

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Docket No. ARMY 20220225

First Lieutenant (O-2)
**ADALBERTO BRINKMAN-
CORONEL,**
United States Army,
Appellant

Tried at Wheeler Army Airfield,
Hawaii, on 19 January, 12–13 April,
and 2–4 May 2022, before a general
court-martial convened by
Commander, 25th Infantry Division,
Lieutenant Colonel Michael Korte,
Military Judge, presiding.

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

Assignment of Error I¹

**THE MILITARY JUDGE ABUSED HIS
DISCRETION WHEN HE DENIED THE MOTION
TO SUPPRESS EVIDENCE DISCOVERED FROM
THE SEARCH OF APPELLANT’S “VACUUM
PHONE” AND ALL DERIVATIVE EVIDENCE.**

Assignment of Error II

**THE MILITARY JUDGE ABUSED HIS
DISCRETION IN ADMITTING EVIDENCE
PURSUANT TO MIL. R. EVID. 404(B) AND THE
ERROR WAS NOT HARMLESS.**

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

Assignment of Error III

THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUSTAIN THE FINDINGS OF GUILTY.

Assignment of Error IV

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE FAILED TO DISQUALIFY HIMSELF FROM PRESIDING OVER APPELLANT'S COURT-MARTIAL.

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Statement of the Case

On 3 May 2022, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of attempted sexual assault and sexual abuse of a child, absence from his appointed place of duty, communicating indecent language, wrongfully possessing child pornography, and three specifications of wrongfully distributing child pornography in violation of Articles 80, 86, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 886, and 934 [UCMJ] (2019). (Statement of Trial Results; R. at 15, 739). On 4 May 2022, the military judge sentenced appellant to confinement for nine years and ten days, and a dismissal. (STR; R. at 820). On 2 June 2022, the convening authority took no action. (Action). On 3 June 2022, the military judge entered judgment. (Judgment).

Statement of Facts

In April 2021, appellant made plans via the Grindr application to have a sexual encounter with a 14-year-old boy. (R. at 419–28). Appellant was not chatting with a real 14-year-old boy; instead, the fictitious boy was an undercover law enforcement agent. (R. at 419–28). After appellant showed up for sex with the fictitious boy, Army Criminal Investigative Division (CID) agents apprehended him and seized his phone. (R. at 428, 453–55, 470). CID released appellant to his company commander, who imposed conditions on his liberty. (R. at 486–90).

When appellant failed to show up two days later at staff duty or morning formation as ordered, appellant's commander and CID searched for him. (R. at 500–05, 537). After speaking with appellant's husband, both appellant's unit and CID feared for appellant's well-being. (R. at 504). During a health and welfare inspection of appellant's apartment, CID agents found a phone in a vacuum cleaner containing "goodbye" messages to appellant's loved ones. (R. at 537–46). Additional forensic examination was conducted on this phone to see if appellant could be found. (R. at 558–61). While looking for clues of appellant's whereabouts, a CID digital forensic examiner found images and videos of suspected child pornography. (R. at 561–62). Additional searches of this phone revealed that appellant distributed videos containing child pornography to others and chatted about his interest in young boys with other users. (R. at 564–98).

A. Appellant sought to have sex with who he thought was a 14-year-old boy living on post with his mother.

On 4 April 2021, Special Agent (SA) [REDACTED] served as an "undercover chatter" to investigate those who may be interested in having sex with children. (R. at 417–19). Special Agent [REDACTED] used a decoy photo of a fellow agent and a profile name called "[REDACTED]" on the Grindr application and waited for individuals to reach out to him. (R. at 419). Appellant, using the profile name "HRNDG," reached out to "[REDACTED]," and sent "[REDACTED]" three photographs of himself. (R. at 420–21). Appellant also immediately told "[REDACTED]" the sexual acts that he was into—

"kissing, sucking, fucking, kink, raunch and tasting ass on fingers[,] cock[,] and a dildo." (R. at 423). Appellant also asked "[REDACTED]" if he had "ever had anything placed in [his] butt before." (R. at 423).

Ultimately, the topic of "[REDACTED]"'s age came up as appellant questioned whether "[REDACTED]" was actually 24-years-old as his profile claimed. (R. at 424). This occurred after appellant inquired if "[REDACTED]" was in the military. (R. at 425). "[REDACTED]" told appellant that while he was not in the military, his mother was and that he lived on Ford Island. (R. at 425, 427, 440). "[REDACTED]" then revealed that he was 14-years-old and asked appellant "if he was mad." (R. at 425). Appellant was not; instead, appellant replied that he would "like to kiss [REDACTED]." (R. at 425).

After learning "[REDACTED]"'s young age, appellant blocked "[REDACTED]"'s profile on Grindr, but then immediately unblocked him. (R. at 425). Appellant told "[REDACTED]" he did so "to get rid of the old chats." (R. at 425). Appellant and "[REDACTED]" then discussed meeting up, as appellant was interested in having sex. (R. at 426). Appellant also asked "[REDACTED]" if he had ever "been rimmed² before." (R. at 426).

Eventually, appellant planned to meet up with "[REDACTED]" on 4 April 2021. (R. at 426). Appellant thought it would be "too risky to meet at [REDACTED]'s house," so he decided to pick "[REDACTED]" up. (R. at 426). Before leaving to pick up "[REDACTED],"

² "Getting rimmed is a sexual term for having your anus touched or penetrated by fingers, mouth, or tongue[.]" and could include touching the buttocks or genitalia. (R. at 426).

appellant commented that “██████” was “cute.” (R. at 427). When appellant showed up at the location to pick up “██████,” he was taken into custody. (R. at 428). “██████” then sent a “test” text message to appellant, which agents observed on the cell phone appellant had on him at the time he was taken into custody. (R. at 428, 455). This is done to help “identify the device that was being used in the communications” with the undercover chatter. (R. at 470–71). CID agents also seized the cell phone that appellant had on him at the time when they took him into custody on 4 April 2021. (R. at 456, 470–73).

B. After being apprehended by CID, appellant’s commander imposed conditions on his liberty, which appellant did not comply with.

Captain (CPT) ██████ served as appellant’s company commander in April 2021. (R. at 486–87). On 4 April 2021, a CID agent contacted CPT ██████ to inform him that CID had appellant in their custody and that CPT ██████ had to come to the CID office to take custody of him. (R. at 490). Captain ██████ subsequently picked up appellant from the CID office and imposed conditions on his liberty. (R. at 490–91). Specifically, CPT ██████ required appellant to check-in with the staff duty officer every four hours between 0600 and 2200 hours beginning on 5 April 2021. (R. at 493). In turn, appellant complied with CPT ██████’s reporting requirements on 5 April 2021. (R. at 494, 497, 500).

On 6 April 2021, CPT ██████ again required appellant to report to the staff duty officer every four hours between 0600 and 2200 hours and ordered him to appear

at morning formation at 0630 hours. (R. at 494–97, 516). Nonetheless, appellant did not show up, as ordered, to report to the staff duty officer at 0600 hours, nor did he show up for morning formation at 0630 hours. (R. at 500). Captain ■ went to appellant's apartment, but appellant was not there even though another part of the conditions on appellant's liberty required him to either be at home or at work. (R. at 501). This caused CPT ■ to change appellant's duty status to absent unknown. (R. at 505). Eventually, CPT ■ filed a missing person's report with the local police on behalf of appellant's husband. (R. at 510). Thankfully, a CID agent called CPT ■ the next day to report that local police had found appellant at a hotel in Honolulu. (R. at 510).

Nonetheless, when CPT ■ could not find appellant on 6 April 2021 after doing additional checks, he became afraid that appellant had tried to harm himself. (R. at 501). Captain ■ contacted the housing authority to conduct a health and welfare check in appellant's apartment. (R. at 501–02). While inside appellant's apartment, CPT ■ also spoke with appellant's husband, who was out of state at the time, for additional clues on appellant's potential whereabouts. (R. at 79–80, 502). During the conversation, appellant's husband told CPT ■ that appellant had left him a message regarding a phone that was inside of a vacuum cleaner. (R. at 502). Captain ■ found the vacuum cleaner, but he could not find a cell phone within it. (R. at 503).

Appellant's husband also informed CPT [REDACTED] that he received some concerning messages from appellant the night before. (R. at 504). The content of the messages worried CPT [REDACTED], and he contacted CID since he thought appellant might be suicidal. (R. at 504–05). Eventually, CID agents, including SA [REDACTED], went to appellant's apartment on 6 April 2021 to help find him. (R. at 537–38). Before arriving at the apartment, SA [REDACTED] learned that a phone containing potential suicide video messages was located inside of a hoover vacuum.³ (R. at 538). Once inside of appellant's apartment, SA [REDACTED] found the vacuum phone with the screen unlocked and phone on. (R. at 539, 546). Next, SA [REDACTED] watched four videos, which were recorded between 2157 and 2230 hours on 4 April 2021. (R. at 539–40, 600). Appellant addressed two of the videos to his husband, one to his brother, and one to his mother. (R. at 540). In the videos, appellant made the following statements:

- I know that you guys might find out about what I did, and I'm sorry. I wish I could turn back time, but I cannot.
- I was ill and I thought I wanted certain things since . . . I could remember and that doesn't fit in this world.
- I made the biggest mistake of my life. There's no going back after that. This was completely my fault.

(R. at 543).

³ This phone will be referred to as the vacuum phone hereinafter.

C. A forensic examination of appellant's cell phone revealed images and videos of child pornography along with chats where appellant expressed to others his sexual interest in young boys.

Special Agent [REDACTED], a digital forensic examiner and expert in digital forensics, forensically examined the vacuum phone. (R. at 558–62). Specifically, SA [REDACTED] was initially tasked with extracting data from the phone to find “signs of life” of appellant as well as the four videos described above. (R. at 561). Special Agent [REDACTED] determined that appellant was the likely device user for the cell phone given the name of the device owner ([REDACTED]) and the corresponding email address and phone number associated with it. (R. at 564–65). This information also matched the device owner information contained on the cell phone that CID agents collected from appellant when they apprehended him a few days earlier on 4 April 2021. (R. at 565, 572). Special Agent [REDACTED] found the four “self-recorded apology videos” and observed appellant in them. (R. at 562, 565).

In addition, SA [REDACTED] “identified what appeared to be suspected child pornography” while looking for these four videos. (R. at 562). Most of the suspected child pornography was in the Telegram application. (R. at 571). It was also linked to Grindr messages that SA [REDACTED] extracted from the cell phone CID agents collected from appellant upon his apprehension on 4 April 2021. (R. at 572–73). For example, SA [REDACTED] located a Grindr conversation between “[REDACTED]” and “[REDACTED]” where “[REDACTED]” stated “I’m into a lot . . . kissing, sucking, rimming,

vers, fucking, tasting ass on dildo, fingers, and cock, kink and raunch.” (R. at 573–76; Pros. Ex. 15, p. 1). “[REDACTED]” also indicated that he was into “[y]oung and incest” as well during a chat that occurred with “[REDACTED]” on 29 March 2021. (R. at 576, 600–01; Pros. Ex. 15, p. 1). Ultimately, “[REDACTED]” and “[REDACTED]” switched to the Telegram application where “[REDACTED]’s” username was “[REDACTED]” while “[REDACTED]’s” was “[REDACTED]” (R. at 577–78). The device user for the vacuum phone subsequently sent “[REDACTED]” five videos containing child pornography on 29 March 2021. (R. at 581; Pros. Ex. 16, 21).

Likewise, SA [REDACTED] found “two more Telegram sequences” that originated in Grindr messages that were extracted from the cell phone collected from appellant on 4 April 2021. (R. at 582). The first were messages SA [REDACTED] observed between “[REDACTED]” and Grindr user “[REDACTED].” (R. at 582; Pros. Ex. 17). As before, the pair switched from Grindr to Telegram as “[REDACTED]’s” username on Telegram was “[REDACTED]” while the device user was “[REDACTED].” (R. at 584–85; Pros. Ex. 17, p. 3–4). After telling “[REDACTED]” that “this is [REDACTED] from Grindr,” “[REDACTED]” sent four videos to “[REDACTED]” in January 2021, which contained child pornography. (R. at 587; Pros. Ex. 18, 21).

The second were messages SA [REDACTED] observed between “[REDACTED]” and “a user identified as visiting,” who was also associated with the number [REDACTED]. (R. at 588). Like before, the pair switched from Grindr to Telegram where the visiting

user was identified as Telegram user “[REDACTED].” (R. at 590; Pros. Ex. 19, p. 4).

Incidentally, the device user told the visiting Grindr user that he could “host during the day, but [that he] live[s] on base on [W]heeler [A]rmy [A]irfield.” (Pros. Ex. 19, p. 1). The device user for the vacuum phone subsequently sent “[REDACTED]” two videos containing child pornography in March 2021. (R. at 592–93; Pros. Ex. 20, 21).

Moreover, SA [REDACTED] found additional images and videos of child pornography in the vacuum phone. (R. at 593). Specifically, SA [REDACTED] found them in the applied cache part of the phone, “which is a way for the device to create thumbnails,” and within the Telegram application. (R. at 593–94). All the images and videos containing child pornography would have been either “sent, received, or saved” for them to be located in the phone. (R. at 594, 638). Special Agent [REDACTED] observed child pornography images on the vacuum phone between May 2019 and November 2020 while the videos were on the vacuum phone between November 2020 and 30 March 2021. (R. at 594). In total, SA [REDACTED] observed over a hundred unique images and videos containing child pornography on the vacuum phone. (R. at 596–97). Prosecution Exhibit 21 contained the child pornography that SA [REDACTED] located as the video attachments sent to the Telegram users referenced above as well as eleven images and eleven videos of what SA [REDACTED] found in the applied cache part and Telegram application of the vacuum phone. (R. at 595–99; Pros. Ex. 21).

Additional facts are incorporated below.

Assignment of Error I

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED THE MOTION TO SUPPRESS EVIDENCE DISCOVERED FROM THE SEARCH OF APPELLANT’S “VACUUM PHONE” AND ALL DERIVATIVE EVIDENCE.

Additional Facts

██████ is appellant’s husband, as he was married to appellant before the charged offenses occurred and remained married to appellant in April 2021 and at the time of trial. (R. at 79–80, 678). ██████ lived with appellant at their apartment on Wheeler Army Airfield before he moved to Michigan at the end of March 2021 just before the undercover sting operation occurred that resulted in appellant’s apprehension on 4 April 2021. (R. at 80–81). ██████ had just moved to Michigan in anticipation of appellant joining him soon after execution of appellant’s pending military separation for cocaine usage. (R. at 67, 81). While ██████ and appellant did not share bank accounts or a cell phone plan, ██████ appeared to have retained his access to appellant’s apartment in Hawaii. (R. at 83, 89, 91; App. Ex. VI(D)).

On 5 April 2021, ██████ woke up to four messages sent to him via Facebook Messenger. (R. at 81, 83). ██████ described the messages as “unsettling,” as appellant told ██████ to immediately come to Hawaii on the next available flight and come to the apartment to find the vacuum phone. (R. at 83, 85–86). Appellant

also provided the password to the vacuum phone. (R. at 83). Hours later, appellant messaged [REDACTED] to “please disregard the previous messages[,] I had a crisis [but] I’m better now.” (R. at 86; App. Ex. VI(D)). Nonetheless, [REDACTED] wanted to talk with appellant despite this “disregard” message. (R. at 84). When he subsequently spoke with appellant, [REDACTED] noted that appellant seemed “exhausted,” but ultimately appellant was laughing and joking at the end of their call, leading [REDACTED] to believe appellant was fine. (R. at 84–85). At the time [REDACTED] received these messages or spoke with appellant, he did not know appellant had been recently apprehended as part of the undercover sting operation. (R. at 84).

When appellant did not report at the staff duty desk or show up for morning formation on 6 April 2021, CPT [REDACTED] felt something was “very, very wrong” because appellant was “shaken” when CPT [REDACTED] picked him up from CID two days earlier and appellant had “a lot of stressors going on.” (R. at 40, 52). He reached out to [REDACTED], who gave CPT [REDACTED] permission to search the apartment as part of a health and welfare check on appellant. (R. at 40, 43, 88). In fact, CPT [REDACTED] remained on the phone with [REDACTED] while searching room to room in the apartment for appellant. (R. at 41–42). [REDACTED] then told CPT [REDACTED] about the “cryptic” Facebook Messenger messages he recently received from appellant along with the presence of a hidden vacuum phone. (R. at 41, 44). While CPT [REDACTED] located the appropriate vacuum cleaner, he could not find the phone inside of it. (R. at 41). [REDACTED] also

provided CPT [REDACTED] potential places appellant could be at in Hawaii since he was not in his apartment or at work. (R. at 45).

Since he was very concerned about appellant's mental state based upon his recent apprehension, the messages [REDACTED] brought to his attention, and his apparent absence, CPT [REDACTED] feared that appellant would or did harm himself. (R. at 52–53, 60, 65). This was especially true after appellant did not respond to CPT [REDACTED]'s attempts to contact him. (R. at 43–44). At this point, CPT [REDACTED] alerted CID that appellant was missing. (R. at 44–45). While CID normally does not become involved in searches for soldiers who failed to report, they did so in appellant's case given the fact they apprehended appellant less than two days previously in an undercover sting operation. (R. at 121–22). Consequently, CID also entered appellant's home, and the housing community assisted by opening the door and permitting agents to enter because the housing authority is permitted to enter residences in an emergency. (R. at 73, 125–27, 149–50).

After giving CPT [REDACTED] permission to enter and search the residence he had shared with appellant, [REDACTED] also gave CID information about appellant's bank accounts, forwarded to them the concerning Facebook Messenger messages he received, and gave permission for agents to look at appellant's vacuum phone to locate him. (R. at 89–90, 102–03). [REDACTED] gave CID broad authority since he told CID to “do what they had to do to find [his] husband.” (R. at 91, 105, 117). [REDACTED]

also implored CID to get appellant medical attention if they found him since appellant was “not okay” at the time. (R. at 102).

CID agents subsequently looked in appellant’s apartment for any sign he was still alive. Instead of finding such a sign, SA [REDACTED] found a receipt on the kitchen counter dated 5 April 2021 for two bottles of Benadryl and one box of cough drops. (R. at 150–53). Once SA [REDACTED] found the vacuum phone, he immediately searched for and found the four videos previously referenced based upon [REDACTED]’s specific consent. (R. at 128–29, 142). The general theme from each of the four videos was that they were “goodbye videos for a man who was about to either commit suicide or disappear permanently.” (R. at 133–34; App. Ex. XXIII, p. 6).

While CID and appellant’s unit searched Hawaii for appellant on 6 April 2021, SA [REDACTED] performed a digital forensic extraction of the vacuum phone to look for recent activity that appellant was still alive (such as financial transactions) and extract the four known “goodbye” videos. (R. at 113, 115–16, 162–63).

Essentially, SA [REDACTED]’s task was to look for anything in the vacuum phone that could offer a clue to help find appellant. (R. at 113). While SA [REDACTED] did not have written legal authorization or a formal, written request to perform an extraction, SA [REDACTED] learned that [REDACTED] consented to the extraction and knew the request was urgent since appellant was missing. (R. at 163, 169). As a result, SA [REDACTED] began by

searching for the “goodbye” messages, which he found by sorting videos by the most recent ones. (R. at 163, 173–74). He used this as a baseline for appellant’s last known activity since the timestamp for the videos was around 2200 hours on 4 April 2021. (R. at 167).

While arranging the “pane” of recent videos from the device on his computer screen, SA ■ also observed suspected child pornography in the group of recent videos. (R. at 164–65, 175). Specifically, SA ■ saw a video from around the end of March 2021 of a “pre-pubescent male” in the screen “pane” also containing the “goodbye” videos. (R. at 164, 179, 192–93). While searching for recent communications appellant had with others to determine if that could lead to appellant’s current whereabouts, SA ■ also identified messages from late March 2021 between appellant and another user on the Telegram chat application discussing engaging in sexual activity with a boy. (R. at 165, 564, 569; Pros. Ex. 12). Ultimately, SA ■ did not find any media or data during his examination on 6 April 2021 that yielded clues of appellant’s current whereabouts. (R. at 191).

Special Agent ■ intended to search the vacuum phone again the following day but did not since appellant had been found. (R. at 166). Specifically, the police found appellant at the Doubletree Hotel in Honolulu after he called the police to report a theft. (R. at 49). The missing person’s report caused the police to find him, and appellant was in “bad shape” when officers found him since he

had taken many pills and was incoherent. (R. at 49–50). Appellant subsequently spent three weeks in the hospital for kidney failure and mental health concerns. (R. at 50). CID later obtained specific legal authorization to search the vacuum phone for child pornography. (R. at 167, 186).

Standard of Review

This court reviews a “military judge’s denial of a motion to suppress for an abuse of discretion, viewing the evidence in the light most favorable to the prevailing party.” *United States v. Eugene*, 78 M.J. 132, 134 (C.A.A.F. 2018) (citation omitted). “The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.” *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (cleaned up). For example, a “military judge abuses his discretion when his findings of fact are clearly erroneous or he misapprehends the law.” *Eugene*, 78 M.J. at 134 (citation omitted).

Law

“The Fourth Amendment protects against unreasonable searches and seizures such that ordinarily searches are prohibited absent a search warrant except for a few specifically established and well-delineated exceptions.” *United States v. Black*, 82 M.J. 447, 451 (C.A.A.F. 2022) (cleaned up). One exception is voluntary consent searches, “which can be provided either from the individual whose

property is searched, or from a third party who possesses common authority over that property.” *Id.* (cleaned up). “The validity of the third party consent does not hinge on niceties of property law or on legal technicalities, but is instead determined by whether the third party has joint access or control of the property for most purposes.” *Id.* (cleaned up). In addition, a “person has apparent common authority to consent to a search if investigators reasonably believe that the person has authority to consent to a search, even if the person does not actually have such authority.” *Id.* at n.1 (citing *Illinois v. Rodriguez*, 497 U.S. 177, 188–89 (1990)). Under Mil. R. Evid. 314(e)(5), the government has the burden to prove by clear and convincing evidence “that a third party has joint access and control to the degree that such control confers a right to consent to search.” *Black*, 82 M.J. at 451. “The degree of control a third party possesses over property is a question of fact [while] [w]hether that control is sufficient to establish common authority is a question of law.” *Id.* (citation omitted). “The scope of a consent search or seizure is limited to the authority granted in the consent and may be withdrawn at any time.” *United States v. Hoffmann*, 75 M.J. 120, 124 (C.A.A.F. 2016).

A second exception to the search warrant requirement of the Fourth Amendment is emergency searches conducted to save one’s life or for a related purpose. Specifically, Mil. R. Evid. 314(i) provides that “[e]vidence obtained from emergency searches of persons or property conducted to save life, or for a related

purpose, is admissible provided that the search was conducted in a good faith effort to render immediate medical aid, to obtain information that will assist in the rendering of such aid, or to prevent immediate or ongoing personal injury.” The rationale for this emergency search doctrine is best summarized below:

[A] warrant is not required to break down a door to enter a burning home to rescue occupants or extinguish a fire, to prevent a shooting or to bring emergency aid to an injured person. The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. Fires or dead bodies are reported to police by cranks where no fires or bodies are to be found. Acting in response to reports of ‘dead bodies,’ the police may find the ‘bodies’ to be common drunks, diabetics in shock, or distressed cardiac patients. But the business of policemen and firemen is *to act*, not to speculate or meditate on whether the report is correct. People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process. Even the apparently dead often are saved by swift police response. A myriad of circumstances could fall within the terms ‘exigent circumstances’ . . . e.g., smoke coming out of a window or under a door, the sound of gunfire in a house, threats from the inside to shoot through the door at police, reasonable grounds to believe an injured or seriously ill person is being held within.

United States v. Muniz, 23 M.J. 201, 207–08 (C.M.A. 1987) (cleaned up and emphasis in original).

Argument

The military judge did not abuse his discretion by admitting the contents of the vacuum phone into evidence for two reasons. First, appellant’s husband

granted consent for law enforcement to search appellant's apartment and vacuum phone. Second, the government's search of the vacuum phone was a legitimate emergency search intended to locate a suicidal officer and prevent him from committing suicide.

A. Appellant's husband granted consent to search appellant's apartment and vacuum phone.

The military judge correctly found that [REDACTED]'s command for CID to "do what they had to do to find [his] husband" was indicative of broad consent for CID to search their shared apartment and the vacuum phone inside of it. (App. Ex. XXIII, p. 12). Even though [REDACTED] had just left Hawaii, he still had access to the apartment. (App. Ex. XXIII, pp. 12–13). In his time of crisis, appellant reached out to his husband to request that he return to their apartment in Hawaii and provided him with the passcode to the vacuum phone. (App. Ex. XXIII, p. 13). Appellant placed no restrictions on the use of his shared apartment with [REDACTED] or the vacuum phone. (App. Ex. XXIII, p. 13). In fact, nobody would have known about the vacuum phone but for [REDACTED]'s actions in alerting authorities to its existence, its secret location, and its passcode to unlock it. (App. Ex. XXIII, p. 13). The military judge's factual findings are correct and supported by the record.

Here, [REDACTED] possessed common authority over the apartment he shared with appellant; thus, he could validly consent to a search of the premises and items within it. *United States v. Matlock*, 415 U.S. 164, 171 (1974); *United States v.*

Weston, 67 M.J. 390, 392 (C.A.A.F. 2009) (stating that “[c]ommon authority over a home extends to all items within the home unless the item reasonably appears to be within the exclusive domain of the third party”). In fact, “where a defendant allows a third party to exercise actual or apparent authority over the defendant’s property, he is considered to have assumed the risk that the third party might permit access to others, including government agents.” *United States v. Basinski*, 226 F.3d 829, 834 (7th Cir. 2000) (citations omitted). Further, “[t]hird-party consent to a search can legitimately be given whether the premises to be searched are as expansive as a house or as minute as a briefcase. The key to consent is actual or apparent authority over the area to be searched.” *Id.* (citation omitted); *see also United States v. Crain*, 33 F.3d 480, 484 (5th Cir. 1994) (holding that the defendant assumed the risk that a car’s co-occupant might consent to a search of the car since he had permission to drive it on a late-night highway trip); *United States v. Jackson*, 598 F.3d 340, 347 (7th Cir. 2010) (recognizing that “the third-party consent exception to the warrant requirement is premised on the assumption of the risk concept” and that “common-authority rights under the Fourth Amendment can be broader than the rights that property law provides”). Again, [REDACTED] shared the apartment in Hawaii at the time with appellant (R. at 80–81), which empowered him as one who had actual and apparent authority to authorize a search of it.

Appellant argues that “█ did not have common authority over the vacuum phone” and that the military judge “incorrectly focused on the house when addressing █’s common authority over the property.” (Appellant’s Br. 46). Even assuming this is true (which the government disagrees), it appeared to CID that █ had apparent authority over the vacuum phone since he had the passcode to it. The Fourth Amendment does not require factual accuracy; instead, it requires law enforcement to be reasonable. *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990). Here, CID reasonably believed █ had apparent authority over the vacuum phone since he provided the passcode to agents and broadly instructed them to act as needed to find appellant. *See Basinski*, 226 F.3d at 834 (observing that “apparent authority turns on the government’s knowledge of the third party’s use of, control over, and access to the container to be searched, because these characteristics are particularly probative of whether the individual has authority over the property”). Thus, CID agents reasonably acted upon █’s apparent authority and broad consent mandate in conducting a search of the vacuum phone if nothing else. For example, the soldier in *Black* lent his cell phone to a fellow soldier “to send text messages and make phone calls, play games, and watch YouTube,” which specifically “cabined” the borrowing soldier’s “common authority over the phone.” *Black*, 82 M.J. at 449, 453. In contrast, appellant placed no limitations on the vacuum phone when he told █ about it and where

to find it. *See also United States v. Rader*, 65 M.J. 30, 31, 34 (C.A.A.F. 2007) (finding that “[a]ppellant’s roommate had sufficient access and control of [a]ppellant’s computer to consent to the search and seizure of unencrypted files in [a]ppellant’s non-password-protected computer”).

Nor did appellant ever act to withdraw [REDACTED]’s consent as appellant argues to the contrary. (Appellant’s Br. 46–48). As an initial matter, appellant cites no case law indicating that he had the power to revoke the consent he had already bestowed upon his husband, who ultimately gave consent to search the phone. *See Eugene*, 78 M.J. at 134 (assuming but not deciding that appellant “possessed the power to revoke the consent given by his wife to search his phone”). Moreover, appellant did not actually withdraw consent to search in this matter. Appellant’s “disregard” message “was not a ‘disallow’ message.” (App. Ex. XXIII, p. 13). In other words, appellant “never told [REDACTED] [that] he could not come to the house or unlock and view the [vacuum] phone.” (App. Ex. XXIII, p. 13). To effectuate a withdrawal of consent, “there must be some communication understandable to those conducting the search that the consent has been withdrawn.” *United States v. Coleman*, 14 M.J. 1014, 1016 (C.M.A. 1982); *see also Eugene*, 78 M.J. at 134 (noting that while no “magic words” are required to effectuate withdrawal of consent, there must be “some unequivocal act or statement”). Appellant ultimately did nothing to interfere with or cabin [REDACTED]’s usage or control of the vacuum

phone; thus, he never acted to withdraw consent from [REDACTED]'s subsequent disclosure of it to law enforcement.

Finally, appellant argues that he “expressly restricted [REDACTED]'s access to the vacuum phone to just the ‘videos in the folder titled camera.’” (Appellant’s Br. 48–51). However, [REDACTED], a person with apparent authority in the eyes of law enforcement at the very least, did not limit the scope of the search in any fashion but instead granted consent for a general search. “The standard for measuring the scope of consent under the Fourth Amendment is one of objective reasonableness and asks what the typical reasonable person would have understood by the exchange between the law enforcement agent and the person who gives consent.” *Jackson*, 598 F.3d at 348 (citations omitted). “Where someone with actual or apparent authority consents to a general search, law enforcement may search anywhere within the general area where the sought-after item could be concealed.” *Id.* (citations omitted). Arguably, [REDACTED]'s consent went further since he instructed CID to take any and all actions to find appellant. Thus, CID had broad apparent authority to search the vacuum phone as it could have contained clues as to appellant’s travel or communications, which could be used to help locate appellant. (App. Ex. XXIII, p. 13–15).

B. Agents lawfully searched the vacuum phone as part of an emergency search to locate a soldier seemingly intent on committing suicide.

The military judge identified several factors both before and after entry into

appellant's apartment that demonstrated CID's need "to locate [appellant] and prevent[] immediate or ongoing personal injury (suicide):"

- 1) [Appellant]'s 'shaken' appearance following his arrest for a serious child-sex related offense,
- 2) the messages to his husband which made it clear he was contemplating a lengthy disappearance,
- 3) [Appellant]'s disappearance from the home and failure to check-in with his unit and show up for formation and work call . . .
- 4) discovery of a receipt indicating the recent purchase of *two bottles of Benadryl* and a box of cough drops (indicative of potential efforts to overdose),
- 5) the finding of a secret, hidden, cellphone in a vacuum as [appellant] notes to his husband during a period of 'crisis;' and
- 6) a cursory review of that cellphone which had 'goodbye videos' for loved ones indicating a clear intent to cause himself immediate self-harm or disappearance.

(App. Ex. XXIII, p. 11) (emphasis in original). These findings are well-supported by the record and certainly not clearly erroneous.

The collective circumstances surrounding appellant's sudden disappearance after his apprehension for serious child-sex related charges were indicative of someone experiencing a mental health crisis, which was subsequently confirmed when local civilian police located appellant the day after CID's search of the vacuum phone. The search of appellant's vacuum phone satisfied the emergency search exception because CID "reasonably believed that an emergency existed at the time" of the search. *United States v. Korda*, 36 M.J. 578, 581 (A.F.C.M.R. 1992) (citations omitted). The facts and circumstances available to CID at the time

justified the perception that an emergency existed and that a search of the vacuum phone could aid in figuring out where appellant was at the time. *See United States v. Curry*, 48 M.J. 115, 116 (C.A.A.F. 1998) (affirming the military judge’s ruling that the military police validly entered appellant’s barracks room given the emergency at hand and read appellant’s suicide notes “as part and parcel of the emergency entry to see if appellant had done anything else to himself such as ingesting pills or poison”); *Korda*, 36 M.J. at 582 (finding that an emergency search for a “suicide” note was reasonable since it could provide “a co-worker, acquaintance, or psychiatrist with a clue to [the missing airman’s] location”); *United States v. Atkins*, 17 M.J. 970, 971 (A.C.M.R. 1984) (finding that the civilian police lawfully found contraband in appellant’s garage since their assessment of the emergency situation was reasonable and made in good faith as they feared “that someone was in a vehicle inside a closed garage with the motor running and thus in danger of carbon monoxide poisoning”).

Appellant argues that the factors the military judge relied upon “are conclusions in search of a rationale to justify the warrantless entry of appellant’s home and search of the vacuum phone,” as appellant ultimately asserts law enforcement’s actions were “textbook subterfuge” since agents “were more interested in uncovering evidence of a crime than in appellant’s well-being.” (Appellant’s Br. 33–44). Appellant’s claims are not supported by the record since

the record shows that agents acted in good faith and his attempt to use the benefit of hindsight does not negate the reasonableness of CID's actions at the time, which the military judge correctly found.

First, appellant claims the “connection between the apprehension and [appellant's] failure to check in was tenuous” because “the arrest occurred two days before appellant failed to check in with staff duty” and “most people would appear ‘shaken’ following an arrest for any type of offense.” (Appellant's Br. 33). The fact that two days had passed before appellant left and failed to report is of no import, as appellant had more time to think about his recent actions and the strength of the government's case as it related to the ultimate sexual assault of a child specification. Appellant knew that he would be going to prison at some point and that he would be labeled as a child sex predator. Agents also apprehended appellant for a serious crime (sexual assault of a child) and not just some petty misdemeanor. Appellant ultimately faced a maximum punishment of confinement for 30 years in addition to a mandatory dismissal for this offense alone. *See Manual for Courts-Martial, United States* (2019 ed.) (MCM), pt. IV, ¶ 62.d.(2). One could certainly feel that their career, marriage, and life as they know it could be over in the face of such serious charges and overwhelming evidence. Thus, appellant appeared “shaken” for good measure given these considerations.

Second, appellant asserts that the “crisis” had ended by the time he went

missing because he assured his husband “that he was ‘better now’ and instructed him to ‘disregard the previous [suicide-type] messages.’” (Appellant’s Br. 34). Similarly, appellant claims his husband would have affirmatively contacted appellant’s commander “[h]ad [he] believed that appellant was in imminent danger of harming himself.” (Appellant’s Br. 37). Again, appellant divorces these arguments from the proper context, as appellant’s husband had no idea at the time that appellant was recently apprehended on child-sex related crimes. This was an important stressor in appellant’s life at the time as shown above, and appellant’s husband could not appreciate all the thoughts and concerns that appellant had at the time since appellant did not share his recent legal predicament with his husband. In fact, it appears that appellant hid many things from his husband, as appellant (1) never expressed any interest in child pornography to his husband; (2) never asked his husband to watch child pornography; and (3) appellant’s husband never caught appellant watching child pornography. (R. at 679–80). Thus, the crisis did not end when appellant told his husband he was fine and to disregard his concerning messages since appellant’s husband really did not know what legal problems appellant was facing at the time. Instead, the crisis became acute after appellant’s conversation with his husband since he essentially dropped off the grid afterwards, ostensibly to execute his suicide plan.

Third, appellant claims that he was “on chargeable leave” on the day that he

“missed one check-in after otherwise complying with the conditions on liberty.” (Appellant’s Br. 35). Appellant argues that the government could always manufacture exigent circumstances requiring warrantless searches since a “[s]oldier is always at risk of self-harm when the [s]oldier is missing or has gone AWOL.” (Appellant’s Br. 36). Appellant ignores the specific circumstances at issue in this case at the time in casting this broad argument. When appellant missed his check-in and failed to comply with the conditions on his liberty, CPT [REDACTED] was immediately and legitimately worried about appellant’s mental state given his recent apprehension and the seriousness of the legal issues he faced. The existence of the suicide messages only increased the alarm over appellant’s mental state. Thus, this is not a case where a soldier simply left. Instead, appellant was (1) being actively investigated for serious charges at the time that left him “shaken;” (2) failed to comply with conditions imposed on his liberty within 36 hours of their imposition; and (3) sent his husband cryptic messages indicating that he intended on harming himself. (R. at 40, 52, 86). Appellant’s commander and CID were justified that an emergency existed at the time under these circumstances.

Next, appellant makes much of the fact that the vacuum phone was not appellant’s “everyday cell phone,” which had been seized a few days before after appellant’s apprehension on 4 April 2021. (Appellant’s Br. 39–40). This actually

made the vacuum phone more important to search since it was the phone most recently used by appellant before his disappearance. The vacuum phone would be the best phone to search for recent clues of appellant's whereabouts such as other people he texted goodbye to or confirmation of a hotel booking. While appellant faults CID for not examining "appellant's Google search history" on the vacuum phone in their attempt to find him (Appellant's Br. 44), appellant's use of hindsight practices that should have been used does not negate the fact that CID was reasonably justified in looking at the vacuum phone for clues of appellant's current whereabouts.

Appellant also attacks SA [REDACTED]'s credibility, arguing that the weight of the evidence shows it was "more likely that SA [REDACTED] entered the passcode" to the vacuum phone rather than finding it on and unlocked. (Appellant's Br. 40–43). Whether SA [REDACTED] found the vacuum phone already on and unlocked or entered the passcode to the phone is not the issue. Instead, the issue is whether CID was reasonably justified at the time in searching the phone for appellant's location. Given the circumstances as they existed at the time, CID was justified in looking at the vacuum phone in order to reasonably save appellant's life whether it was on or they had to unlock it.

Further, appellant asserts that the "crisis" was over at the time CID looked at the vacuum phone and that the goodbye videos "were no longer evidence of

appellant's 'clear intent to cause himself immediate self-harm or disappearance.'" (Appellant's Br. 43). The "crisis" was by no means over at the time as stated above, and in fact was only becoming more acute. Besides, the exact wording of the four goodbye videos would be of interest to CID since the words appellant used in those videos would be important to the overall puzzle of appellant's disappearance and could help shed light on both his location and state of mind.

In sum, the military judge did not abuse his discretion in finding that the home entry and the vacuum cell phone examination were reasonably justified emergency actions CID took to find appellant under the circumstances as they existed at the time. Law enforcement acted in good faith with appellant's well-being in mind, as CID engaged in a multi-agent effort to find appellant as quickly as possible to prevent his suicide, similar to how law enforcement looked for a suicidal airman in *Korda*, 36 M.J. at 580–82. Consequently, there is no support for appellant's accusations that both CPT [REDACTED] and CID colluded to create some sort of subterfuge to search for child pornography in the vacuum phone.


Assignment of Error II

THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING EVIDENCE PURSUANT TO MIL. R. EVID. 404(B) AND THE ERROR WAS NOT HARMLESS.

Additional Facts

The military judge admitted evidence at appellant's court-martial pursuant to Mil. R. Evid. 404(b). (App. Ex. XXVII). First, the military judge admitted messages that appellant exchanged with an unknown user via the Telegram application on 31 March 2021. (App. Ex. XXVII, pp. 1, 5–6). During SA [REDACTED]'s examination of the vacuum phone, he "identified Telegram messages that appeared to be talking about wanting to have sex with [a] 7- or 8-year-old" boy. (R. at 562). Special Agent [REDACTED] found these while looking in the vacuum phone for information that appellant was alive and any indication of his potential whereabouts. (R. at 562). Specifically, appellant told the other user the following: "Damn . . . I've always wanted to have sex with a boy and his dad . . . watch them kiss and fuck each other." (R. at 569; Pros. Ex. 12, p. 4). Appellant also stated "a friend that moved away recently had a son, probably like 7–8, sexy fucking little blonde boy, . . . [b]ig red lips and his ass . . . [f]uck. One time we were visiting and he was lying on his stomach watching TV . . . the way he'd stick his little butt in the air . . . I wanted to slowly pull down his pants and bury my face in his ass." (R. at 569; Pros. Ex. 12, p. 5).

The military judge found that the evidence reasonably showed that appellant made these statements on 31 March 2021 via Telegram, especially since appellant conceded as much. (App. Ex. XXVII, p. 5). Next, the military judge found that “[e]vidence from the 31 March 2021 (Wednesday) Telegram conversation expressing a prior interest in having sex with boys makes it more probable that on 4 April 2021 (Sunday) [appellant] had a motive or intent to commit (or attempt to commit) sexual assault of a child.” (App. Ex. XXVII, p. 5). The military judge also noted that this evidence “carries additional relevance if/when . . . [appellant] raises . . . entrapment/lack of predisposition in defense of the charges that [he] attempted to sexually assault or commit a lewd act with a child.” (App. Ex. XXVII, p. 6 n.5). Finally, the military judge conducted the appropriate balancing test of the probative value of the evidence against any unfair prejudice, finding the messages “highly probative” while noting the evidence “will not take much time to elicit, . . . will not cause a trial within a trial, . . . is not cumulative, and . . . will not distract the factfinder from the true issues.” (App. Ex. XXVII, p. 6). Thus, the military judge found that the Telegram messages were admissible as they pertained to the attempted sexual assault and abuse of a child offenses. (App. Ex. XXVII, pp. 5–6).

Second, the military judge admitted appellant’s action of blocking and then re-adding “” on Grindr. (App. Ex. XXVII, p. 1, 6–8). As previously noted,

appellant blocked “[REDACTED]” on Grindr before unblocking him and starting a new chat. (App. Ex. XXVII, p. 7). Appellant did so “to delete the old chat” and then told “[REDACTED]” that “[REDACTED]” was “not really supposed to be on here.” (App. Ex. XXVII, p. 7). Appellant and “[REDACTED]” subsequently discussed “their desire to engage in sex.” (App. Ex. XXVII, p. 7). Appellant “believed that blocking ‘[REDACTED]’ had the impact of deleting prior chats, and that unblocking ‘[REDACTED]’ had the impact of resuming the chat with a ‘clean slate.’” (App. Ex. XXVII, p. 8).

The military judge found the probative value of this evidence to be “high” since it demonstrates appellant’s “knowledge that the preceding portion of their conversation needed to be erased because of” “[REDACTED]’s” reveal that he was “young.” (App. Ex. XXVII, p. 8). This also “occurred *during* the essential conversation with law enforcement” that served as the basis for the charged Article 80, UCMJ, offenses. (App. Ex. XXVII, p. 8) (emphasis in original). The military judge further found that this evidence indicated “a consciousness of guilt” on appellant’s part, especially since appellant recognized that “[REDACTED]” was too young to comply with Grindr’s minimum age requirement. (App. Ex. XXVII, p. 8). The military judge then conducted the appropriate balancing test weighing the danger of unfair prejudice before admitting the evidence. (App. Ex. XXVII, p. 8).

Third, the military judge admitted appellant’s “goodbye” messages directed to his mother, brother, and husband. (App. Ex. XXVII, pp. 1, 8–10). As

previously noted, appellant recorded four videos on the vacuum phone late in the evening on 4 April 2021. (App. Ex. XXVII, pp. 8–9). In these videos, appellant generally stated that (1) he was ill because he wanted to engage in illicit activities; (2) he was sorry since his family members might find out about what he did; (3) he would miss his family members because he was finished; and (4) he made “the biggest mistake of [his] life.” (App. Ex. XXVII, p. 9).

The military judge found that the evidence reasonably showed that appellant made these videos, especially since appellant conceded as much. (App. Ex. XXVII, p. 9). The military judge also found that appellant “alluded to his guilt . . . [because] portions of the statements . . . unmistakably refer to the child sex offense sting operation he was arrested for earlier in the day.” (App. Ex. XXVII, p. 9). This evidence amounted to “highly probative admissions of guilt” because “[t]he videos were taken so close in time to [appellant’s] arrest and release.” (App. Ex. XXVII, pp. 9–10). The military judge then weighed the danger of unfair prejudice before concluding that the “goodbye” videos were admissible under Mil. R. Evid. 404(b) “as evidence of consciousness of guilt relating to the charged offenses in Charge I.” (App. Ex. XXVII, p. 10).

Standard of Review

This court reviews a “military judge’s ruling on the admissibility of evidence for a clear abuse of discretion.” *United States v. Schlamer*, 52 M.J. 80, 84

(C.A.A.F. 1999) (citation omitted). “The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.” *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (citation omitted).

Even if this court finds that the military judge erred, appellant is not entitled to relief “unless the error materially prejudices [his] substantial rights.” Article 59(a), UCMJ; 10 U.S.C. § 859(a). Thus, “[e]rror not amounting to a constitutional violation will be harmless if the factfinder was not influenced by it, or if the error had only a slight effect on the resolution of the issues of the case.” *United States v. Muirhead*, 51 M.J. 94, 97 (C.A.A.F. 1999) (citation omitted). 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 *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

Law

Mil. R. Evid. 404(b) provides that “[e]vidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character. [Nonetheless,] [t]his evidence may be admissible for another purpose, such as

proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” “Consciousness of guilt evidence is different from propensity evidence” since it “is an acceptable form of circumstantial evidence used to show ‘awareness of an accused that he or she engaged in blameworthy conduct.’” *United States v. Quezada*, 82 M.J. 54, 59 (C.A.A.F. 2021) (quoting *Black’s Law Dictionary* 379 (11th ed. 2019)).

To determine the admissibility of uncharged misconduct under Mil. R. Evid. 404(b), this court applies the following three-part test:

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

United States v. Reynolds, 29 M.J. 105, 109 (C.A.A.F. 1989) (cleaned up). The first and second prongs address the logical relevance of the evidence at issue while the third prong ensures that the evidence is legally and logically relevant. *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006). The evidence at issue must satisfy all three prongs to be admissible. *Id.* Relevant factors in analyzing the above factors include the nature of the acts, the circumstances surrounding the acts, and the time span between the charged and uncharged conduct. *United States v. Morrison*, 52 M.J. 117, 122–23 (C.A.A.F. 1999).

Argument

The military judge did not abuse his discretion in admitting the evidence at issue during appellant's court-martial. The evidence was admissible pursuant to Mil. R. Evid. 404(b) or was properly admissible evidence of appellant's consciousness of guilt. Even if the military judge erred in admitting some or all of this evidence, any error did not materially prejudice appellant's substantial rights.

A. The military judge did not abuse his discretion since the evidence was properly admissible under Mil. R. Evid. 404(b) or as evidence of appellant's consciousness of guilt.

First, the military judge properly admitted the Telegram chats from 31 March 2021 because they were probative to the attempted sexual assault and abuse of a child offenses. As an initial matter, the first prong of the *Reynolds* analysis was met because appellant conceded that he engaged in the Telegram chat at issue with the other user. (App. Ex. IV). Second, appellant's graphic description of desiring to engage in sex acts with young children makes it more likely than not that he intended to engage in sex acts with 14-year-old "[REDACTED]" when they scheduled to meet on 4 April 2021. This is especially true given the short time span between this Telegram chat on 31 March 2021 and appellant's conversation with "[REDACTED]" on 4 April 2021. See *United States v. Munoz*, 32 M.J. 359, 363 (C.M.A. 1991) (upholding the admission of uncharged misconduct evidence to show a plan or scheme even though there was a 12-year gap between the

uncharged misconduct and the charged misconduct). Third, the danger of unfair prejudice did not substantially outweigh the probative value of the evidence, especially given that the Telegram chat occurred mere days before appellant's conversation with "[REDACTED]" and involved appellant discussing his desire to engage in sex acts with children.

Appellant argues that the Telegram "messages did not involve conduct, but only expressions of desire, and the desired activity was so distinct from the charged acts that the evidence did not make a fact of consequence more or less probable." (Appellant's Br. 64). Appellant seems to imply that the uncharged acts need to be exactly like the charged act, but "[t]here is no requirement that the uncharged acts be identical to the charged act so long as there is sufficient similarity to logically conclude that a similar intent existed." *United States v. Jenkins*, 48 M.J. 594, 598 (Army Ct. Crim. App. 1998) (citing *United States v. Bender*, 33 M.J. 111 (C.M.A. 1991)). Appellant is also incorrect that the desired activity discussed in the Telegram chat is distinct from the charged acts. Appellant essentially described two scenarios in the Telegram chat: (1) having "sex with a boy and his dad;" and (2) engaging in sex acts with a friend's 7 or 8-year-old son. These two expressions have a common denominator with the charged conduct—namely, they all involve engaging in sex acts with boys. *Cf. Morrison*, 52 M.J. at 123 (noting that the uncharged misconduct shared "no common theme" with the

charged conduct).

Further, the Telegram messages were illuminative of appellant's motive and intent. "Motive is the moving force that induces the criminal act and comes into play before the actus reus, that is, why the criminal did the act." *Jenkins*, 48 M.J. at 598 (citation omitted). Motive evidence can help identify the perpetrator because "if there is a common motive for both the uncharged misconduct and the charged offense, evidence that the accused committed the former strengthens the inference of his having committed the latter." *Id.* Similarly, "[i]ntent is an integral part of the mens rea element of the criminal act and accompanies the actus reus, that is, what the criminal meant to accomplish by the act." *Id.* at 599 (citation omitted). "The relevancy of the uncharged offense derives from the defendant's indulging himself in the same state of mind in the perpetration of both the uncharged and charged offenses. The reasoning is that because the defendant had unlawful intent in the uncharged offense, it is less likely that he had lawful intent in the present offense." *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (cleaned up). Here, appellant's expressions of desiring to engage in sex acts with boys in the Telegram chat mere days before his conversation with "[REDACTED]" were sufficiently similar to support an inference that he intended on engaging in sex acts with "[REDACTED]" upon meeting him as discussed. *See Jenkins*, 48 M.J. at 600 (finding "the uncharged acts of violence against his spouse were sufficiently

similar to the charged acts of violence against his spouse to support an inference that a similar intent existed”). It also served to rebut appellant’s argument that agents tried “to bait” him into committing the offense. (R. at 711).

Second, the military judge properly admitted evidence that appellant blocked and re-added “██████” on Grindr because it showed his consciousness of guilt and demonstrated the absence of mistake. As an initial matter, there is no dispute that appellant exchanged messages with law enforcement on Grindr since an undercover agent posed as “██████.” Next, appellant’s acts of blocking and re-adding “██████” on Grindr shows an awareness that he knew it was wrong to discuss sex acts with a 14-year-old boy. In fact, these acts were inextricably intertwined with appellant’s conversation with ██████ and admissible as *res gestae* evidence since it served to put the circumstances surrounding the conversation in context. *See United States v. Metz*, 34 M.J. 349, 351 (C.M.A. 1992) (holding that *res gestae* evidence was admissible to place evidence in context); *United States v. Peel*, 29 M.J. 235, 239 (C.M.A. 1989) (noting that when testimony is inextricably intertwined with the alleged offense, it “was admissible as part of the same transaction”). Lastly, the legitimate probative value of the evidence outweighed any unfair prejudice to appellant.

Appellant asserts that “the probative value of [appellant’s acts] was . . . low and was substantially outweighed [by] the danger of unfair prejudice” because the

military judge identified other potential explanations for appellant's action in blocking and re-adding "[REDACTED]." (Appellant's Br. 66). Appellant took the military judge's balancing analysis out of context to make this argument, as the most logical explanation for appellant's acts of blocking and re-adding "[REDACTED]" to Grindr demonstrated a consciousness of guilt since he knew it was wrong to discuss engaging in sex acts with a young teenage boy. While the military judge identified that other "potential alternate explanations" exist for appellant's actions (App. Ex. XXVII, p. 8), it does not correspondingly reduce the strength of the most logical explanation that showed appellant's consciousness of guilt during the same conversation that served as the basis for the Specifications of Charge I.

Third, the military judge properly admitted appellant's "goodbye" videos since they similarly showed a consciousness of guilt. Again, there is no question that appellant produced the videos in question as a threshold matter. Next, appellant's statements indicated that he engaged in blame-worthy, wrong, and criminal conduct, as his videos contained highly probative self-incriminating admissions. In this regard, appellant's statements do not constitute Mil. R. Evid. 404(b) evidence but are admissible as consciousness of guilt evidence. *Quezada*, 82 M.J. at 59. But even assuming appellant's self-incriminating statements constitute Mil. R. Evid. 404(b) evidence, the military judge correctly found that their probative value was not substantially outweighed by the danger of unfair

prejudice.

Once again, appellant contends that “the military judge’s acknowledgment that other potential explanations for the relevant statements exist meant that the strength of proof and probative value of the evidence was exceptionally low.” (Appellant’s Br. 69). In his analysis of the third *Reynolds* prong, the military judge acknowledged that appellant could have been feeling guilty in the videos “about being openly gay, . . . for facing a separation action for drug use, . . . for having just been wrongfully accused of ‘one of the worst crime imaginable,’ or . . . because he may have just stepped outside the bounds of his marriage.” (App. Ex. XXVII, p. 10 n.9). These potential alternative explanations again do not diminish the strength of the primary explanation for the statements in appellant’s videos—appellant’s consciousness of guilt over seeking to have sex with a 14-year-old boy. This is especially true since appellant produced these videos on the same day that law enforcement apprehended him for seeking to have sex with a teenage boy. In fact, appellant produced these videos in the hours after his unit released him with conditions on his liberty. (R. at 421, 490–92, 600). Thus, the timeline of when appellant produced these videos demonstrates their high probative value since appellant made them as soon as he could after his apprehension on attempted child sex charges.

B. Even if the military judge committed error, any error was harmless after application of the *Kerr* factors.

Even if this court finds that the military judge was clearly unreasonable or erroneous in admitting the above evidence, any error was harmless. First, the government's case as to the attempted sexual assault of a child was strong. The most relevant and damning evidence of this came from appellant's conversation on Grindr with "[REDACTED]," which was recorded and admitted into evidence. (R. at 419–23; Pros. Ex. 1). Appellant unmistakably discussed meeting up with a 14-year-old boy to engage in sex acts. (R. at 425–26).

In contrast, appellant's defense to the attempted sexual assault of a child offense was unpersuasive. Appellant argued that SA [REDACTED] (i.e., "[REDACTED]") "was not upfront about his portrayed age and spent more time trying to bait [appellant] into asking for an age rather than just saying it." (R. at 711). Appellant also maintained that his "comments could have been taken as role play." (R. at 712). Appellant further argued that he was not given the opportunity to back out of the meeting. (R. at 712–13). None of these arguments contradict the fundamental fact that appellant showed up at a location intending to engage in sex acts with a boy who he thought was 14-years-old. Appellant had plenty of opportunities to back out given that he knew "[REDACTED]'s" underage status and that "[REDACTED]" lived on post as a military dependent. (R. at 440).

Finally, the materiality and quality of the evidence in question was low in

relation to the content of appellant's Grindr exchange with "[REDACTED]" itself. While appellant's indication of a sexual interest in children, blocking and re-adding "[REDACTED]" on Grindr, and his self-incriminating statements were probative, the best evidence of his guilt for the attempted sexual assault of a child were the messages themselves that he exchanged on Grindr with "[REDACTED]." The messages alone provided the evidence necessary to convict appellant of attempted sexual assault of a child. Correspondingly, the evidence in question, while helpful, did not serve as the linchpin for appellant's convictions on Charge I. *See Barnett*, 63 M.J. at 397 (finding that the erroneous admission of evidence under Mil. R. Evid. 404(b) was harmless error after applying the *Kerr* factors).

Assignment of Error III

THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUSTAIN THE FINDINGS OF GUILTY.

Additional Facts

The government presented evidence that appellant's usage of indecent language and possession and distribution of child pornography was service discrediting. For example, CPT [REDACTED] testified that the American public "would be very displeased" if they knew an officer had possessed and distributed child pornography. (R. at 512–14). Further, CPT [REDACTED] thought appellant's actions embarrassed the Army and could cause the American public to look less favorably

on the Army. (R. at 512–14). In addition, SA ■■■, an active-duty Sergeant First Class, testified that the language appellant used in describing his sexual preferences for young boys was “extremely unprofessional” and would bring discredit upon the armed forces. (R. at 576–77). Special Agent ■■■ also thought appellant’s possession and distribution of child pornography would bring discredit upon the armed forces. (R. at 577).

Standard of Review

This court conducts a de novo review of a record of trial for legal and factual sufficiency. *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003).

Law

Findings of guilt are legally sufficient when “any rational fact-finder could have found all essential elements of the offense beyond a reasonable doubt.”

United States v. Nicola, 78 M.J. 223, 226 (C.A.A.F. 2019) (citations omitted).

When this court conducts a legal sufficiency review, it is obligated to draw “every reasonable inference from the evidence of record in favor of the prosecution.”

United States v. Robinson, 77 M.J. 294, 298 (C.A.A.F. 2018) (citations omitted).

“As such, the standard for legal sufficiency involves a very low threshold to sustain a conviction.” *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (citation and internal quotation marks omitted).

For factual sufficiency, this court takes “a fresh, impartial look at the

evidence,” applying “neither a presumption of innocence nor a presumption of guilt.” *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The court may not affirm a conviction unless, “after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses,” it is personally convinced beyond a reasonable doubt of appellant’s guilt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The degree of deference this court affords the trial court for having seen and heard the witnesses will typically reflect the materiality of witness credibility to the case. *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015).

Argument

Appellant claims that the evidence is legally and factually insufficient to support his convictions for (1) attempted sexual assault of a child; (2) wrongfully possessing and distributing child pornography; (3) using indecent language; and (4) absenting himself from his place of duty. Appellant is mistaken as the evidence is legally and factually sufficient to support all of his convictions.

A. Appellant’s conviction for attempted sexual assault of a child is legally and factually sufficient.

The elements of attempted sexual assault of a child are the following: (1) appellant did a certain act; (2) the act was done with specific intent to commit the offense of sexual assault of a child; (3) the act amounted to more than mere

preparation; and (4) the act apparently tended to bring about the commission of the offense of sexual assault of a child. 10 U.S.C. § 880; *MCM*, pt. IV, ¶ 4.b.

To convict appellant of sexual assault of a child, the government had to prove that: (1) appellant committed a sexual act upon a child; and (2) the child was between the age of 12 and 16 years at the time. 10 U.S.C. § 920b(b); *MCM*, pt. IV, ¶ 62.b.(2). “The term ‘sexual act’ means (A) the penetration, however slight, of the penis into the . . . anus or mouth; (B) contact between the mouth and the penis, . . . scrotum, or anus; or (C) the penetration, however slight, of the . . . penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.” 10 U.S.C. § 920(g)(1).

Alternatively, sexual abuse of a child requires the government to prove that appellant “committed a lewd act upon a child.” 10 U.S.C. § 920b(c); *MCM*, pt. IV, ¶ 62.b.(3). “Lewd act” includes “any sexual contact with a child.” 10 U.S.C. § 920b(h)(5). “Sexual contact” includes “touching, or causing another person to touch, either directly or through the clothing, the . . . penis, scrotum, anus, groin, . . . inner thigh, or buttocks of any person, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.” 10 U.S.C. § 920(g)(2).

Applying the facts to the elements listed above demonstrates that the evidence is legally and factually sufficient to convict appellant of attempted sexual assault and attempted sexual abuse of a child. At its core, the evidence shows that appellant discussed engaging in sexual acts and contact with a 14-year-old child over Grindr. (R. at 419, 425–27). Specifically, appellant discussed engaging in sex with “██████” and also “rimming” “██████.” (R. at 426–27). Appellant then took a substantial step toward completing the offenses of sexual assault and abuse of a child; namely, he made plans to meet “██████” and drove his car to the location where the two arranged to meet. (R. at 427–28).

In response, appellant argues that “[he] was entrapped and the government failed to disprove the affirmative defense beyond a reasonable doubt and . . . the government failed to prove . . . that [he] had the requisite specific intent to commit the charged acts.” (Appellant’s Br. 78–79). Rule for Courts-Martial (R.C.M.) 916(g) provides that “[i]t is a defense that the criminal design or suggestion to commit the offense originated in the [g]overnment and the accused had no predisposition to commit the offense.” “The fact that persons acting for the [g]overnment merely afford opportunities or facilities for the commission of the offense does not constitute entrapment [as] [e]ntrapment occurs only when the criminal conduct is the product of the creative activity of law enforcement officials.” R.C.M. 916(g) discussion. “When the defense of entrapment is raised,

evidence of uncharged misconduct by the accused of a nature similar to that charged is admissible to show predisposition.” *Id.* (citing Mil. R. Evid. 404(b)).

“Entrapment is a relatively limited defense” and only applies in very narrow circumstances where the government induced an accused to commit the criminal acts in question. *United States v. Bell*, 38 M.J. 358, 359–60 (C.M.A. 1993) (citations omitted). Even if elaborate “sting” operations where the government provides the accused “with the opportunity to commit a crime, the entrapment defense is of little use because the ready commission of the criminal act amply demonstrates the defendant’s predisposition.” *Id.* at 360 (citation omitted). The “key inquiry” is “predisposition, in the sense of inordinate willingness to participate in criminal activity.” *United States v. Evans*, 924 F.2d 714, 717 (7th Cir. 1991). Entrapment essentially exists to prevent persons from being “induced to commit a crime only by grave threats, by fraud (the police might persuade him that the act they want him to commit is not criminal), or . . . by extraordinary promises—the sorts of promises that would blind the ordinary person to his legal duties.” *Id.* (citations omitted).

Here, the government did not entrap appellant by merely offering him the opportunity to engage in sex acts with a child. In appellant’s view, he “was never given an opportunity to back out of the encounter” and he “reasonably believed that ‘[REDACTED]’ was an adult male engaging in role play during the chat.”

(Appellant’s Br. 80–81). Neither claim is not supported by the law or the facts. To begin with, the government is not required to give appellant opportunities to back out of any encounter, and it was appellant who willingly and quickly made plans to meet up with “██████” for sex. *See, e.g., Bell*, 38 M.J. at 360 (stating that “the mere fact of deceit” will not “defeat a prosecution”). In fact, appellant traveled to “██████’s” location, showing his predisposition to engage in sex acts with children versus the government inducing appellant by offering to have “██████” take a bus or some other form of public transportation to meet up with appellant. The chat contents also refute the notion that appellant thought he was role playing with an adult. “██████” clearly told appellant he was 14-years-old. (App. Ex. XXXVI, p. 4). Upon finding out “██████’s” age, appellant reassured “██████” he was not mad and would love to kiss “██████.” (App. Ex. XXXVI, p. 4).

Appellant’s follow-up comments and actions showed someone extremely interested in having sex with a child. It was appellant, and not the government, who suggested that the pair engage in sex when they meet up. (App. Ex. XXXVI, p. 5). Appellant asserts that his comment “[s]ex . . . if you want” shows that he did not specifically intend to have sex with “██████.” (Appellant’s Br. 81–82). Yet, appellant afterwards disclosed to “██████” that he does not usually use condoms because he has “trouble staying hard with them on.” (App. Ex. XXXVI, p. 5). After knowing that “██████” was a child, appellant also inquired “[h]ow many

times have you been fucked before” and if “[REDACTED]” had “ever gotten rimmed?” (App. Ex. XXXVI, p. 5). These statements are consistent with someone extremely interested in engaging in sex acts with a child, and appellant’s “if you want” comment only shows that he did not intend to rape “[REDACTED]” but was otherwise intent on engaging in sex acts with him.

In sum, appellant’s conduct and ready acceptance at an offer to engage in sex acts with a child shows his predisposition. *See Evans*, 924 F.2d at 718 (observing that “[w]hen a person accepts a criminal offer without being offered extraordinary inducements, he demonstrates his predisposition to commit the type of crime involved”). Appellant “was merely afforded the opportunity to commit the crime.” *United States v. Lubitz*, 40 M.J. 165, 167 (C.M.A. 1994) (citations omitted). Thus, the limited defense of entrapment does not apply to appellant’s conduct since it was not the product of grave threats, fraud, or extraordinary promises.

B. Appellant’s conviction for possessing child pornography is legally and factually sufficient.

To convict appellant of possessing child pornography, the government had to prove that: (1) appellant knowingly and wrongfully possessed child pornography; and (2) that such possession was of a nature to bring discredit upon the armed forces. 10 U.S.C. § 934; *MCM*, pt. IV, ¶ 95.b.(1). Distributing child pornography requires the government to prove that: (1) appellant knowingly and

wrongfully distributed child pornography to another; and (2) that such distribution was of a nature to bring discredit upon the armed forces. 10 U.S.C. § 934; *MCM*, pt. IV, ¶ 95.b.(3). “‘Child pornography’ means material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct.” *MCM*, pt. IV, ¶ 95.c.(4). “‘Possession’ means exercising control of something” while “‘distributing’ means delivering to the actual or constructive possession of another.” *MCM*, pt. IV, ¶ 95.c.(6) & (8).

Both CPT [REDACTED] and SA [REDACTED]’s testimony established that appellant’s possession and distribution of child pornography was of a nature to bring discredit upon the armed forces. (R. at 512–14, 577). Appellant also apparently concedes that the videos and images at issue meet the definition of child pornography. Appellant instead claims that the evidence shows his possession and/or distribution was not wrongful because any “depictions of child pornography were unintentionally or inadvertently acquired.” (Appellant’s Br. 82). To support his claim, appellant asserts that SA [REDACTED] “could not confirm which videos and images were intentionally stored by the phone’s user on the phone, meaning that the user took an affirmative step to save, request, or send the videos and images, and which videos and images were automatically saved to the cache.” (Appellant’s Br. 82–83).

The evidence rebuts appellant's claim and shows that appellant knowingly and wrongfully possessed and distributed videos and images of child pornography. For example, the videos and images of child pornography within the Telegram application were specifically either sent, received, or saved to the device. (R. at 594). In other words, they could not have been "unintentionally or inadvertently acquired" because they had to have either been sent, received, or saved by the vacuum phone user at some point. (R. at 594, 638–39). This undercuts appellant's claim that the videos and images at issue somehow could have showed up in the phone's cache without the user's knowledge.

Moreover, appellant's interactions with other users showed an awareness of the contraband nature of the videos and images at issue. For example, appellant told Telegram user "■" on 31 March 2021 that he has "a bunch of vids . . . come blow a load." (Pros. Ex. 12, p. 1). The other user asked "how young man," to which appellant replied "[m]ost are like 10-12." (Pros. Ex. 12, p. 1). Appellant's response prompted the other user to state "[d]amn[,] [s]o tempting bro . . . just that shit is serious[,] [y]ou get caught and your life is fucked." (Pros. Ex. 12, p. 1). After appellant reassured the other user he was "not a cop," the other user stated "I'm sorry man. It's hot shit . . . just too risky for me. Got too much to lose." (Pros. Ex. 12, p. 1). The other user further told appellant he just wanted to keep their interactions "legal." (Pros. Ex. 12, p. 1). Appellant's interaction with

Telegram user “[REDACTED]” is probative of the knowing and wrongful nature of his possession and distribution of child pornography and rebuts any claim that such videos and images inadvertently made their way onto the vacuum phone.

C. Appellant’s conviction for using indecent language is legally and factually sufficient.

To convict appellant of using indecent language, the government had to prove that: (1) appellant orally or in writing communicated to another person certain language; (2) that such language was indecent; and (3) that such conduct was of a nature to bring discredit upon the armed forces. 10 U.S.C. § 934; *MCM*, pt. IV, ¶ 105.b. “Indecent language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought.” *MCM*, pt. IV, ¶ 105.c.

Again, appellant apparently concedes that the first and third elements have been met in that appellant communicated certain language to another person via the Telegram application, and SA [REDACTED] testified as to the service discrediting nature of the communication. (R. at 576–77). Appellant essentially maintains that the second element was not met because “[t]he words ‘young’ and ‘incest’ are too vague and ambiguous . . . to satisfy the definition of indecent language.” (Appellant’s Br. 83). However, the full context of the text exchange shows that appellant was interested in sex with young boys, and appellant’s language is

indecent given the larger context of his communications and interactions with others.

First, appellant began his exchange with Grindr user “██████” by asking “[w]hat type of stuff are you into?” (Pros. Ex. 15, p. 1). “██████” responded that he “[l]ove[s] rape, young, incest, older / younger, group and public.” (Pros. Ex. 15, p. 1). “██████” then asked appellant what he was into, and appellant responded “I’m into a lot . . . kissing, sucking, rimming, vers, fucking, tasting ass on dildo fingers and cock, kink and raunch[,] [y]oung and incest.” (Pros. Ex. 15, p. 1). “██████” then stated “I love fucking them young[,] [t]earing them open and hearing them scream.” (Pros. Ex. 15, p. 1). Appellant then sent “██████” five videos of child pornography via Telegram on the same day as the above chat on Grindr. (R. at 581; Pros. Ex. 16). Thus, the larger context of appellant’s communications with “██████” revolved around the topic of engaging in sex acts with young boys, and appellant subsequently followed up by sending “██████” videos of child pornography. In addition, appellant discussed engaging in sex acts with children with multiple other social media users besides “██████.” (Pros. Ex. 12, 17, 19). As a result, the context of appellant’s specific conversation with “██████,” along with other conversations he had with social media users, demonstrate that the charged language appellant used was indecent under the totality of the circumstances.

D. Appellant's conviction for absenting himself from his place of duty is legally and factually sufficient.

To convict appellant of absenting himself from his place of duty, the government had to prove that: (1) appellant absented himself from his place of duty at which he was required to be; (2) the absence was without authority from anyone competent to give him leave; and (3) the absence was for a certain period of time. 10 U.S.C. § 886; *MCM*, pt. IV, ¶ 10.b.(3).

Appellant essentially argues that the first and second elements have not been met because “[t]he combination of a lack of an explicit order with appellant being in a leave status is fatal to the government’s case.” (Appellant’s Br. 84). Neither of these conditions is supported by the evidence, which demonstrates that appellant’s argument is mistaken. First, CPT ■■■, appellant’s commanding officer, specifically ordered him to report to the staff duty desk and morning formation on 6 April 2021. (R. at 486, 490–96). Second, CPT ■■■ specifically revoked appellant’s leave. (R. at 493). Consequently, appellant was not on leave on 6 April 2021, and he did not show up as ordered by his commander. (R. at 500). Thus, the evidence is legally and factually sufficient to show that appellant absented himself from his place of duty.

Appellant presented the testimony of his direct supervisor at the time, CPT ■■■. (R. at 657). Captain ■■■ was not the approval authority for appellant’s leave, as she clarified that CPT ■■■, as the company commander, was responsible for

appellant. (R. at 659–61). Nonetheless, CPT [REDACTED]’s understanding was that CPT [REDACTED] had terminated appellant’s leave as of 4 April 2021. (R. at 661). This demonstrates that appellant’s own witness helped the government establish that he had no authority or authorization for his absence.

Assignment of Error IV

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE FAILED TO DISQUALIFY HIMSELF FROM PRESIDING OVER APPELLANT’S COURT-MARTIAL.

Additional Facts

Prior to assuming his judicial duties, the military judge served as the “special victim prosecutor for Hawaii from 2018 until approximately May of 2021.” (R. at 5). In that capacity, the military judge assisted the trial and defense counsel with investigations involving sexual assault, child abuse, and domestic violence as both served as military justice advisors for brigades within the 25th Infantry Division. (R. at 5–6). The military judge also recognized the assistant trial counsel as somebody who was a fellow special victim prosecutor in 2020 and 2021 while the military judge served as one. (R. at 6). The military judge did not supervise any of the three and classified his relationship with all three as “professional.” (R. at 6). The military judge never had a negative interaction with any of the three counsel discussed above, and he found “them all to be well prepared.” (R. at 7).

The military judge did not have any prior knowledge about appellant's case, and never heard his name before. (R. at 6–7). While the military judge was familiar with the undercover operations used to identify child sex offenders, he was not specifically involved in the one that ensnared appellant. (R. at 7–8). When the military judge assumed judicial duties in May 2021, he was “sectioned off” and did not work on appellant's case in any capacity. (R. at 8–9).

Appellant sought to disqualify the military judge under R.C.M. 902, first arguing that the military judge's “impartiality might reasonably be questioned just based off of [his] background as a [special victim prosecutor] . . . during a timeframe in which some of this misconduct did arise.” (R. at 9–10). Second, appellant argued the military judge should be disqualified based upon his relationships and work with both trial counsel. (R. at 10). The military judge ultimately denied appellant's challenge, and appellant chose to be tried by the military judge after the military judge denied his challenge to disqualify him. (R. at 11, 13).

Standard of Review

This court reviews a “military judge's disqualification decision . . . for an abuse of discretion.” *United States v. Uribe*, 80 M.J. 442, 446 (C.A.A.F. 2021) (citation omitted). “A military judge's ruling constitutes an abuse of discretion if it is arbitrary, fanciful, clearly unreasonable or clearly erroneous.” *Id.* (cleaned up).

The court cannot find an abuse of discretion if it “merely would reach a different conclusion.” *Id.* (citation omitted).

Law

“An accused has a constitutional right to an impartial judge.” *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001) (citation omitted). This right is implemented via R.C.M. 902, which provides for “two bases for disqualification of a military judge.” *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011). First, “a military judge shall disqualify himself . . . in any proceeding in which that military judge’s impartiality might reasonably be questioned.” R.C.M. 902(a). Second, “[a] military judge shall disqualify himself . . . (1) [w]here [he] has a personal bias or prejudice concerning a party of personal knowledge of disputed evidentiary facts concerning the proceeding[; or] (2) [w]here the military judge has acted as counsel . . . to any offense charged or in the same case generally.” R.C.M. 902(b). “There is a strong presumption that a military judge is impartial in the conduct of judicial proceedings.” *United States v. Foster*, 64 M.J. 331, 332 (C.A.A.F. 2007) (citation omitted).

Argument

First, none of the specific circumstances listed in R.C.M. 902(b) required the military judge to disqualify himself from appellant’s court-martial. Second, the surrounding circumstances did not warrant the military judge to disqualify himself

upon a reasonable appearance of bias under R.C.M. 902(a). Even if this court were to disagree and find that the military judge should have disqualified himself, reversal is not warranted.

A. There was no actual bias requiring the military judge to disqualify himself.

Appellant concedes that the military judge “did not know the specifics of appellant’s case before he was detailed to the court-martial.” (Appellant’s Br. 97). Nonetheless, appellant maintains that the military judge was personally biased because he knew how undercover operations involving fictitious minors worked in Hawaii and how the jurisdiction “prosecuted cases involving sexual assault and child abuse offenses.” (Appellant’s Br. 97). Appellant’s general allegations miss the mark, as the military judge did not have specific “personal knowledge of disputed evidentiary facts concerning the proceeding” in question nor did the military judge act as “counsel . . . to any offense charged or in the same case generally.” *See* R.C.M. 902(b)(1)–(2). Either of these specific conditions is required for actual bias disqualification to come into play. Since appellant cannot satisfy either condition, the military judge did not need to disqualify himself for actual bias under R.C.M. 902(b).

First, there is no evidence that the military judge supervised in any capacity the investigation into appellant prior to assuming his judicial duties. Similarly, there is no evidence he consulted on the investigation to any degree or performed

any work during the pre-preferral stage of appellant's case prior to charges being preferred in September 2021. (Charge Sheet). Thus, the military judge did not act "as counsel" in this case.

Next, the military judge's conduct during appellant's court-martial did not demonstrate an actual bias for or against either the government or appellant. Nor did the military judge have specific "personal knowledge of disputed evidentiary facts" pertaining to appellant's case. While the military judge had prior experience prosecuting child abuse offenses, it is not surprising that a military judge would have prior experience with this type of case since having criminal law experience is necessary to master the evidentiary rules and procedures at play under the UCMJ. "To be disqualifying under R.C.M. 902(b)(1)[,] the judge's bias must be based upon extra-judicial, personal knowledge, not knowledge gained through performance of judicial duties." *United States v. Black*, 80 M.J. 570, 574 (Army Ct. Crim. App. 2020) (cleaned up). "Personal means the bias or prejudice must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *Id.* (cleaned up). Having general knowledge and understanding of investigative tactics and techniques does not serve to provide a basis of actual bias; otherwise, every military judge would be disqualified given their prior and often extensive criminal law practice before they assumed the bench. Here, the military judge did not rest

any decision on anything other than the evidence presented before him; thus, appellant's challenge for personal bias or prejudice must fail.

B. There was no appearance of bias requiring the military judge to disqualify himself.

Appearance bias is judged objectively, and this court should consider “[a]ny conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge’s impartiality might reasonably be questioned.” *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012) (cleaned up). “When a military judge’s impartiality is challenged on appeal, the test is whether, taken as a whole in the context of this trial, a court-martial’s legality, fairness, and impartiality were put into doubt by the military judge’s actions.” *Martinez*, 70 M.J. at 157–58 (cleaned up).

Appellant argues that the military judge should have disqualified himself because “the time period of [appellant’s] charged offenses—from 24 May 2019 to April 2021—occurred during the military judge’s tenure and in the same jurisdiction where he served as the ‘subject matter expert for all of Hawaii.’” (Appellant’s Br. 95). According to appellant, this enabled the prosecution team to have “particular insight into a variety of issues in appellant’s case,” such as CID’s “undercover operations” and “tactics and techniques” along with the credibility of the CID agents who investigated appellant’s case and how to handle and admit the forensic digital evidence at issue. (Appellant’s Br. 95).

As an initial matter, appellant's conduct did not come to light until April 2021 when he was apprehended after trying to meet up with "██████" for sex. This is also when law enforcement first discovered that appellant potentially possessed images and videos of child pornography dating back to May 2019. By this time, the military judge had begun his transition to his role as a judge and "sectioned" himself off investigations, and specifically stated that he never worked on appellant's case in any capacity. (R. at 8–9). Accordingly, appellant's focus on conduct back in May 2019 is of no import since nobody in Hawaii was aware of appellant's illicit activities until April 2021 at the earliest.

Further, the military judge's prior professional interactions with trial and defense counsel in this matter was neither unusual nor improper. For example,

[b]oth before and after service in the judiciary, a judge advocate typically will serve in a variety of assignments as a staff attorney and supervisor. Such assignments normally include duties both within and outside the field of criminal law. In the course of such assignments, the officer is likely to develop numerous friendships as well as patterns of social activity. These relationships are nurtured by the military's emphasis on a shared mission and unit cohesion, as well as traditions and customs concerning personal, social, and professional relationships that transcend normal duty hours.

Butcher, 56 M.J. at 91. The fact that both trial and defense counsel had previous professional interactions with the military judge, standing alone, does not create an appearance of bias. *See Uribe*, 80 M.J. at 447 (recognizing "the world of career

JAG Corps officers is relatively small and cohesive, with professional relationships the norm and friendships common”); *United States v. Norfleet*, 53 M.J. 262, 270 (C.A.A.F. 2000) (acknowledging that “[p]ersonal relationships between members of the judiciary and . . . participants in the court-martial process do not necessarily require disqualification”). Appellant’s attempts to speculate about the potential advantages the prosecution team enjoyed cannot suffice since “[m]ere suspicion or conjecture will not suffice.” *United States v. Kincheloe*, 14 M.J. 40, 50 (C.M.A. 1982).

Here, the military judge specifically stated on the record that none of his prior interactions with counsel for both sides would have any impact on his decisions, and nothing demonstrates that his previous professional interactions with counsel inappropriately influenced decisions that he made. *See United States v. Sullivan*, 74 M.J. 488, 454 (C.A.A.F. 2015) (finding that the military judge did not abuse his discretion in failing to disqualify himself since he “specifically stated on the record that none of his associations with court-martial participants would influence any of his decisions” among other reasons). Moreover, the military judge did not have relationships with counsel that were close or unusual, and his associations did not exceed what might reasonably be expected under the circumstances. *Uribe*, 80 M.J. at 447. Thus, the military judge’s professional interactions with counsel for both sides did not create an appearance of bias in this

case. *See United States v. Campos*, 42 M.J. 253, 262 (C.A.A.F. 1995) (stating “[w]here the military judge makes full disclosure on the record and affirmatively disclaims any impact on him, where the defense has full opportunity to *voir dire* the military judge and to present evidence on the question, and where such record demonstrates that appellant obviously was not prejudiced by the military judge’s not recusing himself, the concerns of R.C.M. 902(a) are fully met”) (cleaned up and emphasis in original).

C. Even if this court decides that the military judge should have disqualified himself, reversal is not required.

“Because not every judicial disqualification requires reversal, [this court should follow] the standards announced by the Supreme Court in *Liljeberg* to determine whether a military judge’s conduct warrants that remedy to vindicate public confidence in the military justice system.” *Martinez*, 70 M.J. at 157–58 (citation omitted). In *Liljeberg v. Health Servs. Acquisition Corp.*, the Court examined three factors in assessing “whether a judgment should be vacated” based upon a judge’s appearance of partiality: “[1] the risk of injustice to the parties in the particular case, [2] the risk that the denial of relief will produce injustice in other cases, and [3] the risk of undermining the public’s confidence in the judicial process.” 486 U.S. 847, 864 (1988).

First, appellant did not personally suffer any specific injustice at the hands of the military judge. *See Uribe*, 80 M.J. at 449. Appellant points to the military

judge's adverse ruling on his motion to suppress and the fact that he granted most of the government's motion to admit evidence pursuant to Mil. R. Evid. 404(b) as evidence of injustice to him. (Appellant's Br. 98–99). However, “a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings.” *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001). As noted in the first two assignments of error, the military judge issued two rulings that “were thorough, well-reasoned, and legally correct.” *Black*, 80 M.J. at 570. In addition, “the mere fact that the military judge adversely ruled on some of [a]ppellant's motions and objections does not necessarily demonstrate any risk of prejudice.” *Uribe*, 80 M.J. at 449; *see also Quintanilla*, 56 M.J. at 44 (noting “that remarks, comments, or rulings . . . do not constitute bias or partiality, unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible”) (cleaned up). Lastly, the government's case against appellant was strong since they essentially caught appellant “red-handed” given the chat he exchanged with “[REDACTED].” *See Uribe*, 80 M.J. at 450 (recognizing that the first *Liljeberg* factor favored the government, in part, given the strength of the government's evidence against appellant, which included his recorded admission).


“The second *Liljeberg* factor examines whether granting relief would encourage a judge or litigant to more carefully examine possible grounds for

disqualification and to promptly disclose them when discovered.” *Uribe*, 80 M.J. at 449 (cleaned up). Here, appellant did promptly challenge the military judge based upon his previous assignment as a special victim prosecutor close in time to appellant’s misconduct along with his professional relationships with both counsel. Therefore, counsel diligently pursued the possible disqualification and “[i]t is not necessary to reverse the results of the present trial in order to ensure that military judges exercise the appropriate degree of discretion in the future.” *Butcher*, 56 M.J. at 93.


Finally, an objective review of the circumstances surrounding appellant’s case does not undermine the public’s confidence in the military justice system. *Uribe*, 80 M.J. at 449. Appellant’s military judge “was nothing less than a neutral, detached, and impartial trier of fact.” *Black*, 80 M.J. at 577. Further, appellant’s case did not “involve intimate personal relationships, extensive interaction, conduct bearing on the merits of the proceeds, or other factors that could undermine the basic fairness of the judicial process.” *Butcher*, 56 M.J. at 93. Affirming the findings and sentence in this case “would not upset public confidence in the judicial process[,] but a contrary decision “to reverse the findings and sentence would increase risk that the public will lose faith in the judicial system.” *Uribe*, 80 M.J. at 450 (cleaned up).

Conclusion

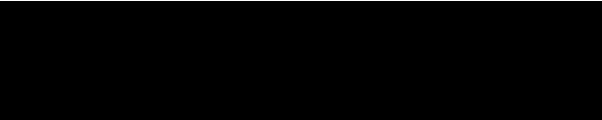
WHEREFORE, the government respectfully requests that this honorable court affirm the findings and sentence.




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CERTIFICATE OF SERVICE, U.S. v. BRINKMAN-CORONEL (20220225)

I certify that a copy of the foregoing was sent via electronic submission to Mr.
William Cassara, civilian appellate defense counsel, at
[REDACTED], and the Defense Appellate Division, at
[REDACTED], on the 3rd day of
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