IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,	Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.		Docket No. ARMY 20220345
Private First Class (E-3) **ANTHONY M. ELMORE,** United States Army,	Appellant	Tried at Fort Bragg,[1] North Carolina, on 17 February, 31 March, 27–30 June 2022 before a general court-martial convened by Commander, Headquarters, 82d Airborne Division, Colonel Harper J. Cook, Military Judge, presiding.

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

Assignments of Error[2]

I. WHETHER DEFENSE COUNSEL WERE INEFFECTIVE BECAUSE THEY DID NOT PRESENT DNA EVIDENCE FROM THE SANE EXAMINATION AND DID NOT OBJECT TO MRS. ED'S TESTIMONY SUPPLEMENTING THE CONTENTS OF APPELLANT'S SNAPCHAT MESSAGES.

II. WHETHER THE CHARGES ARE FACTUALLY INSUFFICIENT.

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[1] At the time of trial, the installation was named Fort Bragg. On 2 June 2023, the installation was officially renamed to Fort Liberty.

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

PANEL NO. 2

III. WHETHER THE MILITARY JUDGE ERRED WHEN HE INSTRUCTED THE PANEL THAT PROS. EX. 3 COULD BE CONSIDERED AS EVIDENCE OF CONSCIOUSNESS OF GUILT.

IV. WHETHER IN LIGHT OF *RAMOS V. LOUISIANA*, APPELLANT'S FIFTH AND SIXTH AMENDMENT RIGHTS WERE VIOLATED BY THE NON-UNANIMOUS VERDICT IN HIS CASE.

V. WHETHER THE MILITARY JUDGE ERRED IN EXCLUDING EVIDENCE UNDER MILITARY RULE OF EVIDENCE 412.

Statement of the Case

On 30 June 2022, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of sexual assault, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2019) [UCMJ].[3] (R. at 809; Statement of Trial Results [STR]). The military judge sentenced appellant to confinement for five years and a dishonorable discharge. (R. at 889; STR). The convening authority took no action on the adjudged sentence but waived automatic forfeitures effective upon entry of judgment. (Action). On 12 August 2022, the military judge entered judgment. (Judgment).

Statement of Facts

On or about 21 March 2021, appellant sexually assaulted [redacted] in her car

[3] At trial, appellant was acquitted of two other specifications of sexual assault and the specification of the charge of obstructing justice, pursuant to Article 131b, UCMJ, 10 U.S.C. § 931b. (R. at 809; STR).

in the parking lot of his barracks. (R. at 353, 414, 433, 809; STR). The two attended a barracks party that night and were seen kissing and sitting on each other's laps. (R. at 644–46, 667–68). Despite not knowing him well, [redacted] offered to drive him and his roommate, Private First Class [PFC] [redacted], home because she knew they had been drinking. (R. at 352, 391–92, 646, 670).

Once at their barracks, PFC [redacted] went upstairs, but appellant stayed in her car and asked [redacted] to go to his room. (R. at 354–55, 493; *see also* R. at 437). She declined, so appellant asked for a hug instead. (R. at 354–55, 404–06). When she agreed, he walked around the car, opened the driver's door, gave her a "bear hug," and pulled her out of the car. (R. at 354–355, 406).

Appellant then turned [redacted] around, pulled her jeans down, pushed her into the car, and held her down so she was now bent over the driver's seat. (R. at 355, 409–12; *see also* R. at 464). He moved her underwear to the side and then penetrated her vagina, alternating between his fingers and penis. (R. at 356–57, 419, 437, 468–69, 498). The victim screamed, told him "Stop, don't do this," and called for help. (R. at 412, 415–16). Due to pain in her right shoulder—sustained from a prior surgery and aggravated by being pushed into the car—she "blacked out" and felt as if she lost control of her body. (R. at 413–14, 467, 488).

As he penetrated her, the victim reached for her phone to call for help but instead inadvertently recorded her assault. (R. at 358–61, 363, 421–32, 495). That

recording was admitted at trial without objection. (R. at 362). Mr. [redacted], the government's expert witness qualified in digital evidence (audio and video) examinations, determined it was unaltered. (R. at 523, 539; *see also* Pros. Ex. 4).

The video showed the reflection of a driver's seat on the windshield. (R. at 547; Pros. Ex. 1). The victim could be heard tearfully saying, "Please don't." (R. at 427; Pros. Ex. 1 at 00:00–00:10). In the reflection, appellant is penetrating the victim's vagina with his right hand as she is bent over the driver's seat, and he stands outside the vehicle manipulating his penis before he then pulls aside her underwear and penetrates her vagina with his penis. (Pros. Ex. 1 at 00:00–00:22). Right before the video shuts off, appellant leans over the victim, smiles, and repeatedly thrusts as she continues crying. (Pros. Ex. 1 at 00:27–00:36). The victim explained she grabbed the phone at this point because she was worried appellant would see it and "do something more aggressive" to her. (R. at 425–27).

[redacted] testified that appellant eventually stopped. He then appeared to ejaculate in front of her car and afterwards headed upstairs to his barracks. (R. at 358). Disoriented, she got into her car and called her then-husband, Sergeant [SGT] [redacted], to navigate her home. (R. at 433, 504–05). She told him, "I was raped again." (R. at 506–07, 510). SGT [redacted] recalled she seemed "disturbed," and was crying and breathing fast on the call and when she arrived home. (R. at 504–06).

Two days after the assault, she consented to a Sexual Assault Forensic

Examination [SAFE] and told the examining nurse appellant penetrated her vagina with his finger and penis. (Pros. Ex. 11 at 4–5; *see also* R. at 757). Her bra and her underwear were tested for DNA. (Pros. Ex. 11 at 11; Def. Ex. H; R. at 497–98). The redacted DNA report showed appellant's DNA on the victim's bra but excluded his sperm cell DNA on her underwear. (Def. Ex. H). No sperm was observed on her vaginal, cervical, or pubic mound swabs and no further testing were performed on them due to an insufficient DNA target amount. (Def. Ex. H).

Special Agent [SA] [redacted] interviewed appellant. (R. at 542). The recording of this interview was admitted without objection. (Pros. Ex. 5; R. at 550). Two excerpts were played in court, wherein SA [redacted] played appellant the audio from the victim's video. (R. at 573, 574; Pros. Ex. 5 at "VTS_01_2", "VTS_01_3"). During the 19 May 2021 interview with CID, appellant admitted, "I am extremely sorry that . . . I let that happen. . . . "I raped [Mrs. ED] . . . she said no, and I didn't stop, and I should have." (Pros. Ex. 5 "VTS_01_2" at 09:56–10:02, 10:40–10:57, 11:15–11:50; *see also* R. at 606). But he maintained he was drunk, remembered he could not have an erection, and did not remember her saying, "No." (*See*, *e.g.*, Pros. Ex. 5 at "VTS_01_2" at 12:48–12:59; *see also* Pros. Ex. 5 "VTS_01_2" at 02:36–03:43, 05:15–05:38, 07:17–07:38).

In October 2021, appellant texted the victim that his girlfriend was pregnant and asked for mercy. (R. at 371, 625; Pros. Ex. 3). The text read, in relevant part:

> I want to prove that [I'm not a bad person] through stepping up and being a responsible father and husband. I will do anything you need if it means we can settle this outside of court. I can pay you, no questions asked [. . .] I will do anything you want[.] I'll complete any task. Pay any price.

Pros. Ex. 3. Additional facts are incorporated below.

Assignment of Error I

WHETHER DEFENSE COUNSEL WERE INEFFECTIVE BECAUSE THEY DID NOT PRESENT DNA EVIDENCE FROM THE SANE EXAMINATION AND DID NOT OBJECT TO MRS. ED'S TESTIMONY SUPPLEMENTING THE CONTENTS OF APPELLANT'S SNAPCHAT MESSAGES.

Additional Facts

A. Evidence of Bleeding.

The victim testified she bled the morning after her assault due to anal penetration by appellant. (R. at 469, 491). The SAFE report showed no bleeding or injury on her anus. (Pros. Ex. 11). A photo of a bloody wipe was admitted without objection. (R. at 490; Pros. Ex. 8). The panel acquitted appellant of the specifications alleging anal penetration. (R. at 809; STR).

B. DNA Results.

At trial, defense counsel sought to elicit testimony that appellant's DNA was excluded from the DNA mixture on the victim's underwear through the victim, SA CS, and defense-proffered DNA expert, Mr. [redacted], but was prohibited from doing so

based on lack of foundation and timeliness. (R. at 499, 592–601, 627–34, 700). That evidence eventually came before the factfinder via admission of the redacted DNA report in response to a panel member's question. (R. at 725–26, 743; Def. Ex. H; App. Ex. XX).

Defense marked an unredacted version of the DNA report. (*Compare* Def. Ex. H *and* Def. Ex. G for ID). Defense also proffered Mr. [redacted]'s direct examination testimony as an expert witness. (R. at 635, 701–07; App. Ex. XVI, XVII). Mr. [redacted]'s proffer included that (1) there was no DNA evidence that supported digital or penile penetration between appellant and the victim, and (2) saliva can stay on underwear for months or more if it is unwashed. (App. Ex. XVII at 4–5). Ultimately, the parties agreed to defense moving the redacted DNA report into evidence without Mr. [redacted]'s expert testimony. (R. at 715–25).

In closing, defense counsel reiterated the DNA results (R. at 782), while trial counsel argued appellant's DNA was not found on her person because the victim showered (R. at 791).

B. Reference to Additional Snapchat Messages.

After trial counsel published Prosecution Exhibit 3, the following exchange took place:

> Q. [redacted], in addition to those messages, did he ever reach out again over Snapchat, or previously, anything you remember?

> A. He reached out multiple times. But it didn't start until after this investigation had started.
>
> Q. Do you remember . . . what he said to you in the messages?
>
> A. He asked me--he's offered to pay me money to drop the case. He told me that his girlfriend was pregnant, and that this was going to ruin all of their lives. He's--he said that he realized that he had done it and that he was so sorry. It happened to his sister, and that he never wishes that kind of thing on anyone.

(R. at 371). Defense did not object.

Standard of Review

Allegations of ineffective assistance of counsel are reviewed de novo. *United States v. Cueto*, 82 M.J. 323, 327 (C.A.A.F. 2022) (citations omitted).

Law

Military courts evaluate ineffective assistance claims using the Supreme Court's framework from *Strickland v. Washington*, 466 U.S. 668 (1984). *United States v. Furth*, 81 M.J. 114, 117 (C.A.A.F. 2021). "Under Strickland, an appellant bears the burden of demonstrating that (a) defense counsel's performance was deficient, and (b) this deficient performance was prejudicial." *Id*. (quoting *Strickland*, 466 U.S. at 687). Courts need not apply the *Strickland* test in any particular order; rather, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed." *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016)(citing *Strickland*, 466

U.S. at 697; *United States v. Datavs*, 71 M.J. 420, 421 (C.A.A.F. 2012)).

In evaluating performance, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Captain*, 75 M.J. at 103 (C.A.A.F. 2016) *(quoting Strickland*, 466 U.S. at 689, 694). This presumption can be rebutted by "showing specific errors [made by defense counsel] that were unreasonable under prevailing professional norms." *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001) (citations omitted). Appellant must show that "counsel's representation fell below an objective standard of reasonableness" to demonstrate deficiency. *Strickland*, 466 U.S. at 688. Further, a court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id*. at 690. While defense counsel would normally be expected to introduce potentially exculpatory evidence, their performance is not deficient when a tactical reason cautions against admission. *United States v. McIntosh*, 74 M.J. 294, 296 (C.A.A.F. 2015)(citations omitted).

Even where counsel has committed an unreasonable error, it "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. Appellant must "affirmatively prove prejudice." *Id*. at 693. This means appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceeding would have been different. *Captain*, 75 M.J. at 103. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. In other words, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). This requires consideration of "the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. In short, appellant must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

Argument

Appellant's trial defense counsel's performance was objectively reasonable.

A. Testimony about Appellant's Admissions.

Appellant contends defense counsel was ineffective for failing to object to the victim's testimony as to the contents of Snapchat messages contrary to the Best Evidence Rule. (Appellant's Br. at 19). But appellant was not prejudiced by this claim. First, the nature of his statements in Prosecution Exhibit 3 were not transformed by the victim's testimony (Appellant's Br. at 19–20); they stood on their own as statements of consciousness of guilt. Appellant was aware he had engaged in blameworthy conduct when he wrote that he wanted to prove he was "not a bad person" and soon would be at a different duty station so she would "never have to worry about seeing [him] again." (Pros. Ex. 3). Second, the

statements he made referring to his sister's similar experience were already before the factfinder. (Pros. Ex. 5 at "VTS_01_03"). Third, the government's evidence in this case consisted of the video of sexual assault and appellant's admissions to CID. *See infra* AE II. Thus, there was no reasonable probability that, but for counsel failing to object based on Best Evidence, the result of the proceeding would have been different. *See Captain*, 75 M.J. at 103.

B. Alternate Defense Theory.

Appellant asserts trial defense counsel were ineffective for failing to pursue a Mil. R. Evid. 412 theory of an alternate source for the victim's alleged injuries, resulting in inculpatory evidence (bloody wipe) being admitted without objection and exculpatory DNA evidence never being admitted. (Appellant's Br. at 17).

1. Bloody Wipe.

First, evidence of the bloody wipe admitted without objection did not cause prejudice to appellant. While appellant argues defense had nothing to rebut the claim that blood came from appellant penetrating her anus (Appellant's Br. at 17), it is unclear how the alternate source theory would have caused the panel to acquit him of the specifications relating to vaginal penetration. Instead, the wipes were introduced to prove anal penetration. (R. at 489–91; Pros. Ex. 8; *see also* R. at 496–97). Appellant was acquitted of those specifications. (R. at 809; STR). Thus, he suffered no prejudice.

2. Unadmitted Evidence.

Second, appellant contends that unadmitted evidence existed that disproved the victim's account and rebuts the government's argument that the victim showered away his DNA. (Appellant's Br. at 17–18; Def. Ex. G for ID).

But defense counsel's performance is not deficient when a tactical reason cautions against admission. *McIntosh*, 74 M.J. at 296. In this case, defense counsel pursued three theories in the alternative—no penetration, actual consent, and mistake of fact as to consent. (R. at 344, 631–33, 777, 788; *see also* R. at 747–49, 791). Defense wanted to present the DNA report in support of its no penetration theory to show that appellant's DNA was excluded. The evidence appellant now proposes on appeal could have rendered that fact irrelevant. By means of comparison, video evidence shows appellant using his left hand to grab the crotch of the victim's underwear and move it aside. (Pros. Ex. 1 at 00:06–00:09). That no epithelial cell DNA, resulting either from saliva or touch, was found on the crotch of her underwear is less revealing about penetration than it may be about testing methodology. An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense. *Harrington*, 562 U.S. at 108 (citing *Strickland*, 466 U.S. at 691).

Moreover, appellant need not maintain an erection, nor would sperm cell DNA need to be present, for penile or digital penetration to have occurred. Nor

was this a case of mistaken identity or incapability to consent. Instead, appellant was drunk while the victim was sober, appellant's face is visible in the video, and the sexual acts as well as the victim's tearful cries were similarly captured. (Pros. Ex. 1). That this other evidence existed, does not mean appellant did not penetrate the victim. Thus, even if it had been apparent that an alternate source theory could support appellant's defense, it is reasonable to conclude that a competent attorney might elect not to use it. *Harrington*, 562 U.S. at 108.

Instead, defense counsel's actions fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. Even without this alternate source theory, defense counsel was able to argue no penetration. (R. at 782). The DNA results excluding appellant from the DNA mixture on the victim's underwear were admitted. (Def. Ex. H). His statements to CID that he was drunk and could not maintain an erection were before the factfinder. (Pros. Ex. 5, "VTS_01_02" at 07:17–07:38). Defense elicited testimony from SGT [redacted] that she told him she was raped again. (R. at 506–07, 510). Thus, appellant argues another means to the same end. When viewed cumulatively, there is no reasonable probability the panel would have arrived at a different outcome.[4] *Captain*, 75 M.J. at 103.

[4] If this court finds defense counsel's performance was deficient, appellant suffered no prejudice as evidence of his guilt in this case was overwhelming. *See infra* AE II. If this court "finds that allegations of ineffective assistance and the record contain evidence which, if unrebutted, would overcome the presumption of competence," the government requests this court order "a response from trial

Assignment of Error II

WHETHER THE CHARGES ARE FACTUALLY INSUFFICIENT.

Additional Facts

At trial, defense counsel argued the victim's motives to fabricate were to save her relationships with SGT [redacted], SPC [redacted], and Ms. [redacted]. (R. at 778–80). Defense challenged her credibility with Ms. [redacted] testifying to the victim's character for untruthfulness. (R. at 688). They further cross-examined and impeached the victim on her prior statements to law enforcement, the SANE nurse, SGT [redacted], and in court about whether she was drinking on this night and whether she tried to call her father or 911 so that her recording the video was truly inadvertent. (R. at 388–94, 398, 512, 583, 586).

Standard of Review

This Court conducts a de novo review of the record for factual sufficiency. *United States v. Scott*, __ M.J. ___, 2023 CCA LEXIS ___, at *2 (Army Ct. Crim. App. 27 Oct. 2023)(citing *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Further, this Court's assessment of factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

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defense counsel in order to properly evaluate the allegations" in accordance with *United States v. Melson*, 66 M.J. 346, 350–51 (C.A.A.F. 2008).

Law

A. Factual Sufficiency.

For offenses that occurred on or after 1 January 2021, the Court may consider whether the findings of guilty are correct in fact upon the appellant's request if appellant makes a specific showing of a deficiency in proof. 10 U.S.C. § 866(d)(1)(B)(2021); *see generally* Pub. L. No. 116-283, 134 Stat. 3611-12. The Navy-Marine Corps Court of Criminal Appeals recently held that to make a "specific showing of a deficiency in proof," appellant must identify a "weakness in the evidence admitted at trial to support an element (or elements) and explain why, on balance, the evidence (or lack thereof) admitted at trial contradicts a guilty finding." *United States v. Harvey*, 83 M.J. 685, 691 (N.M. Ct. Crim. App. 2023)

After appellant has made such a showing, the Court may weigh the evidence and determine controverted questions of fact. 10 U.S.C. § 866(d)(1)(B)(ii). In weighing the evidence, the Court affords "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence and findings of fact entered into the record by the military judge." *Id*. This "new burden of persuasion with its required deference makes it more difficult for an appellant to prevail on appeal[.]" *Scott*, __ M.J. ___, 2023 CCA LEXIS ___, at *3; *see Harvey*, 83 M.J. at 692 (finding "appropriate deference" was a higher standard than the previous "recognizing that the trial court saw and heard the witnesses" standard). But it

does not create a presumption that in reviewing a conviction, a court of criminal appeals presumes an appellant is in fact guilty. *Scott*, __ M.J. ___, 2023 CCA LEXIS ___, at *3 (rejecting the rebuttable presumption of guilt created in *Harvey*, 83 M.J. at 693).

If the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding. 10 U.S.C. § 866(d)(1)(B)(iii).

B. Article 120.

Any person subject to [Manual for Courts-Martial (2019 ed.) [*MCM*], part IV] who commits a sexual act upon another person without the consent of the other person is guilty of sexual assault. Art. 120(b)(2)(A), UCMJ. The term "sexual act" means the penetration, however slight, of the penis into the vulva; or of the vulva of another by any part of the body or any object, with an intent to arouse or gratify the sexual desire of any person. Art. 120(g)(1)(A), (C), UCMJ. The term "consent" means a freely given agreement to the conduct at issue by a competent person. Art. 120(g)(7)(A), UCMJ. An expression of lack of consent through words or conduct means there is no consent. *Id.* Lack of verbal or physical resistance does not constitute consent. *Id.* All the surrounding circumstances are to be considered in determining whether a person gave consent. Art. 120(g)(7)(C), UCMJ.

Argument

A. Predicate Showing and Request.

Here, appellant requests the Court consider whether the findings with respect to Specification 1 of Charge I and Specification 2 of Additional Charge I are correct in fact. (Appellant's Br. 20–26). Namely, appellant argues the government failed to prove the elements of sexual act (i.e., penetration) and lack of consent. (Appellant's Br. 22–26). Assuming *arguendo* appellant made a "specific showing of a deficiency in proof," this Court may weigh the evidence and determine these controverted questions of fact.[5] U.S.C. § 866(d)(1)(B).

B. Finding of Guilty is in accordance with the Weight of the Evidence.

In this case, the victim's testimony with respect to penetration was corroborated by the video, while appellant's mistake of fact defense was overcome by the same. Moreover, appellant's credibility arguments on appeal are the same that were argued at trial wherein the panel believed the victim.

[5] The scope, applicability, and meaning of Article 66(d), UCMJ, is a matter of statutory interpretation reviewed de novo. *United States v. McAlhaney*, 83 M.J. 164, 166 (C.A.A.F. 2023). While there is no presumption of guilt, this Court should interpret "appropriate deference" to mean total deference to the factfinder where the conviction rests solely on the credibility of the testifying victim (e.g., "he-said, she-said" cases).

1. Penetration.

The evidence admitted at trial relevant to vaginal penetration included the video of the assault, the SAFE report, the redacted DNA report, and the victim's testimony as well as appellant's admissions to CID and texts to the victim. (Pros. Ex. 1, 3, 5 "VTS_01_2" at 00:11:15–00:11:50, 11; Def. Ex. H; R. at 356–57, 371, 437, 468–69, 498, 606, 625).

At trial, the members found the victim's testimony that appellant penetrated her vulva with his penis and fingers to be credible. While her statements about who she tried to call for help differed at various points during the investigation and trial, she was consistently stated she was penetrated during her SAFE examination. (Pros. Ex. 11 at 4–5; *see also* R. at 757). Similarly, while the DNA report may not corroborate the victim's testimony that appellant used his spit as lubricant (Def. Ex. H), the video corroborates her testimony that he penetrated her with his fingers (Pros. Ex. 1 at 00:00–00:09) and penis (Pros. Ex. 1 at 00:09–00:14), especially considering his repeated thrusts (Pros. Ex. 1 at 00:19–00:36). *See also supra* AE I.B.2. Even if appellant was unable to maintain an erection, penetration, however slight, is sufficient to prove this element. Art. 120(g)(1)(C), UCMJ. Moreover, appellant's admissions to CID that he "didn't stop" and "should have" as well as his texts to the victim demonstrate his consciousness of guilt and support this finding. (R. at 371, 606, 625; Pros. Ex. 3, 5 "VTS_01_2" at 00:11:15–00:11:50).

2. Lack of Consent.

The evidence admitted at trial relevant to this element included the video of the assault and the victim's testimony as well as appellant's statements to CID. (Pros. Ex. 1, 5 "VTS_01_2"). The members found her testimony that appellant penetrated her vulva with his penis without her consent to be credible and thus, determined appellant's mistake of fact defense did not exist. (AE XXII). The victim testified she cried and told him to stop. (R. at 412, 415, 427; *see also* R. at 466–68). Defense counsel argued that if the video was watched without audio, it looked as if the assault was consensual. (R. at 781, 785). But with the sound on, it was clear there was no consent as she cries and says, "Please don't." (Pros. Ex. 1 at 00:00–00:10). She continues to cry as appellant leans close to her head and repeatedly thrusts. (Pros. Ex. 1 at 00:27–00:36). Even if appellant may not have understood her cries in his state of intoxication, an ordinary, prudent, sober adult hearing the victim would not mistake her cries as consent. (App. Ex. XXII at 4). Appellant, listening to the audio after-the-fact, believed so himself. (Pros. Ex. 5 "VTS_01_2" at 05:14–05:28, 00:11:15–00:11:50). Thus, the video corroborates her testimony and rebuts the claim of a reasonable mistake of fact.

Assignment of Error III

WHETHER THE MILITARY JUDGE ERRED WHEN HE INSTRUCTED THE PANEL THAT PROS. EX. 3 COULD BE CONSIDERED AS EVIDENCE OF CONSCIOUSNESS OF GUILT.

Additional Facts

The military judge permitted trial counsel to argue a fair inference of the Snapchat messages as appellant's consciousness of guilt for the sexual assault. (R. at 734–36, 738; Pros. Ex. 3). When reviewing the government's closing slides (App. Ex. XXIII at 9), defense counsel stated, "I don't disagree that it could be argued as consciousness of guilt. . . . What I have an issue with is that it looks like, according to these slides, that they are saying, he committed obstruction of justice, therefore, that shows that he committed the sexual assault." (R. at 734–35). In closing, defense counsel argued these messages were mere offers to settle matters outside of court. (R. at 371, 625; Pros. Ex. 3; *see also* R. at 786–87).

Standard of Review

A failure to preserve an objection is reviewed for plain error, but waiver leaves no error for this court to correct on appeal. *United States v. Davis*, 76 M.J. 224, 227 n.1 (C.A.A.F. 2017).

Law and Argument

A. Waiver.

"A waiver by a servicemember is ordinarily an intentional relinquishment or

abandonment of a known right or privilege." *United States v. Elespuru*, 73 M.J. 326, 328 (C.A.A.F. 2014). Defense counsel's response to the military judge, "I don't disagree that it could be argued as consciousness of guilt," (R. at 735) was a deliberate decision to relinquish his right to object to the use of these messages in this manner. As such, the waiver leaves no error for this Court to review.

B. No Error.

Military Rule of Evidence 409 addresses offers to pay medical or similar expenses. It states, "Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury." Mil. R. Evid. 409; *see United States v. Jensen*, 25 M.J. 284, 291 (C.M.A. 1987)(finding offer to pay to not cooperate in foreign prosecutions fell under Mil. R. Evid. 408, not Mil. R. Evid. 409).

If this court finds appellant forfeited, rather than waived this objection, the military judge did not commit error because Military Rule of Evidence 409 does not apply in this case. Appellant's offer to "settle this outside of court," "complete any task," and "pay any price" so he could marry and support his then-pregnant girlfriend (Pros. Ex. 3) was not an offer to pay "medical, hospital, or similar expenses resulting from an injury." Mil. R. Evid 409. As such, the military judge committed no error, plain or otherwise.

Assignment of Error IV

WHETHER IN LIGHT OF *RAMOS V. LOUISIANA*, APPELLANT'S FIFTH AND SIXTH AMENDMENT RIGHTS WERE VIOLATED BY THE NON-UNANIMOUS VERDICT IN HIS CASE.

Law and Argument

The Court of Appeals for the Armed Forces [C.A.A.F.] has held courts-martial defendants do not have a right to a unanimous guilty verdict under the Sixth Amendment, Fifth Amendment Due Process Clause, or Fifth Amendment component of equal protection. *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023). As such, this court is bound by vertical stare decisis. *United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018).

Assignment of Error V

WHETHER THE MILITARY JUDGE ERRED IN EXCLUDING EVIDENCE UNDER MILITARY RULE OF EVIDENCE 412.

Additional Facts

The parties litigated defense's Mil. R. of Evid. 412 motions in closed sessions. (R. at 21, 44–84, 377–451; App. Ex. II, IIA, III, IIIA, IIIB, VIII, VIIIA, IX, IXA)(sealed). The military judge ruled the Mil. R. 412 evidence at issue inadmissible pursuant to Mil. R. Evid. 403. (R. at 83–87)(sealed).

In opening and closing, as well as during cross-examination of the victim, defense counsel referred to SPC [redacted] as the victim's prospective boyfriend. (R. at

341, 345–46, 468, 779). The victim testified he was never her boyfriend; she texted him but stopped when she found out he was married. (R. at 495). SPC [redacted] testified about her state of mind in those text messages that gave him the impression she wanted a romantic relationship with him. (R. at 678–79). Trial counsel did not object. (R. at 679).

Standard of Review

This Court reviews a military judge's ruling on whether to exclude evidence pursuant to Mil. R. Evid. 412 for an abuse of discretion. *United States v. Roberts*, 69 M.J. 23, 26 (C.A.A.F. 2010) (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). In doing so, it reviews findings of fact under a clearly erroneous standard and conclusions of law under a de novo standard. *Id.*

Law

Evidence offered to prove that a victim engaged in other sexual behavior is not admissible in any proceeding involving an alleged sexual offense unless its exclusion would violate the accused's constitutional rights. Mil. R. Evid. 412(a), (b)(3). "Sexual behavior" includes any sexual behavior not encompassed by the alleged offense. Mil. R. Evid. 412(d). Constitutionally required evidence includes that evidence necessary to permit effective cross-examination by discrediting a complaining witness. *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011). Nevertheless, trial judges retain wide latitude to impose reasonable limits

on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). "The Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id*. (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)). Any evidence introduced under this rule is subject to challenge under Mil. R. Evid. 403. Mil. R. Evid. 412(c)(3).

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

Argument

Appellant raises two grounds that hereinafter will be referred to as Category A and Category B. (Appellant's Br. at 4–7)(sealed). But in this case, the military judge did not abuse his discretion because his rulings were supported by the evidence, he used correct legal principles, he applied those principles to the facts in a way that was reasonable, and he considered all important facts. Namely, the military judge correctly found the requested Mil R. Evid. 412 evidence failed the Mil. R. Evid. 403 balancing test.

With respect to Category A (Appellant's Br. at 4–6)(sealed), the military judge found its probative value was outweighed by unfair prejudice to the trial process and that it would create a trial within a trial. (R. at 83–84; *see also* R. at 71–72)(sealed). The fact of the romantic relationship and not the origins of that interest were sufficient to give context to the victim's conversation with SPC [redacted] days after the incident, which was defense's stated intent. (R. at 65, 76–77; *see also* R. at 83–84)(sealed). These rulings were reasonable limitations, especially as extensive evidence about the victim's marital troubles were already permitted. Indeed, appellant's lack of prejudice argument (Appellant's Br. at 6–7)(sealed) supports the military judge's propensity concerns.

In turn, the military judge found Category B (Appellant's Br. at 7)(sealed) too attenuated to satisfy Mil. R. Evid. 403. (R. at 85)(sealed). Such evidence if admitted would therefore, waste time. Additionally, while on appeal appellant asserts this evidence was constitutionally required, appellant's counsel did not object to this ruling and only raised concerns related to foundation. (App. Ex. VIII; R. at 85–87)(sealed).

To the extent this court finds error, the error was harmless. In addition to the strength of the government's evidence in this case *supra* AE II, his counsel was able to elicit testimony about the victim's romantic interest in SPC [redacted] through SPC [redacted] and the victim's testimony while his counsel freely referenced to SPC [redacted]

as the victim's boyfriend in front of the panel. (R. at 495, 678–79). Moreover, defense's direct examination of SPC [redacted] elicited unnoticed Mil. R. Evid. 412 testimony. (R. at 679). Thus, the panel had sufficient information to draw the same inferences now appellant seeks. (Appellant's Br. at 6)(sealed). As such, these facts merit no relief.

Conclusion

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

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CERTIFICATE OF SERVICE, U.S. v. ELMORE (20220345)

I certify that a copy of the foregoing was sent via electronic submission to Mr. Robert Feldmeier, civilian appellate defense counsel, at [redacted], and the Defense Appellate Division, at [redacted], on the 5th day of December, 2023.

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PANEL NO. 2