

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Docket No. ARMY 20200538

First Lieutenant (O-2)
SAMUEL B. BADDERS,
United States Army,
Appellant

Tried at Fort Hood,¹ Texas, on 21
January, 15 and 22–24 September,
and 19 November 2020, before a
general court-martial convened by
Commander, 1st Cavalry Division,
Colonel Douglas K. Watkins and
Colonel Maureen A. Kohn, Military
Judges, presiding.

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

Assignment of Error I²

THE EVIDENCE WAS INSUFFICIENT.

Assignment of Error II

**THE MILITARY JUDGE REVERSIBLY ERRED BY
EXCLUDING EVIDENCE REGARDING TEXT**

¹ At the time of trial the installation was still named Fort Hood. On 9 May 23, Fort Hood officially changed its name to Fort Cavazos.

² The government has reviewed appellant's *Grostefon* matters and agrees with the appellate counsel that they do not warrant full briefing as an assignment of error. Furthermore, the government respectfully submits that they lack merit. The government recognizes this court's authority to elevate *Grostefon* matters deserving of increased attention. *United States v. Grostefon*, 12 M.J. 431, 437 (C.M.A. 1982). Should this court exercise such authority, finding any of appellant's *Grostefon* matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

MESSAGES BETWEEN 1LT BADDERS AND THE COMPLAINANT.

Assignment of Error III

THE MILITARY JUDGE REVERSIBLY ERRED BY ALLOWING MAJOR SS TO TESTIFY OVER DEFENSE OBJECTION.

Assignment of Error IV

THE MILITARY JUDGE REVERSIBLY ERRED BY DENYING PRODUCTION OF THE COMPLAINANT'S MENTAL HEALTH RECORDS IN ACCORDANCE WITH MILITARY RULE OF EVIDENCE 513.

Assignment of Error V

THE MILITARY JUDGE REVERSIBLY ERRED BY DENYING THE MEMBERS' REQUEST FOR ACCESS TO TEXT MESSAGES NOT ADMITTED IN EVIDENCE.

Assignment of Error VI

ACTUAL AND APPARENT UNLAWFUL COMMAND INFLUENCE EXISTED.

Assignment of Error VII

SEVERAL MEMBERS WERE SUBJECT TO CHALLENGE FOR ACTUAL AND IMPLIED BIAS.

Assignment of Error VIII

“ON OR ABOUT 1 JANUARY 2019” LANGUAGE IN THE SPECIFICATION CONSTITUTED AN EX POST FACTO VIOLATION/THE FINDING IS AMBIGUOUS.

Assignment of Error IX

**THE MILITARY JUDGE PLAINLY ERRED IN
ADMITTING EVIDENCE OF THE CONTENTS OF
WRITINGS WITHOUT ADMITTING THE
ORIGINAL WRITINGS.**

Assignment of Error X

**CUMULATIVE ERROR OCCURRED AND
WARRANTS RELIEF.**

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Statement of the Case

On 24 September 2020, an officer panel 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 (2019) [UCMJ].³ (R. at 570). That same day, the military judge sentenced appellant to twelve months of confinement and a dismissal. (R. at 596). The convening authority took no action on the findings or sentence on 20 November 2020. (Action). On 16 February 2021, the military judge granted a defense post-trial motion by granting a mistrial (App. Ex. LXV), and the United States thereafter appealed the ruling under Article 62, UCMJ. (App. Ex. LXVII). This court set aside the military judge's mistrial ruling and the Court of Appeals for the Armed Forces [CAAF] granted review on the question of jurisdiction with respect to a mistrial ruling and affirmed. *United States v. Badders*, ARMY MISC 20200735, 2021 CCA LEXIS 510, at *43 (Army Ct. Crim. App. 30 Sep. 2021) (mem. op.), *aff'd*, 82 M.J. 299 (C.A.A.F. 2022).

³ Appellant was also charged with one specification of fraternization, in violation of Article 134, UCMJ. (Charge Sheet). The military judge entered a finding of not guilty to this charge and specification in accordance with Rule for Courts-Martial (R.C.M.) 917. (R. at 510).

Statement of the Facts

A. Appellant and Specialist (SPC) [REDACTED]⁴ had a consensual sexual relationship prior to appellant sexually assaulting her.

Specialist [REDACTED] first met appellant in 2017 through a dating application. (R. at 328). At the time, SPC [REDACTED] was a member of the Ohio National Guard completing Advanced Individual Training [AIT] at Joint Base San Antonio.⁵ (R. at 328). Although they never met in person, they spoke to one another through the dating application and exchanged social media handles. (R. at 329). More than a year later, SPC [REDACTED]'s National Guard unit was activated, and she was in Hohenfels, Germany. (R. at 330–31). Appellant was also deployed to Germany at the time and, after recognizing the background of a photo SPC [REDACTED] shared on social media, reached out to her. (R. at 330). In Germany appellant and SPC [REDACTED] began speaking to one another through social media and arranged to get together. (R. at 332). Specialist [REDACTED] and appellant met four times prior to the sexual assault, and over the course of those interactions their intimate relationship progressed from kissing to oral and vaginal sex. (R. at 333–41).

⁴ At the time of the sexual assault SPC [REDACTED] was a “Private” (R. at 334), presumably a Private First Class (her rank at the time of AIT graduation (R. at 330)), but this brief will refer to [REDACTED]'s rank at the time of trial.

⁵ SPC [REDACTED] referred to this as “San Antonio; Fort Sam Houston” in her testimony, but the fort merged with Lackland and Randolph Air Force Bases in 2010. <https://www.jbsa.mil/Information/JBSA-History-Fact-Sheets/> (last visited 30 Jul. 2023).

B. Appellant sexually assaulted SPC [REDACTED] by penetrating her anus with his penis without her consent.

In the early morning hours of 1 January 2019, SPC [REDACTED] returned to her hotel room where appellant, at SPC [REDACTED]'s invitation, was waiting. (R. at 345). The two started kissing and appellant undressed himself and SPC [REDACTED]. (R. at 345). After SPC [REDACTED] performed oral sex on appellant, they moved into the bedroom. (R. at 345).

Appellant bent SPC [REDACTED] over the bed with her torso laying on top of the mattress and bedding. (R. at 345–46). Specialist [REDACTED] felt the tip of appellant's penis enter her anus while he was standing directly behind her. (R. at 345–46). Not wanting to have anal sex, SPC [REDACTED] immediately pushed appellant back away from her by reaching back and pushing on his lower abdomen/pelvis area. (R. at 347). In response, appellant "forcefully pushed forward" in to SPC [REDACTED] and while her arm was outstretched appellant grabbed her by the wrist and twisted her arm up in between her shoulder blades. (R. at 347). Specialist [REDACTED] said "No, stop" and "what are you doing?" (R. at 347). Appellant then grabbed her other arm and twisted it up behind her back with her first arm. (R. at 347). Due to her resistance movements, SPC [REDACTED] scooted further up the bed and could no longer put her feet on the ground, significantly hindering her ability to fight back. (R. at 348). Specialist [REDACTED] continued to tell appellant no and to stop but appellant responded by saying, "Shut the fuck up you dumb bitch." (R. at 348). Once appellant

completely entered her anus with his penis she began crying. (R. at 349). She then passed out as a result of trying to talk and struggling against appellant's assault while her face was laying in plushy bedding. (R. at 349).

Specialist [REDACTED] woke up in the hotel bathtub and had pain in her anus and saw blood streaming from her behind. (R. at 349–50). Also present was appellant, who asked her, “What the fuck is wrong with you?” (R. at 350). Specialist [REDACTED] froze up, unable to speak, and passed out again. (R. at 350).

The next time SPC [REDACTED] woke up she was naked in the hotel bed with appellant and scoffed out of disbelief that he was still there. (R. at 356, 427, 461–62). Specialist [REDACTED] confronted appellant and said something to the effect of “you had anal with me and I did not want that” and appellant responded, “Wow, you must’ve been very scared.” (R. at 356). Appellant continued “Well you’re basically saying that I raped you” and SPC [REDACTED] said, “Yeah, you know you did.” (R. at 357). After this exchange appellant offered to go get them both breakfast and then talk about what happened when he returned. (R. at 357). Specialist [REDACTED] agreed and when appellant returned, he asked her “if I got a document would you sign a nondisclosure agreement either saying that we never had sex or that we had consensual sex?” (R. at 357).

C. Specialist [REDACTED] and appellant's relationship after the sexual assault.

Specialist [REDACTED] spent most of New Year's Day with appellant. (R. at 358). Thereafter, she texted appellant saying that she had a good time with him on New Year's Eve and it was nice hanging out with him. (R. at 432, 442). She also enthusiastically responded to a text message from appellant about having lively sex with him again in the same hotel as New Year's Eve night. (R. at 443). Specialist [REDACTED] testified that she still wanted to have sex with appellant after he sexually assaulted her "because [she] wanted to mask the feelings that [she] had before." (R. at 463).

Specialist [REDACTED] testified that she was having a rough time with her unit and she explained that she maintained contact with appellant after the sexual assault, in part, because she wanted appellant to apologize or to do or say something "to override all of [her traumatic] feelings[.]" (R. at 362). Specialist [REDACTED] reasoned that if she "could have a positive sexual encounter with him that it would somehow trump . . . everything else that happened before, and maybe that would be an opportunity to talk about [the sexual assault] and to understand [appellant's] mind set and why he did what he did." (R. at 463). Further, SPC [REDACTED] told appellant that she missed him. (R. at 444). Specialist [REDACTED] explained her counter-intuitive behavior as follows:

At that point I was really in denial of what was happening, and I was trying to look at a person that I thought I knew and not a specific action

and trying to deal with my feelings in the moment by honestly smothering them in good rather than cause more trouble for myself with the unit.

(R. at 495).

Specialist [REDACTED] texted appellant that she “wasn’t feeling well from what happened on New Year’s, and that it was getting worse and straining on [her] mental health.” (R. at 466). Appellant did not respond to her substantively and eventually stopped communicating with her entirely until he apologized to her after she filed a report of sexual assault. (R. at 467–68). Appellant said, “I’m sorry for what I did” and “I didn’t mean to leave you like that.” (R. at 468).

Additional facts are incorporated below.

Assignment of Error I

THE EVIDENCE WAS INSUFFICIENT.

Standard of Review

Military courts review questions of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

A. Sexual assault by anal penetration.

The elements of sexual assault (without consent theory) are: (i) that the accused committed a sexual act upon another person; and (ii) that the accused did so without the consent of the other person. *Manual for Courts-Martial, United*

States (2019 ed.) [MCM], pt. IV, ¶60.b.(2)(d)(i)–(ii). A sexual act is defined, in pertinent part, as “the penetration, however slight, of the penis into the . . . anus[.]” UCMJ art. 120(g)(1)(A). Consent is defined, in part, as “a freely given agreement to the conduct at issue by a competent person.” UCMJ art. 120(g)(7)(A).

B. Legal Sufficiency

The test for legal sufficiency is “whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.” *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). “[I]n resolving questions of legal sufficiency, [courts of criminal appeals] are bound to draw every reasonable inference from the evidence of record in favor of the prosecution.” *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). During a legal sufficiency review, courts consider all available facts within the record and are “not limited to [the] appellant’s narrow view of the record.” *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996).

C. Factual Sufficiency.

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, the members of [this] court are themselves convinced of appellant’s

guilt beyond reasonable doubt.” *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)). In its factual sufficiency review, this court, “in considering the record . . . may weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.” UCMJ Art. 66(d)(1).

Further, this court has stated: “[W]e are required to make credibility determinations on appeal, but those determinations . . . recognize the trial court’s superior position in making those determinations. Our assessment of evidence must be sifted through a filter that recognizes our inferior fact-finding viewpoint.” *United States v. Feliciano*, ARMY 20140766, 2016 CCA LEXIS 512, at *8 (Army Ct. Crim. App. 22 Aug. 2016) (mem. op.) (citing *Washington*, 57 M.J. at 399).

Factfinders “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). “In weighing and evaluating the evidence, [the factfinder is] expected to use [his] own common sense and [his] knowledge of human nature and the ways of the world. In light of all the circumstances in the case, [the factfinder] should consider the inherent probability or improbability of the evidence.” Dep’t of Army, Pam. 27-9, Legal Services: Military Judges’ Benchbook, para. 2-5-12 (29 February 2020) [Benchbook].

D. Counterintuitive victim behavior.

The Court of Appeals for the Armed Forces [CAAF] has consistently recognized the existence of counterintuitive victim behavior. *See United States v. Pagel*, 45 M.J. 64, 68 (C.A.A.F. 1996) (“[B]ehavioral patterns of an alleged victim in a sexual abuse case may need to be explained by expert testimony”); *United States v. Peel*, 29 M.J. 235, 241 (C.M.A. 1989) cert. denied, 493 U.S. 1025 (1990) (allowing an expert to testify to the counterintuitive behavior of a rape victim “acting as if the rape never happened”); *United States v. Rynning*, 47 M.J. 420, 422 (C.A.A.F. 1998) (explaining “behavioral characteristics or behavioral patterns of an alleged sexual abuse victim [is helpful] especially where the behavior would seem to be counterintuitive”) (internal citations and quotations omitted). In *United States v. Flesher*, the CAAF held that testimony about what might be considered counterintuitive behavior of victim is permissible because it “assists jurors in disabusing themselves of widely held misconceptions.” 73 M.J. 303, at 313 (C.A.A.F. 2014) (internal citations omitted). Moreover, “victim[s] of sexual assault [are] permitted to discuss the surrounding circumstances regarding how [they] reacted to being sexually assaulted” in explaining their own counterintuitive behavior. *United States v. Coover*, No. ACM 39848, 2021 CCA LEXIS 355, at *28–29 (A.F. Ct. of Crim. App. 21 July 2021) (unpub.) pet. denied, 81 M.J. 223 (C.A.A.F. 2021).

Argument

A. Appellant's conviction is legally sufficient because the government established every element of sexual assault by anal penetration without consent.

Although not directly raised by appellant, his conviction is legally sufficient.⁶ Specialist [REDACTED]'s testimony establishes every element of the charged offense. While SPC [REDACTED] was bent over a bed expecting vaginal sex, appellant forcibly inserted his penis into her anus as she said no and struggled against him. (R. at 345–47). Thus, when “considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.” *Turner*, 25 M.J. at 324.

B. Appellant's conviction for sexual assault is factually sufficient.

Appellant claims SPC [REDACTED] is not credible largely fall into five discernable categories: (1) purported impossible timeline; (2) lack of corroboration; (3) nonsensical described behavior of appellant; (4) SPC [REDACTED]'s conduct after the sexual assault; and (5) SPC [REDACTED]'s mental health.⁷ (Appellant's Br. 15–18).

Appellee will address each of these bases in turn.

⁶ Appellant recites the law for legal sufficiency, implying that he is challenging his conviction on this ground, but he fails to provide any such analysis; rather, his argument concentrates on the victim's testimony and credibility, or a factual sufficiency challenge. (Appellant's Br. 13–14).

⁷ Appellee addresses appellant's purported factual insufficiency with respect to SPC [REDACTED]'s mental health in Assignment of Error IV, *infra* pp. 31-37.

1. Timeline.

The uncontradicted evidence at trial established the following timeline:

On 31 December 2018 appellant and SPC [REDACTED] woke up together in the hotel room, watched a movie and then had consensual sex. (R. at 342). They both went to the gym and SPC [REDACTED] left the gym to get food to prepare dinner that evening. (R. at 343). They both returned to the hotel room after the gym and errands and SPC [REDACTED] starting cooking around 1700 to 1800. (R. at 343). While getting ready to head out to New Year's Eve parties, SPC [REDACTED] testified that she "pulled up the news, like when the ball drops[, i]t was on [her] computer and [she] hooked it up to the TV." (R. at 344).

Appellant did not want to go out to any of the parties. (R. at 344).

Therefore, after eating dinner with appellant, SPC [REDACTED] left the hotel room alone and "pop[ped] into a couple of parties[.]" (R. at 344). Specialist [REDACTED] later returned to her hotel room and "watched the ball drop" with appellant.⁸ (R. at 425, 461). After watching the ball drop, she performed oral sex on appellant.⁹ (R. at

⁸ There is no evidence in the record that establishes what ball appellant and SPC [REDACTED] watched drop. The only reference to the New York City ball drop is in civilian defense counsel's closing argument: "[t]here's only one ball drop, and everyone's familiar with it. It's the one in Times Square in New York City." (R. at 533). However, there was no evidence on the record that establishes that.

⁹ Specialist [REDACTED] testified that she remembered telling CID that she performed oral sex on appellant for 30–45 minutes before moving into the bedroom where she was sexually assaulted. (R. at 426). She does not, however, say that the oral sex did in fact last 30–45 minutes. (R. at 426).

426). Following the oral sex, appellant sexually assaulted SPC [REDACTED]. That evening SPC [REDACTED] sent a text message to appellant at 0326 while she was in the local Burger King.¹⁰ (R. at 461).

This timeline establishes that SPC [REDACTED] went to a few parties on the evening of 31 December 2018, she was sexually assaulted sometime after midnight, and that she was at Burger King at 0326 on 1 January 2019. These facts support the finding of guilty to The Specification of sexual assault. (Charge Sheet).

2. Corroboration.

Notwithstanding appellant's assertion that there was no corroborating evidence of the anal sexual assault, corroboration is not required. *See United States v. Rodriguez-Rivera*, 63 M.J. 372, 383 (C.A.A.F. 2006) ("The testimony of only one witness may be enough [for the government to meet its] burden so long as the members find that the witness's testimony is relevant and is sufficiently credible."); *see also Weiler v. United States*, 323 U.S. 606, 608 (1945) ("Triers of fact in our fact-finding tribunals are, with rare exceptions, free in the exercise of their honest judgment to prefer to testimony of a single witness to that of many.").

¹⁰ Specialist [REDACTED] does not specifically indicate whether the 0326 Burger King visit was before or after the sexual assault.

3. Appellant's treatment of SPC [REDACTED] during the sexual assault.

Appellant argues that his treatment of SPC [REDACTED] in the early morning hours of 1 January 2019, as detailed by her testimony, was so out of character from their other consensual sexual encounters that she must be testifying falsely.

(Appellant's Br. 16). Yet, appellant's abhorrent behavior, while aberrant, is not indicative that the sexual assault did not occur; rather, it is circumstantial evidence to suggest that it did. Regardless of appellant's ill reasoned position, evidence at trial established that appellant was "frustrated" around this period, he had expressed "discontent," and "was going through a hard time" which could provide context to his unadulterated mistreatment of SPC [REDACTED]. (R. at 340, 407, 425, 458–59).

4. Specialist [REDACTED]'s conduct after the sexual assault.

Appellant's attack of SPC [REDACTED]'s credibility is largely explained by counterintuitive victim behavior. Specialist [REDACTED]'s purported interest in seeing appellant after the sexual assault does not *ipso facto* mean the sexual assault did not occur.

Appellant relies on the fact that SPC [REDACTED] did not leave the hotel room upon waking up and finding appellant still present. (Appellant's Br. 17). However, SPC [REDACTED] explained her reasoning for remaining in the room with him. Specialist [REDACTED] detailed how after she woke up and confronted him about the non-consensual anal

sex, he offered to get breakfast for them both and to talk about how she was feeling when he returned. (R. at 357). Reasonably, she wanted him to say that it was “a one-time thing,” that he was “really sorry,” and he “didn’t mean to do it.” (R. at 362). Yet, in response to their further discussions, appellant asked her to “sign a non-disclosure agreement either saying that [they] never had sex of that [they] had consensual sex[.]” (R. at 357).

Next, appellant argues that because SPC █████ sought to continue her relationship with appellant that the sexual assault could not have occurred. (Appellant’s Br. 17–18). While it may appear that SPC █████’s outward façade of interacting with appellant as if she had not been sexually assaulted is counterintuitive, this behavior is not unique to victims of sexual assault. *See Peel*, 29 M.J. at 241 (C.M.A. 1989) (allowing an expert to testify to the counterintuitive behavior of a rape victim “acting as if the rape never happened”). Further, SPC █████ explained that if she “could have a positive sexual encounter with him that it would somehow trump . . . everything else that happened before.” (R. at 463).

Thus, these actions do not create a “fair and reasonable hypothesis” that appellant did not sexual assault SPC █████ on 1 January 2019. *United States v. Billings*, 58 M.J. 861, 869 (Army Ct. Crim. App. 2003), *aff’d*, 61 M.J. 163 (C.A.A.F. 2005). They are merely the reality of complex human emotions in response to being sexually assaulted.

Accordingly, “the members of [this] court [can be] convinced of appellant’s guilt [of sexually assaulting SPC ■■■] beyond a reasonable doubt.” *Rosario*, 76 M.J. at 117 (internal quotations and citations omitted).

Assignment of Error II

THE MILITARY JUDGE REVERSIBLY ERRED BY EXCLUDING EVIDENCE REGARDING TEXT MESSAGES BETWEEN 1LT BADDERS AND THE COMPLAINANT.

Additional Facts

Appellant’s counsel sought to admit one line of a text message exchange between SPC ■■■ and appellant.

The day following the sexual assault, on 2 January 2019, SPC ■■■ sent text messages to appellant stating she “had a good time with him on New Year’s Day.” (R. at 431–32). The two engaged in the following exchange:

SPC ■■■: They don’t sell plan b at the px.....Happy new year¹¹

Appellant: I’m sorry [SPC ■■■’s first name]

Appellant: I thought I was pretty careful but it doesn’t hurt to be too safe

SPC ■■■: That’s what I’m saying. I’m not too upset about it, just taking the situation at face value. Like I said, I had a great time w you

Appellant: Me too

SPC ■■■: [thumbs up emoji] thank you for your service

(Def. Ex. J for ID; App. Ex. LVX, p. 6).

¹¹ “Plan B” is a brand name for the morning after pregnancy prevention pill.

On cross-examination, defense counsel asked SPC [REDACTED] if she “thanked [appellant] for his service and put a thumbs up emoji in the text.” (R. at 432). Specialist [REDACTED] responded that she did not remember. (R. at 432). When defense counsel attempted to refresh SPC [REDACTED]’s recollection with the text, the government objected on the basis of hearsay. (R. at 433). The defense counsel first stated the text was being offered for “[t]hen existing state of mind for the witness” but the military judge sustained the objection. (R. at 433). In response, the defense counsel then offered it for the “effect on the listener” and requested an Article 39(a), UCMJ, session. (R. at 433).

During the session, defense counsel argued the “thank you for your service” line was “in reference to a conversation about the sex they are having the night before.” (R. at 434). The defense offered the message to demonstrate SPC [REDACTED]’s “then existing mental, emotional, or physical condition” because she testified that she had “mental trauma” after the assault. (R. at 435). The government responded that the “thank you for your service text” “does not get to her state of mind at all – it’s not clear what she’s referencing.” (R. at 436). The military judge affirmed her earlier ruling and sustained the objection, finding the statement was “too ambiguous” and she did “not see how it ties to her then existing state of mind” under Mil. R. Evid. 803(3). (R. at 438).

Appellant now asserts, for the first time, that the text message is admissible as a recorded recollection and a prior inconsistent statement. (Appellant’s Br. 23–26).

Standard of Review

“A military judge’s decision to admit or exclude evidence is reviewed under an abuse of discretion standard.” *United States v. Roberson*, 65 M.J. 43, 45 (C.A.A.F. 2007) (cleaned up). ““A military judge abuses his discretion when his findings of fact are clearly erroneous, the court’s decision is influenced by an erroneous view of the law, or the military judge’s decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law.”” *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019) (quoting *United States v. Kelly*, 72 M.J. 237, 242 (C.A.A.F. 2013)). “This standard requires more than just [this Court’s] disagreement with the military judge’s decision.” *United States v. Bess*, 75 M.J. 70, 73 (C.A.A.F. 2016) (citing *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015)).

Law and Argument

A. Military Rule of Evidence 803(3)—Then-Existing Mental, Emotional, or Physical Condition.

The text message, “[thumbs up emoji] thank you for your service” is not admissible¹² as an exception to hearsay pursuant to Mil. R. Evid. 803(3).

Therefore, the military judge did not abuse her discretion when she did not allow defense counsel to question SPC [REDACTED] about this message.

Mil. R. Evid. 803(3) provides as follows:

A statement of the declarant’s then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it related to the validity or terms of the declarant’s will.

The statement must “show the victim/declarant’s *present* state of mind, [not] statements of memory describing past events[.]” *United States v. Fleming*, ARMY 20200721, 2022 CCA LEXIS 661, at *24 (Army Ct. Crim. App. 15 Nov. 2022) (emphasis in original).¹³ Moreover, the out-of-court statement must “constitute[] a

¹² Appellant incorrectly asserts “the Government has conceded this issue[.]” (Appellant’s Br. 22). To the extent that was not clear from the government’s initial brief to this court pursuant to Article 62, UCMJ, this was explicitly stated in the government’s reply brief in support of government appeal under article 62, UCMJ. Appellant’s Reply Br. 9, *United States v. Badders*, ARMY MISC 20200735, 2021 CCA LEXIS 510 (Army Ct. Crim. App. 30 Sept. 2021) (mem. op.).

¹³ See also *United States v. Shepard*, 34 M.J. 583, 590 (A.C.M.R. 1992) (“statements regarding past events are statements of ‘memory or belief,’ specifically excluded by Mil. R. Evid. 803(3)”; *United States v. Elmore*, 33 M.J.

direct assertion as to [the declarant’s] state of mind [to be admissible as an] exception to this rule.” *United States v. Hart*, 55 M.J. 395, 397 (C.A.A.F. 2001) (Sullivan, J. concurring in the judgment) (emphasis added). A statement that may be used to draw an inference as to the declarant’s state of mind does not qualify under this exception to the rule against hearsay. *See People v. Green*, 27 Cal. 3d 1, 13 n.9 (1980) (rev’d on other grounds).

Specialist ██████’s text message to appellant “[thumbs up emoji] thank you for your service” does not enlighten the listener to any state of mind *directly*. (Def. Ex. J for ID). This is further detailed when defense counsel was required to explain to the military judge what state of mind SPC ██████ was expressing: “And her response to all of this is ‘Thank you for your service,’ as if the sex was the service.” (R. at 436). One can glean that the state of mind defense counsel was seeking to demonstrate was “thankfulness.” However, it is not apparent that the statement shows that the declarant is thankful for sex, thus defense counsel wanted the fact-finder to *infer* that her thankfulness was for sex.¹⁴ Notably, the military

387, 396 (C.A.A.F. 1991) (statements citing prior threats and assaults are specifically not included under the Mil. R. Evid. 803(3) exception); *United States v. Reyes*, 78 M.J. 831, 833 (Army. Ct. Crim. App. 2019) (statements about past events do not qualify as hearsay exceptions under Mil. R. Evid. 803(3)); *United States v. Robles*, 53 M.J. 783, 795 (A.F. Ct. Crim. App. 2000) (because the victim’s statement describing the abuse amounted to a memory, the military judge erred in admitting it under Mil. R. Evid. 803(3)) (citation omitted).

¹⁴ In her post-trial ruling the military judge concluded that she erred when she sustained the government’s objection and prevented SPC ██████ from testifying about

judge concluded that she “[does not] see how it ties to her then existing state of mind. The statement is too ambiguous.” (R. at 437).

Thus, because the statement is not admissible as a statement of SPC [REDACTED]’s then existing state of mind, the military judge could not have abused her discretion. However, assuming *arguendo* the statement was admissible, appellant was not prejudiced—appellee will conduct a full *United States v. Kerr* prejudice analysis in the final subsection of this Assignment of Error. 51 M.J. 401, 405 (C.A.A.F. 1999).

B. Mil. R. Evid. 803(5)—Recorded Recollection and Mil. R. Evid. 613—Witness’ Prior Statement.

Mil. R. Evid. 803(5) provides as follows:

A record that—

- (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
- (B) was made or adopted by the witness when the matter was fresh in the witness’s memory; and
- (C) accurately reflects the witness’ knowledge, [is not excluded by the rule against hearsay].

whether she made the statement “[thumbs up emoji] thank you for your service” because the “text was a declarative statement about a past event that could demonstrate how [SPC [REDACTED]] felt on 2 January 2019, which she was thankful for the sexual experience from the night before” and therefore fell within the hearsay exception under Mil. R. Evid. 803(3). (App. Ex. LXV, p. 17). This analysis, however, misses the rule’s limitation on backwards-looking statements. *See* Steven A. Salzberg *et. al*, *Military Rules of Evidence Manual*, 803.02[4][a] (8th ed. 2015) (The rule “generally does not permit evidence of present memory or belief to prove the existence of a past condition or fact”).

Under this rule, the proponent must show that the witness “lacks sufficient recollection to testify fully and completely [about the condition at hand.]” *United States v. Gans*, 32 M.J. 412, 416 (C.M.A. 1991). The proponent is not required to show “that the witness lacks all recollection of the event or condition described[.]” *Id.*

At trial, defense counsel asked SPC [REDACTED] “You also thanked him for his service and put a thumbs up emoji in the text message; didn’t you?” (R. at 432). Thus, the event or condition of the question is sending the text message. Specialist [REDACTED] stated that she did not remember, and defense counsel sought to refresh her recollection under Mil. R. Evid. 612. (R. at 432–33). In the Article 39(a), UCMJ proceeding on this statement, defense counsel never offered the statement under Mil. R. Evid. 803(5), nor requested the opportunity to continue to lay the foundation for the statement’s admittance under this rule.¹⁵

Mil. R. Evid. 613(b) provides, “Extrinsic evidence of a witness’ prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given the opportunity to

¹⁵ The question of whether the statement “thank you for your service” would have been admissible under Mil R. Evid. 803(5) is unlikely based on the call of the question—asking SPC [REDACTED] whether she *sent* this text message. The admissibility of this statement is more likely if the question was whether SPC [REDACTED] was, in fact, thankful for appellant’s service and defense counsel was also able to lay a proper foundation regarding her ability to remember.

examine the witness about it.” Extrinsic evidence is only admissible if the witness denies the statement and “[i]f the inconsistency is admitted, extrinsic evidence is generally not admissible.” *United States v. Harrow*, 65 M.J. 190, 199 (C.A.A.F. 2007) (citation omitted). Mil. R. Evid. 613 can only be used as impeachment evidence, not as substantive evidence regarding the truth of what the statement asserts. *Id.* A witness merely stating that they do not remember is not enough to admit the impeachment evidence; however, testimony inconsistent “with a prior statement is not limited to diametrically opposed answers but may be found as well in evasive answers, inability to recall, silence, or changes of position[.]” *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993).

Defense counsel stated that the message “thank you for your service” was a statement SPC [REDACTED] said to appellant while she is processing mental trauma she purported to have. (R. at 437). Government counsel responded “that sounds like impeachment evidence.” (R. at 437). The defense never stated that the statement was not offered for the truth of the matter asserted nor were they seeking the statement’s admission under Mil. R. Evid. 613.

Under either Mil. R. Evid. 803(5) or 613, the statement at issue is not admissible, nor was it offered at trial under either theory. Therefore, the military judge could not have abused her discretion in not admitting this statement under these rules of evidence. “If evidence is excluded at trial because it is inadmissible

for the purpose articulated by its proponent, the proponent cannot challenge the ruling on appeal on the ground that the evidence should have been admitted for another purpose.” *United States v. Palmer*, 55 M.J. 205, 208 (C.A.A.F. 2001) (citing *United States v. Hudson*, 970 F.2d 948, 957 (1st Cir. 1992)).

C. Appellant was not prejudiced.

Assuming, *arguendo*, the military judge erred in excluding the statement, the error did not materially prejudice the substantial rights of the accused. UCMJ art. Article 59(a). “For preserved nonconstitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings.” *Frost*, 79 M.J. at 111, In determining the prejudice from an erroneous admission of evidence, the court weighs: “(1) the strength of the government’s case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question.” *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (citing *Kerr*, 51 M.J. at 405). “We apply the same four-pronged test for erroneous admissions of government evidence as for erroneous exclusion of defense evidence.” *Kerr*, 51 M.J. at 405. When analyzing the materiality and quality of the evidence factors to “assess how much the erroneously admitted evidence may have affected the court-martial,” courts “consider[] the particular factual circumstances of each case.” *United States v. Washington*, 80 M.J. 106, 111 (C.A.A.F. 2020); *see also United States v. Hursey*,

55 M.J. 34, 36 (C.A.A.F. 2011) (concluding that an error was harmless, in part, because the record was “replete with admissible evidence” that was similar).

In considering the *Kohlbek* factors, it is clear appellant suffered no prejudice. The materiality of the evidence is low when considering the many other text messages SPC [REDACTED] sent appellee after the assault, all of which appellant’s defense counsel had an opportunity to explore during cross-examination. Those include texting appellant on 1 January 2019 that she was “order number 69” (R. at 429); that she told appellant “I had a good time with you” on 1 and 2 January 2019 (R. at 432); on 10 January she told appellant “it was very nice hanging out with [him] on New Year’s Eve” (R. at 442); and on 1 February 2019 she told appellant that she wanted to have sex with him again (R. at 443). Accordingly, the quality of the contested evidence, SPC [REDACTED]’s testimony regarding her text message, is identical to the admitted evidence—SPC [REDACTED]’s testimony about her post-assault interactions with appellant.

The government had a strong case built on the credible testimony of SPC [REDACTED]. Specialist [REDACTED] testified in detail how appellant penetrated her anus with his penis despite her telling him no and trying to push him off her. (R. at 346–49). Conversely, defense’s case was scant—consisting mostly of the cross-examination of SPC [REDACTED] on her post-assault behavior and relationship with appellant. (R. at 396–433, 439–45, 449–54, 467, 496).

In sum, the purported error concerning the single line of text did not prejudice appellant or otherwise substantially impact the proceedings because the existence of other properly admitted evidence dispelled any concern that the inadmissible evidence had anything more than a *de minimus* impact on appellant's trial. *Kerr*, 51 M.J. at 405.

Assignment of Error III

THE MILITARY JUDGE REVERSIBLY ERRED BY ALLOWING MAJOR SS TO TESTIFY OVER DEFENSE OBJECTION.

Additional Facts

During its case-in-chief, the government called Major (MAJ) SS, a licensed physician who served as the brigade surgeon in SPC [REDACTED]'s unit. (R. at 474, 478). The government elicited MAJ SS's qualifications and training but did not qualify her as an expert. (R. at 475–78). In April 2019, SPC [REDACTED] sought treatment related to appellee's assault from MAJ SS in her capacity as a sexual assault care provider. (R. at 479). Major SS treated SPC [REDACTED], which included providing behavioral health resources, screening for sexually transmitted diseases, screening for pregnancy, and providing access to legal advice. (R. at 479). Major SS testified she was not aware of the details of the assault, including the alleged assailant and when, where, or how the assault occurred. (R. at 493). Major SS thereafter became SPC [REDACTED]'s supervisor and testified that during her tenure as supervisor,

she noticed a positive change in SPC [REDACTED]'s demeanor. (R. at 490). Major SS testified that part of her duties as a sexual assault care provider is to assess victim behavior.¹⁶ (R. at 478).

Major SS testified she was aware that SPC [REDACTED] continued to communicate with appellant after the assault. (R. at 480). The defense objected to the government asking MAJ SS whether that seemed unusual to her, on the basis that the question called for an expert opinion. (R. at 480). The government stated it was seeking a lay witness opinion based on her assessment as a sexual assault examiner. (R. at 480–81). The military judge overruled the defense objection and found the evidence was relevant because it made “the fact she made her report more or less probable” and the prejudicial effect did not outweigh the probative value. (R. at 488). Major SS then testified SPC [REDACTED]'s continued communication with appellant did not seem unusual to her. (R. at 490). The military judge did not give the witness opinion on credibility or guilt instruction. The defense did not object to the military judge's instructions or request additional instructions. (R. at 511–12).

¹⁶ In the record of trial this line is: “Q: As part of that are you required to assess [inaudible]?” (R. at 478). However, in the military judge's post-trial mistrial ruling she recounts MAJ SS's testimony as stated above. (App. Ex. LXV, p. 9).

Standard of Review

This court reviews for an abuse of discretion the decision by a military judge to admit evidence. *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997). A military judge's application of Mil. R. Evid. 701 is also reviewed for an abuse of discretion. *United States v. Norman*, 74 M.J. 144, 149 (C.A.A.F. 2015).

Law

Relevant evidence is that which “has any tendency to make a fact” that “is of consequence in determining the action” “more or less probable than it would be without the evidence.” Mil. R. Evid. 401. Relevant testimony may nevertheless be excluded if its probative value is significantly outweighed by its prejudicial effect. Mil. R. Evid. 403. Lay witness testimony is proper when it is “(a) rationally based on the witness’ perception; (b) helpful to clearly understanding the witness’ testimony or to determine a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge[.]” Mil. R. Evid. 701.

Testimony that is “the functional equivalent of saying that the victim in a given case is truthful and should be believed” is not admissible. *United States v. Brooks*, 64 M.J. 325, 329 (C.A.A.F. 2007). “The prohibition [against human lie detector testimony] applies not only to expert testimony, but also to conclusions as to truthfulness offered by a nonexpert.” *United States v. Kasper*, 58 M.J. 314, 315 (C.A.A.F. 2003) (citing *United States v. Robbins*, 52 M.J. 455, 458 (C.A.A.F.

2000)). When “testimony invade[s] the province of the court members to determine the credibility of the victim [it] violate[s] the limitations of [Mil. R. Evid.] 608 on admissible testimony related to truthfulness.” *Brooks*, 64 M.J. at 329.

Argument

A. One line of MAJ SS’s testimony was improper lay witness testimony.

Major SS’ testimony that she did not find it unusual that SPC [REDACTED] was still communicating with the perpetrator is improper lay witness testimony when taking the trial counsel’s explanation into consideration. (R. at 480, 490). In responding to defense counsel’s objection to this line of questioning, trial counsel stated, “Your Honor, I’m just going for a lay opinion based on her assessment as a SAFE [Sexual Assault Forensic Exam] examiner, I’m not calling for an expert opinion.” (R. at 480). Then during an Article 39(a), UCMJ hearing, trial counsel further explained, “This is a lay witness’ opinion and is very similar to what it would be if she was a SANE [Sexual Assault Nurse Examiner] nurse, in this case she just happens to be a doctor.” (R. at 481). While appellee believes that MAJ SS’s testimony qualifies under the first two prongs of lay witness testimony—“(a) rationally based on the witness’ perception and (b) helpful to clearly understanding the witness’ testimony or to determine a fact in issue”—appellee concedes that discussing MAJ SS’s credentials as a medical provider and SANE,

coupled with the asserted underlying knowledge base to form this opinion, places this one question outside the purview of lay witness testimony.

B. MAJ SS's testimony was not improper "lie detector" evidence.

Appellant contends that MAJ SS's testimony was inadmissible human "lie detector" evidence because she testified that "SPC [REDACTED]'s behavior improved" during MAJ SS's tenure as SPC [REDACTED]'s supervisor. (Appellant's Br. 34–35; R. at 490).¹⁷ This line of questioning is far from the "functional equivalent of saying that [SPC [REDACTED]] is truthful and should be believed." *Brooks*, 64 M.J. at 329 (finding "credibility qualification testimony" to be the "functional equivalent of saying" the victim is truthful). In *United States v. Flores*, the CAAF held that an expert testifying that "a majority of sexual assault cases involve alcohol" is not the type of evidence that "invade[s] the province of the court members to determine the credibility of the victim[.]" 82 M.J. 737, 749 (C.A.A.F 2022). Similarly, in this case, a generalized statement that SPC [REDACTED]'s behavior improved over time does not impermissibly bolster any credibility of the victim. This statement in no way quantified the probability that SPC [REDACTED] was being truthful or that MAJ SS considered her credible, as was the case in *Brooks*.

¹⁷ The asserted "lie detector" evidence should not be confused with appellant's claim that MAJ SS provided improper lay witness testimony when she testified that she did not find it unusual that SPC [REDACTED] was still communicating with the perpetrator. (R. at 480, 490).

C. Appellant suffered no prejudice from MAJ SS's testimony.

The purported error and conceded error concerning MAJ SS's testimony did not prejudice appellant or otherwise substantially impact the proceeding because the panel heard SPC [REDACTED] testify as to how she communicated with appellant (R. at 432, 439–44); the length of time she remained in communication with him (R. at 444); why she continued to communicate with him (R. at 360–62); and why she stopped communicating with him (R. at 468). Further, the defense extensively cross-examined SPC [REDACTED] on her motives to remain in contact with the appellant and potential motivations as to why she would later file a report of sexual assault. (R. at 432, 439–44, 468).

“If a witness offers human lie detector testimony, the military judge must issue prompt cautionary instruction to ensure that the members do not make improper use of such testimony.” *Kasper*, 58 M.J. at 315. Appellant asserts such a failure to instruct the panel was error (Appellant's Br. 37), but defense counsel at trial voiced no objection to the proposed panel instructions and requested no such additional instructions based on the testimony when provided the opportunity. (R. at 511–12). Accordingly, this issue is waived. *See United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020).

Assignment of Error IV

THE MILITARY JUDGE REVERSIBLY ERRED BY DENYING PRODUCTION OF THE COMPLAINANT'S MENTAL HEALTH RECORDS IN ACCORDANCE WITH MILITARY RULE OF EVIDENCE 513.

Additional Facts

With respect to SPC [REDACTED]'s medical records, appellant motioned the court three times—Defense Motion to Compel Production of Medical Records, Defense Motion to Compel Production Under Mil. R. Evid 513, and Defense Post-Trial Motions. (App. Exs. VII (sealed), VIII (sealed), and XXXVI). The military judge granted only defense's motion to compel medical records, which included a date range from prior to the sexual assault (November 2018) through a date past the sexual assault (February 2020). (App. Ex. XVI (sealed)). Additionally, the military judge found that defense counsel articulated a sufficient basis to compel medical records from an off-post medical provider because they may be related to the sexual assault. (App. Exs. VII and XVI (sealed)). Appellant received these medical records. (*See* Def. Ex. A for ID (sealed)).

These records were marked as Defense Exhibit A for Identification at trial and with them, appellant was able to confront SPC [REDACTED] and establish the following: SPC [REDACTED] lost her alcohol privileges and her medic privileges in October 2018 (R. at 382); in November 2018, SPC [REDACTED] was command-referred to

behavioral health where she was diagnosed with “adjustment disorder with mixed anxiety and depressed mood” and insomnia (R. at 383); and in December 2018, SPC [REDACTED] was diagnosed with nightmare disorder (R. at 387). Appellant used Defense Exhibit A for Identification to refresh SPC [REDACTED]’s recollection three times. (R. at 384, 385, 386).

Appellant’s first motion for SPC [REDACTED]’s mental health records pursuant to Mil. R. Evid. 513 asserted that appellant was entitled to them under the constitutional exception. (App. Ex. VIII (sealed)). Appellant argued that they had met the thresholds for production under Mil. R. Evid. 513. (App. Ex. VIII (sealed)). However, the military judge denied that motion because the defense was unable to establish that the records existed or how these potential mental health records would yield any evidence admissible under an exception to Mil. R. Evid. 513. (App. Ex. XVII (sealed)).

Then, after findings and sentencing, appellant filed a post-trial motion that alleged error regarding the military judge’s ruling pursuant to Mil. R. Evid. 513, among others. (App. Ex. XXXVI, p. 19). The military judge heard argument on the issue and denied the defense’s motion for reconsideration to compel the production of SPC [REDACTED]’s mental health records. (App. Ex. LXVI (sealed)). The military judge found that the defense failed to meet its burden to show “a reasonable likelihood that the records or communications would yield evidence

admissible under the exception to the privilege,” even considering the trial testimony of MAJ SS and SPC [REDACTED]’s acknowledgement of her diagnoses. (App. Ex. LXVI (sealed)).

Standard of Review

A military judge’s decision to deny a motion for in camera review of records is reviewed for an abuse of discretion. *United States v. Beauge*, 82 M.J. 157, 166 (C.A.A.F. 2022).

Law and Argument

Mil. R. Evid. 513 grants a patient the privilege to prevent the disclosure of “confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist . . . if such communication was made for the purpose of facilitating diagnosis or treatment of the patient’s mental or emotional condition.” Mil R. Evid. 513(a). The rule does not categorically protect all medical records that contain diagnoses and treatment. *United States v. Mellette*, 82 M.J. 374, 378 (C.A.A.F. 2022). Subsection (d) of the rule lists exceptions, and subsection (e) outlines the procedures to determine admissibility of such records. Mil. R. Evid. 513(d), (e). However, “where an Appellant’s motion to compel does not meet the standard laid out in [Mil. R. Evid.] 513(e)(3), a military judge does not have the authority to conduct an in camera review.” *Beauge*, 82 M.J. at 166.

In finding that the defense failed to meet its burden to show “a reasonable likelihood that the records or communications would yield evidence admissible under the exception to the privilege” the military judge said “at best” all defense had established was that SPC [REDACTED] testified she had a difficult time dealing with the trauma of the assault and was referred to counseling. (App. Ex. LXVI (sealed)). “[A]ny implied linkage between what is alleged to have occurred in this case and [SPC [REDACTED]]’s mental health records is too tenuous to justify an *in camera* review of the records[.]” (App. Ex. LXVI (sealed)).

Appellant’s previous and present contentions claiming they are entitled to SPC [REDACTED]’s mental health records is because her testimony “indicates a problem perceiving, remembering, and/or recounting events accurately.” (Appellant’s Br. 39). This statement, however, is a mischaracterization of the evidence and far too vague to warrant piercing the privilege. For example:

(1) Appellant states that SPC [REDACTED] was inconsistent because she testified that she watched appellant, through the window from the hotel, as he went to Burger King to get them both breakfast the morning of the assault, while also testifying that she was the one to get breakfast. (Appellant’s Br. 38). However, appellant’s recitation of the facts is inaccurate. The portions of SPC [REDACTED]’s testimony cited to by appellant viewed together with the rest of her testimony establish that SPC [REDACTED]

went to Burger King around 0326¹⁸ on 1 January 2019 (R. at 429, 461), and then in the morning—meaning after the sun rose and she slept, i.e. the common understanding of morning—after the sexual assault, appellant left the hotel room to get breakfast at Burger King. (R. at 357). In other words, they each made a trip.

(2) Next, appellant alleges an inconsistency regarding the New Year’s Eve ball drop and the 0326 Burger King receipt. (Appellant’s Br. 39). This is most likely resolved one of two ways: first, appellant and SPC █████ watched the New York ball drop at 0600 Germany time on 1 January 2019, which means that SPC █████ went to Burger King before the sexual assault. Alternatively, appellant and SPC █████ watched a previously recorded ball drop at midnight Germany time, and SPC █████ when to Burger King after the sexual assault.

Appellant also claims that because SPC █████ testified that she had “mental health and other issues prior to the alleged assault,” her mental health records should have been disclosed. (Appellant’s Br. 39). However, what SPC █████ actually testified to was that she was “having a rough time” in October 2018 (R. at 371); that in November 2018 she was “diagnosed with adjustment disorder with mixed anxiety and depressed mood as a result of [a] meeting with behavioral

¹⁸ Specialist █████ testified on re-direct, “So when I was in Burger King that timestamp, I believe that was 3:26 AM, there was two of them, one after another, I was in and out of that hotel room all night, and I remember seeing the ball with him.” (R. at 461).

health” (R. at 383) and anxiety disorder (R. at 386); and in December 2018 she was diagnosed with nightmare disorder (R. at 387). However, the medical records that the military judge ordered produced established all the above diagnoses, about which the defense was able to cross-examine SPC [REDACTED]. Thus, appellant has failed to establish whether “other mental health records exist” and, most notably, whether “the information sought is not merely cumulative of other information available[.]” Mil. R. Evid. 513(e)(3)(C).

Appellant’s final purported basis for the disclosure of SPC [REDACTED]’s mental health records is based on SPC [REDACTED] testifying that “she experienced symptoms such as night terrors and depression *as a result of the alleged sexual assault.*” (Appellant’s Br. 39) (emphasis in original). On direct examination SPC [REDACTED]’s testimony regarding this issue came out as follows:

Q: Did you ever go for treatment?

[The witness indicated an affirmative response.]

Q: When was that?

A: So I ended up having night terrors ---

(R. at 362).

On cross-examination SPC [REDACTED] testified as follows:

Q: Now earlier you testified on direct that as a result of what you alleged against [appellant] occurring on New Year’s Eve that you felt a lot of anxiety, that you had some depression, that you had night terrors; is that right?

A: Yes.

(R. at 382).

Defense counsel was then able to use SPC [REDACTED]'s answer to impeach her on when she was diagnosed with several medical conditions. (R. at 383, 386–87). Thus, the medical records they already had detailing her diagnoses, timing of such diagnoses, and treatment were all available and utilized by appellant. (*See* Def. Ex. A for ID (sealed); R. at 383, 386–87). As such, this last asserted basis for disclosure of theoretical additional mental health records is meritless.

Accordingly, the military judge did not abuse her discretion in denying appellant's motion for disclosure of SPC [REDACTED]'s mental health records because the defense did not meet its burden under Mil. R. Evid. 513.

Assignment of Error V

**THE MILITARY JUDGE REVERSIBLY ERRED BY
DENYING THE MEMBERS' REQUEST FOR
ACCESS TO TEXT MESSAGES NOT ADMITTED
IN EVIDENCE.**

Additional Facts

During deliberations, the members twice stopped to ask the military judge questions. (R. at 551, 560). The first question was, "Does the panel still at this time have the ability of ask questions of previously called witness?" (R. at 551). The member clarified that there was no specific question in mind. (R. at 551). The

military judge responded, “Generally no. You can always ask to review what has been previously asked.” (R. at 551). Then the military judge said, “I’ll tell you what . . . upon your return [from lunch] I will have an answer to your question.” (R. at 551). During the lunch hour the military judge crafted a written response to the panel’s question and sent the proposed instruction to both the trial and defense counsels. (App. Ex. XXX).

Defense counsel requested an Article 39(a), UCMJ hearing to discuss the proposed instruction. (R. at 553). At that hearing, defense counsel expressed concern that it was unclear “whether [the panel] would be able to recall the witness and ask the witness something new, or to hear . . . something that the witness has already said[.]” (R. at 554). Defense counsel therefore asked that the military judge provide the panel with the language of R.C.M. 921(b) including the line, “the member may request a court-martial be reopened and that portions of the record may be read.” (R. at 553–54). The defense counsel further noted that any new evidence received would be subject to the Military Rules of Evidence. (R. at 554–55). The military judge added the requested language and the panel received the following instruction:

Members may request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced (which includes recalling a witness). The military judge may, in the exercise of discretion, grant such request.

Please write down which witness you want to recall and your question or questions for the witness and give them to the bailiff. If you do not have additional questions for a witness, please inform the bailiff.

(App. Ex. XXXI; R. at 556).

After the panel received the written instructions, the military judge confirmed with the panel president that the member's questions had been answered and that at that time, the panel did not wish to recall any witness. (R. at 557).

The second question was, "can we review and take a look at . . . some of the evidence that was presented during the trial[?]" (R. at 559). After a clarifying question the military judge informed the panel president that "any exhibits that have not been admitted into evidence cannot—are not properly before the members." (R. at 560). The panel president followed up about "those text messages portions of the CID report, those things that were admitted." (R. at 560). The military judge explained that the physical copies of those messages were not admitted, otherwise the panel would have them with them in the deliberation room, but she said "if there was some questions of a witness that were in reference to those you could request that portion of the transcript be read back." (R. at 561).

Defense counsel interjected to make sure it was clear to the members that "the testimony they heard is evidence; the documents themselves is [sic] not. So what they heard here about the messages, that's evidence. But the fact that the [sic] tangible documents to read, that's not evidence." (R. at 561). The military

judge instructed the panel “defense counsel is correct in that statement. Does that clarify [sic] for you?” (R. at 561). The panel president said it did. (R. at 561). Defense counsel affirmatively stated that they had no objection to the military judge’s instructions to the panel on this question. (R. at 558).

The panel did not ask for any portion of the transcript to be read back to members nor did they ask to reopen the court-martial for additional evidence.

Standard of Review

Appellate courts review a military judge’s denial of a panel member’s request for additional evidence for an abuse of discretion. *United States v. Clifton*, 71 M.J. 489, 491 (C.A.A.F. 2013) (internal citations omitted). Where counsel affirmatively states no objection to the military judge’s denial of a panel member’s request the issue is waived; otherwise, the objection is forfeited the appellant must show that the denial was plainly erroneous. *Id.* Courts will grant relief for plain nonconstitutional errors if “(1) there was error; (2) the error was plain and obvious; and (3) the error materially prejudiced a substantial right of the accused.” *Id.* (citation omitted).

Law

Panel members have the “opportunity to obtain witnesses and other evidence.” Article 46, UCMJ. Furthermore, panel “members may request [a] court-martial be reopened and that . . . additional evidence [be] introduced.” R.C.M. 921(b).

Argument

The panel members were accurately advised that they could request that the military judge reopen the court-martial for them to hear additional evidence. (R. at 551, 557, 559–61; App. Ex. XXXI). Panel members are presumed to follow the instructions of the military judge. *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003). After the panel members were advised of the opportunity to reopen the court-martial to hear additional evidence, they informed the military judge that they had no additional questions. (R. at 577; App. Ex. XXXI). When the panel asked its second question—requesting to see “those text messages portions of the CID report, those things that were admitted”—the military judge correctly advised them on the law. (R. at 560–61). Further, defense counsel agreed with the military judge’s instructions and added “the tangible documents to read, that’s not evidence.” (R. at 561). Thus, appellant’s current complaint that the military judge erred by not providing the requested evidence is patently wrong and he has waived any objection to it now. (Appellant’s Br. 42–43).

However, even under a plain error analysis, appellant has failed to demonstrate either error or prejudice. First, appellant has failed to establish there was error in the military judge's instructions to the panel. Appellant currently states, "The military judge should have clarified with the members exactly what text messages they sought, and explained their right to request evidence even if the parties ha[d] not offered it." (Appellant's Br. 43). But the military judge had instructed the members, in response to their first question, to write down any questions they had for previous witnesses and provide them to the bailiff. (App. Ex. XXXI). The panel was thus on notice of its right to recall witnesses and seek the admittance of additional evidence, which it did not do. (R. at 561). Because there was no error, it could not have been plain and obvious.

Finally, appellant has not demonstrated how he was prejudiced when he failed to offer a basis for the admission of these unspecific, but used on cross-examination, text messages. As noted by defense counsel at trial, the questions by panel members are "still subject to the Military Rules of Evidence." (R. at 554).

This assignment of error is wholly without merit where the military judge did instruct the panel on their authority to request to reopen the court martial, where defense counsel participated in the crafting the instruction, where the court-martial chose not to seek additional evidence, and where appellant fails to demonstrate how the messages would have otherwise been admissible.

Assignment of Error VI

ACTUAL AND APPARENT UNLAWFUL COMMAND INFLUENCE EXISTED.

Additional Facts

On 30 August 2020, the commanding general (CG) of 1st Cavalry Division (1CD) held a meeting to initiate Operation Pegasus Strength (OPS). (R. at 691). Colonel (COL) RH, COL NS, Lieutenant Colonel (LTC) CB, and LTC JW attended the meeting.¹⁹ (R. at 691–92). In line with the Army’s greater campaign, OPS was a program focused on “ensuring junior enlisted soldiers have resources” and combating harmful conduct, called “corrosives” by the CG, that impacts the ability to build a cohesive team. (R. at 717–19). These corrosives include sexual harassment, sexual assault, suicide, and failure to uphold equal opportunity principles. (R. at 717–18). The 30 August 2020 meeting specifically, and OPS broadly, were not focused on courts-martial or their outcomes. (R. at 717).

All four panel members present at the 30 August 2020 meeting were subject to both group and individual voir dire at trial. (R. at 56–90, 147–75, 194–223).

Appellant’s group voir dire questions included inquiries into whether the members

¹⁹ Colonel RH and COL NS were 1CD brigade commanders, LTC CB was 1CD’s Public Affairs Officer (PAO), and LTC JW was a chaplain. Appellant never explicitly names COLs RH and NS or LTC JW as the other three members in the OPS meeting, however a review of the record confirms their participation. (Appellant’s Br. 46).

understood appellant had a right to fair and unbiased panels, whether members believed the Army had “a problem with sexual assault,” whether the members believed that Army leadership is trying to increase punishments for sexual assault, and whether they agreed that such ideas should not trump constitutional protections. (R. at 65, 76–78). The members also agreed they would disregard what they “may have heard from senior leadership” and follow the military judge’s instructions. (R. at 79).

In individual voir dire COL RH again confirmed that he could follow the military judge’s instructions. (R. at 150). He also differentiated between his duty as an officer outside of the courtroom and his duty as a panel member to ensure a fair and impartial trial. (R. at 154–55). When questioned by defense counsel, COL RH reiterated that the legal process and the law will decide whether an accusation is true. (R. at 160). Similarly, COL NS agreed he could follow the military judge’s instructions, consider the evidence and ensure a fair trial, and that past experiences would not affect his impartiality. (R. at 163–65). When confronted by defense counsel regarding the “systemic issue” of sexual assault, COL NS stated “my job here is to look at evidence.” (R. at 173). Lieutenant Colonel EW was questioned in individual voir dire regarding the perception of a “sexual assault problem.” (R. at 223). He denied any pressure or obligation to come to a certain outcome in order to show that Fort Hood took sexual assaults

seriously. (R. at 223). He likewise agreed that he could put aside beliefs and follow the military judge's instructions and laws. (R. at 220).

Lieutenant Colonel CB was questioned extensively during individual voir dire about his relationship with the OSJA and SJA, his ability to follow the military judge's instructions, his involvement with the suicide of Sergeant (SGT) EF, his role as PAO, and his relationship with the 1CD commander.²⁰ (R. at 194–210). Throughout this inquiry, LTC CB denied pressure from the CG to decide the case in a certain manner or that a certain outcome will show that Fort Hood takes sexual assault seriously. (R. at 197–98, 209–10). None of the four officers in question were challenged at trial (R. at 291–97), although “[t]he trial and defense counsel at the time of [appellant’s] trial were not aware of Operation Pegasus Strength.” (App. Ex. LXV, p. 4).

On 23 September 2020—during appellant’s court-martial—a journalist emailed LTC CB and requested a response to comments made by the Massachusetts members of a congressional delegation that recently visited Fort Hood related to the death of SGT EF. (App. Ex. LXV, pp. 10, 24; App. Ex. XXXVII, encl. 4). The journalist, Mr. CS, stated in his email to LTC CB that he was “working on this story with an end-of-day-deadline.” (App. Ex. XXXVII,

²⁰ Sergeant EF was a Fort Hood soldier who committed suicide on 25 August 2020 after his allegation that he was sexually assaulted by a superior was unsubstantiated. (App. Ex. XXXII).

encl. 4). Later that afternoon, LTC CB forwarded the request to the SJA, among other individuals. (App. Ex. XL). After the government and defense rested and the court recessed for the evening, LTC CB returned to his office, drafted a response to Mr. CS's press inquiry, and at approximately 1803, emailed the draft to the SJA and others for their input. (App. Ex. LXV, p. 24; App. Ex. XL; R. at 699). At approximately 1909, the SJA responded via email with his input. (App. Ex. XL).

Because they worked in the same building, LTC CB went to see the SJA shortly thereafter to discuss the draft response and obtain information on the investigation pertaining to the sexual harassment claims made by SGT EF. (App. Ex. LXV, pp. 10, 24; R. at 659, 667). At one point, LTC CB spoke with the Chief of Military Justice (COJ) regarding the correct terminology to use when referring to the outcome of the investigation into SGT EF's sexual harassment claims. (App. Ex. LXV, p. 24; R. at 686–87). During this conversation, the SJA, Deputy SJA, and COJ were aware that LTC CB was a panel member in appellant's court-martial. (App. Ex. LXV, pp. 10, 24). At no point in their interaction did the SJA, Deputy SJA, or COJ indirectly or directly reference or discuss appellant's case with LTC CB. (App. Ex. LXV, pp. 10, 24; R. at 679). Lieutenant Colonel CB responded to the press inquiry around 2045 with a statement that included talking points from OPS. (App. Ex. LXV, p. 10; App. Ex. XXXVII, encl. 4; R. at 704).

On 9 November 2020, after learning about this meeting between LTC CB and members of the OSJA, appellant filed a post-trial motion for a mistrial. (App. Ex. XXXVI). On 19 November 2020, the military judge held a post-trial Article 39(a), UCMJ, session to address the motion. (R. at 603–756). The court heard testimony from the SJA and LTC CB regarding the 23 September 2020 conversation and OPS. (R. at 654–83, 688–723). Lieutenant Colonel CB testified that OPS addressed overall wellness issues that included eradicating the “corrosives” of suicide, extremism, sexual harassment, sexual assault, among other issues, and ensuring that soldiers have access to resources if they are involved in such situations. (R. at 692, 717–18; App. Ex. LXV, p. 15). He further testified that when he discussed “corrosives” in the press release, this did not refer to people but rather to “conduct that is antithetical to building cohesive teams.” (R. at 718).

On 16 February 2021, the military judge granted the defense request for a mistrial and found that a mistrial was warranted pursuant to R.C.M. 915 for a combination of three reasons, including LTC CB’s meetings with the OSJA personnel. (App. Ex. LXV, pp. 31–32). This court heard an appeal of that decision pursuant to Article 62, UCMJ and ultimately held that the military judge abused her discretion in imputing implied bias to LTC CB due to his meetings with the SJA and his team. *Badders*, 2021 CCA LEXIS 510, at *42. The military judge’s granting of a mistrial was reversed. *Id.*

Standard of Review

Claims of unlawful command influence [UCI] are reviewed de novo. *United States v. Gilmet*, __ M.J. ___, at *7 (C.A.A.F. 3 Aug. 2023) (citing *United States v. Barry*, 78 M.J. 70, 77 (C.A.A.F. 2018)).

Law

Traditionally, two types of UCI can arise within the military justice system: actual and apparent. *United States v. Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2017).

A. Actual UCI.

Actual UCI occurs when any person subject to the UCMJ “attempt[s] to coerce or, by any unauthorized means, influence the action of a court-martial . . . in reaching the findings or sentence in any case. . . .” Article 37, UCMJ (2019), 10 U.S.C. § 837(a)(3). It is an “improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case.” *Boyce*, 76 M.J. at 247. Actual UCI requires “the court-martial proceedings were unfair to the accused (i.e., the accused was prejudiced).” *Boyce*, 76 M.J. at 248 (quoting *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006)).

Appellant bears the initial burden of making out a prima facie case of UCI. *United States v. Bergdahl*, 80 M.J. 230, 234 (C.A.A.F. 2020), *vacated on other grounds by Bergdahl v. United States*, 2023 U.S. Dist. Lexis 127510, __F.Supp.3d.__ (D.D.C. 25 Jul. 2023). Appellant must show: (1) facts, which if

true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that the unlawful command influence was the cause of the unfairness.

United States v. Richter, 51 M.J. 213, 224 (C.A.A.F. 1999) (citing *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)). “Although this initial burden is low, the accused must present more than mere allegations or speculation.” *Id. Gilmet*, __ M.J. at *7 (quoting *Biagase*, 50 M.J. at 150).

If appellant meets his burden and produces “some evidence” of UCI, the burden shifts to the government beyond a reasonable doubt to (1) disprove “the predicate facts on which the allegation of [UCI] is based;” (2) persuade “the appellate court that the facts do not constitute [UCI];” or (3) persuade “the appellate court that the [UCI] had no prejudicial impact on the court-martial.” *Biagase*, 50 M.J. at 150–51. A showing of UCI “in the air, so to speak, will not do.” *United States v. Allen*, 33 M.J. 209, 212 (C.A.A.F. 1991), *overruled on other grounds by United States v. Dinger*, 77 M.J. 447, 453 (C.A.A.F. 2018).

B. Apparent UCI.

Article 37, UCMJ was amended by the Fiscal Year 2020 National Defense Authorization Act to specifically eliminate the judicially created doctrine of apparent UCI. Pub. L. No. 116-92, 133 Stat. 1361, § 532(c) (2019) [FY20 NDAA]. This amendment was effective on 20 December 2019 and was thus in effect to any purported violations that would have occurred during appellant’s

September 2020 court-martial. *Id.*; see also *United States v. Garrett*, ARMY 20210298, 2022 CCA LEXIS 638 at *17 (Army Ct. Crim. App. 21 Oct. 2022) (“This change significantly impacts the judicially created doctrine of apparent unlawful command influence. . . .”) ²¹

Nevertheless, assuming apparent UCI is still good law, such allegations are to be judged objectively. *Boyce*, 76 M.J. at 248. “The appearance of [UCI] will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.” *Id.* Upon a showing of apparent UCI, the government “must prove beyond a reasonable doubt that the [UCI] ‘did not place an intolerable strain upon the public’s perception of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would [not] harbor a significant doubt about the fairness of the proceeding.’” *Bergdahl*, 80 M.J. at 234 (quoting *Boyce*, 76 M.J. at 249). No prejudice need be shown since the prejudice involved is “the damage to the public’s perception of fairness of the military justice system as a whole.” *Boyce*, 76 M.J. at 248. A finding, however, “that an appellant was not personally prejudiced by the [UCI] . . . is a significant factor that must be given considerable weight when deciding whether the [UCI]

²¹ The CAAF recently declined to determine “how recent amendments to Article 37, UCMJ . . . affect this Court’s apparent UCI jurisprudence.” *Gilmet*, __ M.J. ___, at n. 2.

placed an ‘intolerable strain’ on the public’s perception of the military justice system.”). *Boyce*, 76 M.J. at 248, n.5.

Argument

The facts as alleged from both the 30 August 2020 meeting with the 1CD CG and the mid-trial meeting between LTC CB and attorneys from the Office of the Staff Judge Advocate (OSJA) do not amount to UCI. Even if these events did amount to UCI, there was no prejudicial impact on the court-martial.

A. Appellant has not met his initial burden to show “some evidence” of UCI; neither the OPS meeting, nor the mid-trial meeting between LTC CB and the SJA, constitute UCI.

As a threshold matter, appellant must meet the three requirements of *Richter* to even establish there was UCI. 51 M.J. at 224. Here, although it is uncontroverted that both meetings occurred, appellant has not shown that the meetings constituted UCI, that the proceedings were unfair, or that the meetings were the cause of any such unfairness. *Id.* Appellant has provided no actual evidence of any of the *Richter* requirements, but rather has presented speculative inferences without pointing to the requisite fact-based evidence of impropriety. *Id.*; *Biagase*, 50 M.J. at 150; *Allen*, 33 M.J. at 212. (Appellant’s Br. 60–61).

1. The OPS meeting did not constitute UCI.

There is no evidence of influence by the CG on any panel member present at the OPS meetings. An analysis of the timing and content of the meeting will show

that appellant's contention that panel members were biased is without merit. (Appellant's Br. 60–61).

This court's superior court jurisprudence is illustrative. In *United States v. Proctor*, the CAAF found that an Air Force lieutenant colonel's comments about not writing a character letter in support of an accused, and no member of appellant's squadron doing the same, rose beyond mere speculation of UCI. 81 M.J. 250, 256 (C.A.A.F. 2021). In *United States v. Dugan* a panel member provided evidence that, during deliberations, another panel member reminded the group that their sentence would be reviewed by the convening authority. 58 M.J. 253, 255 (C.A.A.F. 2003). In both cases, the CAAF determined appellant had met his initial burden to show some evidence of UCI. *Id.*; *Proctor*, 81 M.J. at 253.

Here, the comments at issue—ones about Army policy writ large—were much more generalized, unrelated to appellant's or any other court-martial, provide no evidence of influence by the CG or anybody else.²²

The CAAF has likewise found that a combination of both timing and content of commander's meetings can be concerning. In *United States v. Brice*, the

²² Appellant largely contends that the government's alleged lack of candor and disclosure regarding the mid-trial meeting between the OSJA personnel and LTC CB creates UCI. (Appellant's Br. 60–61). Appellant has not shown how those actions, many of which occurred post-trial or while the panel was deliberating, could have any influence on—let alone manipulation of—the trial proceedings. *See Allen*, 33 M.J. at 212.

Commandant of the Marine Corps gave a “justice lecture” on the drug problems in the Corps, with mandatory attendance even by panel members, during appellant’s drug related court-martial. 19 M.J. 170 (C.M.A. 1985). The CAAF found unlawful command influence under those particular facts. *Id.* In *United States v. Baldwin*, the CAAF ordered a *Dubay* hearing to investigate the possible influence on Baldwin’s court-martial by mandated Officer Professional Development meetings, including one that occurred during her trial and discussed the lack of punishment for another officer. 54 M.J. 308 (C.A.A.F. 2001). In *Dugan*, however, the commander’s call took place several weeks before the appellant’s court-martial, “in stark contrast to [the mid-trial meetings in] the *Baldwin* and *Brice* cases.” 58 M.J. at 259. “To the extent the timing of such meetings—coupled with their content—alone gives rise to an inference of unlawful command influence, such an inference is not [always] warranted.” *Id.*

In the present case, the OPS meeting is vastly different than the commander’s calls of *Brice* and *Baldwin*. This was a meeting about a program aimed at combating several negative behaviors, consistent with Army policy, several weeks prior to trial. The OPS program was focused on providing junior enlisted soldiers resources and ensuring conduct antithetical to building cohesive teams was eliminated in response to recent events at Fort Hood, Texas. (R. at 717–19). Its focus and content was not the outcome of courts-martial. (R. at 717). The

CG having a meeting to discuss a plan to eliminate sexual assault, harassment, suicide, and other such negative behavior is “neither novel nor shocking.” *See Dugan*, 58 M.J. at 259. The timing and content of the meeting, combined, indicate that there was no UCI. *Id.*

2. LTC CB’s meeting with the SJA team did not constitute UCI.

Likewise, this court should look at the confluence of timing and content when evaluating LTC CB’s meeting with the Staff Judge Advocate (SJA) and his personnel. While the meeting did coincidentally occur mid-trial, unlike *Brice* and *Baldwin*, the content of the meeting was not centered on appellant’s court-martial, courts-martial more generally, or even on sexual assault. As this court noted in the appeal under Article 62, UCMJ, the purpose of the meeting was to respond “to a media query in an unrelated high-profile investigation with Congressional implications” that had strict time constraints. *Badders*, 2021 CCA LEXIS 510 at *40; (R. at 702–04; App. Ex. XXXVII). This was a short meeting, done in accordance with practice of the PAO and the SJA, to discuss a time-sensitive press release regarding SGT EF’s death. *Id.* (R. at 660, 679–80). The conversation covered how to describe the legal process of SGT EF’s case being unsubstantiated, how best to make that understandable to the public audience without violating laws, rules, or compromise other investigations, and specific responses to comments made by Congress. (R. at 700, 703–04). Most importantly, appellant’s

court-martial was never discussed. (R. at 679–80, 715).²³ Despite the timing of the meeting, an examination of its content eliminates any specter of UCI.

Appellant’s arguments purporting to show UCI are remarkably similar to the “UCI in the air” rejected by the *Allen* court and, likewise, should be rejected here. *Allen*, 33 M.J. at 212.

B. The meetings did not prejudice the proceedings.

Even assuming appellant has met his initial burden to show “some evidence” of UCI, there was no prejudice to the accused, and therefore no UCI. *Boyce*, M.J. 76 at 248. This court can be certain that the meetings in no way influenced the panel members and appellant received a fair trial given the answers of the panel members concerned in their pretrial voir dire and post-trial testimony. Each member confirmed that they were in no way inappropriately influenced and would base their decision on the evidence and the military judge’s instructions. (R. at 160, 173, 197–98, 209–10, 223). It is clear from the members’ statements that there was no unlawful influence and therefore appellant was not materially prejudiced. *Boyce*, M.J. 76 at 248.

²³ During the post-trial Article 39(a) session the SJA testified that he did not inform trial counsel of the meeting because he did not believe the SGT EF situation was relevant to appellant’s court-martial. (R. at 680). This goes to show that the SJA was not influencing the court-martial, but rather dealing with what he saw as a completely different issue.

The meeting between LTC CB and the SJA likewise did not prejudice the court-martial. Prior to the meeting, LTC CB stated in voir dire he would not give weight to the government because of his relationship with the OSJA. (R. at 196). He also stated in individual voir dire that neither his role in press releases regarding the SGT EF situation nor his role generally as a PAO would impact his ability to serve impartially, and explained that he does not feel obligated to come to any conclusions to show the installation takes sexual assaults seriously. (R. at 197, 200, 209). Further, none of LTC CB's testimony in the post-trial Article 39(a) hearing casts doubt upon his impartiality. (R. at 705–19). During the 23 September 2020 meeting LTC CB was engaged solely in his role as PAO, no evidence exists to the contrary, and appellant therefore has suffered no material prejudice. *Boyce*, M.J. 76 at 248; (R. at 197, 200). The court can be certain the meeting had no impact on LTC CB's impartiality.

C. The meetings did not place an intolerable strain upon the public's perception of the military justice system or create a perception of unfairness.

Should this court determine that prejudice need not be shown to prove UCI, and therefore apparent UCI is still good law, appellant's claim still fails as neither meeting placed an intolerable strain on the public's perception of the military justice system or created a perception of unfairness. *Boyce*, 76 M.J. at 248. First, this court should consider that no prejudice can be shown, as that fact weighs heavily in the analysis. *Id.* at 248 n.5. Next, the court should consider that an

objective observer, fully informed of all facts and circumstances, would have no doubt about the fairness of the proceedings. *Id.* at 248. After that analysis, this court can be certain, beyond a reasonable doubt, that there was no intolerable strain on the public's perception of the military justice system.

In *Proctor* the CAAF held an Air Force squadron commander's comments, although unwise, did not amount to apparent UCI because there was no evidence from witnesses that the comments influenced them to not support appellant, the comments made were about general issues rather than specific targeting of the appellant, they occurred well before trial, and there was no prejudice to appellant. 81 M.J. at 257–58. Assuming appellant has shown the OPS meeting and LTC CB's midtrial consultation with the SJA to meet the threshold showing of some UCI, a comparison of his case to *Proctor* proves helpful.

First, as evidenced by the voir dire responses, none of the four members present at the OPS meeting were influenced by the CG to come to a particular outcome in the case. (R. at 160, 173, 197–98, 209–10, 223). Second, the OPS meeting was about general problems and corrosive behavior—clear command prerogatives—rather than the specifics of appellant's case or any other. (R. at 717). Third, the meeting was held weeks prior to the trial. (R. at 691). Finally, as discussed *supra*, there was no prejudice to appellant. There is no basis for an

impartial observer to believe that the OPS meeting caused appellant to receive an unfair court-martial.

As this court has already discussed, LTC CB's meeting with the SJA would not lend an objective, disinterested member of the public, knowing all the facts and circumstances, to harbor doubt about the fairness of the proceeding:

[When an] observer and member of the public is made aware of: the purpose and subject of the mid-trial meeting (i.e., responding to a media query in an unrelated high-profile investigation with Congressional implications); the time constraints involved (i.e., the media response was due the next morning); the fact that the PAO (LTC [CB]) always ran his high-profile media responses by legal (i.e., the SJA; the discussion was standard operating procedure for the PAO); and, the fact that neither [appellant's] court-martial nor LTC [CB]'s role as a member were discussed [, there is no substantial doubt about the court-martial's fairness.]

Badders, 2021 CCA LEXIS 510, at *40–41; *see also* *Boyce*, 76 M.J. at 248.²⁴

Simply put, a neutral observer, knowing all the facts and circumstances, would understand that this meeting was not manipulation of the criminal justice system, but a PAO and SJA appropriately doing their jobs to address a short-suspense

²⁴ Although this court was addressing the military judge's decision regarding implied bias, the logic and rationale of its statement is equally applicable to the issue of UCI. The *United States v. Townsend* standard for implied bias ("whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high") is almost identical to the *Boyce* standard for apparent UCI. 65 M.J. 460, 463 (C.A.A.F. 2008).

public affairs matter, separate and apart from appellant's court-martial. Thus, appellant's claim of UCI fails.

Assignment of Error VII

SEVERAL MEMBERS WERE SUBJECT TO CHALLENGE FOR ACTUAL AND IMPLIED BIAS.

Standard of Review

Appellate courts will review the military judge's ruling actual panel member bias for an abuse of discretion. *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012). "[I]ssues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than de novo." *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004) (quoting *United States v. Miles*, 58 M.J. 192, 195 (C.A.A.F. 2003) (citing *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002))).

Law

"As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001). Rule for Courts-Martial 912(f)(1)(N) provides, "A member shall be excused for cause whenever it appears that the member . . . should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." Rule for Courts-Martial 912 "encompasses challenges based upon both actual bias and implied bias." *United*

States v. Elfayoumi, 66 M.J. 354, 356 (C.A.A.F. 2008).

“Actual and implied bias are ‘separate legal tests, not separate grounds for a challenge.’” *Nash*, 71 M.J. at 88 (quoting *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000)). “A military judge’s determinations on the issue of member bias, actual or implied, are based on the ‘totality of the circumstances particular to a case.’” *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007) (quoting *Strand*, 59 at 456). “The test for actual bias is whether any personal bias ‘is such that it will not yield to the evidence presented and the judge’s instructions.’” *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997) (citation and quotation omitted). “The existence of actual bias is a question of fact, and [appellate courts] consequently provide the military judge with significant latitude in determining whether it is present in a prospective member.” *Terry*, 64 M.J. at 303. In the absence of such analysis by the court, the CAAF has applied a *de novo* standard. *United States v. Rogers*, 75 M.J. 270, 274 (C.A.A.F. 2016).

Where “there is no actual bias, implied bias should be invoked rarely.” *Wiesen*, 56 M.J. at 174 (internal citation and quotation omitted). “Implied bias addresses the perception or appearance of fairness of the military justice system.” *Downing*, 56 M.J. at 422. In testing for implied bias, this court considers “whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high.” *Townsend*, 65 M.J. at 463; *see also*

United States v. Peters, 74 M.J. 31, 34 (C.A.A.F. 2015) (“The core of [the] objective [implicit bias] test is the consideration of the public’s perception of fairness in having a particular member as part of the court-martial panel.”). “[A]n implied bias analysis is viewed through the eyes of a member of the public watching the proceedings.” *United States v. Hines*, 75 M.J. 734, 740 n.5 (Army Ct. Crim. App. 2016); *see also United States v. Woods*, 74 M.J. 238, 243 n.1 (C.A.A.F. 2015) (“resolving claims of implied bias involves questions of fact and demeanor, not just law”). Finally, military courts are mindful of the close-knit nature of military communities, and “relationships among panel members and others involved in the case are unavoidable.” *Peters*, 74 M.J. at 35. Such professional relationships are not, per se, bases for disqualification. *Id.*

Argument

The record is clear that none the members who sat on appellant’s court-martial were biased. The military judge did not abuse her discretion in determining that LTC CB was not biased, actually or impliedly (App. Ex. LXV, pg. 21–22), and appellant has failed to meet his burden in establishing that implied bias existed from the OPS meeting. R.C.M. 912(f)(3); *Napoleon*, 46 M.J. at 283. There is little risk the public would perceive that appellant received anything less than a court of fair, impartial members. *Townsend*, 65 M.J. at 463.

A. The Military Judge did not abuse her discretion in determining LTC CB held no actual bias.

The military judge correctly cited the standard for actual bias and applied that standard to the facts of this case.²⁵ (App. Ex. LXV, p. 21). The military judge’s findings of fact regarding OPS were that the operation sought to “implement[] training on equal opportunity, discrimination, impacts to readiness, SHARP, resiliency, [and] physical readiness . . . among other topics. It focused on training all leaders to identify stressors impacting soldier performance.” (App. Ex. LXV, p. 21). This finding is not clearly erroneous, nor is her conclusion that no “language within the order; testimony from LTC CB and [the SJA] regarding their perception of the order; or statements of leaders in [1CD] published in press releases discussing the order . . . demonstrate any type of actual bias.” (App. Ex. LXV, p. 21). Finally, she correctly applied the *Napoleon* standard to the facts when she found “no evidence in [LTC CB’s] answers or demeanor that indicate that he did not yield to the court’s instructions or to the evidence presented at trial.” (App. Ex. LXV, p. 22).

Further, as the military judge correctly found, LTC CB’s nuanced beliefs expressed in a subsequent court-martial still “conformed to what military justice

²⁵ Appellant has made no showing of which findings of fact were clearly erroneous or what erroneous view of law was relied upon by the military judge in making her ruling. (Appellant’s Br. 66–67).

requires of an impartial panel member.” (App. Ex. LXV, p. 22). Lieutenant Colonel CB explained in that questioning that there are “levels of truth,” but also that complaints may be false, and it is important to ensure due process in accordance with the Constitution.²⁶ (R. at 723–24; App. Ex. XXXVII, p. 9).²⁷ The military judge correctly noted “LTC [CB’s] response may have been an unartful description of the government’s burden, but it was not incorrect.” (App. Ex. LXV p. 22). In analyzing LTC CB for actual bias, the military judge did not abuse her discretion.

B. Colonel RH, COL NS, and LTC EW did not display actual bias.

This court can be reassured that there was no actual bias by COL RH, COL NS, or LTC EW by looking at their voir dire responses. In group voir dire all three officers, plus LTC CB, denied believing Army leadership wanted more convictions for courts-martial nor that zero tolerance could trump constitutional protections. (R. at 77). In individual voir dire, each member described how they would impartially weigh the evidence of the case. (R. at 151, 166, 173, 195, 200, 218).

²⁶ Appellant highlights a subsequent court-martial LTC CB did not sit on (Appellant’s Br. 49; App. Ex. LXV, p. 13), but fails to note that prior to appellant’s trial LTC CB was a panel member for a court-martial that acquitted soldier of a sexual offense. (R. at 198).

²⁷ To the extent the subsequent court-martial voir dire is even relevant, LTC CB’s responses are in line with his voir dire in appellant’s case and show his continued ability to follow the law, evidence, and military judge’s instructions. (R. at 78, 79, 199–200). *Napoleon*, 46 M.J. at 283

There is no reason to question the candor or sincerity of the members' responses in voir dire, much less their impartiality. None of the officers displayed an inelastic opinion or belief that created a bias against appellant or the offenses with which he was charged. *Cf. United States v. Giles*, 48 M.J. 60, 63 (C.A.A.F. 1998) (finding a member held an inelastic attitude towards sentencing, despite indicating he could follow the evidence and circumstances of a case but repeatedly "stated that he believed a bad-conduct discharge or a dishonorable discharge was necessary" demonstrated actual bias.) Unlike the member in *Giles*, in this case there was no indication whatsoever that the members could not, or would not, do as they said and yield to the instructions and evidence. The answers given by COL RH, COL NS, and LTC EW clearly meet the *Napoleon* standard for showing lack of actual bias. 46 M.J. at 283. Appellant's argument "that all of the members who attended the pre-trial meeting . . . were actually biased" is not supported by any evidence on the record and amounts solely to speculation. (Appellant's Br. 66).

C. The OPS meeting did not create an implied bias.²⁸

There is no risk that the public will perceive that the appellant received anything less than a court of fair, impartial members.²⁹ *Townsend*, 65 M.J. at 463. The court rightly found that OPS was clearly a program aimed at proactive prevention of corrosive behavior, not punishment of individuals—a conclusion that would be evident to the public as well. (App. Ex. LXV, p. 22). She further correctly noted “this court would be hard pressed to find anyone who would not agree that sexual assault, sexual harassment, bullying and other similar behavior is in fact detrimental to forming cohesive teams.” (App. Ex. LXV, p. 22). Importantly, the military judge used those findings of fact to determine “LTC [CB]’s involvement in Operation Pegasus Strength . . . did not establish . . . implied bias.” (App. Ex. LXV, p. 22). That finding is not clearly erroneous, as a member of the public would not believe OPS was aimed at courts-martial generally and thus would not perceive appellant’s trial unfair. *Peters*, 74 M.J. at 34.

²⁸ Appellant does not appear to explicitly raise the issue of implied bias in the meeting between LTC CB and the SJA but does reference the meeting in a parenthetical. (Appellant’s Br. 67–68). This court has already decided the issue of implied bias in regard to that mid-trial meeting. *United States v. Badders*, ARMY MISC 20200735, 2021 CCA LEXIS 510, Army Ct. Crim. App. 30 Sep. 2021) (mem. op.) No further analysis is needed on that issue.

²⁹ While the military judge did not rule explicitly on this basis for challenge for all the members, she did make a ruling regarding OPS and LTC CB. (App. Ex. LXV, pg. 22). As all four members were at the OPS meeting and received the same information, this court should apply an abuse of discretion standard to all four members. *Strand*, 59 M.J. at 459.

The military judge's findings of fact regarding OPS can be used to determine if there is implied bias to the remaining members. The public would not be concerned that a commanding general held a meeting with his commanders and senior staff to discuss "equal opportunity, discrimination impacts to readiness, SHARP, resiliency, [and] physical readiness . . . among other topics." (App. Ex. LXV, p. 22; R. at 691). Even if the purpose of the meeting was to eradicate corrosive conduct, the military judge was correct in determining that the public would agree "sexual assault, sexual harassment, bullying and other similar behavior" is detrimental. (App. Ex. LXV, p. 22). The public would also expect our military leaders to work to eradicate that detrimental behavior from their formations. *Giles*, 59 M.J. at 378 ("A military commander is responsible for maintaining good order and discipline within his or her unit.").

This court should compare appellant's case to *United States v. Youngblood*, where the CAAF determined a previous staff meeting created implied bias, despite the members' statements in voir dire regarding their independent judgement. 47 M.J. 388 (C.A.A.F. 1997). The facts of *Youngblood* are illustrative of how a CG meeting can create an implied bias. In *Youngblood* the CG and SJA held a staff meeting where they disparaged a former commander for his apparent failure to punish a soldier appropriately. 47 M.J. at 340. The SJA "said that he thought the commander probably should have been given an Article 15 for dereliction of duty

and removed of his position” while the CG “forwarded a letter to that commander's new duty location expressing the opinion that ‘that officer had peaked.’” *Id.*

While the members who were present at that meeting did express an ability to be impartial, the presence of the CG and SJA’s words was still obviously present. *Id.*, at 340–41. As the CAAF summarized, “the members heard the SJA make the remarks and heard [the CG] reinforce them. The remarks were recent and fresh in the minds of the court members. The threat was not hypothetical but was specific and reinforced by a recent example.” *Id.* at 342.

That is entirely dissimilar to the OPS meeting in this case. The OPS meeting was not about courts-martial, UCMJ processes, or punishment. (R. at 717). It was about the implementation of training on “equal opportunity, discrimination impacts to readiness, SHARP, resiliency, physical readiness, and . . . other topics.” (App. Ex. LXV, p. 22). Further, there is no evidence in the record that the CG made threats, real or implied, to the members’ careers if they did not arrive at a particular finding or punishment. Unlike the members in *Youngblood*, the public would not believe the members in appellant’s case would be forced to balance impartiality with their careers, as the tenor of the meeting was about proactive culture change, not reactive punishment for alleged failures. 47 M.J. at 342.

As appellant notes in his brief, LTC CB was much more heavily involved in OPS than the other three members at the 30 August 2020 meeting. (Appellant’s

Br. 46). The military judge’s ruling regarding OPS and LTC CB is thus illustrative for the remaining members. If LTC CB’s involvement does not imply bias, then it is logical to conclude that the other members would not either simply for being at one meeting several weeks before trial. (App. Ex. LXV, p. 22; R. at 691).

Applying the military judge’s OPS findings of fact to COL RH, COL NS, and LTC JW, there remains no concern as to the public perception of the fairness of appellant’s trial. *Hines*, 75 M.J. at 740 n.5; *Peters*, 74 M.J. at 34.

Assignment of Error VIII

“ON OR ABOUT 1 JANUARY 2019” LANGUAGE IN THE SPECIFICATION CONSTITUTED AN EX POST FACTO VIOLATION/THE FINDING IS AMBIGUOUS.

Standard of Review

Whether a conviction violates the *Ex Post Facto* clause of the United States Constitution is a question of law that the court reviews de novo. *United States v. Busch*, 75 M.J. 87, 91 (C.A.A.F. 2016) (internal citation omitted).

Law and Argument

The *Ex Post Facto* clause of the United States Constitution prohibits laws that “criminalize acts that were not criminal at the time they were committed.” *United States v. Millican*, 2023 CCA LEXIS 6, at *4 (N-M Ct. of Crim. App. 11 Jan. 2023) (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)); Article 1, Section 9, U.S. Const.

Appellant's reliance on the majority opinion in *United States v. Muscat* is misplaced. ARMY 20160534, 2018 CCA LEXIS 511 (Army Ct. Crim. App. 26 Oct. 2018); (Appellant's Br. 70). In *Muscat* this court was faced with reviewing a conviction "on divers occasions" which straddled both sides of a change to the language of the statute. *Muscat* 2018 CCA LEXIS 511, at *5. Here, however, appellant was charged and convicted of one instance of sexual assault. (R. at 570; STR). Notably, such a scenario was discussed in Senior Judge Wolfe's *Muscat* concurrence. 2018 CCA LEXIS 511, at *10–11 (Wolfe, SJ., concurring in the judgment). He proposed a hypothetical conviction for robbery that occurred sometime between New Year's Eve 2018 and 1 January 2019. Due to the change of the statutory elements, he reasoned that one way the crime could be proven is if the government showed that the robbery occurred after midnight "'on 1 January 2019,' not 'on or about 1 January 2019[.]'" *Id.* (emphasis in original). Accordingly, this court need only look to when the sexual assault was proven to have occurred to affirm the specification.

Appellant's conviction is *directly* implicated in Senior Judge Wolfe's concurring opinion. Appellant was charged with sexually assaulting SPC [REDACTED] without her consent "on or about 1 January 2019." (Charge Sheet). Article 120, UCMJ, sexual assault without consent became effective 1 January 2019. NDAA for FY 2017, Pub. L. No. 114-328, §§ 5430, 5542, 130 Stat. 2000 (2016).

Specialist [REDACTED] testified that she was sexually assaulted sometime after watching the ball drop on New Year's Eve 2018, thus the only evidence on the record for when this sexual assault occurred is sometime on 1 January 2019.³⁰ (R. at 425, 461). Therefore, there was no violation of the *Ex Post Facto* clause and the government charged and proved the offense of sexual assault without consent in violation of Article 120, UCMJ (2019).

Assignment of Error IX

THE MILITARY JUDGE PLAINLY ERRED IN ADMITTING EVIDENCE OF THE CONTENTS OF WRITINGS WITHOUT ADMITTING THE ORIGINAL WRITINGS.

Additional Facts

On direct examination SPC [REDACTED] testified that she “met [appellant] on Tinder, a dating app.” (R. at 328). When asked “Did you communicate through that app?” SPC [REDACTED] stated, “Yes.” (R. at 329). Specialist [REDACTED] explained that she knew he was located in the general area that she was in “because of how the app works.” (R. at 329). Later, SPC [REDACTED] noted that she “posted an Instagram story” and that is how she believes appellant became aware that she was in Germany. (R. at 330).

³⁰ Indeed, appellant's counsel seemed to concede as much when he argued in closing: “[t]here's only one ball drop, and everyone's familiar with it. It's the one in Times Square in New York City. . . . [t]he ball drop is 6 AM Germany time. There's a six hour difference in time.” (R. at 533).

Specialist [REDACTED] described communicating with appellant by broadly stating they messaged each other—in setting up her and appellant’s meetings, SPC [REDACTED] testified that they “had messaged back and forth” (R. at 332), and “we had been messaging back and forth about getting back together and just hanging out.” (R. at 334). On re-direct examination SPC [REDACTED] explained the disclosure and timing of the disclosures of her text messages with appellant. (R. at 455–56). Specialist [REDACTED] testified to the substance of several messages with appellant on re-direct in order to respond to her cross-examination. (R. at 457–64). Defense counsel never objected under Mil. R. Evid. 1002.

Standard of Review

Appellate courts review a military judge’s decision to admit evidence for an abuse of discretion. *United States v. Finch*, 79 M.J. 389, 394 (C.A.A.F. 2020). “The lack of a timely objection to evidence at trial forfeits that error in the absence of plain error.” *United States v. Grindstaff*, ARMY 20200315, 2022 CCA LEXIS 524, at *16 (Army Ct. Crim. App. 30 Aug. 2022) (citing Mil. R. Evid. 103(a)(1)(A)). To prevail under this standard, an appellant must show “(1) there was error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.” *United States v. Erikson*, 65 M.J. 221, 223 (C.A.A.F. 2007) (internal citations omitted).

Law and Argument

Appellant's argument that SPC [REDACTED]'s testimony regarding her written communication with appellant should have been excluded because the physical messages themselves constitute the "best evidence" of those communications is without merit. Military Rule of Evidence 1002 requires an original writing, recording or photograph be provided in order to "prove its contents, unless these rules, this Manual, or a federal statute provides otherwise."

That an event or statement has been reduced to writing does not by itself trigger the Rule and prevent a witness from testifying as to the statement. *United States v. Jewson*, 5 C.M.R. 80, 85 (C.M.A. 1952). The rule only operates when someone is trying to prove the contents of the writing. *See, e.g., Jackson v. Crews*, 873 F.2d 1105, 1110 (8th Cir. 1989) (best evidence rule did not prevent counsel from questioning a witness about a flyer used to solicit potential witnesses where the questions were designed to show how the witness was contacted instead of the contents of the flyer). Similarly, the government was not seeking to prove the contents of SPC [REDACTED] and appellant's conversations on direct examination when SPC [REDACTED] testified that she and appellant communicated through an application and that they messaged back and forth. (R. at 328–330, 332, 334). To assess whether this rule is triggered, the court must first "isolate precisely what the proponent is

seeking to establish.” *Jewson*, 5 C.M.R. at 85. Here, this testimony was offered to establish how SPD [REDACTED] and appellant met and began seeing one another.

When the material facts of consequence necessarily place the document’s terms in issue—such as a forgery case—the proponent must offer the original writing or meet an exception enumerated in Mil. R. Evid. 1004. In *United States v. Rose* the Seventh Circuit found that the Best Evidence Rule was inapplicable to a witness’ testimony regarding a recorded conversation because the “government sought to prove the contents of a conversation, not the contents of a tape recording.” 590 F.2d 232, 237 (7th Cir. 1978), cert. denied, 442 U.S. 929 (1979); *See also United States v. White*, 223 F.2d 674, (2d Cir. 1955) (“Since the matter at issue regarding the confession was not the content of the tape recording but what the appellant had said, the best evidence rule did not require that the recording be produced and oral testimony of what had been said was admissible.”).

Specialist [REDACTED]’s testimony regarding the substance of her messages with appellant on re-direct was admissible under the same basis. It was immaterial that the communications between appellant and SPC [REDACTED] occurred over text messages. The government was seeking to establish the context for the messages that SPC [REDACTED] sent to appellant—messages that she was cross-examined on at length. (R. at 455–56, 457–64). Therefore, no portions of SPC [REDACTED]’s testimony were subject to the Best Evidence Rule.

Assignment of Error X

CUMULATIVE ERROR OCCURRED AND WARRANTS RELIEF.

Standard of Review

The cumulative effect of all plain errors and preserved error is reviewed de novo. *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011).

Law and Argument

“Under the cumulative-error doctrine, a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding.” *Pope*, 69 M.J. at 335 (cleaned up). Appellant courts may “reverse only if it finds the cumulative errors denied [a]ppellant a fair trial.” *Id.*

As argued *supra* pp. 28–30, the only error present in the trial was MAJ SS’s statement regarding that she did not find it unusual that SPC [REDACTED] was still communicating with the perpetrator, but that error was not prejudicial to appellant. A single non-prejudicial error did not deny appellant a fair trial and should not merit reversal. *Pope*, 69 M.J. at 335. Accordingly, this court should reject the cumulative error claim. *United States v. Gray*, 51 M.J. 1, 61 (C.A.A.F. 1999) (“Assertions of error without merit are not sufficient to invoke this doctrine.”); *see also United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993) (“the errors, in the aggregate, do not come close to achieving the critical mass necessary to cast a shadow upon the integrity of the verdict.”).

Conclusion

WHEREFORE, the government respectfully requests this honorable Court affirm the findings and sentence as approved by the convening authority.



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I certify that a copy of the foregoing was sent via electronic submission to
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APPENDIX