RULE FOR COURTS-MARTIAL (R.C.M.) 406* require the CA to submit all preferred charges to an SJA for "consideration and advice" before referring any charge to a general court-martial for trial. *MCM, UNITED STATES (2012)*. Such pretrial advice must be provided in writing and signed by the SJA to enable the CA to proceed. *R.C.M. 406(b)*.³⁴ Whether [*22] an individual is disqualified from acting as an SJA is a legal question reviewed *de novo*. [*United States v. Stefan, 69 M.J. 256, 258 \(C.A.A.F. 2010\)*](#).

1. Col W's role

The facts underlying this claim and key to its resolution are undisputed.³⁵ In approximately July 2012, after the preferral of charges and *Article 32* hearing for the appellant's first court-martial, Col W assumed the Regional Trial Counsel (RTC) billet at the Legal Services Support Section East (LSSS-E). In this capacity, Col W "oversaw all prosecutions within the geographic region encompassing Camp Lejeune,"³⁶ and was delegated detailing authority over the trial counsel stationed within the region.

³⁴ "The staff judge advocate is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice. . . . [B]ut the staff judge advocate is, unless disqualified, responsible for it and must sign it personally. Grounds for disqualification in a case include previous action in that case as a preliminary hearing officer, military judge, trial counsel, defense counsel, or member." *R.C.M. 406(b) Discussion*.

³⁵ In his written ruling on Col W's disqualification, the military judge adopted the findings of fact from both defense counsel's motion and government counsel's response. *AE XLII* at 1, n.1 ("To the extent that a factual dispute exists between the two documents[,] the Court finds that this dispute is inconsequential to the resolution of this issue.").

³⁶ *Id.* This region included Camp Lejeune, Marine Corps Air Station Cherry Point, and Marine Corps Recruiting Depot Parris Island.

While Col W was serving as RTC, Major (Maj) L requested to be detailed to the appellant's first court-martial to assist with pretrial motions. Col W granted his request, detailing Maj L to join, but not supplant, the acting trial counsel originally detailed by the senior trial counsel. Beyond this one instance, "[n]either Col [W][,] nor any other member of the prosecution recall the extent that [he] personally participated in the prosecution of the [appellant's] case (if at all)."³⁷ Col W completed his roughly eight-month RTC tour shortly thereafter—months before the appellant's first trial [*23] began.³⁸

However, that did not mark the end of his involvement with the appellant's case. When our superior court later authorized a rehearing on the charges involving Ryan, Col W was the SJA for the General Court-Martial Convening Authority. On 3 May 2016, Col W prepared an *Article 34, UCMJ*, pretrial advice letter regarding the appellant's rehearing. Consistent with Col W's recommendation, the CA referred the charges to a general court-martial.

2. The military judge's ruling

On 8 September 2016, the appellant filed a motion claiming improper referral of charges, asserting that Col W was disqualified from acting as SJA due to his previous role as RTC during the appellant's first court-martial.

The military judge granted the motion in part in a thorough written ruling. First, he concluded "in the exercise of an abundance of caution, that [Col W] was disqualified from providing the pretrial advice" for the appellant's rehearing.³⁹ He noted that although it was unclear "whether he performed the duties of a trial counsel while fulfilling his role as

³⁷ *Id.*

³⁸ *AE XXXIII* at 2 ("[H]e ceased being the RTC on 14 March 2013" and the first court-martial "was conducted in August 2013").

³⁹ *AE XLII* at 2.

RTC[.]" the billet itself "implies that he played some role sufficient to make disqualification appropriate."⁴⁰ Specifically, the military judge [*24] surmised that Col W "likely remained cognizant of trial strategy" given his direct supervisory responsibility, the close physical proximity to the trial counsel, the severity of the charges, and the discretion exercised in detailing Maj L.⁴¹

Second, the military judge denied the appellant's request to dismiss the charges. Instead, he ordered the provision of new *Article 34, UCMJ*, advice, concluding it was "only necessary for a qualified SJA to provide the appropriate pretrial advice, and for the [CA] to affirm whether he desires to adhere to his previous decision to refer the charges."⁴² In so doing, the military judge relied on *United States v. Loving*, 41 M.J. 213, 288 (C.A.A.F. 1994), which held that factual errors in an *Article 34, UCMJ*, letter are not jurisdictional and therefore may be cured through supplemental advice without re-referral.

As directed by the military judge, an uninvolved, qualified SJA prepared a new *Article 34* advice letter. This second advisement entailed the same conclusions on the sufficiency of the charges, evidence, and jurisdiction, with the same recommendation. Armed with this new *Article 34* advice, the CA reaffirmed his original decision referring the charges to general court-martial.

3. Disqualification [*25] of the SJA

On appeal, the appellant argues that the charges should have been dismissed as a result of Col W's narrow disqualification and likely pretrial involvement prior to the provision *Article 34* advice—decisions to retry the case and to continue

pretrial confinement.⁴³ The government opposes, arguing the provision of new *Article 34, UCMJ*, advice prepared by a different judge advocate remedied any potential prejudice.

In *United States v. Hardin*, 7 M.J. 399, 405 (C.M.A. 1979) the issue was "whether the mere fact that government counsel at the pretrial investigation participated in the preparation of this otherwise sound pretrial advice requires automatic reversal of the appellant's conviction." The court answered in the negative, finding that the predecessor to the R.C.M. 406 Discussion, ¶ 35b,⁴⁴ was "not a codal proscription and accordingly, if error, it can hardly be considered anything but ordinary." *Id.*

Instead, *Hardin* endorsed a more pragmatic approach, recognizing that to "find no error in the contents of the pretrial advice but per se error in the one who writes it is perception for perception's sake alone." *Id. at 404*. Thus, "[t]he advice must be tested for legal competence and accuracy as well as the possibility [*26] . . . that the [CA] might have been misled in his prosecutorial decision as a result of some bias in the advice stemming from the [SJA's] prior involvement in the case." *Id. at 405*. In other words, "it is the lawfulness of their prosecutorial conduct performed in a professional manner which must be tested under *Article 34*, and not their functional inclinations at this [pretrial] stage of the proceedings." *Id. at 404*.

This approach recognizes that the SJA's pretrial advice is "primarily [a] prosecutorial codal tool." *Id. at 403*. As such, the SJA shall not be elevated "to a state of absolute impartiality required in the strict sense for a trial judge," but rather acts properly like a prosecutor when "advis[ing] the

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ The appellant makes this argument, but provides no evidence of Col W's involvement in these two areas. Appellant's Brief of 18 Sep 2017 at 32.

⁴⁴ Paragraph 35b, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969) (Revised Edition) ("No person who has acted as investigating officer, military judge, or member of the court, prosecution, or defense in any case may later act as staff judge advocate or legal officer in the same case.").

referral authority whether he may legally proceed if he so desires." [*Id.* at 403-04](#)

4. Prejudice

The military judge's ruling remedied any deficiency—real or perceived—resulting in no prejudice to the appellant.⁴⁵

Here, the CA's decision to order a rehearing did not constitute "ill-considered action," nor were the referred charges regarding Ryan "ordered to trial due to inadvertence or mistake." [*United States v. Smith*, 13 C.M.A. 553, 33 C.M.R. 85, 89 \(C.M.A. 1963\)](#) (citations omitted). As part of his written ruling, the military judge ordered a qualified SJA to provide fresh pretrial advice [*27] for the CA to then affirm or revoke his referral decision via written memorandum. One week later, Maj Z provided just that, and the CA affirmed his decision to refer.

Even proven errors in pretrial advice, whether found within the four corners of the *Article 34, UCMJ*, advice or in the status of the author, may be cured through supplemental advice.⁴⁶ Likewise, it would defy all notions of judicial efficiency to mandate the per se withdrawal of charges without a minimal showing of prejudice. Undoubtedly, the very purpose in requiring the parties at trial to move for appropriate relief based on defects in *Article 34, UCMJ*, advice before the entry of pleas⁴⁷ is "to prevent otherwise correct trials from

being vitiated by defects in ancillary proceedings." [*United States v. Klawuhn*, 33 M.J. 941, 943 \(N.M.C.M.R. 1991\)](#). Thus, we agree with the military judge that the charges were properly referred and need not have been withdrawn or dismissed.

After reviewing the record, we conclude that *Article 34, UCMJ*, advice was provided by Maj Z to the CA before the appellant's charges were again referred to general court-martial. Therefore, there is neither improper referral nor prejudice to the appellant.

D. Military judge recusal

The appellant's [*28] fourth claimed error focuses on a past position held by the military judge before presiding over the rehearing. Specifically, the appellant argues that in light of his former role as the Officer-in-Charge (OIC) of the LSSS during the investigation stage of the appellant's first court-martial, the military judge "should have recused himself and avoided any appearance of conflict."⁴⁸ We disagree.

We review a military judge's decision not to recuse himself for an abuse of discretion. [*United States v. McIlwain*, 66 M.J. 312, 314 \(C.A.A.F. 2008\)](#) (citing [*United States v. Butcher*, 56 M.J. 87, 90 \(C.A.A.F. 2001\)](#)). "An accused has a constitutional right to an impartial judge." [*Butcher*, 56 M.J. 87, 90](#) (quoting [*United States v. Wright*, 52 M.J. 136, 140 \(C.A.A.F. 1999\)](#)). "There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle[.]" [*United States v. Quintanilla*, 56 M.J. 37, 44 \(C.A.A.F. 2001\)](#). Accordingly, the "moving party has the burden of establishing a reasonable factual basis for disqualification. More than a mere surmise or conjecture is required." [*Wilson v. Ouelette*, 34 M.J. 798, 799 \(N.M.C.M.R. 1991\)](#) (citing [*United States*](#)

⁴⁵ Notably, the appellant does not allege prejudice and we find no material prejudice to the appellant's substantial rights.

⁴⁶ See, e.g., [*Loving*, 41 M.J. at 288](#) ("We hold that the factual errors in the original pretrial advice were not jurisdictional, were corrected by the supplemental advice, and were not prejudicial to appellant."); [*United States v. Gebert*, No. 201500381, 2016 CCA LEXIS 662, at *19-22 n.47](#), unpublished op. (N-M. Ct. Crim. App., 15 Nov 2016) ("We also find no support for the appellant's assertion that the originally defective *Article 34, UCMJ*, advice in some way "baked" prejudice into the process that wasn't remedied by the issuance of new advice"), *rev. denied*, 76 M.J. 172 (C.A.A.F. 2017).

⁴⁷ R.C.M. 905(b)(1) requires "objections based on defects (other than jurisdictional defects) in the . . . referral of charges" to be raised

before a plea is entered, and R.C.M. 905(b)(1), Discussion explicitly states that such a defect includes "inadequate pretrial advice."

⁴⁸ Appellant's Brief at 39.

v. Allen, 31 M.J. 572, 601 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991)). in this case."⁵⁰

Disqualification of a military judge may occur for either the appearance of bias or actual bias. R.C.M. 902(a) and (b). "The appearance standard is designed to enhance public confidence in the integrity of the judicial system." *Quintanilla*, 56 M.J. at 45 (citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)). "Th[is] rule also serves to reassure the parties as to the fairness of the proceedings[.]" [*29] *Id.*

1. The military judge's ruling

At an *Article 39(a)*, *UCMJ*, session during appellant's second trial, defense counsel conducted *voir dire* of the military judge. The military judge acknowledged that he had served as the LSSS OIC from October 2010 through May 2012, before the appellant's charges were preferred in mid-May 2012. In this capacity, he supervised the trial and defense sections, among several others. As part of his supervisory responsibilities, the military judge also served as the reporting senior for the Military Justice Officer (MOJO) and was copied on all of the MOJO's ongoing NCIS investigations. The MOJO at the time "was delegated authority to detail cases[,] generally oversaw the prosecutorial function at the LSSS. . . . and would periodically brief [the OIC] on important cases that he or others were working on[.]"⁴⁹ After eliciting this information from the military judge, the trial defense counsel verbally requested that he disqualify himself under R.C.M. 902(a).

The military judge denied the defense's motion after having "thought hard" about his previous role because he had "absolutely no recollection of participating in any aspect of the investigation, pre-preferred process, or [*30] preferred of the charges

Unsatisfied, the trial defense counsel filed a written motion for reconsideration. After considering this motion, the government's response, the additional *voir dire* by trial counsel, and the oral arguments of both parties, the military judge again declined to recuse himself, making findings of fact and conclusions of law regarding his impartiality in an even more thorough verbal ruling. The military judge found the "fact that NCIS includes 'OIC/LSSS' on the distribution list for their reports of investigation has little significance, as [he] certainly [does] not recall receiving copies" of every single one during his tenure.⁵¹ The military judge also reemphasized that neither he nor the MOJO "can recall ever discussing this matter back in 2011 or 2012, and to speculate as to whether [they] did talk about it over four years ago would be pure conjecture."⁵²

2. Appearance of bias

The appellant raises solely the appearance of bias in his appeal. That test under R.C.M. 902(a) is an objective standard concerning whether there was "[a]ny conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably [*31] be questioned." *Butcher*, 56 M.J. at 91 (quoting *United States v. Kincheloe*, 14 M.J. 40, 50 (C.M.A. 1982)) (internal quotation marks omitted). While performing this test, we consider the facts and circumstances through an objective lens: "not in the mind of the military judge himself, but rather in the mind of a reasonable man . . . who has knowledge of all the facts." *Wright*, 52 M.J. at 141 (citations and internal quotation marks omitted). Thus, the "judge's statements concerning his intentions and the matters upon which he will rely are not

⁵⁰ *Id.* at 15-16.

⁵¹ *Id.* at 100.

⁵² *Id.* at 99.

⁴⁹ Record at 99.

irrelevant to the inquiry." *Id.* (citations omitted)

On appeal, the appellant remains unable to provide any meaningful evidence to support his assertion that the military judge exuded the appearance of bias in order to elevate his claim above conjecture. The appellant's brief is an almost verbatim reiteration of the challenge at trial⁵³ and does not reveal any new facts that would suggest a lack of impartiality. The appellant provides no evidence, relying instead on conclusory statements that the possibility of the military judge's awareness of the facts of the case creates an apparent bias.⁵⁴

There is simply no evidence that the military judge was biased or had the appearance of bias; he was firm but fair to both sides. The full record discloses that [*32] the military judge applied the law correctly and even-handedly. We find that the "court-martial's legality, fairness, and impartiality" were not put into doubt. [*United States v. Burton*, 52 M.J. 223, 226 \(C.A.A.F. 2000\)](#) (citations and internal quotation marks omitted).

Based on our review of the record and in light of the actions taken by the military judge, we find that no reasonable observer, seized of the pertinent facts, could reasonably question the military judge's impartiality. We therefore hold that the military judge did not abuse his discretion in denying the appellant's recusal motion. We further conclude that a reasonable person observing this court-martial would have full confidence in the judicial process.

E. Sentence disparity and severity

In his final AOE, the appellant argues that his sentence is "inappropriate and highly disparate from a closely related" Army case with an

"extremely similar fact pattern," which entitles him to relief.⁵⁵ Because he has since completed his confinement, he asks this court to set aside his dishonorable discharge.⁵⁶ We decline to do so.

1. Sentence disparity

A narrow exception to the general principle of non-comparison regarding sentences exists "in those rare instances in which sentence appropriateness [*33] can be fairly determined only by reference to disparate sentences adjudged in closely related cases." [*United States v. Lacy*, 50 M.J. 286, 288 \(C.A.A.F. 1999\)](#) (quoting [*United States v. Ballard*, 20 M.J. 282, 283 \(C.M.A. 1985\)](#)). When requesting relief by way of this exception, an appellant's burden is twofold: the appellant must demonstrate "that any cited cases are 'closely related' to his or her case and that the resulting sentences are 'highly disparate.'" *Id.* Only if the appellant succeeds on both prongs will the burden shift to the government to "show that there is a rational basis for the disparity." *Id.*

First, for cases to qualify as closely related, "the cases must involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design." [*United States v. Kelly*, 40 M.J. 558, 570 \(N.M.C.M.R. 1994\)](#). "This threshold requirement can be satisfied by evidence of "co[-]actors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared[.]" [*United States v. Pena*, No. 201700327, 2018 CCA LEXIS 279, at *4 \(N-M. Ct. Crim. App. 5 Jun 2018\)](#) (quoting [*Lacy*, 50 M.J. at 288-89](#) (finding cases qualified as closely related "where appellant and two other Marines engaged in the same course of conduct with the same victim in

⁵³ Appellant's Brief at 34-39; Appellate Exhibit XXVII at 1-5.

⁵⁴ Record at 93-94 ("it is not an unreasonable stretch to believe that the military judge was certainly aware of the case" because "it is possible that there was a general discussion of the facts" and "the reality is that the optics here just aren't good").

⁵⁵ Appellant's Brief at 40, 44.

⁵⁶ The case cited for sentence comparison resulted in a bad-conduct discharge and the appellant is requesting that we set aside his dishonorable discharge.

each other's presence")); [*United States v. Williams*, No. 201600197, 2017 CCA LEXIS 702, at *8](#), unpublished op. (N-M. Ct. Crim. App. 16 Nov [*34] 2017) (finding cases did not qualify as closely related where "the appellant's offenses and those committed by the other five Marine E-8s took place at different times, at different commands, in different parts of the world, and involved unrelated women under differing factual circumstances").

Second, when assessing disparity among sentences, we look only to adjudged sentences, rather than those approved or bargained for in a pre or post-trial agreement: "[a]djudged sentences are used because there are several intervening and independent factors between trial and appeal—including discretionary grants of clemency and limits from pretrial agreements—that might properly create the disparity[.]" [*United States v. Roach*, 69 M.J. 17, 21 \(C.A.A.F. 2010\)](#). Accordingly, we "refrain from second guessing or comparing a sentence that flows from a lawful pretrial agreement or a CA's lawful exercise of his authority to grant clemency to an appellant." [*United States v. Widak*, No. 201500309, 2016 CCA LEXIS 172, at *7](#), unpublished op. (N-M. Ct. Crim. App. 22 Mar 2016) (citations omitted).

Here, the appellant requests we compare his sentence to one other sentence awarded in [*United States v. Rodriguez*, No. 20130577, 2015 CCA LEXIS 551](#), unpublished op. (A. Ct. Crim. App. 1 Dec 2015). In *Rodriguez*, an Army specialist "followed minor girls walking on post in his car, and then approached [*35] them and talked to them." *Id.* at *3. He received a sentence of a bad-conduct discharge, confinement for two years, and reduction to pay grade of E-1 for his offenses, which included one specification of sexual abuse of a child by committing a lewd act.⁵⁷

⁵⁷ The appellant in *Rodriguez* was convicted of "one specification of failing to obey a lawful order, one specification of sexual abuse of a child by committing a lewd act, and six specifications of wrongfully annoying and molesting a minor in violation of [California Penal Code § 647.6\(a\)\(1\)](#), in violation of Articles 92, 120b, and 134,"

We find the appellant has failed to carry his preliminary burden to show this cited case is closely related to his own. His analogy is insufficient—the two offenders were not co-conspirators, involved in a common criminal scheme, pursuing a shared victim, or otherwise acting in concert to establish the prerequisite "direct nexus" with one another. Rather, the two men are from different branches of service, different coasts, and were charged under different versions of Article 120, UCMJ. Whether cases are closely related is a legal question that cannot be satisfied by some semblance of factual similarity between two independent actors. See [*United States v. Durant*, 55 M.J. 258, 262 \(C.A.A.F. 2001\)](#).

Assuming the appellant's case was closely related to *Rodriguez*, he also fails to satisfy the second prong of the test of proving a wide disparity between the two adjudged sentences "that are unsupported by good and cogent reasons." [*Kelly*, 40 M.J. at 570](#). The appellant overlooks the procedural history in *Rodriguez* [*36], specifically the key factor that *Rodriguez* had negotiated a pretrial agreement and pled guilty to all offenses with a military judge; whereas the appellant pled not guilty and was sentenced by members. Because "pretrial agreements involve highly subjective processes which this court is ill-equipped to second guess[.]" we must refrain questioning the disparity alleged here. [*Widak*, 2016 CCA LEXIS 172, at *7](#).

Thus, the appellant has not sustained either part of his dual burden of showing a closely related case with an adjudged sentence to warrant comparison. Plainly, "[t]he mere similarity of offenses is not sufficient." [*United States v. Washington*, 57 M.J. 394, 401 \(C.A.A.F. 2002\)](#) (citation omitted). We are not convinced that the appellant suffered a miscarriage of justice solely because another offender took advantage of the benefits and relief of a pretrial agreement by accepting full responsibility

UCMJ, [10 U.S.C. §§ 892, 920b](#), and [934 \(2012\)](#). *Id.* at *1-2. The Army Court of Criminal Appeals set aside the specifications charged under the California Penal Code as preempted by [Article 120\(b\), UCMJ](#), and reassessed the sentence. *Id.* at *7-8.

for his actions, while the appellant declined to do so.

2. Sentence severity

Having found the appellant's request for comparison unpersuasive, we now evaluate the appellant's sentence on its own facts as part of our due diligence under *Article 66(c)*, *UCMJ*. See [*United States v. Baier*, 60 M.J. 382, 384-85 \(C.A.A.F. 2005\)](#).⁵⁸ We review issues of sentence appropriateness *de novo*. [*United States v. Lane*, 64 M.J. 1, 2 \(C.A.A.F. 2006\)](#).

"Sentence appropriateness involves the judicial function [*37] of assuring that justice is done and that the accused gets the punishment he deserves." [*United States v. Healy*, 26 M.J. 394, 395 \(C.M.A. 1988\)](#). This requires our "individualized consideration of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" [*United States v. Snelling*, 14 M.J. 267, 268 \(C.M.A. 1982\)](#) (quoting [*United States v. Mamaluy*, 10 C.M.A. 102, 27 C.M.R. 176, 180-81 \(C.M.A. 1959\)](#)). In making this assessment, we analyze the record as a whole. [*Healy*, 26 M.J. at 395](#). Notwithstanding our significant discretion for determining appropriateness, we must remain mindful that we may not engage in acts of clemency. [*United States v. Nerad*, 69 M.J. 138, 146 \(C.A.A.F. 2010\)](#).

Looking to his offenses, our superior court has recognized that "taking indecent liberties [with a child] is the first step toward more serious sex crimes of a perverted nature[.]" [*United States v. Brown*, 3 C.M.A. 454, 13 C.M.R. 10 \(C.M.A. 1953\)](#). Here, the appellant targeted young and vulnerable children for his indecent communications with the hope that his words would lead to more. His two

convictions involving Ryan demonstrate a calculated attempt to entice a teenage boy to engage in oral sexual acts without regard for the impact on his impressionable victim. He repeatedly circled around the block, unwilling to accept Ryan's refusal to participate until Ryan ran home to prevent a possible fifth drive-by. Despite these actions, he remained largely unremorseful throughout his [*38] unsworn statement, making a general apology⁵⁹ and claim that he had "changed from [his] experiences."⁶⁰

The appellant faced the possibility of 35 years' confinement and a dishonorable discharge. Given the circumstances of his offenses, we find that the approved 7 years' confinement is within the bounds of reason. Regarding the dishonorable discharge, the appellant's actions severely compromised his standing as a member of society and the armed forces. We too are satisfied that these offenses warrant the severe punishment that such a discharge represents.

Having given our individualized consideration of the appellant, the appellant's record of service, the nature and seriousness of the offenses, and all other matters contained in the record of trial, we find the sentence to be appropriate for this offender and his offenses. Granting sentence relief at this point would be to engage in clemency, and we decline to do so. [*Healy*, 26 M.J. at 395-96](#).⁶¹

⁵⁹ The appellant said, "I would like to apologize for any mistakes I've made, any pain I have caused." Record at 672. Otherwise, he did not express any other signs/words of remorse or concern for his child victim.

⁶⁰ *Id.* at 674.

⁶¹ We note that here the CA in this case was not constrained in his clemency consideration. Because the appellant's offenses occurred in 2011, the CA was vested with full [*Article 60, UCMJ*](#), authority to "modify or dismiss charges and modify the sentence." [*United States v. Perez*, 66 M.J. 164, 165 \(C.A.A.F. 2008\)](#) (per curiam). The CA declined to exercise [*39] this unfettered authority and instead approved the sentence authorized by the law. Although the appellant was sentenced to 10 years' confinement on rehearing, he was sentenced to 7 years' confinement at his first court-martial and therefore the CA properly approved the 7 vice 10 years' confinement.

⁵⁸ See also [*United States v. Snelling*, 14 M.J. 267, 268 \(C.M.A. 1982\)](#) ("However proper it may be for the [CA] and [Courts of Criminal Appeals] to consider sentence comparison as an aspect of sentence appropriateness, it is only one of the many aspects of that consideration") (citations omitted).

III. CONCLUSION

The findings and sentence are affirmed.

Senior Judge HUTCHISON and Judge SAYEGH
concur.

End of Document

United States v. Hyppolite

United States Air Force Court of Criminal Appeals

October 25, 2018¹, Decided

No. ACM 39358

¹ We heard oral argument in this case on 5 September 2018.

Reporter

2018 CCA LEXIS 517 *

UNITED STATES, Appellee v. Ralph J. HYPPOLITE, II, Staff Sergeant (E-5), U.S. Air Force, Appellant

Notice: THIS IS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 18.4. NOT FOR PUBLICATION

Subsequent History: Review granted by, in part *United States v. Hyppolite*, 78 M.J. 320, 2019 CAAF LEXIS 49 (C.A.A.F., Jan. 29, 2019)

Review denied by *United States v. Hyppolite*, 79 M.J. 58, 2019 CAAF LEXIS 305, 2019 WL 2092333 (C.A.A.F., Apr. 25, 2019)

affirmed on other grounds by *United States v. Hyppolite*, 79 M.J. 161, 2019 CAAF LEXIS 570 (C.A.A.F., Aug. 1, 2019)

Writ of habeas corpus denied *In re Hyppolite*, 2021 CCA LEXIS 126 (A.F.C.C.A., Mar. 29, 2021)

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Charles E. Wiedie, Jr. (arraignment); Joseph S. Im-burgia. Approved sentence: Dishonorable discharge, confinement for 7 years, forfeiture of all pay and allowances, and reduction to E-1. Sentence adjudged 8 June 2017 by GCM convened at Kadena Air Base, Japan.

Counsel: For Appellant: William E. Cassara, Esquire (argued); Captain Dustin J. Weisman, USAF.

For Appellee: Major J. Ronald Steelman, III, USAF; Captain Michael T. Bunnell (argued), USAF; Mary Ellen Payne, Esquire.

Judges: Before HARDING, HUYGEN, and POSCH, Appellate Military Judges. Judge POSCH delivered the opinion of the court, in which Senior

Judge HARDING joined.² Judge HUYGEN filed a separate opinion concurring in the result in part and dissenting in part.

Opinion by: POSCH

Opinion

POSCH, Judge:

A general court-martial composed of a military judge found Appellant guilty, contrary to his pleas, of three specifications of abusive sexual contact and one specification of sexual assault, all in violation of [Article 120](#), Uniform Code of Military Justice (UCMJ), [10 U.S.C. § 920](#). Appellant was acquitted of one specification of abusive sexual contact. The military judge sentenced Appellant to a dishonorable discharge, [*2] confinement for seven years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.

Appellant raises five issues on appeal: (1) whether the military judge erred in allowing the Government to use the charged offenses as evidence of a plan or scheme under Mil. R. Evid. 404(b) to prove other charged offenses; (2) whether the evidence is legally and factually sufficient to support the convictions; (3) whether the convening authority improperly referred Specifications 1 and 5 of the Charge alleging sexual misconduct after a preliminary hearing officer (PHO) determined there was no probable cause to believe Appellant committed those offenses; (4) whether the addendum to the staff judge advocate's recommendation (SJAR) failed to adequately address raised legal errors and provided incomplete advice to the convening authority; and (5) whether the military judge erred by admitting messages

²Senior Judge Harding participated in this decision prior to his retirement.

Appellant sent to Senior Airman (SrA) JD, in which Appellant took "full responsibility for what happened," without also admitting later messages from the conversation, which showed that Appellant believed he and SrA JD both made bad decisions while they [*3] were drunk.³ We also considered the issue of post-trial delay, although it was not raised by Appellant.

We find the evidence is factually insufficient to sustain the conviction of abusive sexual contact of Staff Sergeant (SSgt) RW in Specification 1 of the Charge. We thus set aside the finding of guilt for Specification 1 and reassess the sentence. We also find the military judge erred in ruling that evidence of a common plan or scheme under Mil. R. Evid. 404(b) was relevant and probative for all specifications but conclude the error was harmless. Finding no further error, we affirm the remaining convictions and sentence as reassessed.

I. BACKGROUND

The five charged offenses span a two-year period when Appellant and the alleged victims were assigned to the same unit at Seymour Johnson Air Force Base, North Carolina. The allegations involve three Airmen and a former Airman, SSgt RW, SSgt SAK, Mr. STK, and SrA JD, who all testified at Appellant's court-martial.⁴ In Specifications 1-3, Appellant was alleged to have committed abusive sexual contact by touching the genitalia of SSgt RW, SSgt SAK, and Mr. STK, respectively, either directly or through their clothing, while each was asleep, with an intent to gratify [*4] Appellant's sexual desire. In Specification 4, Appellant was alleged to have committed abusive sexual contact by causing

bodily harm by touching SrA JD's genitalia with an intent to gratify Appellant's sexual desire. In Specification 5, Appellant was alleged to have sexually assaulted SrA JD by penetrating his mouth and anus with Appellant's penis.

The military judge applied Mil. R. Evid. 404(b) to find a common plan or scheme and ruled that evidence of each offense alleged in Specifications 1-3 was relevant and probative as to Specifications 4 and 5 and vice versa. The military judge convicted Appellant of abusive sexual contact of SSgt RW, Mr. STK, and SrA JD (Specifications 1, 3, and 4, respectively) and of sexual assault of SrA JD (Specification 5). Appellant was acquitted of abusive sexual contact of SSgt SAK (Specification 2). At trial, the parties presented evidence as described below.

A. Evidence of Abusive Sexual Contact of SSgt RW, SSgt SAK, and Mr. STK (Specifications 1-3)

1. SSgt RW

SSgt RW and Appellant became friends in technical training and worked together in the same unit at Seymour Johnson Air Force Base. They remained friends and were housemates from the fall of 2011 until SSgt RW moved [*5] out just before Appellant transferred to a new duty assignment in 2014. In August 2012, Appellant, SSgt RW and other Airmen were on a temporary duty (TDY) assignment to Mountain Home Air Force Base, Idaho, and were billeted on base in individual rooms. One evening Appellant, SSgt RW, and others visited a bar to celebrate SSgt RW's birthday and consumed alcohol. Around 0200, the group, including Appellant and SSgt RW, returned to lodging. SSgt RW went to bed in his own room wearing only boxer-brief underwear.

After falling asleep, SSgt RW woke from a "very, oddly realistic" dream about having sexual intercourse with a woman. He testified that during

³ Appellant personally asserts issues (4) and (5). See [United States v. Grostefon, 12 M.J. 431 \(C.M.A. 1982\)](#).

⁴ For consistency, we refer to the Airmen by their grade on the charge sheet and when they testified. At the time of the respective alleged offenses, SSgt RW and SSgt SAK were Senior Airmen (E-4), Mr. STK was an Airman First Class (E-3), and SrA JD was an Airman (E-2).

the dream he "felt weight" on his body, and "[i]t actually felt like [he] was having intercourse." Then, "when it just seemed too real and [he] woke up from [his] sleep," he called out, "who's there?" unsure if someone else was in his room or not. After a moment of silence, SSgt RW felt movement at the foot of the bed and observed a figure run out of the room. SSgt RW sprang out of bed and gave chase. He pulled up his underwear as he pursued because the waist band of his briefs covered only the bottom half of his genitalia. His penis was [*6] partially exposed but still tucked under the waistband of his briefs. In the light of the hallway, SSgt RW observed Appellant, wearing only underwear, go into Appellant's room.

SSgt RW returned to his room to go back to bed and noticed his penis was "wet." He was confused, "didn't know what to think," and "didn't know if anything was even real at that point." SSgt RW testified he texted a coworker and relayed some of what happened to him, except he told her that the dream involved him and Appellant having sex. The coworker testified that SSgt RW knocked on her door after everyone had returned to lodging from the bar, and he looked like he had seen a ghost. He appeared panicked, out of breath, pale, "clammy looking," and sweaty, and he repeated over and over that "[Appellant] was in my room." SSgt RW testified he was terrified but convinced himself that the incident was a dream, that nothing had happened with Appellant, and that the wetness he felt was his own sweat.

SSgt RW remained housemates with Appellant for at least 16 months after the incident and nothing similar happened to him again. SSgt RW continued to believe the incident in his billeting room was a dream. That belief changed [*7] in December 2013 or early 2014 when SSgt RW learned of an incident involving Appellant and another housemate. Consequently, SSgt RW led an "intervention" with at least three other Airmen, including SSgt SAK and Mr. STK, to confront Appellant about his behavior. Speaking for the group, SSgt RW told Appellant that they knew what he had been doing

to them when they were sleeping or after they had been drinking and that he needed to stop. None of the Airmen went into detail about what each believed Appellant had done. Appellant appeared nervous and responded, "I know it's a problem . . . it's caused by when I drink," or words to that effect, but did not admit to specifics of any particular incident. They told Appellant they would report him if it happened again. Even though they tried to stay friends with Appellant, Appellant started to avoid them and soon thereafter SSgt RW moved out of the house.

The military judge convicted Appellant of abusive sexual contact of SSgt RW as charged in Specification 1.

2. SSgt SAK

SSgt SAK testified that he knew Appellant from technical training and work and was once housemates and close friends with Appellant. Outside of work SSgt SAK and a group of friends [*8] that included Appellant and SSgt RW spent time together at house parties, bars, movies, and the like. After he had moved out of the house, in October 2013, he and Appellant went to a bar, drank alcohol, and returned to Appellant's house. SSgt SAK fell asleep on a couch and awoke three hours later to find his pants' zipper undone and his penis and testicles fully exposed through the opening in his underwear. SSgt SAK testified that Appellant's housemates were absent and he was alone with Appellant. SSgt SAK had no recollection of Appellant touching his genitalia. He did not think at the time that Appellant had done anything untoward until about January 2014 when SSgt RW related his own incident with Appellant when the two were TDY.

The military judge acquitted Appellant of abusive sexual contact of SSgt SAK as charged in Specification 2.

3. Mr. STK

Mr. STK described Appellant as a best friend and coworker. He was considered the "extra roommate" because two or three times a week he was at Appellant's house. Their off-duty time together included going to bars and riding motorcycles on weekends. Sometime in 2013 or early 2014, Mr. STK and Appellant completed their shifts and went to Appellant's [*9] house. Both drank alcohol and no one else was present. Mr. STK consumed several beers and, although not intoxicated, fell asleep on the couch wearing his Airman Battle Uniform (ABU). As he slept on his back, Mr. STK woke up feeling someone touch his groin near his penis and reach for his belt. He observed a hand reaching over the back of the couch and touching his genitalia over his ABU at least five times, and each time Mr. STK swatted at the hand. Finally, Mr. STK stood up and asked Appellant, who was behind the couch, "What are you doing?" Mr. STK observed Appellant crouched over, face down as if Appellant were "trying to hide," and then Appellant "scurried" away.

The military judge convicted Appellant of abusive sexual contact of Mr. STK as charged in Specification 3.

B. Evidence of Abusive Sexual Contact and Sexual Assault of SrA JD (Specifications 4 and 5)

SrA JD, who was then an E-2, met Appellant in June 2014, soon after SrA JD had graduated from technical training and was assigned to Appellant's unit. SrA JD thought of Appellant, an E-5, as an "acquaintance." In August 2014, SrA JD accepted an invitation to a party at Appellant's house along with six to eight other Airmen from [*10] the unit. Appellant served alcoholic beverages, including to SrA JD who had at least three or four mixed drinks. Early in the evening, SrA JD "was feeling quite intoxicated" to the point that he was slurring words and bumping into things. SrA JD told Appellant he "felt really drunk" and was concerned about where he was going to sleep. Appellant offered him

Appellant's bed, and he went to Appellant's bedroom, closed the door, lay on top of the bedding with his clothes on, and quickly fell asleep.

SrA JD testified that he woke to the sound of the door opening and Appellant entering the bedroom. As Appellant got on the bed to lie down, SrA JD felt awkward because he thought Appellant would sleep somewhere else. However, SrA JD knew there was plenty of room for them both, compared sharing the bed with Appellant to military members showering together in Basic Military Training, and was not going to "kick [Appellant] out of his own bed." Appellant rolled to face SrA JD and asked SrA JD "if [he]'d ever wanted to experiment with guys, or if [he]'d ever thought about messing around with other guys." Still feeling the effects of alcohol, including a headache and nausea, SrA JD responded, "no, [*11] man. I just want to go to sleep." As SrA JD lay on his back, Appellant reached out and grabbed SrA JD's penis over his shorts and began to massage it. Meanwhile, Appellant asked SrA JD, "you've never thought about it before?" and "are you sure?" Three or four times, SrA JD told Appellant variously "no, man" and that he just wanted to sleep. Appellant persisted in touching SrA JD's genitalia through his clothing and trying to change his mind. SrA JD testified that Appellant's conduct in touching his genitalia was the first time a male had ever done something like that to him.

The next thing SrA JD recalled was being naked with his feet towards the head of the bed, his head positioned over Appellant's groin, and Appellant moving Appellant's penis into and out of SrA JD's mouth. SrA JD testified that he did not recall his precise position or how he got into that position and felt "disassociated" from what was happening. SrA JD felt a "dullness of senses" and the same effects of intoxication from alcohol that he felt when Appellant was rubbing his penis. SrA JD testified that he remembered tasting lotion and noticed Appellant was naked at least from the neck to the knees, and he did not [*12] try to stop Appellant. He remembered Appellant "grabbed" and "kind of

pushed and moved" him to a "chest-to-chest" position so that SrA JD was on top of Appellant. SrA JD did not resist because, according to his testimony, he "disassociated" from what was happening to him physically. Appellant then pushed his penis into SrA JD's anus. SrA JD testified the penetration was very painful and he felt fear. He winced and may have made a vocal expression of pain. Appellant stopped said he would finish on his own and began to masturbate. SrA JD faced away from Appellant and fell asleep. Later, SrA JD awoke, dressed, left Appellant asleep in the bed, and laid awake on a couch in the living room for a couple hours. SrA JD testified that he had a "very severe headache and very bad nausea" as well as soreness on his anus. He did not leave immediately because he thought he might still be intoxicated. It did not occur to him to call someone to pick him up and he just wanted to go back to sleep. When asked how he knew the sexual acts were nonconsensual, SrA JD testified that he would not have engaged in the acts had he been sober and that he did not feel like he had consented at the time.

That morning [*13] SrA JD told his girlfriend what had happened. He did not report the incident to law enforcement because the thought of having the "spotlight" on him, being an E-2 and new to the Air Force, was an "incredibly terrifying thought." About one month after the incident, among other attempts to contact SrA JD, Appellant sent SrA JD a message stating Appellant took "full responsibility for what happened that night. We were drunk and one thing lead [sic] to another." In 2016, SrA JD reported the assault after he learned he was to be transferred to a new base and assigned to the same unit as Appellant.

The military judge convicted Appellant of abusive sexual contact and sexual assault of SrA JD as charged in Specifications 4 and 5.

II. DISCUSSION

Appellant submitted five assignments of error. We

separately address four of these issues⁵ and post-trial delay below.

A. Mil. R. Evid. 404(b) Evidence

Before trial, the Defense moved to sever Specifications 1-3 from Specifications 4 and 5, as the latter specifications dealt with a different victim. The Government argued, as a reason the motion to sever should be denied, that Appellant's conduct admitted to prove each charged offense could properly be used under Mil. R. Evid. 404(b) as evidence [*14] that Appellant had a pattern or common plan of engaging in sexual conduct with his friends after they had been drinking and were asleep or trying to fall asleep.

The crux of Appellant's position throughout trial and on appeal is that the sexual conduct alleged in each specification was separate and distinct and must stand on its own. Appellant contends that the allegations were not sufficiently similar to show a common plan and that allowing evidence of one charged offense as evidence of a separate charged offense was tantamount to allowing the factfinder to consider evidence of Appellant's propensity to engage in sexual misconduct. Appellant, citing [*United States v. Hukill*, 76 M.J. 219 \(C.A.A.F. 2017\)](#), and [*United States v. Hills*, 75 M.J. 350 \(C.A.A.F. 2016\)](#), renews on appeal his claim that the military judge misapplied Mil. R. Evid. 404(b) and Mil. R. Evid. 403 and improperly allowed charged offenses to be used as propensity evidence to prove other charged offenses.⁶

⁵ Appellant's fourth assignment of error alleging defects in the post-trial processing of his case is resolved by our assessment of the impact of the military judge's error in the Mil. R. Evid. 404(b) ruling. While we agree with Appellant that the SJAR addendum incorrectly assessed the legal error in the use of Mil. R. Evid. 404(b) in his case, we find no prejudicial error because the SJAR addendum was legally sufficient. Rule for Courts-Martial 1106(d)(4). Thus, we have considered and reject this claim, which neither requires additional analysis nor warrants relief. See [*United States v. Matias*, 25 M.J. 356, 363 \(C.M.A. 1987\)](#).

⁶ In [*Hukill*, 76 M.J. at 222](#), and [*Hills*, 75 M.J. at 355-56](#), the United

1. Military Judge's Ruling

The military judge who presided on the motion agreed with the Government and denied the Defense motion to sever.⁷ To resolve the severance motion, the military judge determined that evidence admitted to prove Specifications 1-3 was probative as to Specifications 4 and 5 and vice versa. The military judge applied the three-pronged test [*15] articulated in *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989), to find that Mil. R. Evid. 404(b) allowed the evidence of one charged offense to be used to prove another.

In *Reynolds*, the Court of Military Appeals, the predecessor to the United States Court of Appeals for the Armed Forces (CAAF), established a threepronged test for the admission of evidence under Mil. R. Evid. 404(b): (1) Does the evidence reasonably support a finding by the factfinder that Appellant committed other crimes, wrongs, or acts? (2) Does the evidence of the other act make a fact of consequence to the instant offense more or less probable? (3) Is the probative value of the evidence of the other act substantially outweighed by the danger of unfair prejudice under Mil. R. Evid. 403? 29 M.J. at 109 (citations omitted). "If the evidence fails to meet any one of these three standards, it is inadmissible." *Id.*

Applying the first *Reynolds* prong, the military judge found that a reasonable member could find by a preponderance of evidence that Appellant engaged in the conduct alleged in each charged specification. As to the second prong, the military judge agreed with the Government that the evidence could be used for a purpose other than to show propensity. The military judge explained:

In this case, the common factors were the

States Court of Appeals for the Armed Forces (CAAF) held that the use of evidence of charged conduct as Mil. R. Evid. 413 propensity evidence for other charged conduct in the same case is error, regardless of the forum, the number of victims, or any connection between the events.

⁷ Appellant does not challenge the severance ruling on appeal.

relationship [*16] of the alleged victims to the accused (friends), the circumstances surrounding the alleged commission of the offenses (after a night of drinking when the alleged victim was asleep or falling asleep), and the nature of the misconduct (touching the alleged victims' genitalia). The nature of the misconduct alleged in Specification 5 is different than the other allegations but is alleged to have occurred in connection with the alleged touching of SrA [JD]'s genitalia. This court finds that each specification is relevant and probative as to the other specifications regarding the accused's common plan to engage in sexual conduct with his friends after they have been drinking and were asleep or falling asleep.

The military judge applied the third *Reynolds* prong and concluded the probative value of the common-plan evidence was not substantially outweighed by the danger of unfair prejudice, such as the risk of confusion of the issues, misleading the members, or any other factor listed in Mil. R. Evid. 403.

Appellant elected trial by military judge alone.⁸ After the presentation of evidence, the military judge who presided at trial held the testimony at trial was similar to the evidence on the motion to sever and, [*17] citing Rule for Courts-Martial (R.C.M.) 801(e)(1)(A), did not disturb the motions judge's Mil. R. Evid. 404(b) ruling except to find a "scheme" instead of a "common plan."

2. Law

Mil. R. Evid. 404(b) provides that evidence of a crime, wrong, or other act by a person is not admissible as evidence of the person's character in order to show the person acted in conformity with that character on a particular occasion. It cannot be used to show predisposition toward crime or criminal character; however, such evidence may be

⁸ A change of military judge occurred after the ruling on the severance motion.

admissible for another purpose, including, *inter alia*, proving intent or plan. Mil. R. Evid. 404(b); [United States v. Staton, 69 M.J. 228, 230 \(C.A.A.F. 2010\)](#).

The three-pronged test for determining the admissibility of evidence under Mil. R. Evid. 404(b) is set forth in [Reynolds, supra](#). The CAAF has applied *Reynolds* when the Government seeks to use evidence of charged misconduct for a Mil. R. Evid. 404(b) purpose to prove another charged offense. See [United States v. Tanksley, 54 M.J. 169, 176 \(C.A.A.F. 2000\)](#) (overruled in part on other grounds by [United States v. Inong, 58 M.J. 460, 465 \(C.A.A.F. 2003\)](#)). Consequently, we conclude that the *Reynolds* test for admissibility of uncharged acts is instructive to determine use of facts underlying one charged offense to prove a different charged offense.

A military judge's ruling under Mil. R. Evid. 404(b) and Mil. R. Evid. 403 will not be disturbed except for a clear abuse of discretion. [United States v. Morrison, 52 M.J. 117, 122 \(C.A.A.F. 1999\)](#) (citation omitted). In analyzing discrete acts for evidence of a "plan," we consider whether the "charged [*18] act is an additional manifestation, or whether the acts merely share some common elements." [United States v. McDonald, 59 M.J. 426, 430 \(C.A.A.F. 2004\)](#) (citations omitted). Evidence of other acts "'must be almost identical to the charged acts' to be admissible as evidence of a plan or scheme." [Morrison, 52 M.J. at 122](#) (quoting [United States v. Brannan, 18 M.J. 181, 183 \(C.M.A. 1984\)](#)). The standard for a "scheme" is "significantly similar conduct." [Reynolds, 29 M.J. at 110](#). In contrast, to be used as evidence of intent, the "other wrongs or acts need only be similar to the offense charged and not too remote therefrom." [United States v. Woodyard, 16 M.J. 715, 718 \(A.F.C.M.R. 1983\)](#) (footnote omitted) (citing [United States v. Goodwin, 492 F.2d 1141, 1153 \(5th Cir. 1974\)](#)).

"A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his

ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." [United States v. Ellis, 68 M.J. 341, 344 \(C.A.A.F. 2010\)](#) (citing [United States v. Mackie, 66 M.J. 198, 199 \(C.A.A.F. 2008\)](#)). In reviewing the military judge's decision to admit evidence, "we consider the evidence 'in the light most favorable to the' prevailing party." [United States v. Rodriguez, 60 M.J. 239, 246-47 \(C.A.A.F. 2004\)](#) (citation omitted).

3. Analysis

We agree with the military judge's ruling on the first *Reynolds* prong. A reasonable factfinder could find by a preponderance of evidence that Appellant engaged in or attempted the conduct alleged in each of the [*19] five charged specifications.

As to the second *Reynolds* prong, a fact of consequence for Specifications 1-3 was whether Appellant engaged in a plan or scheme to touch the genitalia of friends in a way that evaded their notice or attention after they had been drinking and were asleep. The separate evidence of Specifications 1, 2, and 3 made this fact more probable than not for each offense charged in Specifications 1, 2, and 3. Appellant's furtive conduct in Specifications 1-3 was nearly identical and, therefore, could properly be used as evidence of a plan or scheme common to Specifications 1-3. A second fact of consequence for Specifications 1-3 was Appellant's intent to gratify his sexual desire. Though not articulated by the military judge, we find that the separate evidence of Specifications 1, 2, and 3 made this fact more probable than not for each offense charged in Specifications 1, 2, and 3 because it showed Appellant's intent to gratify his sexual desire as opposed to an intent to joke. The acts in Specifications 1-3 are significantly alike, are not too remote, and support an inference of Appellant's intent to gratify his sexual desire. Thus, Appellant's plan or scheme to touch [*20] the genitalia of

friends after they had been drinking and were asleep and specific intent to gratify Appellant's sexual desire are facts of consequence for Specifications 1-3 made more probable by the evidence of Specifications 1-3.

As to the third *Reynolds* prong, the military judge properly applied the Mil. R. Evid. 403 balancing test. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to determine Appellant's guilt of Specifications 1-3.

We find, however, that the military judge erred in concluding that evidence of sexual contact supporting Specifications 1-3 made more probable a fact of consequence for Specifications 4 and 5 and vice versa. In Specifications 1-3, Appellant acted secretly while his friends slept, whereas, in Specifications 4 and 5, Appellant initiated sexual contact with SrA JD while SrA JD was awake and aware of Appellant's presence and Appellant communicated Appellant's desire to engage in sexual activity with SrA JD. The common factors between Specifications 1-3 and Specifications 4-5 were that Appellant attempted sexual activity with a male Airman after the Airman had been drinking and lain down to sleep. Considering that Appellant [*21] lived in a house with several male Airmen and regularly socialized and drank alcohol with these and other male Airmen, we find the acts charged as Specifications 1-3 and the acts charged as Specifications 4-5 shared some common factors but were insufficiently similar to prove a common plan or scheme.⁹

⁹The Government urges us to consider that "each specification involved Appellant taking advantage of his friends when they were asleep or almost asleep after drinking alcohol." Indeed, there is commonality in relationship (Airmen who were assigned to the same unit and sometimes worked together), ages of victims (young adult males), circumstances of the acts (nighttime sexual activity after drinking alcohol and sleeping or falling asleep in the same general location as Appellant), and the sexual nature of the acts. However, we caution that many incidents share these common factors but do not result in sexual abuse or assault. And, on these facts, we cannot conclude that the factors were sufficiently distinctive to establish a common plan or scheme under Mil. R. Evid. 404(b) and Mil. R.

Therefore, we find that evidence of sexual contact supporting Specifications 1-3 did not make a fact of consequence for the sexual contact charged in Specification 4 and the sexual act charged in Specification 5 more probable and vice versa. Accordingly, we conclude that the military judge's application of the second *Reynolds* prong to the evidence of each of the five specifications as a plan or scheme common to all five specifications was clearly unreasonable and therefore constituted a clear abuse of discretion. We address the impact of our finding in our test for prejudice below.

B. Factual and Legal Sufficiency

Appellant challenges the legal and factual sufficiency of the four findings of guilty. We review issues of legal and factual sufficiency de novo. *Article 66(c)*, UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. [*22] *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted). Though we "cannot find as fact any allegations of which [an appellant] was found not guilty at trial," we "may consider facts underlying an acquitted charge in considering whether the facts support a separate charge." *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017).

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (quoting *Rosario*, 76 M.J. at 117 (C.A.A.F. 2017)).

"For factual sufficiency, the test is whether, after weighing the evidence in the record of trial and

Evid. 403—particularly when the charged acts themselves were infrequent and the "common" factors were enduring (e.g., friendship) and recurring (e.g., drinking alcohol) over a prolonged period of time (e.g., as long as two years).

making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." Washington, 57 M.J. at 399. While we must find that the evidence was sufficient beyond a reasonable doubt, it "does not mean that the evidence must be free of conflict." United States v. Galchick, 52 M.J. 815, 818 (A.F. Ct. Crim. App. 2000) (citation omitted).

1. [*23] Specification 1—Abusive Sexual Contact of SSgt RW

We are not convinced that the evidence of Specification 1 was sufficient beyond a reasonable doubt and find Appellant's conviction factually insufficient. In order for the military judge to find Appellant guilty of abusive sexual contact of SSgt RW, as charged in Specification 1, the Government was required to prove beyond a reasonable doubt four elements: (1) Appellant committed sexual contact upon SSgt RW by touching SSgt RW's genitalia; (2) SSgt RW was asleep; (3) Appellant knew or reasonably should have known that SSgt RW was asleep; and (4) Appellant touched SSgt RW's genitalia with the intent to gratify Appellant's sexual desire. See *Manual for CourtsMartial, United States* (2016 ed.) (MCM), pt. IV, ¶ 45.b.(7)(e). The term "sexual contact" allows that "[t]ouching may be accomplished by any part of the body." Article 120, UCMJ, 10 U.S.C. § 920(g)(2)(B).

Even accepting the truth of SSgt RW's recollection and testimony and considering the evidence of Specifications 2 and 3 as a common plan or scheme under Mil. R. Evid. 404(b), we are not convinced beyond a reasonable doubt that Appellant

committed an abusive sexual contact offense against SSgt RW. Immediately after his late-night [*24] interaction with Appellant, SSgt RW was confused, "didn't know what to think," and "didn't know if anything was even real at that point." For about 16 months he believed that he had only experienced a very realistic dream and that his penis was wet from his own sweat and not attributable to sexual contact by Appellant.

On this record, we find reasonable doubt whether Appellant touched SSgt RW—much less made sexual contact—while SSgt RW slept. However realistic the erotic dream may have seemed to SSgt RW at the time, it is insufficient proof of sexual contact of SSgt RW's genitalia by any part of Appellant's body. We also do not agree with the Government's claim that sexual contact was proven beyond a reasonable doubt because SSgt RW woke to find his underwear partially covered his genitalia or because, sometime after giving chase to Appellant, SSgt RW discovered that his penis was wet. A coworker's testimony corroborated that SSgt RW was sweating and he looked "clammy" immediately after the incident. We give greater weight to this circumstantial evidence that SSgt RW's penis was wet because he was sweating than circumstantial evidence that Appellant touched SSgt RW's penis and somehow [*25] made it wet because Appellant was present at the foot of the bed.

At trial, the Government relied on Appellant's guilty conscience—shown by Appellant bolting out of SSgt RW's room when discovered and Appellant's admission when confronted that he had a "problem"—and pattern of engaging in sexual conduct with male friends after they had been drinking and were asleep or falling asleep as evidenced by Appellant's common plan or scheme. We agree these facts tend to show that Appellant was present in SSgt RW's room with the intent to gratify Appellant's sexual desire. However, the evidence as a whole does not persuade us beyond a reasonable doubt that Appellant touched SSgt RW's genitalia and engaged in sexual contact.

After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are not convinced beyond a reasonable doubt of Appellant's guilt of the offense against SSgt RW. We therefore find the evidence factually insufficient¹⁰ to support the finding of guilty for Specification 1. We address the impact of our finding and reassess Appellant's sentence below.

This finding of factual insufficiency does not end our analysis of Specification [*26] 1. We "may approve or affirm . . . so much of the finding as includes a lesser included offense." [Article 59\(b\)](#), UCMJ, [10 U.S.C. § 859\(b\)](#). We "may not affirm an included offense on 'a theory not presented to the' trier of fact." [United States v. Riley, 50 M.J. 410, 415 \(C.A.A.F. 1999\)](#) (citation omitted) (quoting [Chiarella v. United States, 445 U.S. 222, 236, 100 S. Ct. 1108, 63 L. Ed. 2d 348 \(1980\)](#)). "To do so 'offends the most basic notions of due process,' because it violates an [appellant's] 'right to be heard on the specific charges of which he [or she] is accused.'" *Id.* (second alteration in original) (quoting [Dunn v. United States, 442 U.S. 100, 106, 99 S. Ct. 2190, 60 L. Ed. 2d 743 \(1979\)](#)).

Before findings argument, the Government maintained there was no lesser-included offense (LIO) of Specification 1. The military judge asked the Defense and the Defense agreed. Even if we were convinced beyond a reasonable doubt that Appellant is guilty of attempted abusive sexual contact of SSgt RW, this theory was disclaimed by the Government at the close of its case, and it was not presented to the military judge as the trier of fact. Accordingly, we may not affirm a conviction on the LIO of attempted abusive sexual contact.

2. Specification 3—Abusive Sexual Contact of Mr. STK

In order for the military judge to find Appellant

guilty of abusive sexual contact of Mr. STK, as charged in Specification 3, the Government was required [*27] to prove beyond a reasonable doubt the same four elements of abusive sexual contact as charged in Specification 1. However, unlike in Specification 1, in Specification 3 the Government charged Appellant with touching "through the clothing" the genitalia of Mr. STK. Appellant argued at trial and again on appeal that proof Appellant acted with the intent to gratify his sexual desire is lacking. Mr. STK testified that it was not uncommon for members of the unit to flick each other's genitalia as a joke, or what was called a "ball tap." The Defense characterized Appellant's actions on the night in question as such a joke. We are not persuaded.

The touching charged in Specification 3 was very different from the joke Mr. STK described in that Appellant's hand stayed on Mr. STK's genitalia for longer than a mere flick and the contact occurred when Mr. STK was asleep. Because of Appellant's repeated groping of Mr. STK, his hiding behind the couch and then fleeing when confronted by Mr. STK, and his general admission to his friends that he knew he had a "problem" that happened when he had been drinking, we agree with the Government that Appellant's contact with Mr. STK's genitalia on the night [*28] in question was motivated by an intent to gratify Appellant's sexual desire and was not meant as a joke. Additionally, evidence supporting Specifications 1 and 2 could properly be used under Mil. R. Evid. 404(b) as a plan or scheme to prove that the sexual contact charged in Specification 3 occurred and that it was intended to gratify Appellant's sexual desire.¹¹

Considering the evidence in the light most favorable to the prosecution, we find that a rational factfinder could have found Appellant guilty

¹⁰Because we find the evidence factually insufficient, we do not address legal sufficiency.

¹¹Though we find Appellant's conviction of sexual misconduct of SSgt RW factually insufficient and Appellant was acquitted of sexual misconduct of SSgt SAK, the facts underlying these allegations are nevertheless permissible for appellate review. See [United States v. Rosario, 76 M.J. 114, 117 \(C.A.A.F. 2017\)](#).

beyond a reasonable doubt of all the elements of Specification 3. Furthermore, we ourselves are convinced of Appellant's guilt beyond a reasonable doubt. Therefore, we find Appellant's conviction both legally and factually sufficient.

3. Specification 4—Abusive Sexual Contact of SrA JD

Appellant renews the argument he made at trial that the Government failed to prove beyond a reasonable doubt that SrA JD did not consent to Appellant touching SrA JD's genitalia and that, even if SrA JD did not consent, it was reasonable for Appellant to have had a mistaken belief that SrA JD did consent. We disagree.

As charged in Specification 4, the Government had to prove beyond a reasonable doubt the following three elements: [*29] (1) Appellant committed sexual contact upon SrA JD by touching SrA JD's genitalia;¹² (2) Appellant caused bodily harm to SrA JD by touching SrA JD's genitalia; and (3) Appellant did so with the intent to gratify his own sexual desire. *See MCM*, pt. IV, ¶ 45.b.(7)(b). "The term 'bodily harm' means any offensive touching of another, however slight, including any . . . nonconsensual sexual contact." [Article 120](#), UCMJ, [10 U.S.C. § 920\(g\)\(3\)](#).

With regard to consent, the statute provides, "[C]onsent' means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the [appellant]'s use of force . . . does not constitute consent." *Id.* [§ 920\(g\)\(8\)\(A\)](#). "Lack of consent may be inferred based on the circumstances of the

offense. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions." *Id.* [§ 920\(g\)\(8\)\(C\)](#).

Before and after Appellant initiated sexual contact, SrA JD repeatedly told Appellant "no, man." His words were plain, [*30] unambiguous and coherent and more than adequately manifested lack of consent:

Q [Trial Counsel]. Did you say anything that would convey to [Appellant] that that was something that you wanted?

A [SrA JD]. No, not at all.

Q. Did you say that loud enough that [Appellant] would have been able to hear it?

A. Absolutely.

Q. How many times do you think that you said no, or stop or some variation thereof?

A. At least three or four times.

Q. Did [Appellant] stop?

A. No, he continued.

Q. And had you said stop or no, I want to go to sleep before [Appellant] touched you as well?

A. Yes.

Q. And you said that [Appellant] touched you where at that point?

A. On my penis, on top of my shorts . . . [he] didn't place his hands underneath my pants, but over my pants and he began to massage my penis.

Q. Is that something you wanted?

A. No, ma'am.

Knowing full well that SrA JD had gone to bed because of the amount of alcohol he had consumed and because he was tired, Appellant was on notice that SrA JD's words and inaction unequivocally conveyed that all he wanted to do was sleep. SrA JD's verbal protestations and—under these circumstances—his lack of physical resistance demonstrate and are consistent with a lack of consent. [*31]

If shown by some evidence, mistake of fact as to

¹² The evidence at trial established that Appellant touched, *through the clothing*, the genitalia of SrA JD. We find this variance from the specification was not material and did not substantially change the nature of the offense, increase the seriousness of the offense, or increase the punishment. *See United States v. Marshall*, 67 M.J. 418, 420 (C.A.A.F. 2009).

consent is a defense to abusive sexual contact. It requires that an appellant, due to ignorance or mistake, incorrectly believed that another consented to the sexual contact. To be a viable defense, the mistake of fact must have been honest and reasonable under all the circumstances. *See* R.C.M. 916(j)(1). To be persuaded by Appellant's argument that he was mistaken, we would have to discount evidence that Appellant initiated sexual contact with SrA JD and that Appellant continued to touch SrA JD in spite of his protests. On these facts we find the Government proved Appellant was not reasonably mistaken as to consent.

Viewing the evidence in the light most favorable to the prosecution, we find that a rational factfinder could have found Appellant guilty beyond a reasonable doubt of all the elements of Specification 4. Furthermore, we ourselves are convinced of Appellant's guilt beyond a reasonable doubt. Specifically, we find there was proof beyond a reasonable doubt that Appellant committed sexual contact upon SrA JD by touching his genitalia through his clothing, without SrA JD's consent, and with the intent to gratify Appellant's sexual desire. Therefore, [*32] we find Appellant's conviction both legally and factually sufficient.

4. Specification 5—Sexual Assault of SrA JD

The military judge also convicted Appellant of sexual assault of SrA JD. As charged in Specification 5, the Government had to prove beyond a reasonable doubt the following elements: (1) Appellant committed a sexual act upon SrA JD by causing penetration, however slight, of SrA JD's mouth and anus with Appellant's penis; and (2) Appellant caused bodily harm to SrA JD by penetrating SrA JD's mouth and anus with Appellant's penis. *See MCM*, pt. IV, ¶ 45.b.(3)(b). "The term 'bodily harm' means any offensive touching of another, however slight, including any nonconsensual sexual act" [Article 120](#), UCMJ, [10 U.S.C. § 920\(g\)\(3\)](#). "Lack of consent" is defined by statute the same as it was in our analysis of

Specification 4.

As with Specification 4, Appellant renews the argument he made at trial that the Government failed to prove beyond a reasonable doubt that SrA JD did not consent to the sexual acts and that, even if SrA JD did not consent, it was reasonable for Appellant to have had a mistaken belief that SrA JD did consent. Viewing the sexual assault offense in isolation from Appellant's abusive [*33] sexual contact of SrA JD that preceded this allegation, we might agree. However, the sexual act alleged in Specification 5 followed Appellant's nonconsensual sexual contact with SrA JD that was charged in Specification 4. Appellant's conduct with SrA JD, charged as two discrete offenses, nevertheless occurred as a continuous course of conduct with a single criminal objective. Thus, we find the two offenses are factually intertwined and the circumstances that underlie Appellant's non-consent to the abusive sexual contact in Specification 4 are relevant here.

SrA JD was a very junior Airman and did not know Appellant well either socially or professionally. On the night of the assault, Appellant knew that SrA JD was tired, drunk, and—as evident by Appellant's query if SrA JD had "ever wanted to experiment" or had "ever thought about" messing around with other men—uninitiated in male-on-male sexual acts. Appellant's repeated propositioning of SrA JD verbally and, at the same time, physically was unwelcome, and his prodding was matched by SrA JD's repeated protests to just allow him to sleep. It is in this context that we consider evidence that SrA JD "disassociated" and did not further [*34] resist oral and anal penetration by Appellant and that SrA JD's memory or recall of the incident was far from complete. On these facts, Appellant as the initiator to the conduct that began in Specification 4 turned a deaf ear to SrA JD's repeated manifestations of non-consent and, we find, could not have held a reasonably mistaken belief that SrA JD consented to the sexual acts of Specification 5. Considering all the surrounding circumstances in a light most favorable to the prosecution, to include Appellant's

statement taking full responsibility for his conduct with SrA JD, we find that a reasonable factfinder could have found that SrA JD ceased resisting because of Appellant's actions and that there was no "freely given agreement to the conduct at issue." [Article 120](#), UCMJ, [10 U.S.C. § 920\(g\)\(8\)\(A\)](#). We conclude that the Government proved beyond a reasonable doubt that SrA JD did not consent to Appellant's oral and anal penetration of SrA JD and that it was not reasonable for Appellant to believe that SrA JD had consented.

Considering the evidence in the light most favorable to the prosecution, we find that a rational factfinder could have found Appellant guilty beyond a reasonable doubt of all the elements [*35] of Specification 5. Furthermore, we ourselves are convinced of Appellant's guilt beyond a reasonable doubt. Therefore, we find Appellant's conviction both legally and factually sufficient.

C. Harmless Error

Finding error in the Mil. R. Evid. 404(b) ruling allowing use of the evidence underlying Specifications 1-3 to prove Specifications 4-5 and vice versa, we address the impact of our finding and test for prejudice. When there is nonconstitutional¹³ error in the admission of evidence, including under Mil. R. Evid. 404(b), we ask whether the evidence had a "substantial influence on the [military judge's] verdict in the context of the entire case." See [United States v. Harrow](#), 65 M.J. 190, 200 (C.A.A.F. 2007) (citations omitted). "We consider four factors: (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.* (citation omitted). "An error is more likely to be prejudicial if the fact was not already obvious from the other evidence presented at trial and would have provided new ammunition against an appellant." [United States v. Barker](#), 77 M.J. 377, 384 (C.A.A.F. 2018) (citing [Harrow](#), 65 M.J. at 200).

1. Conviction of Specification 3—Abusive Sexual Contact of Mr. STK

As to Specification 3, we conclude the erroneous Mil. R. Evid. 404(b) ruling did not have a [*36] substantial influence on Appellant's conviction.¹⁴ The Government's case for Specification 3 was very strong without the evidence underlying Specifications 4 and 5. The testimony of Mr. STK provided convincing proof of all the elements of the abusive sexual contact offense. It was supported by Appellant's admission when he was confronted by his friends. The Government's case was also supported by Appellant's common plan or scheme to secretly engage in sexual contact with SSgt RW and SSgt SAK with the specific intent to gratify Appellant's sexual desire, as shown by SSgt RW and SSgt SAK's testimony.

The Defense largely conceded that Appellant touched Mr. STK on his genitalia but sought to minimize Appellant's specific intent by characterizing his conduct as a prank. The "prank" argument was a weak one as the circumstances of Appellant touching Mr. STK's genitalia were not the typical circumstances of a "ball tap" joke.

As to *Harrow* factors (3) and (4), the materiality and quality of the evidence for Specifications 4 and 5 was low because Appellant's acts were dissimilar, even if the military judge erred in finding a common plan or scheme. Further, questions about consent and mistake [*37] of fact as to consent that

¹³ Citing [Hukill](#), 76 M.J. at 222, and [Hills](#), 75 M.J. at 357, Appellant urges us to apply the harmless beyond a reasonable doubt standard to test for prejudice because the military judge committed constitutional error. We decline to apply the more stringent standard. Because the military judge did not use the charged conduct as propensity evidence under Mil. R. Evid. 413, there are no "constitutional dimensions at play." [Hukill](#), 76 M.J. at 222 (citation omitted).

¹⁴ Because we find the evidence of Specification 1 factually insufficient and because Appellant was acquitted of Specification 2, we consider the erroneous admission of Appellant's acts with SrA JD only as they may affect the finding of guilty of Specification 3.

permeated the Defense case against Specifications 4 and 5 were not present in litigating Specification 3.

Collectively, the evidence of Specifications 1, 2, and 3 could properly be used pursuant to Mil. R. Evid. 404(b) for Specifications 1, 2, and 3. Considering the four *Harrow* factors together, we conclude that the admission of evidence of sexual conduct underlying Specifications 4 and 5 to prove Specification 3 did not have a substantial influence on the finding or materially prejudice Appellant's substantial rights. Accordingly, we find the error to be harmless.

2. Conviction of Specifications 4 and 5—Abusive Sexual Contact and Sexual Assault of SrA JD

As to Specifications 4 and 5, we conclude the erroneous ruling did not have a substantial influence on Appellant's convictions of these offenses. The testimony of SrA JD established convincing proof of all the elements of the abusive sexual contact and sexual assault offenses involving SrA JD. The Government's case was also supported by Appellant's admission taking "full responsibility" for what happened. The Defense largely conceded that Appellant engaged in sexual conduct with SrA JD but sought to show that either SrA JD consented [*38] or that Appellant labored under an honest and reasonable mistake of fact as to consent. The cross-examination of SrA JD challenged his claim of lack of consent and tried to bolster Appellant's mistake of fact as to consent. Because the critical issue was not whether Appellant engaged in the charged acts or, for Specification 4, whether Appellant intended to gratify his sexual desire, the erroneous admission of plan or scheme evidence of Specifications 1-3 was not dispositive for the findings on Specifications 4-5. With respect to the materiality and quality of the evidence of acts underlying Specifications 1-3, they, again, were dissimilar, even if the military judge erred in finding a common plan or scheme, and thus not logically material to the Government's

proof on Specifications 4-5. The evidence of Appellant's intent to gratify his sexual desire underlying Specifications 1-3 was of little consequence to litigation of consent and mistake of fact in Specifications 4-5.

Considering the four *Harrow* factors together, we conclude that the admission of evidence of sexual conduct underlying Specifications 1-3 to prove Specifications 4 and 5 did not have a substantial influence on the findings [*39] or materially prejudice Appellant's substantial rights. Accordingly, we find the error to be harmless.

D. Referral of Specification 5

Appellant alleges that the military judge who presided at his trial erred in denying Appellant's motion to dismiss Specifications 1, 2, and 5 because the staff judge advocate (SJA) improperly advised the convening authority that the specifications were warranted by the evidence contrary to the determination made by the PHO who conducted the *Article 32*, UCMJ, 10 U.S.C. § 832, preliminary hearing. Because we find the evidence of Specification 1 factually insufficient and Appellant was acquitted of Specification 2, we address Appellant's assignment of error only as it affects Specification 5.

1. Procedural Background

The PHO found no probable cause and recommended Specification 5 not be referred to trial. The special court-martial convening authority disagreed and forwarded the specification to the general court-martial convening authority (GCMCA) with the recommendation that it be referred. The pretrial advice of the SJA stated that Specification 5 was warranted by the evidence and recommended referral. The GCMCA followed his SJA's advice and ordered Specification 5 be referred [*40] to trial.

2. Analysis

Appellant asserts that when a PHO determines there is no probable cause, the specification cannot be warranted by the evidence and cannot be referred to trial. We disagree. Were we to follow Appellant's logic to its conclusion, a PHO's determination of no probable cause would bind and diminish the role of the GCMCA and moot the independence of the SJA who may disagree with the PHO's determinations and recommendations.

We agree with the Government that the PHO's recommendation, to include the probable cause determination, is not binding on the SJA or GCMCA. *See also* R.C.M. 405(a), Discussion ("Determinations and recommendations of the preliminary hearing officer are advisory."). We conclude that Appellant's substantial rights were not prejudiced by the manner in which Specification 5 was referred to trial by court-martial.

E. Evidence of Messages Between Appellant and SrA JD

Appellant asserts that the military judge erred when he refused to admit text messages between Appellant and SrA JD. Over Defense objection, the military judge admitted a message Appellant sent to SrA JD in September 2014, in which Appellant stated he took "full responsibility" for what happened the night of [*41] the alleged sexual assault. The Defense moved to admit subsequent messages in the same message thread arguing that they were part of the same conversation or statement. These messages, initiated by SrA JD with the assistance of an AFOSI agent, were exchanged between Appellant and SrA JD about 20 months later in May 2016, and they continued the discussion of what happened in August 2014. Appellant argues on appeal, as he did at trial, that the subsequent messages show that Appellant apologized because he believed both he and SrA JD made mistakes that night while they were drunk and that Appellant did not believe he had done

anything against SrA JD's will.

We review a military judge's ruling on the admissibility of evidence for an abuse of discretion. *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997). In *United States v. Rodriguez*, the CAAF determined that a subsequent statement made at a different time and place and to a different set of persons is a "discrete, complete event" and is not admissible under the rule of completeness to rebut, explain, or modify the content of an earlier statement if it was "not part of the same transaction or course of action." 56 M.J. 336, 342 (C.A.A.F. 2002). In *Rodriguez*, the CAAF held that the military judge did not err in excluding [*42] the appellant's subsequent statements to law enforcement provided one day after the statements admitted by the Government, even though the statements all related to the same topic: the death of the appellant's wife. *Id.* at 338-39, 342. Here, Appellant's subsequent statements occurred 20 months after Appellant's original message to SrA JD and after Appellant's transfer to a new duty station without any intervening contact between the two. Like *Rodriguez*, the subsequent messages here were exchanged at a different time and at a different place. The continuation of a previous message thread using the same messaging application does not make the new messages part of the same conversation, or statement, as one made many months prior.

We find that the messages Appellant sought to admit were discrete and complete events unto themselves owing to the very significant passage of time and therefore were not part of the same transaction or course of action as his message taking "full responsibility." We find the military judge did not abuse his discretion in either admitting Appellant's admission to SrA JD or excluding the subsequent messages Appellant sent some 20 months later.

F. Sentence Reassessment

Because we [*43] set aside and dismiss Specification 1 of the Charge, we next consider whether we can reassess the sentence. We have "broad discretion" when reassessing sentences. [*United States v. Winkelmann*, 73 M.J. 11, 13 \(C.A.A.F. 2013\)](#) (citation omitted). The CAAF has repeatedly held that if we "can determine to [our] satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error" [*United States v. Sales*, 22 M.J. 305, 308 \(C.M.A. 1986\)](#). Thus, our analysis is based on a totality of the circumstances with the following as illustrative factors: dramatic changes in the penalty landscape and exposure, the forum, whether the remaining offenses capture the gravamen of the criminal conduct, whether significant or aggravating circumstances remain admissible and relevant, and whether the remaining offenses are of the type that we as appellate judges should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial. [*Winkelmann*, 73 M.J. at 15-16](#) (citations omitted). We find the factors weigh in favor of reassessment rather than rehearing.

We can reliably determine Appellant would have received a sentence of at least a dishonorable discharge, confinement for [*44] six years, forfeiture of all pay and allowances, and reduction to the grade of E-1. We are mindful there has been a change in the sentencing posture of this case, with three victims and three convictions of abusive sexual contact reduced to two and the maximum sentence to confinement reduced from 51 to 44 years. Appellant's conviction for sexual assault remains the most serious offense of which Appellant was found guilty. While the dismissal of Specification 1 of the Charge creates a moderate difference in what would be an appropriate punishment, the remaining offenses of abusive sexual contact of Mr. STK and SrA JD and sexual assault of SrA JD are of the type that we have experience and familiarity with as appellate judges to determine the sentence that would have been

imposed.

We also conclude that the reassessed sentence is appropriate. We assess sentence appropriateness by considering Appellant, the nature and seriousness of the offenses, Appellant's record of service, and all matters contained in the record of trial. [*United States v. Bare*, 63 M.J. 707, 714 \(A.F. Ct. Crim. App. 2006\)](#) (citing [*United States v. Healy*, 26 M.J. 394, 395-96 \(C.M.A. 1988\)](#); [*United States v. Snelling*, 14 M.J. 267, 268 \(C.M.A. 1982\)](#)). We are convinced that the reassessed sentence is not inappropriately severe.

G. Post-Trial Delay

We note that 131 days elapsed between Appellant's sentencing [*45] and the convening authority's action. Although this 11-day delay is presumptively unreasonable, Appellant asserts no prejudice and we discern none. See [*United States v. Moreno*, 63 M.J. 129, 142 \(C.A.A.F. 2006\)](#) (establishing presumption of unreasonable delay where the convening authority does not take action within 120 days of the completion of trial). Accordingly, we find no violation of Appellant's due process right to timely post-trial processing and appeal. [*Id.* at 136](#). The delay was not so egregious as to undermine the appearance of fairness in Appellant's case and the integrity of our military justice system. See [*United States v. Toohey*, 63 M.J. 353, 362 \(C.A.A.F. 2006\)](#).

Nevertheless, recognizing our authority under *Article 66(c)*, UCMJ, 10 U.S.C. § 866(c), we considered whether relief for post-trial delay is appropriate in this case even in the absence of a due process violation. See [*United States v. Tardif*, 57 M.J. 219, 225 \(C.A.A.F. 2002\)](#) ("Appellate relief under *Article 66(c)* should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review."). After considering the factors enumerated in [*United States v. Gay*, 74 M.J. 736, 744 \(A.F. Ct. Crim. App. 2015\)](#), we find it is not.

III. CONCLUSION

The finding of guilty of Specification 1 of the Charge is **SET ASIDE** and Specification 1 of the Charge is **DISMISSED WITH PREJUDICE**. We reassess the sentence to a dishonorable [*46] discharge, confinement for six years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The remaining findings and the sentence as reassessed are correct in law and fact, and no other error materially prejudicial to the substantial rights of Appellant occurred. [Articles 59\(a\)](#) and [66\(c\)](#), UCMJ, [10 U.S.C. §§ 859\(a\)](#), [866\(c\)](#). Accordingly, the remaining findings and the sentence as reassessed are **AFFIRMED**.¹⁵

HUYGEN, Judge (concurring in the result in part and dissenting in part):

I agree with my esteemed colleagues in the majority that the military judge erred by admitting for a Mil. R. Evid. 404(b) purpose the evidence of Specifications 1, 2, and 3 as a common plan or scheme to find Appellant guilty of Specifications 4 and 5. However, I respectfully dissent with regard to that error's harm for Specification 5 and, correspondingly, the factual sufficiency of Appellant's conviction of sexual assault of SrA JD.

The majority finds that the error was harmless with regard to Specification 4 because the evidence of Specifications 1-3 as a common plan or scheme did not have a substantial influence on Appellant's conviction for abusive sexual contact of SrA JD; I concur.¹⁶ Nonetheless, I must distinguish SrA JD's

actual testimony [*47] about the incident from the majority's succinct description of it.

At trial, SrA JD testified as follows:

He [Appellant] gets into the bed and I remember him rolling towards me to face me and asking me if I'd ever wanted to experiment with guys, or if I'd ever thought about messing around with other guys, to which I responded, you know, no, man. I just want to go to sleep. . . . He continued questioning, and it was at that point he reached his hand out and grabbed my penis over my pants and began to massage it. And while he was doing that, he continued to sort of ask me, you know, you've never thought about it before, you know, are you sure? Like he kept pleading to, you know, get me to change my mind to which I continued saying, you know, no, man, I just want to go to sleep.

As the Defense pointed out at trial, SrA JD's "no" was not specifically and directly a "no" to the sexual contact, before or while it was taking place.¹⁷ Instead, it was a specific and direct answer that no, SrA JD had not previously wanted to engage in or thought about sexual experimentation with another male. I still concur with the majority's decision to affirm the guilty finding of Specification 4. The most [*48] important facts and circumstances of the contact charged in Specification 4—namely, that Appellant knew SrA JD was awake and had a verbal exchange with him about sexual experimentation before touching

¹⁵The military judge ordered sealed pages 173-86 of the transcript, which was a closed Mil. R. Evid. 412 hearing; however, those pages were not sealed. We direct the Government seal those pages in the original record of trial. We further direct the Government ensure that every paper copy of those pages is retrieved and destroyed, and every electronic copy is destroyed.

¹⁶I also concur with the majority that the current state of the law is to analyze Mil. R. Evid. 404(b) error as nonconstitutional error and apply the four-factor test of [United States v. Harrow](#), 65 M.J. 190, 200 (C.A.A.F. 2007), but I question whether that will remain the state of the law. In Appellant's case, Mil. R. Evid. 404(b) presents the

same problem as Mil. R. Evid. 413 prior to [United States v. Hills](#), 75 M.J. 350 (C.A.A.F. 2016), and [United States v. Hukill](#), 76 M.J. 219 (C.A.A.F. 2017): the factfinder is tasked first to apply a preponderance of the evidence standard to charged conduct of similar crimes in a sexual offense case and then to apply a standard of beyond a reasonable doubt to the same charged conduct. The Court of Appeals for the Armed Forces in *Hills* could have been talking about Appellant's case and Mil. R. Evid. 404(b) when it wrote, "While [a Mil. R. Evid. 413] error . . . is usually nonconstitutional in nature, here, the error involved using charged misconduct . . . and violated Appellant's presumption of innocence and right to have all findings made clearly beyond a reasonable doubt, resulting in constitutional error." *Id.* at 356 (citation omitted).

¹⁷Despite trial counsel's attempts to the contrary, SrA JD was clear: he never said "stop."

him—were sufficiently different from those of the contact incidents charged in Specifications 1, 2, and 3, all of which involved the alleged victim being asleep or unaware, to conclude the evidence of Specifications 1, 2, and 3 did not have a substantial influence on the finding of Specification 4. Moreover, SrA JD's "no," combined with his immediate follow-on statement of "I just want to go to sleep," made clear to Appellant that, at that moment, SrA JD wanted to sleep. This manifestation of lack of consent made it unreasonable for Appellant to believe SrA JD consented to Appellant's contemporaneous touching of SrA JD's genitalia.

I cannot apply the same reasoning to the guilty finding of Specification 5. Considering the four factors of *Harrow*, I find the Government's case for Specification 5 had a glaring weakness: SrA JD had no memory of the period of time during which he went from being clothed to being naked, from having his head at the head of the bed to having his feet there, or [*49] from lying on his back to facing downward and holding his head over Appellant's groin while Appellant's lotion-coated penis first moved in and out of his mouth. The Defense's case was strong in that SrA JD did not remember Appellant holding SrA JD's head during the oral penetration or restraining him during the anal penetration. But SrA JD did remember that he did nothing to resist, verbally or physically, the oral penetration, Appellant's re-positioning of his body, or the anal penetration and that, as soon as he winced and may have made a "vocal expression of pain," Appellant stopped the anal penetration. At that point, not only did Appellant stop and roll SrA JD or allow SrA JD to roll off of Appellant, but he acknowledged SrA JD's reaction to the anal penetration and said he would "just finish the rest" himself.

Considering the third and fourth *Harrow* factors, I find the evidence of Specifications 1-3 immaterial and of low quality as evidence of Specification 5. This finding is premised on the charging theory the Government chose for Specification 5, which was

charged as bodily harm, or the alleged act being nonconsensual, and not as the alleged victim being asleep or unaware, which [*50] was the Government's charging theory of Specifications 1-3. But I note that the difference is one of charging and not of key fact. The evidence was that SrA JD, the alleged victim in Specification 5, remembered nothing between the ongoing sexual contact and the ongoing oral penetration and thus was arguably unaware at the time the sexual assault began, as the alleged victims of Specifications 1-3 were asleep or unaware at the time the sexual contact began. Despite the obvious difference in charging theories, the military judge found a common plan or scheme between Specifications 1-3 and Specification 5, and that finding leads me to conclude the evidence of Specifications 1-3 substantially influenced the judge's verdict on Specification 5. Thus, the judge's error to admit, for a Mil. R. Evid. 404(b) purpose, the evidence of Specifications 1-3 for Specification 5 was not harmless.

I also dissent from the majority's conclusion that the guilty finding for Specification 5 is factually sufficient. Even if I assume arguendo the Government proved beyond a reasonable doubt that SrA JD did not consent to either the oral or the anal penetration, I cannot agree that the Government met its burden and proved beyond [*51] a reasonable doubt that Appellant did not have an honest and reasonable belief SrA JD consented to both.

There is no basis to presume that a man who has a girlfriend or who has not previously engaged in male-male sexual activity or who, when sober, would not consent to male-male sexual activity would never consent to such activity when drunk. The record indicates all of those presumptions were implicated in the Government's case with regard to not only the question of SrA JD's consent but also the question of Appellant's mistake of fact about SrA JD's consent, specifically, whether the mistake was reasonable.

SrA JD did nothing to physically resist or avoid

Appellant's repeated contact of SrA JD's genitalia. SrA JD did answer the question of whether he had "ever thought about messing around with other guys" with the disjointed answer of "no, man, I just want to go to sleep." While SrA JD had no memory of what SrA JD (or Appellant) did next, the evidence is clear that some period of time elapsed during which SrA JD went from being clothed, positioned with his head at the head of the bed, and lying on his back to being naked with his clothes on the floor on the side of the bed where he [*52] slept, having his feet at the head of the bed, and facing down, holding his head over Appellant's naked groin while Appellant's lotion-coated penis moved in and out of his mouth. The only manifestation of non-consent was SrA JD's ambiguous "no" before and during the touching of his genitalia. There was a break in time long enough for SrA JD and Appellant's state of clothing and physical positions to undergo complete transformation. By the end of that break in time, the manifestations of consent, particularly SrA JD holding up his own head after the oral penetration began, support Appellant's honest and reasonable belief that SrA JD was consenting to the oral penetration. Similarly, SrA JD's apparent acquiescence to Appellant moving him and then penetrating his anus were manifestations of consent that support Appellant's honest and reasonable belief that SrA JD consented to the anal penetration. Finally, that Appellant stopped the anal penetration when SrA JD winced demonstrates that Appellant was willing to stop at the first indication SrA JD was uncomfortable and is evidence that Appellant believed SrA JD consented to the anal penetration.

Applying the test for factual sufficiency, [*53] I am not convinced beyond a reasonable doubt of Appellant's guilt on Specification 5. The majority considers it significant that Appellant sent a message to SrA JD in which Appellant accepted "full responsibility" for the sexual activity with SrA JD; I do not. The message was the last of several Appellant sent to SrA JD to discuss what happened, none of which SrA JD responded to and none of

which referred to the sexual activity as occurring against SrA JD's will. Accepting responsibility for sexual activity is not confessing to sexual assault, and Appellant's message doing the former cannot be read as doing the latter.

The majority also considers "Appellant's conduct with SrA JD, charged as two discrete offenses" as "a continuous course of conduct" and thus applies SrA JD's answer of "no, man, I just want to go to sleep" before and during the touching of his genitalia to the later oral and anal penetration. I do not and, because of the break in time and significant change in circumstances during that time, cannot. For all of the reasons articulated, I am not persuaded the Government proved beyond a reasonable doubt that Appellant did not honestly and reasonably believe SrA JD consented [*54] to the oral and anal penetration.

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United States v. Norris

United States Army Court of Criminal Appeals

September 14, 2018, Decided

ARMY 20160262

Reporter

2018 CCA LEXIS 447 *

UNITED STATES, Appellee v. Captain JACK K.
NORRIS United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by *United States v. Norris*, 78 M.J. 199, 2018 CAAF LEXIS 704 (C.A.A.F., Nov. 14, 2018)

Motion granted by *United States v. Norris*, 78 M.J. 202, 2018 CAAF LEXIS 714 (C.A.A.F., Nov. 16, 2018)

Review denied by *United States v. Norris*, 2019 CAAF LEXIS 123 (C.A.A.F., Feb. 27, 2019)

Prior History: [*1] Headquarters, III Corps and Fort Hood Douglas. Watkins and Rebecca Connally, Military Judges. Lieutenant Colonel Travis L. Rogers, Staff Judge Advocate.

Counsel: For Appellant: Captain Cody Cheek, JA; Richard W. Rousseau, Esquire; Zachary Spilman, Esquire (on brief and reply brief).

For Appellee: Lieutenant Colonel Eric K. Stafford, JA; Captain Austin L. Fenwick, JA; Captain KJ Harris, JA; Captain Joshua B. Banister, JA; Captain Sandra L. Ahinga, JA (on brief).

Judges: Before CAMPANELLA¹, SALUSSOLIA, and FLEMING Appellate Military Judges. Senior Judge CAMPANELLA and Judge SALUSSOLIA concur.

Opinion by: FLEMING

Opinion

MEMORANDUM OPINION

FLEMING, Judge:

We hold, under the unique facts of this case, appellant's act of lying his body on top of his victim is sufficient force to sustain a conviction to the offense of rape by force under [Article 120\(a\)\(1\), Uniform Code of Military Justice \[UCMJ\]](#), [10 U.S.C. § 920 \(2006\)](#). We also find the military judge erred, in part, by allowing the government to admit evidence under Military Rule of Evidence [Mil. R. Evid.] 404(b) to establish appellant's intent to dominate and control his victim and his motive of hostility towards his victim. We, nevertheless find this error did not materially prejudice appellant's rights.

A military [*2] judge, sitting as a general-court-martial convicted appellant, contrary to his pleas, of two specifications of rape by force, two specifications of sexual assault, one specification of simple assault, and three specifications of assault consummated by a battery, in violation of [Articles 120 and 128, UCMJ](#), [10 U.S.C. §§ 920 \(2006\)](#), and [920 and 928 \(2012\)](#). The military judge sentenced appellant to confinement for seventeen years and a dismissal. The military judge granted appellant seven days of [Article 13, UCMJ](#), confinement credit. The convening authority approved the adjudged sentence and credited appellant with seven days against his sentence to confinement in accordance with the military judge's ruling.

This case is before us for review pursuant to *Article*

¹ Senior Judge Campanella decided this case prior to her departure from the Court.

66, *UCMJ*. Appellant asserts eight assignments of error, three of which merit discussion, but no relief.

BACKGROUND

Appellant's offenses were against his then-wife, JC. Appellant was convicted of two specifications of raping JC by lying on top of her with his body, sufficient that she could not avoid or escape the sexual contact. Appellant raped JC on divers occasions between 1 November 2011 and 31 December 2011 (Specification 2 of Charge I) and on [*3] one occasion between 25 March 2012 and 15 April 2012 (Specification 3 of Charge I).

Rape by Force Offenses

As to the rape in Specification 2 of Charge I, appellant and JC met in August 2011 and married a month later. Around November or December 2011, JC awoke several mornings with a sore vagina and her clothes removed or improperly located on her body. She also noticed the presence of semen when she used the bathroom.

When JC confronted appellant about what was happening, he admitted to having sexual intercourse with her while she was asleep. During this time, JC was taking prescription Ambien before going to bed, which she testified made her "sleepy and drowsy." JC communicated to appellant that she felt humiliated, violated, and she did not consent to him having sexual intercourse with her while she was asleep and under the influence of Ambien.

After this discussion with appellant, JC testified to awakening on more than one occasion while "very groggy" to find appellant engaging in sexual intercourse with her. JC stated she would start to cry. JC described the occasions as:

I could just feel, he is a really big guy, and he was a lot bigger than me. At that time he was very muscular and [*4] he worked out, so you could definitely feel the weight. And I

remember feeling him moving my clothing. I remember feeling his weight on my chest and on my hips, and then I felt him put his penis into my vagina.

When asked if she could move, JC testified:

No, absolutely not. You are groggy, and he is so much bigger than I am. It is not like you can wake up, you know, and roll over or even push someone off. You can't push—you can't push anything bigger than you off of you.

As to the rape in Specification 3 of Charge I, JC testified to being approximately four months pregnant and returning home after her first ultrasound. JC stated appellant entered their bedroom, grabbed her shoulders, threw her on her back on the bed, pulled down her pants, climbed on top of her, and proceeded to have sexual intercourse with her. JC testified that while appellant was on top of her, his arms were positioned at her sides, and she felt like she could not move because he was so heavy. JC testified she cried during the sexual intercourse because it was very painful.

Admission of Appellant's Uncharged Acts

At trial, the government admitted the following Mil R. Evid. 404(b) evidence: (1) appellant drove erratically on two occasions; [*5] (2) appellant choked JC and placed a pillow over her face during sexual intercourse on several occasions; and (3) appellant dominated JC in other various ways to include taking her personal items during their entire marriage. *See* Mil. R. Evid. 404(b).²

Appellant's Erratic Driving on Two Occasions

After JC's first ultrasound, appellant drove her home. They began arguing during the car ride.

² "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . ." Mil R. Evid. 404(b).

Becoming more angry, appellant stomped on the accelerator increasing the car's speed to approximately ninety miles per hour on a busy road. Appellant also swerved the car causing JC to hit her head on the side of the car. This driving incident immediately preceded the rape by force offense charged in Specification 3 of Charge I.

JC testified that on 27 May 2013, she and appellant visited a planetarium with their infant daughter. Their daughter was in the back of the vehicle in a car seat. JC and appellant started arguing during the drive home. Appellant drove fast and erratically, running red lights, and swerving in and out of lanes.³

Appellant's Uncharged Acts Involving Sexual Intercourse with JC

JC testified on one occasion, appellant entered their bedroom to engage in sexual intercourse. JC told appellant she was too tired. [*6] Appellant placed his forearm over her throat, leaned forward, and asked her if "[she] would like to go to sleep forever." JC perceived this as a threat that appellant would use more force against her if she refused to engage in sexual intercourse. JC also testified to other instances during their marriage when appellant would strangle her or place a pillow over her face during sexual intercourse.⁴

Appellant's Multiple and Varied Uncharged Acts against JC

JC testified appellant would take her car keys, cell phone, credit card, military identification card, wallet, her engagement ring, and other items of

value throughout the course of their marriage.⁵ She testified appellant put a "find my i-Phone" application on her cell phone in order to track her whereabouts. Appellant deprived her of sleep by not allowing her to go to sleep or waking her while she was sleeping. JC testified if she offered an opinion contrary to appellant, he would force her to sit on the couch so he could "pontificate for hours if necessary until [JC] said [to him] 'you're right. I'm sorry.'" Appellant also frequently did not allow JC to leave their house or if she left the house he would lock her out.

The military judge [*7] ruled orally that all of the uncharged acts were admissible for the non-propensity purpose of establishing appellant's intent to dominate and control JC and his motive of hostility towards her. The military judge reasoned appellant's uncharged acts were relevant because the acts made it more likely than not that appellant possessed the intent or motive to commit the multiple charged offenses of rape, sexual assault, and assault against JC.⁶ The military judge also held "the fact that the uncharged acts and the charged acts have the same alleged victim, at the time, which was the accused's spouse at the time, strengthens the mode of relevancy." Although the military judge stated she "considered all three parts" of the Mil. R. Evid. 404(b) test and "under

³ This driving incident occurred the afternoon before the charged offense of child neglect, to which appellant was found not guilty, for leaving his infant daughter unattended in his quarters for over six hours.

⁴ Although JC testified to multiple strangulations, appellant was charged with only one specification of aggravated assault for strangling JC and found guilty of the lesser included-offense of assault consummated by a battery (Specification 2 of Charge III).

⁵ As to the cell phone, JC testified to one incident on or about 4 August 2013 when she argued with appellant about him turning off her phone. In the middle of the argument, appellant unlawfully pushed JC's head on the ground resulting in a conviction for an assault consummated by a battery (Specification 3 of Charge III).

⁶ At the time of the military judge's ruling, appellant was charged with one specification of sexually assaulting JC while she was substantially incapacitated, in violation of [Article 120, UCMJ](#) (found not guilty); two specifications of forcible rape of JC, in violation of [Article 120, UCMJ](#) (found guilty of both specifications); three specifications of sexual assault by causing bodily harm to JC, in violation of [Article 120, UCMJ](#) (found guilty of two of the three specifications); two specifications of aggravated assault against JC, in violation of [Article 128, UCMJ](#) (found guilty of the lesser included offense of assault consummated by battery for both specifications); and three specifications of assault consummated by battery against JC, in violation of [Article 128, UCMJ](#) (found guilty of two of the three specifications).

the [*Reynolds*] three part test, this evidence [met] the criteria for admission to show the accused's motive, intent, or state of mind," she did not articulate her Mil. R. Evid. 403 balancing analysis on the record.⁷

LAW AND DISCUSSION

Legal and Factual Sufficiency of the Rape Offenses

Appellant asserts the act of lying on top of another does not constitute sufficient force to affirm his conviction to two specifications of forcible rape under of [Article 120\(a\)\(1\)\(2006\)](#), *UCMJ*. [*8] We disagree.

We review claims of legal and factual insufficiency *de novo*, examining all of the evidence properly admitted at trial. *Art. 66(c)*, *UCMJ*; [United States v. Beatty](#), 64 M.J. 456, 459 (C.A.A.F. 2007). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, any rational trier of fact could have found the elements of the contested crimes beyond a reasonable doubt. [Jackson v. Virginia](#), 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The test for factual sufficiency is whether after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. [United States v. Turner](#), 25 M.J. 324, 325 (C.M.A. 1987).

We find JC's testimony, regarding the rapes by force in Specifications 2 and 3 of Charge I, describes "physical violence, strength, power or restraint sufficient that [she] could not avoid [appellant] or escape the sexual conduct." See [10](#)

[U.S.C. § 920\(t\)\(5\)\(C\)\(2006\)](#), [Article 120\(t\)\(5\)\(C\)MCM](#) (2008 ed.), Part IV, ¶45(a)(t)(5). Appellant cites to [United States v. Soto](#), 2014 CCA LEXIS 681 (A.F. Ct. Crim. App. 17 Sep. 2014) and [United States v. Valentin](#), 2012 CCA LEXIS 180 (N.M. Ct. Crim. App. 17 May 2012) for the proposition that lying on top of another does not constitute force under [10 U.S.C. § 920\(t\)\(5\)\(C\)\(2006\)](#). This case, however, is readily distinguishable from *Soto* and *Valentin*. We discuss these [*9] distinctions in turn.

In *Soto*, the evidence of force was much weaker than in this case in three ways. [2014 CCA LEXIS 681](#). First, the government failed to present detailed evidence regarding the victim's communication of non-consent to *Soto*. *Id. at *12-13*. In contrast, evidence of JC's non-consent is sufficiently detailed. For Specification 2 of Charge I, JC testified she told appellant she felt humiliated, violated, and she did not consent to having sexual intercourse while asleep on Ambien. For Specification 3 of Charge I, JC described appellant's hostility towards her during the car ride home from her first ultrasound when appellant started driving erratically, which caused her to hit her head in the car. When they returned home, despite JC separating herself from appellant, he sought her out in their bedroom, forced her on the bed, forcibly removed her clothes, and proceeded to have sexual intercourse with her. JC cried during the rape because she was in pain. As to both specifications, we find the evidence of JC's non-consent much more compelling than in *Soto* and are convinced beyond a reasonable doubt she did not consent.

Second, in *Soto*, the government presented ambiguous evidence regarding when and for how [*10] long *Soto* was on top of her. *Id. at *13-14*. Whereas, JC's testimony to both offenses provided graphic detail of appellant's force. During the rape in Specification 2 of Charge I, JC testified appellant was physically much bigger than she. She described feeling his weight on her chest and hips holding her down preventing her from moving,

⁷ "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Mil. R. Evid. 403.

rolling over, or pushing him off of her. JC also testified appellant penetrated her while she was "groggy" from Ambien usage which further impaired her physical ability to resist appellant. Similarly, JC testified during the rape in Specification 3 of Charge I she could not move because he was heavy, she was four months pregnant, and the intercourse was painful. We find the evidence of appellant's physical force in both offenses not only much more detailed than in *Soto* but also sufficient to support the conviction.

Third, the victim in *Soto* testified she was afraid during the encounter because she feared getting in trouble for having sex with her instructor and cheating on her boyfriend, not that she was afraid of Soto. *Id. at *13*. In stark contrast, appellant was convicted of physically assaulting JC on multiple occasions during the period surrounding the charged rapes. JC [*11] described being afraid of appellant and trapped in the marriage. The record clearly demonstrates JC feared appellant and that fear was present during the rapes for which he was convicted.

Valentin is distinguishable because it involved proof of constructive force. [2012 CCA LEXIS 180](#). Here, it is the amount of actual force that is at issue. In *Valentin*, the court held the military judge erred by instructing the panel members that constructive force under a parental psychological compulsion theory was sufficient to meet the definition of rape by force under [10 U.S.C. § 920\(t\)\(5\)\(C\)\(2006\)](#). *Id. at *30*. To constitute a rape by force, however, there must be a physical act. *Id. at *32*. Although the government presented evidence of appellant's hostility towards JC and how it influenced her psychologically, in contrast to *Valentin*, the government also presented evidence of actual physical force through appellant's use of his greater body weight to restrain JC. Here, JC testified to the actual physical acts which constituted the force for the rapes in Specifications 2 and 3 of Charge I.

We find appellant's physical acts in Specifications 2 and 3 of Charge I constituted sufficient force to

overcome JC. Accordingly, we find there was sufficient evidence [*12] for the trier of fact and us to conclude beyond a reasonable doubt appellant raped JC using unlawful force.⁸

Mil. R. Evid. 404(b) Evidence

Appellant asserts the military judge erred in admitting evidence pursuant to Mil R. Evid. 404(b) to prove appellant's intent to dominate and control JC and his motive of hostility towards JC.

A decision to admit evidence is reviewed for abuse of discretion. [United States v. McCollum, 58 M.J. 323, 335 \(C.A.A.F. 2003\)](#). "[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." [United States v. Ayala, 43 M.J. 296, 298 \(C.A.A.F. 1995\)](#).

The test for admissibility of uncharged misconduct under Mil. R. Evid. 404(b) is set out in [United States v. Reynolds, 29 M.J. 105, 109 \(C.M.A. 1989\)](#): (1) Does the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs or acts?; (2) What "fact...of consequence" is made "more" or "less probable" by the existence of this evidence?; and (3) Is the "probative value... substantially outweighed by the

⁸ We further note even if we were to find the facts of this case did not support a factual finding of force, we could still approve a conviction for the lesser included offense of aggravated sexual assault. See [United States v. Alston, 69 M.J. 214 \(C.A.A.F. 2010\)](#). In *Alston*, the CAAF held "[t]he bodily harm element of aggravated sexual assault under [Article 120\(c\)](#) - defined in [Article 120\(t\)\(8\)](#) to include an offensive touching, however slight — is a subset of the force of rape under [Article 120\(a\)](#), as defined in [Article 120\(t\)\(5\)\(C\)](#)." *Id. at 216*. We also note a reassessment of the sentence in accordance with the principles of [Winckelmann, 73 M.J. 11, 15-16 \(C.A.A.F. 2013\)](#) and [United States v. Sales, 22 M.J. 305, 307-08 \(C.M.A. 1986\)](#) would yield the same sentence. We are confident the military judge would have adjudged the same sentence. The maximum punishment for aggravated sexual assault is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years. *MCM*, 2008, pt. IV, ¶ 45.e(2)(f)(2). Thus, appellant's conviction for Specifications 2 and 3 of Charge I still would have carried a maximum punishment of 60 years. Further, the gravamen of appellant's criminal conduct would remain substantially the same.

danger of unfair prejudice?" *Id. at 109*. In order for evidence to be relevant under Mil. R. Evid. 404(b), the evidence must be probative of a material issue other than character. *Huddleston v. United States*, 485 U.S. 681, 686, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988).

Ordinarily, under the third prong of the *Reynolds*' test, we review a military judge's Mil. R. Evid. 403 ruling for a "clear abuse of discretion." *United States v. Ruppel*, 49 M.J. 247, 250 (1998). However, we give military judges less deference [*13] if they fail to articulate their balancing analysis on the record, and no deference if they fail to conduct a Mil. R. Evid. 403 balancing analysis altogether. See *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010); *United States v. Berry*, 61 M.J. 91, 96 (C.A.A.F. 2005); *United States v. Manns*, 54 M.J. 164 (C.A.A.F. 2000). Our superior court has identified a non-exhaustive list of factors to consider when conducting a Mil. R. Evid. 403 balancing test: "[S]trength of proof of prior act—conviction versus gossip; probative weight of evidence; potential for less prejudicial evidence; distraction of factfinder; . . . time needed for proof of prior conduct[;] . . . temporal proximity; frequency of the acts; presence or lack of intervening circumstances; and relationship between the parties." *United States v. Wright*, 53 M.J. 476, 482-83 (C.A.A.F. 2003) (citations omitted).

In analyzing the first prong of the *Reynolds* test, JC's testimony describing each uncharged act, reasonably supports a finding appellant committed each prior act. As to the second and third prongs of the *Reynolds* test, the military judge stated she conducted a Mil. R. Evid. 403 balancing test but failed to articulate her analysis on the record. Accordingly, the military judge's ruling is not entitled to a "clear abuse of discretion" but instead we will apply a lesser deference for failing to articulate her analysis. Even after applying this lesser deference, we find the military judge [*14] did not err in admitting some uncharged acts but erred in admitting other uncharged acts. We discuss

each in turn.

Uncharged Acts Properly Admitted by the Military Judge

We find the military judge did not err in admitting the uncharged acts of appellant driving erratically after JC's ultrasound, strangling or placing a pillow over JC's face during sexual intercourse, and taking JC's cellphone on one occasion.⁹

Appellant's Erratic Driving after the Ultrasound

The uncharged act of appellant driving erratically after JC's first ultrasound is highly relevant to the forcible rape charged in Specification 3 of Charge I because it occurred immediately prior, and is considered *res gestae* evidence. See e.g. *United States v. Moran*, 65 M.J. 178, 183 (C.A.A.F. 2007) (noting otherwise disallowed testimony is permitted because it is necessary to complete the chronological sequence of events).

Appellant and JC had an argument during the drive home, appellant began driving erratically, causing JC to hit her head on the window. JC testified when they returned home, appellant continued to be angry, entered their bedroom and forcibly raped her. We find the military judge properly allowed evidence of appellant's erratic driving on this one occasion because it is [*15] relevant to show appellant's intent to dominate and control JC and his motive of hostility towards her which remained present during the rape in Specification 3 of Charge I. See *United States v. Watkins*, 21 M.J. 224, 227 (C.M.A. 1986) (holding prior acts are admissible which reasonably could be viewed as "the expression and effect of the existing internal emotion" and "the same motive [is] shown to have existed in appellant at the time of the subsequently charged acts.").

⁹ We would find these uncharged acts were properly admitted even if we gave no deference to the military judge's ruling.

Under Mil R. Evid. 403, appellant's erratic driving is highly probative because it immediately precedes the charged act in Specification 3 of Charge I and lends explanation to appellant's hostility towards JC during the charged rape. The prejudice of admitting the uncharged acts that appellant drove erratically and committed an assault and battery against JC when her head hit the car window does not substantially outweigh the probative value of the evidence. Admitting the uncharged act is not substantially outweighed by any Mil. R. Evid 403 concerns; particularly in a case where an appellant is charged with a plethora of far more serious offenses against the same victim.

Appellant's Uncharged Acts Involving Sexual Intercourse with JC

JC testified appellant placed his forearm over JC's neck prior to sexual [*16] intercourse and threatened her and on several occasions throughout the marriage appellant strangled her or placed a pillow over her face during sexual intercourse. These uncharged acts are highly relevant to show appellant's intent to dominate and control JC and his motive of hostility towards her. Appellant was charged with several crimes of sexual violence against JC. The aforementioned uncharged acts are similarly violent acts to the charged sexual offenses. Additionally, the uncharged acts occurred on divers occasions within the same time period as the charged offenses.

United States v. Jenkins, presented a similar Mil. R. Evid. 403 analysis as occurred in this case. [48 M.J. 594 \(1998\)](#). Similar to appellant's assaults against JC, Jenkins also had a "long sordid history of battering his spouse." *Id.* at 595. In *Jenkins*, this court held the military judge correctly applied the three-part *Reynolds* test and properly admitted the evidence of uncharged acts "given the repetition of very similar circumstances on five occasions, always between Jenkins and [his wife], always involving matters beyond the control of [Jenkins], matters which led to an argument and a lashing out,

and often times to injury to [his spouse]." *Id.* at 598. Similar to [*17] *Jenkins*, appellant's uncharged acts were all similar acts of repeated violence and always against his wife.

While some prejudice exists in admitting uncharged acts of appellant's additional violence against JC, the uncharged acts are highly relevant as to appellant's hostility towards JC. See *Jenkins*, 48 M.J. at 598-99 (*Army Ct. Crim. App.* 1998); see also *United States v. Hamilton*, 2001 CCA LEXIS 451 at *25 (*Army Ct. Crim. App.* 2001) (reversing because of erroneously admitted Mil. R. Evid. 404(b) evidence but recognizing the relevancy of motive is strengthened when the charged and uncharged acts occur against the same victim).¹⁰ Accordingly, we find the probative value of this evidence not substantially outweighed by any Mil. R. Evid 403 concerns.

Appellant's Control over JC's Cell Phone

JC testified that on 4 August 2013, she and appellant argued over her cell phone because he had turned it off, which was a common occurrence in their marriage. This angered JC because it was her phone and appellant never paid for her phone. She confronted appellant about turning off her phone, which resulted in an argument. During the argument, appellant pushed JC's head into the ground. Appellant was charged with this assault of JC in Specification 3 of Charge III, and convicted of this offense.

Under Mil R. Evid. 403, the probative value of appellant's prior [*18] act of turning off JC's cell phone on 4 August 2013 is highly relevant because it provides context to the argument immediately preceding the assault in Specification 3 of Charge

¹⁰ Appellant asserts his case is similar to *Hamilton* and requires reversal. Appellant's case, however, is readily distinguishable from *Hamilton* because the uncharged acts in *Hamilton* were committed against a different victim, an ex-wife, and the acts were far more serious crimes than the charged offenses against his current wife. *Id.* at *18-19.

III and the probative value of the evidence is not substantially outweighed by any Mil. R. Evid 403 concerns.

Relevance of Appellant's Motive and Intent

We next address appellant's argument that the evidence of his intent and motive were not relevant because appellant's defense at trial was JC fabricated the charged offenses and thus he did not assert his acts were an accident or he possessed an innocent mental state. Appellant asserts his intent was therefore not in controversy. We disagree for two reasons.

First, appellant's defense theory did not relieve the government of the burden of establishing beyond a reasonable doubt that appellant possessed the general intent to commit the offenses against JC. See *United States v. Harrow*, 65 M.J. 190 (C.A.A.F.). "[T]he basic tenet from the Supreme Court is '[a] simple plea of not guilty . . . puts the prosecution to its proof as to all elements of the crime charged.'" *United States v. Harrow*, 65 M.J. 190 (C.A.A.F. 2007) (quoting *Mathews v. United States*, 485 U.S. 58, 64-65, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988)). "The Supreme Court, examining this same question, unequivocally determined that evidence of intent and lack of accident may be admitted regardless of [*19] whether a defendant argues lack of intent because every element of a crime must be proven by the prosecution." *Id.* at 202 (citing *Estelle v. McGuire*, 502 U.S. 62, 69, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); *Mathews v. United States*, 485 U.S. 58, 64-65, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988)). "Motive is the moving force that induces the criminal act and comes into play before the actus reus, that is, why the criminal did the act." *United States v. Jenkins*, 48 M.J. 594, 598 (Army Ct. Crim. App. 1998) (citation omitted). "[A]lthough never an element of an offense, [motive] may be relevant in a case to . . . to show criminal intent." *United States v. Hamilton*, 2001 CCA LEXIS 451, at *25 (Army Ct. Crim. App. 2001). "Uncharged misconduct can be probative of

general criminal intent, such as that required of rape [...]." *U.S. v. Jenkins*, 48 M.J. 594, 599 (Army Ct. Crim. App. 1998).

Second, appellant's defense was JC fabricated the charged offenses, which ultimately creates an inverse presumption regarding appellant and that he did not possess any motive or intent to harm JC. However, if appellant possessed an intent to dominate and control JC and a motive of hostility towards her, the government could establish it was less likely JC was fabricating the allegations. In other words, appellant's motive and intent were relevant to rebut the defense theory that JC was lying. During cross-examination of JC at trial, defense attempted to undermine JC's credibility, on multiple grounds, to include insinuating JC actually had a happy and loving marriage with appellant. [*20] Defense counsel cross-examined JC extensively with multiple pictures of her and appellant appearing happy. This cross-examination increased the relevance of appellant's motive and intent against JC, allowing the government to rebut the defense theory that JC and appellant had a happy marriage so JC must be lying about the alleged offenses.

While the government may not have been required to prove appellant's "specific intent" as an element, we find the government should not be constrained from presenting relevant acts regarding appellant's specific intent as evidence to establish the element of appellant's general intent. We also find the defense's theory of the case and cross-examination of JC created an inverse presumption that appellant possessed no criminal intent or motive, which placed his intent and motive into controversy and made the uncharged acts relevant to the government's case.

Uncharged Acts Improperly Admitted by the Military Judge

We find the military judge erred in admitting the uncharged acts of appellant driving erratically after a family visit to the planetarium and the other

multiple and varied acts against JC.

The uncharged act of appellant driving erratically after [*21] a family visit to the planetarium, appears to have had minimal, if any, relevance to any of the charged offenses related to JC. JC testified she and appellant argued during the drive home. JC testified appellant stomped on the accelerator, ran a couple of red lights, and was driving erratically by swerving in and out of lanes. When they returned home, they continued to argue, eventually leading to JC leaving the house without their infant daughter. Appellant was charged with child endangerment for leaving their daughter unattended for over 6 hours in her crib. Appellant's hostility towards JC, by driving erratically, however, lacks sufficient relevance as to appellant's alleged neglect towards their daughter. Even if the evidence had some relevance the probative value was substantially outweighed by Mil. R. Evid. 403 concerns. We find this incident of appellant's erratic driving too attenuated from the charged offenses regarding JC for its admission under Mil. R. Evid. 404(b).

With the exception of appellant shutting off JC's cell phone on or about 4 August 2013, the other uncharged acts of appellant taking JC's other personal items, depriving JC of sleep, forcing her to sit on the couch, and not allowing her to leave the house [*22] or locking her out of the house had minimal, if any, relevance under Mil. R. Evid. 404(b) as to appellant's intent or motive to commit the charged offenses. We find these uncharged acts had minimal, if any, relevance to the charged offenses because they were too attenuated in time to any actual alleged offense. JC testified these uncharged acts occurred throughout the course of their marriage. These minor acts are not sufficiently relevant to appellant's motive or intent to commit any of the charged offenses against JC on a date certain. Even if the acts were relevant, their probative value was substantially outweighed by Mil. R. Evid. 403 concerns.

Prejudice to Appellant

Having determined the military judge improperly admitted evidence under Mil. R. Evid. 404(b), we must now determine whether this error resulted in material prejudice to appellant's substantial rights. [*Article 59\(a\), UCMJ*](#). "We evaluate prejudice from an erroneous evidentiary ruling by weighing (1) the strength of the government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." [*United States v. Kerr, 51 M.J. 401, 405 \(C.A.A.F. 1999\)*](#) (citing [*United States v. Weeks, 20 M.J. 22, 25 \(C.M.A. 1985\)*](#)). Appellant was not materially prejudiced by the military judge erroneously admitting some uncharged [*23] acts.

Here, the government's case was strong. In addition to JC's testimony recalling all of the details of appellant's assaults against her, the government also corroborated her testimony with several other witnesses, an audio recording, photos of injuries, and appellant's own statements.

Four witnesses corroborated JC's testimony. JC's friend, SO, testified JC called her after the assault in Specification 3 of Charge III. JC's brother, BC, sister-in-law, CC, and friend, GS all testified JC told them appellant physically and sexually assaulted her. SO testified she observed injuries on JC's shoulder, arms, wrist, and face. SO took photos of these injuries which were admitted into evidence at trial. These injuries were further corroborated by CC, who testified she observed these injuries on JC in person.

The government also admitted into evidence a recording from August 2013, retrieved from appellant's cell phone. The recording contained audio of JC arguing with appellant about how he sexually abused her "all of the time."

The government's case was also strengthened by appellant's own statements to JC in a handwritten letter in which appellant admitted to "violating" JC. Appellant wrote: [*24]

[JC], especially you — who are so fragile (sic),

so tender and sensitive towards me — deserve boundaries. You have them and you know what they are when they have been violated — AND I have violated them indeed! Since our wedding day I have exercised free reign over your body and thought that that was okay, that as your husband that was my right. What age am I living in, 1613? [...] I have violated you, our marriage, and our wedding vows. I have been that husband that no girl dreams and every father fears — I have been no husband at all.

The defense case was not strong. The crux of appellant's defense was that none of the charged allegations occurred and JC was fabricating the allegations as part of the divorce and child custody dispute. The four corroborating witnesses, photos of injuries, audio recording, and appellant's handwritten letter to JC undercut the defense's theory of the case.

The materiality and quality of the improperly admitted uncharged acts were low. The uncharged acts consisted of much less serious offenses or crimes than the charged offenses. The minimal relevance of the uncharged acts, which warranted their exclusion, negates their prejudicial impact on the proceedings. [*25]

Accordingly, we find the military judge's ruling under Mil R. Evid. 404(b) harmless because the government's case was strong and appellant's defense case was weak. See [*United States v. Kerr*, 51 M.J. 401, 405 \(C.A.A.F. 1999\)](#) (holding that when the remainder of the government's case was strong and the defense presented no evidence to contradict it, instead relying "on suggestion and insinuation," the Mil. R. Evid. 404(b) error was harmless); [*United States v. Corbett*, 29 M.J. 253, 256 \(C.M.A. 1989\)](#) (determining inadmissible Mil. R. Evid. 404(b) evidence had a minimal effect on the members considering all the other evidence presented at trial and the inadmissible evidence's tenuous relevance).

To establish ineffective assistance of counsel, an appellant must demonstrate both (1) his counsel's performance was deficient, and (2) the deficiency resulted in prejudice. [*United States v. Green*, 68 M.J. 360, 361-62 \(C.A.A.F. 2010\)](#) (citing [*Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 \(1984\)](#)). In order to establish deficient performance, an appellant must establish that counsel's "representation amounted to incompetence under 'prevailing professional norms.'" [*Harrington v. Richter*, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 \(2011\)](#) (quoting [*Strickland*, 466 U.S. at 690](#)).

Appellant claims his trial defense counsel were ineffective for failing to present evidence of his "pertinent character traits." Appellant does not specify which character traits. However, appellant references a forensic psychologist report conducted of appellant and submitted [*26] with his R.C.M. 1105 matters. Appellant directs this court's attention to a portion of the report, which states, "[...] anger and aggression were specifically considered and neither was not found to be a manifest problem. His level of anger-proneness appeared to be similar to that of the average individual. There was no evidence of sadistic personality features. Neither was there evidence of serious sexual psychopathology." Appellant appears to be referencing evidence of a character for peacefulness.¹¹

We find trial defense counsel's election to not present evidence of appellant's character for

¹¹ To the extent appellant may also be referencing a "good soldier defense," we note Mil R. Evid. 404 was modified by the *National Defense Authorization act for Fiscal Year 2015*, Pub. L. No. 113-291, § 536, 128 Stat. 2268 (19 December 2014). Appellant's case was tried after this date. The modified rule prohibits an accused from offering evidence of his general military character for sexual assault offenses and "any other offense in which evidence of general military character of the accused is not relevant to any element of an offense for which the accused has been charged." Mil. R. Evid. 404(a)(2)(A) (2016 ed.). Even if appellant could have presented such evidence, we again note, it would have permitted the government to rebut this evidence with a deluge of appellant's specific violent acts. We find trial defense counsel's election to not present evidence of appellant's general military character to be a reasonable trial strategy.

peacefulness to be a reasonable trial strategy. Had defense counsel presented this evidence, the government would have been permitted to rebut defense's assertion that appellant is a peaceful person. Moreover, we find the lack of evidence of appellant's character for peacefulness did not prejudice appellant. Appellant's own words to JC in a text message, "I'm still a bitter angry man. And I have impulses to cause hurt not only to myself but to those around me," greatly undermined any potential evidence of appellant's peaceful character. Additionally, appellant's handwritten letter to JC, JC's testimony, and [*27] the testimony of four other witnesses contradicted appellant's possession of a peaceful character.

Therefore, we find appellant has failed to meet his burden of showing he was denied effective assistance of counsel.

CONCLUSION

The findings of guilty and sentence are AFFIRMED.

Senior Judge CAMPANELLA and Judge SALUSSOLIA concur.

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United States v. Soto

United States Air Force Court of Criminal Appeals

September 16, 2014, Decided

ACM 38422

Reporter

2014 CCA LEXIS 681 *

UNITED STATES v. Staff Sergeant EDDY C.
SOTO, United States Air Force

Notice: THIS OPINION IS SUBJECT TO
EDITORIAL CORRECTION BEFORE FINAL
RELEASE.

Subsequent History: Affirmed by [United States v. Soto, 2015 CAAF LEXIS 398 \(C.A.A.F., Apr. 2, 2015\)](#)

Prior History: [*1] Sentence adjudged 16 March 2013 by GCM convened at Joint Base San Antonio-Lackland, Texas. Military Judge: Matthew D. Van Dalen (sitting alone). Approved Sentence: Dishonorable discharge, confinement for 48 months, forfeiture of all pay and allowances, and reduction to E-1.

Counsel: For Appellant: Major Zaven T. Saroyan and Captain Lauren A. Shure.

For United States: Major Daniel J. Breen; Major Jason S. Osborne; and Gerald R. Bruce, Esquire.

Judges: ALLRED, HECKER, MITCHELL, WEBER, TELLER, and CONTOVEROS, Appellate Military Judges.

Opinion by: WEBER

Opinion

En Banc

OPINION OF THE COURT

WEBER, Judge:

A military judge sitting as a general court-martial accepted the appellant's pleas of guilty to two specifications of violating a lawful general regulation, one specification of making a false official statement, and two specifications of adultery, in violation of Articles 92, 107 and 134, UCMJ, [10 U.S.C. §§ 892, 907, 934](#). Contrary to the appellant's plea, the military judge convicted the appellant of one specification of rape, in violation of Article 120, UCMJ, [10 U.S.C. § 920](#). The military judge acquitted the appellant of two other specifications alleging aggravated sexual assault and wrongful sexual contact. The adjudged and approved sentence consisted of a dishonorable [*2] discharge, confinement for 48 months, forfeiture of all pay and allowances, and reduction to E-1.

On appeal, the appellant challenges the factual sufficiency of his rape conviction and the appropriateness of his sentence. We sua sponte elected to consider this appeal en banc and provided the parties an opportunity to file supplemental briefs on a narrower aspect of the factual sufficiency of the conviction than that originally briefed. We find the appellant's rape conviction factually insufficient, rendering moot the sentence appropriateness issue.

Background

The appellant served as a military training instructor (MTI) in basic military training at Joint Base San Antonio-Lackland, Texas. During the charged time frame, a punitive Air Education and Training Command instruction prohibited instructors, such as the appellant, from developing

or attempting to develop a personal, intimate, or sexual relationship with a trainee, including former basic trainees who remained in follow-on technical training school. The instruction also prohibited such relationships with a trainee's immediate family member.

In 2011, the appellant engaged in inappropriate relationships with two female Airmen who were [*3] formerly trainees in his basic military training flight. First, he twice had sexual intercourse with an Airman who remained at technical training school in San Antonio. Second, he twice had sexual intercourse with the spouse of one of his trainees who had come to see her husband graduate basic military training. This spouse was also a former trainee in the appellant's flight, though she was no longer in trainee status. For these two prohibited relationships, the appellant pled guilty to two specifications of violating the Air Education and Training Command instruction. He also pled guilty to two specifications of adultery because he was married at the time of the sexual encounters and so was one of the female Airmen involved.¹ When Air Force Office of Special Investigations agents questioned the appellant about his relationships with trainees, he falsely stated that he had never engaged in sexual relationships with a trainee, leading to his plea of guilty for making a false official statement.

The Government also charged the appellant with rape, aggravated sexual assault, and wrongful sexual contact resulting from his relationship with another of his former trainees, SrA TS.² After SrA TS completed basic training and technical training school, she e-mailed the appellant along with other

instructors to let them know she had arrived at her first duty station in California. The appellant promptly replied to her message, and the two began communicating via e-mails, Facebook messages, and text messages. The messages grew more personal, and the two discussed meeting in person. SrA TS purchased an airline ticket to visit the appellant in San Antonio in October 2010. She offered to procure a hotel room and rental car for herself, but the appellant informed her she could stay at his apartment and he would drive her where she wanted to go. SrA TS agreed to this.

The incident that led to the rape specification took place soon after SrA TS arrived in San Antonio. She stated the appellant met her at the airport and as she entered his car, he promptly pushed her into her seat and kissed her. She stated she attempted to distract him by stating she wanted to go out to eat, but the appellant insisted they stop by his apartment to drop off her luggage. SrA TS stated she used the restroom in his apartment, and when she emerged from the restroom, the appellant hugged her, kissed her, took her to the bed, pulled down her shorts, and had sexual intercourse with her. SrA TS stated this was against her will; she pushed him and told him, "No, I'm not ready," to no avail.

At trial and on appeal, the parties focused much of their attention on SrA TS's actions following this charged rape. SrA TS continued to stay at the appellant's apartment and slept in his bed for her five-day stay in San Antonio. When she returned to California, she continued to communicate with the appellant and sent him explicit pictures of herself. She also communicated with a friend from basic training that she was dating the appellant, that he was her boyfriend, [*6] and that the relationship was a "dream come true." Although she considered herself in a relationship with the appellant, SrA TS also remained in an "on again, off again" relationship with her boyfriend in California during this time; however, the relationship was strained.

Over the next several months, SrA TS visited the appellant twice more, both times bringing family

¹ The appellant was married at the time of both incidents. However, the Specification of Charge IV, alleging adultery by wrongfully having sexual intercourse with the spouse of the appellant's trainee, [*4] fails to allege that the appellant was married at the time of the sexual intercourse. We find no legal deficiency caused by this omission, since the specification does properly allege that the female Airman was married to another person.

² At the time of the charged actions, Senior Airman TS's rank was Airman First Class and her [*5] last name was different.

members to view houses for the family's possible move to San Antonio. Some consensual sexual activity took place between SrA TS and the appellant during SrA TS's visits to San Antonio, and she stayed with the appellant during each visit. During the last visit, SrA TS stated that she woke up after consuming alcohol to find herself unclothed in the appellant's apartment smelling like she had sex. However, SrA TS could not state positively whether intercourse occurred, and she testified that she did not feel like she had sex. The appellant was acquitted of aggravated sexual assault and wrongful sexual contact resulting from this incident. Soon after this last visit, SrA TS and the appellant stopped communicating, and SrA TS married her boyfriend in California.

SrA TS did not report any sexual assault to the authorities. Investigators [*7] learned of this matter when they interviewed SrA TS as part of an investigation into the appellant's relationships with trainees.

SrA TS was of Vietnamese origin. At trial, the Government called an expert in Southeast Asian cultures to explain how Vietnamese culture's views on rape and women may help explain SrA TS's actions after the charged events. Trial defense counsel effectively explored the limitations of the expert witness's testimony. On appeal, the appellant alleges that his conviction for rape is factually insufficient, asserting that SrA TS's actions following the charged incident undermine her credibility and demonstrate her consent to sexual activity with the appellant. Alternatively, he argues that the adjudged and approved sentence is inappropriately severe. We invited the parties to brief whether the evidence introduced at trial about the charged rape itself rendered the conviction factually sufficient, without focusing on SrA TS's actions after the first charged act.

Factual Sufficiency

We review issues of factual sufficiency de novo. [*United States v. Beatty*, 64 M.J. 456, 459 \(C.A.A.F.](#)

[2007\)](#).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having [*8] personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." [*United States v. Turner*, 25 M.J. 324, 325 \(C.M.A. 1987\)](#), quoted in [*United States v. Reed*, 54 M.J. 37, 41 \(C.A.A.F. 2000\)](#). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." [*United States v. Washington*, 57 M.J. 394, 399 \(C.A.A.F. 2002\)](#). Our factual sufficiency determination is limited to a review of the "entire record," meaning evidence presented at trial. [*United States v. Bethea*, 22 C.M.A. 223, 46 C.M.R. 223, 225 \(C.M.A. 1973\)](#); see also [Reed](#), 54 M.J. at 44.

The appellant was convicted of causing SrA TS to engage in sexual intercourse "by using physical strength or power or restraint applied to her person sufficient that she could not avoid or escape the sexual contact." We have reviewed the record of trial and evaluated the arguments by the appellant and the Government, including the supplemental briefs submitted by the parties. Making our own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt and making allowances for not having personally observed the witnesses, we are not convinced of the appellant's guilt [*9] of rape beyond a reasonable doubt. We make this finding on narrower grounds than the parties' focus in their initial briefs, focusing solely on the evidence introduced about the charged rape itself.

The parties initially centered their attention on SrA TS's actions after the charged incident, arguing whether SrA TS's actions undermine her credibility or demonstrate her consent to the sexual intercourse at issue. We find it unnecessary to evaluate SrA

TS's actions after the charged act because we find the Government failed to introduce sufficient evidence at trial that the appellant used force against SrA TS to cause the sexual act. The appellant was charged under the version of Article 120, UCMJ, in effect from 2007 to 2012, which made it an offense to cause another person of any age to engage in a sexual act by using force against that other person. [Article 120\(a\), UCMJ](#) (2007). In pertinent part, "force" was defined as follows: "action to compel submission of another or to overcome or prevent another's resistance by . . . strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct." [Article 120\(t\)\(5\), UCMJ](#) (2007). [*10]

At trial, the Government elicited only cursory information about the intercourse that was charged as rape. The entire substance of SrA TS's testimony consists of the following:³

As soon as I came out [from the restroom] he started hugging me and try[ing] to guide me on his bed and trying to have sex with me.

....

I'm just pretty scared and didn't know what to do.

....

I said, "No, I'm not ready."

....

I was afraid because like I couldn't believe that I came to San Antonio and I [was having] sex with my [MTI]. And then another thing I was scared because I already [was having] a sexual relationship with [another] male. [It doesn't] matter [if] it's my fault or his fault, it's still considered cheating on my boyfriend at that time.

....

[When I came out of the restroom], he wrapped

[his arms] around me.

....

Then he tried kissing me; kissing my lips and my neck.

....

We [were] moving. He kind of like turn[ed] me around towards the bed.

....

Then he's got my back on the bed and he stopped kissing and tried to take off my pants. Then we started having sex.

Trial counsel asked SrA TS if she tried to push him; she responded yes. She explained, "I tried to get out from it but he's really heavy and he was on top of me. So I just quit." Trial counsel asked what the appellant said when SrA TS said no and tried to push him. She said, "He said, 'It's okay. I love you. You're so pretty.'" In response to this, SrA TS told the appellant, "I'm not ready." SrA TS does not remember if the appellant responded to this statement. Trial counsel then asked what SrA TS meant when she testified that he was too heavy and she stopped. She said, "I just quit. It's like I didn't try to get out anymore. My hands just quit . . . [b]ecause he [was] heavy and I didn't think I could do anything."

On cross-examination, SrA TS's testimony about the charged act was again brief. Asked what happened when the appellant started kissing her, SrA TS testified, "He guid[ed] me to the bed and then tr[ie]d to pull my pants down." On redirect, trial counsel asked what SrA TS told the appellant when he began kissing her. SrA TS responded, "I told him that 'No, I'm not ready.'" [*12] Asked if she tried to push the appellant, she responded, "I tried to push him." She then testified that the appellant did not stop when she did this.

This testimony is the entirety of the evidence produced on the issue of whether the appellant used force to cause the sexual conduct. Based on these limited details in the record about the appellant's actions, we find the evidence factually insufficient to support the rape conviction. The record does not

³SrA TS is a non-native English speaker. While she articulated herself clearly at trial, certain phrases quoted here have been slightly altered to [*11] represent standard English without changing the substance of her testimony. These changes are reflected in the bracketed text.

convince us beyond a reasonable doubt that the appellant took "action to compel submission of [SrA TS] or to overcome or prevent [her] resistance by [applying] strength, power, or restraint applied to [her], sufficient that [she] could not avoid or escape the sexual conduct."

The Government elicited three primary pieces of evidence about the charged act itself to build its case: 1) SrA TS told the appellant "No, I'm not ready" at some point after the appellant began his advances; 2) SrA TS pushed the appellant while he was on top of her in an unsuccessful attempt to get the appellant off her; and 3) SrA TS was afraid during the encounter. The testimony on each point was extremely brief and left several questions unanswered. For example, [*13] the Government did not elicit sufficient context about when the "No, I'm not ready" statement occurred, what her tone of voice was, whether the appellant could have been expected to hear her, or whether the two said anything else before or during the intercourse. SrA TS testified that she pushed the appellant while he was on top of her, but trial counsel did not elicit sufficient evidence to indicate that the appellant used force to overcome the pushing. On the third point, SrA TS did testify that she was afraid during the encounter, but she never testified that she was afraid of the appellant; rather, she only testified that she was afraid she was having sex with her MTI and she would be seen as cheating on her boyfriend.

The Government's evidence was scarce in other respects. There is no evidence about the distance between the point where the appellant kissed SrA TS and the bed, and there is little to no evidence about how the appellant got SrA TS to the bed. (Her testimony on cross-examination merely indicates that he "guided" her to the bed.) SrA TS indicated that she was on her back at some point leading up to the intercourse and he was "too heavy," but there is no unambiguous [*14] testimony that indicates he was on top of her throughout the intercourse. SrA TS's testimony scarcely mentions the intercourse itself, and trial

counsel did not even ask SrA TS if the appellant used any restraint or force other than the fact he was on top of her to complete the sexual conduct.

We do not discount SrA TS's testimony, and we recognize she portrayed what could have been a sinister act by the appellant. The appellant was previously SrA TS's military training instructor, and he placed SrA TS in a situation where they would be alone in an environment unfamiliar to her without her own means of transportation. It is certainly possible the appellant used some combination of his coercive power as SrA TS's former MTI, his knowledge that she was dependent on him for shelter and transportation during the visit, his body weight, and his refusal to heed SrA TS's cues that she was not ready to cause SrA TS to have sexual intercourse.

However, the Government charged the appellant with using force to complete a rape. Whatever mental pressure the appellant utilized on his former trainee, the Government retained the burden to demonstrate that the appellant used physical force to cause the [*15] intercourse. The Government did not satisfy its burden. Whatever possibilities SrA TS's testimony raises about the appellant's actions, it is not this court's role to speculate on what possibly occurred in the appellant's bedroom or to fill in the gaps left by the Government's presentation of its case. We also may not affirm the conviction simply because the record of trial portrays the appellant as an unsavory character. Rather, we are prohibited from affirming a conviction unless we find it both factually and legally sufficient. [*United States v. Beatty*, 64 M.J. 456, 458 \(C.A.A.F. 2007\)](#); [*United States v. McAllister*, 55 M.J. 270, 277 \(C.A.A.F. 2001\)](#). We take this charge seriously, as our unique factfinding authority "provide[s] a source of structural integrity to ensure the protection of service members' rights within a system of military discipline and justice where commanders themselves retain awesome and plenary responsibility." [*United States v. Jenkins*, 60 M.J. 27, 29 \(C.A.A.F. 2004\)](#). Under these facts, we simply are not personally convinced that the

Government satisfied its heavy burden of proving force beyond a reasonable doubt. The Government's evidence is too thin to satisfy us beyond a reasonable doubt that the appellant used force to cause the sexual conduct. Put simply, it appears the Government was so focused on explaining SrA TS's actions after the [*16] charged act that it neglected to have the witness adequately detail the charged act itself in a manner that permits us to find the appellant applied strength, power, or restraint to SrA TS, sufficient that she could not avoid or escape the sexual conduct.⁴ We therefore find the appellant's rape conviction factually insufficient.⁵

We are aware of our statutory authority to affirm a lesser included offense, even where such lesser included offense was not instructed upon or considered at trial. Article 59(b), UCMJ, [10 U.S.C. § 859\(b\)](#); [United States v. Upham, 66 M.J. 83, 88 \(C.A.A.F. 2008\)](#). Given the minimal facts presented in this record, we decline to affirm any lesser included offense.

Sentence Reassessment

Having found the appellant's rape conviction factually insufficient, we now must decide whether we can accurately reassess the appellant's sentence,

⁴ The narrow basis of our holding renders it unnecessary to cast any aspersions on SrA TS's credibility, and we recognize that the nature of rape cases dictates that precise testimony about every detail is rarely possible.

⁵ While this case was pending our review, the appellant moved to attach an analysis of his cell phone and related documents to the record of trial, documents he averred helped demonstrate the factual insufficiency of his rape conviction. He also petitioned for a new trial based on this evidence he stated was newly discovered. Our decision today renders these matters moot, and the court need not act on these filings. Finally, during supplemental briefing, the appellant filed an additional supplemental brief that alleged the rape specification failed to specify the event charged. We see no ambiguity in the specification and find that the rape specification [*17] clearly alleges that the charged rape involves the incident discussed in this opinion rather than another sexual act that took place the following morning. In any event, our holding today renders the appellant's complaint moot.

or whether we must return this case for a sentence rehearing. This court has "broad discretion" in deciding whether it may reassess a sentence to cure error. [United States v. Winckelmann, 73 M.J. 11, 15 \(C.A.A.F. 2013\)](#). A court of criminal appeals may reassess a sentence "if the court can determine to its satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity." [United States v. Moffeit, 63 M.J. 40, 41 \(C.A.A.F. 2006\)](#). In making this determination, we consider factors such as:

- (1) Dramatic changes in the penalty landscape and exposure.
- (2) Whether an appellant chose sentencing [*18] by members or a military judge alone. As a matter of logic, judges of the courts of criminal appeals are more likely to be certain of what a military judge would have done as opposed to members. This factor could become more relevant where charges address service custom, service discrediting conduct or conduct unbecoming.
- (3) Whether the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses and, in related manner, whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses.
- (4) Whether the remaining offenses are of the type that judges of the courts of criminal appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial.

[Winckelmann, 73 M.J. 11, 15-16 \(C.A.A.F. 2013\)](#)
(internal citations omitted)

Applying these considerations, we are unable to determine to our satisfaction what the appellant's sentence would have been without the rape conviction. The rape conviction was much more serious than the offenses to which the appellant pled guilty. SrA TS's testimony in sentencing

proceedings was by far the most aggravating evidence the Government [*19] presented. The remaining offenses do not capture the gravamen of the criminal conduct included within the rape charge, and nothing about the actions with SrA TS would have been admissible solely as a result of the appellant's guilty pleas to the remaining offenses. Our finding that the rape conviction is factually insufficient also dramatically changes the penalty landscape, as the maximum sentence to confinement is reduced from life to 11 years. Under these circumstances, the only permissible approach is to remand this case for a sentence rehearing. This action means the appellant's claim of sentence inappropriateness is not ripe for this court's consideration.⁶

Conclusion

The findings of guilty for Charge III, Specification 1 are set aside and dismissed. The remaining findings of guilty are affirmed. The sentence is set aside. The record of trial is returned to The Judge Advocate General for remand to an appropriate convening authority who may order a rehearing to determine an appropriate sentence for the affirmed findings of guilty.

If the convening authority determines that a rehearing on the sentence is impracticable, the convening authority may approve a sentence of "no punishment" or dismiss the remaining charges and specifications.

End of Document

⁶We note one matter in the convening authority's original action. The action waived mandatory forfeitures for six months for the benefit of the appellant's dependents. However, the convening authority approved the adjudged total forfeitures. Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 9.28.7 (6 June 2013) states that the convening authority must defer, suspend, mitigate or disapprove all or part of adjudged total forfeitures in order to waive any amount of mandatory forfeitures. Should the appellant's [*20] sentence on rehearing include forfeitures of pay, the convening authority must follow this guidance if he or she wishes to waive any amount of mandatory forfeitures.

United States v. Yepez

United States Army Court of Criminal Appeals

January 11, 2023, Decided

ARMY 20210236

Reporter

2023 CCA LEXIS 12 *; 2023 WL 319185

UNITED STATES, Appellee v. Specialist
THOMAS R. YEPEZ, United States Army,
Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, 1st Cavalry
Division. Lanny J. Acosta Jr., Military Judge.
Colonel Howard T. Matthews Jr., Staff Judge
Advocate.

Counsel: For Appellant: Colonel Michael C.
Friess, JA; Lieutenant Colonel Dale C. McFeatters,
JA; Major Christian E. DeLuke, JA; Captain Sarah
H. Bailey, JA (on brief).

For Appellee: Colonel Christopher B. Burgess, JA;
Major Pamela L. Jones, JA; Captain Lisa Limb, JA
(on brief).

Judges: Before BROOKHART, PENLAND, and
ARGUELLES¹, Appellate Military Judges. Senior
Judge BROOKHART and Judge ARGUELLES
concur.

Opinion by: PENLAND

Opinion

MEMORANDUM OPINION

PENLAND, Judge:

A military judge sitting as a general court-martial
convicted appellant, contrary to his plea, of one
specification of sexual assault in violation of

Article 120, Uniform Code of Military Justice, 10
U.S.C. §§ 920 [UCMJ]. The military judge
sentenced appellant to a dishonorable discharge and
to be confined for twenty-eight months. The
convening authority took no action on the findings
or sentence.

We review the case under *Article 66*, and we have
fully and fairly considered all matters either
assigned as error or personally raised by appellant
pursuant to United States v. Grostefon, 12 M.J. 431
(C.M.A. 1982). Among them, appellant asserts the
military judge abused his discretion by denying the
defense motion to introduce Military Rule of
Evidence [Mil. R. Evid.] 412 evidence. We agree,
and, considering this error is [*2] of constitutional
magnitude, we also find the government has not
disproven prejudice beyond a reasonable doubt.^{2,3}

BACKGROUND

The government's evidence at trial consisted mainly
of testimony from SGT AT (hereinafter referred to
as "victim"), who was appellant's friend. On 21
June 2018, she went to his apartment after work;
appellant was also there. The victim and appellant
listened to music, drank alcohol, and played UNO;
after drinking heavily, the victim got sick.
Appellant held her hair while she vomited, then

² Pretrial motion papers regarding appellant's request to introduce
evidence under Mil. R. Evid. 412 were sealed, as were the transcripts
of the hearing involving the request. Our decision contains
discussion of sealed material necessary for our analysis.

³ The remaining assignment of error and the matters personally
raised by appellant under Grostefon merit neither discussion nor
relief.

¹ Judge ARGUELLES decided this case while on active duty.

encouraged her to rest on a bed, which she did. The victim woke up to appellant "trying to do something to me." She intermittently blacked out, but also told appellant to stop. The victim testified that appellant removed her pants and underwear, saying, "You asked for this. You wanted this . . . You wanted this to happen." According to her testimony, appellant penetrated her vagina with his penis without her consent. The next day, the victim made a restricted report, then changed it to unrestricted approximately one year later. She told her boyfriend three days after the incident. In addition to the victim's testimony, the government called a sexual assault forensic medical examiner [*3] and a forensic DNA expert. Taken together, they established DNA transfer between appellant and the victim.

Before trial, the defense sought to introduce evidence of a flirtatious relationship between appellant and the victim. This evidence consisted of three selfie photographs of her; the first two depicted her in underwear, and the third depicted her naked, with emoji images covering her breasts and genitalia. The defense called the victim to testify in a closed Mil. R. Evid. 412 hearing, where she denied flirting with appellant or sending any of the photos directly to him. Of the third photo, she said that — if she sent it to anyone — she would have sent it directly and exclusively to her boyfriend, a person other than appellant. In contrast with her testimony, the defense offered an "affidavit"⁴ from appellant. He asserted: (1) he and the victim had a flirtatious relationship before the charged misconduct; (2) the victim sent all three photos directly to him, and not to a larger group of people; (3) the victim sent him the photos in the spring and summer of 2018; and, (4) she sent appellant additional photos after the third selfie.

⁴To characterize the document as an "affidavit" is too generous. Although it concludes "I declare under penalty of perjury that the foregoing is true and correct," it is still essentially an unsworn memorandum for record, signed by appellant. Nonetheless, we recognize when "deciding [whether evidence is admissible], the military judge is not bound by evidence rules, except those on privilege." Mil. R. Evid. 104(a).

The military judge ruled against appellant, writing that it was unclear [*4] where the victim had sent the photographs and that "the Defense ha[d] failed to show any evidence that these photographs were in anyway intended for [appellant] alone." Among other things, the military judge found as fact "no evidence of the time or date for any of the photos or to whom they were sent." On the other hand, the military judge did find appellant possessed the three photos. Denying the motion under Mil. R. Evid. 412(b)(2) and (b)(3), he ruled the proffered photos were neither relevant nor material, as they were not evidence of the victim's "sexual behavior with the accused."

LAW AND DISCUSSION

We are keenly aware that we review military judges' Mil. R. Evid. 412 admissibility decisions for an abuse of discretion. [*United States v. Carpenter*, 77 M.J. 285 \(C.A.A.F. 2018\)](#); [*United States v. Erikson*, 76 M.J. 231 \(C.A.A.F. 2017\)](#); [*United States v. Gaddis*, 70 M.J. 248 \(C.A.A.F. 2011\)](#). "Trial judges retain wide latitude . . . to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." [*Gaddis*, 70 M.J. at 256](#) (quoting [*Delaware v. Van Arsdaal*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 \(1986\)](#)). Military Rule of Evidence 412 is an exclusionary rule, requiring a proponent to meet the burden to show that an exception prevails. [*Gaddis*, 70 M.J. at 251-52](#); [*United States v. Banker*, 60 M.J. 216, 223 \(C.A.A.F. 2004\)](#); [*United States v. Savala*, 70 M.J. 70, 72 \(C.A.A.F. 2011\)](#).

In deciding whether a military judge has abused his discretion in establishing evidentiary limits, we do not [*5] ask ourselves whether we would have made the same decision if presiding over the trial; such an approach would deprive the trial judge of the deference required by the standard of review. Instead, we ask, among other things, whether his

relevant factual findings are clearly erroneous, or whether his conclusions from the facts and applicable law are clearly unreasonable. See [*Erikson*, 76 M.J. at 235](#) (quoting [*United States v. Olson*, 74 M.J. 132, 134 \(C.A.A.F. 2015\)](#)) ("A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect"); [*United States v. McElhaney*, 54 M.J. 120, 130 \(C.A.A.F. 2000\)](#) (quoting [*United States v. Miller*, 46 M.J. 63, 65 \(C.A.A.F. 1997\)](#)) (The challenged action must be "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous."). Under the circumstances, we answer yes to both.

The military judge's factual findings were clearly erroneous in at least two material respects. First, there was evidence of the photos' timing: appellant's memorandum stated that he received them from approximately April to June, 2018.⁵ While this might not have dispositively proven when they were made, it was some circumstantial evidence thereof. Second, there was also evidence that appellant received them directly from the victim: again, his memorandum asserted "[s]he sent me these photos directly as a one-on-one [*6] Snapchat message."⁶ It is unclear why the military judge positively stated there was no evidence of these matters. In his ruling, he correctly cited [*Banker*, 60 M.J. at 224](#), for the principle that it was not his function to assess the credibility of the proffered evidence in deciding its admissibility.⁷ We can only conclude he either: (1) made such a

determination regarding appellant's memorandum; or (2) overlooked multiple material parts of it. In either event, the military judge erred.

We also find clearly unreasonable the military judge's conclusions that the excluded evidence was not relevant or material under Mil. R. Evid. 412(b)(2) and Mil. R. Evid. 412(b)(3). At the very least, the photos "ha[d] [the] tendency to make a fact⁸ more or less probable than it would be without the evidence; and . . . the fact [was] of consequence in determining the action." Mil. R. Evid. 401. We hasten to add that we are not finding as a matter of fact that the victim [*7] *actually* sent the photos directly to appellant, or that they, by themselves, *actually* established her consent⁹ or an honest—and reasonable—mistake of fact in appellant's mind. Instead, we find, as a matter of legal relevance, the proffered evidence made it more likely for the fact finder to conclude that she sent the photos to appellant, that she consented, or that he honestly and reasonably believed she did. As a result, the excluded evidence was relevant, and its probative value outweighed the countervailing considerations in Mil. R. Evid. 403 or Mil. R. Evid. 412(b)(3).¹⁰ See [*United States v. Roberts*, 69 M.J. 23, 27 \(C.A.A.F. 2010\)](#) (holding that there is a "low

⁵The government charged appellant with sexually assaulting the victim "on or about 21 June 2018[.]"

⁶On the other hand, the military judge did rely on appellant's memorandum in making at least one of his findings: that appellant possessed the three photos. The military judge could have only derived that fact from the memorandum.

⁷Quoting [*Banker*, 60 M.J. at 224](#), the military judge wrote:

In applying M.R.E. 412, the judge is not asked to determine if the proffered evidence is true; it is for the members to weigh the evidence and determine its veracity. Rather, the judge serves as a gatekeeper deciding first whether the evidence is relevant and then whether it is otherwise competent, which is to say, admissible under M.R.E. 412.

⁸The disputed facts here were, at minimum, whether the victim consented, or whether appellant honestly and reasonably believed she did.

⁹We recognize [*Article 120*](#)'s definition of consent, which includes: "A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent." We take this to mean that the photos, by themselves, were insufficient to constitute consent. However, we also recognize that, in accordance with Article 36, the President has promulgated Mil. R. Evid. 412, which allows admission of "evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the accused to prove consent[.]" Reading them in harmony with one another, we interpret these provisions to mean that, *taken together with other evidence in the case*, a victim's sexual behavior with an accused may be admissible if it makes it more likely to conclude the victim consented to the charged sexual misconduct.

¹⁰We do not criticize the military judge for not conducting these balancing analyses; he determined the evidence was not relevant in the first place.

threshold for relevant evidence" under Mil. R. Evid. 412). The error was constitutional in proportion,¹¹ for it unreasonably curtailed both appellant's [Fifth Amendment](#) due process right to present a defense and his [Sixth Amendment](#) right to meaningfully cross-examine the victim.

Presented with a non-structural constitutional error, "the Government must prove...harmless[ness] beyond a reasonable doubt." [United States v. Cueto](#), 82 M.J. 323, 334 (C.A.A.F. 2022) (quoting [United States v. Tovarchavez](#), 78 M.J. 458, 460 (C.A.A.F. 2019)). While the government correctly writes of *Van Arsdall's* multi-part prejudice inquiry, we are not "confident that there was no reasonable possibility that the error might have contributed to the conviction." [Tovarchavez](#), 78 M.J. at 460 (citing [*8] [Chapman v. California](#), 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). The victim's testimony was pivotal to the government's case, especially where the government offered no evidence to corroborate her allegation that the sexual activity was non-consensual. And, the excluded evidence was not cumulative with other admitted evidence — the fact finder received no information about the victim's and appellant's allegedly flirtatious relationship. Considering these factors, we conclude the fact finder might reasonably have viewed the excluded evidence as a reason to doubt the government's proof, whether pertaining to the victim's credibility, lack of consent, or appellant's state of mind.

CONCLUSION

The finding of guilty and the sentence are set aside. A rehearing may be ordered by the same or a different convening authority. All rights, privileges, and property, of which appellant has been deprived by virtue of the findings set aside by this decision are ordered restored. See [UCMJ arts. 58b\(c\)](#) and [75\(a\)](#).

Senior Judge BROOKHART and Judge ARGUELLES concur.

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¹¹ Considering the error's constitutional dimension, we do not assess whether the excluded evidence would cause unfair prejudice to the victim's privacy. See [Gaddis](#), 70 M.J. at 256 ("M.R.E. 412 cannot limit the introduction of evidence required by the Constitution"); Mil. R. Evid. 412(b) ("In a proceeding, the following evidence is admissible . . . (2) evidence of specific instances of a victim's sexual behavior with respect to the person accused of sexual misconduct, if offered by the accused to prove consent . . . and (3) evidence the exclusion of which would violate the accused's constitutional rights.")

CERTIFICATE OF SERVICE, U.S. v. NIEVES VELE (20220166)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at *usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@mail.mil* on the 15th day of September, 2023.



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