IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.	Docket No. ARMY 20230233
First Sergeant (E-8) **STEVEN K. WILSON,** United States Army, Appellant	Tried at Vilseck, Germany, on 3 March 2023, 30 March 2023, 26 April 2023, and 27-28 April 2023 before a special court-martial convened by the Commander, 7th Army Training Command, Lieutenant Colonel Thomas Hynes, Military Judge, presiding.

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

Assignments of Error[1]

I. WHETHER APPELLANT'S CONVICTION FOR CHARGE I AND ITS SPECIFICATION IS FACTUALLY AND LEGALLY INSUFFICIENT.

II. WHETHER APPELLANT'S CONVICTION FOR CHARGE IV AND ITS SPECIFICATION IS FACTUALLY AND LEGALLY INSUFFICIENT.

III. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED PRODUCTION OF A NECESSARY AND RELEVANT WITNESS.

[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.

PANEL No. 2

Statement of the Case

On 28 April 2023, a military judge sitting as a military judge alone special court-martial convicted appellant, contrary to his pleas, of one specification of kidnapping, one specification of assault consummated by a battery, one specification of communicating a threat, and one specification of provoking speeches or gestures in violation of Articles 125, 128, 115, and 117, Uniform Code of Military Justice, 10 U.S.C. §§ 925, 928, 915, and 917 [UCMJ].[2] (R. at 450; Statement of Trial Results [STR]). The military judge sentenced appellant to no punishment. (R. at 549; STR).

Statement of Facts

A. Appellant's Provoking Speech.

In August 2020 while appellant was participating in a field exercise, he learned from his wife and son that his son was having trouble with a friend. (R. at 328–29). On or about 11 September 2020, appellant was told by his son that the same friend had made fun of him. (R. at 329). Appellant decided to take his son and go to the home of the child's father, Staff Sergeant [SSG] [redacted].[3] (R. at 329–30).

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[2] The military judge found appellant guilty of The Specification of Charge III, except the words, "I'm going to knock you out, or words to that effect, and by saying." (R. at 450; STR). Of The Specification of Charge IV, the military judge found appellant guilty, except the words, "You and your wife are bad parents." (R. at 450, STR). Of the excepted words, the military judge found appellant not guilty. (R. at 450).

[3] When SSG [redacted] testified at trial, he had been promoted to master sergeant.

When appellant arrived at SSG [redacted]' home, he introduced himself, and the conversation quickly escalated to raised voices. (R. at 249). Staff Sergeant [redacted] testified that he stayed "relatively calm the majority of the time" until appellant called him and his family "racist." (R. at 249). They then moved from the first floor of the apartment building and went outside. (R. at 249). Staff Sergeant [redacted] recalled appellant calling him "stupid," cussing at him, and calling him a "racist." (R. at 250). However, he did not recall any other comments. (R. at 250–51). Appellant testified that he told SSG [redacted] he looked "like a fucking moron." (R. at 334). He also admitted to calling him a "racist." (R. at 335). During the conversation, appellant was angry, screaming, and had his fists balled up next to his side for a period of the conversation. (R. at 251–52). Towards the end of the altercation, appellant kept getting closer to SSG [redacted]' face. (R. at 252). Staff Sergeant [redacted] found this more threatening, but he testified that appellant's hands never came near his face and were not a "specific threat to physical violence." (R. at 252).

After appellant called SSG [redacted] racist, SSG [redacted] began yelling in return. (R. at 252). Staff Sergeant [redacted] stated that "when he attacks my family and myself with those phrases, it's a pretty big issue … So when those accusations came up, it was an attack on myself and my family. So I did yell and scream in response to those things." (R. at 253). While SSG [redacted] and appellant were yelling at each other,

appellant was moving towards SSG [redacted], and SSG [redacted] was trying to increase the distance between them as to not escalate the confrontation into a physical altercation. (R. at 253). Once appellant was done yelling at SSG [redacted], he went into his vehicle and left, only to return a few minutes later to retrieve his cellphone which he had left. (R. at 253–54). After he grabbed his phone and "had some choice words" for SSG [redacted], he left again. (R. at 254). Throughout the altercation, SSG [redacted] was very conscious of trying to prevent a physical fight and stated that he kept his hands at his side and did not ball them. (R. at 255).

B. Appellant's Kidnapping of SFC [redacted].

While stationed in Ansbach, Germany, SFC [redacted]'s children played flag football with appellant's children. (R. at 127). On 19 October 2022, SFC [redacted] participated in a parent versus player flag-football game along with his and appellant's children. (R. at 128). When he got home from the football game, he got a phone call from appellant. (R. at 129). Appellant was angry and after confirming who he was talking to and where he lived, told SFC [redacted], "You better meet me outside right now." (R. at 129). Approximately four to five minutes later, appellant arrived in his truck and "rapidly pulled in" to the parking lot. (R. at 129). Appellant got out of the vehicle enraged and got in SFC [redacted]'s face and said, "I'm going to fuck you up." (R. at 129–30). Appellant's forehead was "practically touching" SFC [redacted]'s face, and he had his fists by SFC [redacted]'s chin. (R. at 130). He

kept telling SFC [redacted] that he was going to "fuck [him] up" and that his daughter never cries. (R. at 130). Sergeant First Class [redacted] wanted to de-escalate the situation, so he offered to apologize to appellant's children. (R. at 131).

Appellant told SFC [redacted] to "get in the fucking truck," and SFC [redacted] complied. (R. at 131). Sergeant First Class [redacted] got in the truck because he felt he "did not have a choice" and "it seemed like the best option to do." (R. at 131). He felt he did not have a choice due to appellant being very aggressive, and if SFC [redacted] did not get in the truck, he felt that appellant would have fought him in the parking lot. (R. at 131).

After SFC [redacted] got in the truck, appellant drove him to appellant's apartment. (R. at 131). During the drive, appellant told SFC [redacted] to not say a word and to "shut the fuck up." (R. at 132). He also kept "flinching" with his fist at SFC [redacted] while he was driving. (R. at 132). When they got to appellant's home, appellant told SFC [redacted] that he "better fucking apologize," and SFC [redacted] walked behind him up the stairs. (R. at 132–33). Sergeant First Class [redacted] did not leave at this point because he felt that appellant "was so enraged, he would have chased [him] down." (R. at 133). Appellant's three children were in the home when they entered. (R. at 133). Appellant told SFC [redacted] to apologize, and SFC [redacted] got on one knee and apologized to two of the children. (R. at 135).

C. Appellant Strikes and Kicks SFC [redacted].

After SFC [redacted] apologized to appellant's children, appellant told SFC [redacted] to leave his house. (R. at 135). As SFC [redacted] was leaving, appellant struck his face with appellant's hand. (R. at 135–36). Sergeant First Class [redacted] walked to the first step of the stairwell, and appellant kicked him in the lower back and buttocks with appellant's foot. (R. at 136).

D. Admissions by Appellant.

Mr. [redacted] was a civilian who worked with the Child and Youth Services in Ansbach, Germany. (R. at 191). He knew appellant and his children through the youth sports program. (R. at 192). On the night of the kidnapping, Mr. [redacted] learned of an incident involving appellant and SFC [redacted] so he called appellant's spouse. (R. at 193–94). Shortly after appellant's spouse answered the phone, appellant began speaking to Mr. [redacted]. (R. at 195). During the phone call, appellant was "irate" and used vulgar language. (R. at 196). Appellant then proceeded to tell Mr. [redacted], in regard to SFC [redacted], "I slapped his bitch ass in front of his family. I brought him down, and I forced him into my truck. I took him … to my place. I brought him into my house, and I forced him to apologize on his hands and knees to [redacted], asking for forgiveness." (R. at 198). Appellant also told him he "put [SFC [redacted]] into his truck and that he drove down the street really fast." (R. at 219).

Sergeant [SGT] [redacted] coached appellant's children's flag football team (R. at 221), and SFC [redacted] was SGT [redacted]'s platoon sergeant (R. at 239). Sergeant [redacted] received a phone call from appellant on the night of the incident during which appellant told him about his interaction with SFC [redacted]. (R. at 225). Appellant told SGT [redacted], "So I went over to his house. I smacked his bitch ass up. I put him in my truck, made him apologize to my little girl, and then I smacked his bitch ass up[.]" (R. at 225).

Assignment of Error I

WHETHER APPELLANT'S CONVICTION FOR CHARGE I AND ITS SPECIFICATION IS FACTUALLY AND LEGALLY INSUFFICIENT

Standard of Review

This court conducts a de novo review of legal and factual sufficiency. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

A. Factual Sufficiency.

To test factual sufficiency under Article 66, UCMJ, 10 U.S.C. § 866 (2018), courts decide "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt." *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)

(cleaned up). When conducting this review, this court takes "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt." *Washington*, 57 M.J. at 399.

B. Legal Sufficiency.

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

C. Kidnapping.

The elements of the offense of kidnapping, under Article 125, UCMJ, are as follows: (1) That the accused seized, confined, inveigled, decoyed, or carried away another person; (2) That the accused then held such person against that person's will; and (3) That the accused did so wrongfully. 10 U.S.C. § 925; *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*], pt. IV, ¶ 74.b.

"'Held' means detained", and "the holding must be more than a momentary or incidental detention." *MCM*, pt. IV, ¶ 74.c.(2).

> 'Against that person's will' means that the victim was held involuntarily. The involuntary nature of the detention may result from force, mental or physical coercion, or from other means…Evidence of the availability or nonavailability to the victim of means of exit or escape is relevant to the voluntariness of the detention, as is evidence of threats or force, or lack thereof, by the accused to detain the victim.

MCM, pt. IV, ¶ 74.c.(3). The involuntariness of the seizure is "the very essence of the crime of kidnapping." *Chatwin v. United Sates*, 326 U.S. 455, 464 (1946).

Argument

A rational trier of fact could have found, beyond a reasonable doubt, that appellant wrongfully seized, carried away, and held SFC [redacted] against his will.

A. Appellant seized and carried away SFC [redacted].

Appellant, after telling SFC [redacted] that he was "going to fuck [him] up" and getting in his face (R. at 130), mentally coerced SFC [redacted] into getting into his truck and then drove him to appellant's home. (R. at 130–33). Appellant argues that there is no evidence that SFC [redacted] was forcibly placed in the truck and that there was no physical interference from appellant. (Appellant's Br. 10–11). However, physical interference or physical force is not required to seize or carry away.

MCM, pt. IV, ¶ 74.c.(3). While appellant did not physically grab, push or drag SFC [redacted] into his truck, he did get in SFC [redacted]'s face and put his two fists up to SFC [redacted]'s chin. (R. at 129–30). He appeared "very enraged," told SFC [redacted] he was "going to fuck [him] up," and told him to "[g]et in the fucking truck." (R. at 129–31). Sergeant First Class [redacted] testified that he got into appellant's truck "[b]ecause, at that moment, it seemed like the best option to do…I did not have a choice…[be]cause he was very aggressive." (R. at 131). If he did not get in the truck, SFC [redacted] felt that appellant would have attempted to fight him, and he did not want that to happen. (R. at 131).

In *United States v. Acevedo*, the appellant argued that the victim was not held against her will because she had many opportunities to leave the taxi that she and appellant were riding in together. 77 M.J. 185, 188 (C.A.A.F. 2018). While the Court of Appeals for the Armed Forces [C.A.A.F.] recognized that "a passenger in a taxi normally has as much control over the taxi as another passenger," the court held that "a reasonable trier of fact could have found beyond a reasonable doubt that Appellant held [the victim] against her will during the taxi ride through mental coercion." *Id*. at 188–89. In arriving at their holding that the victim was mentally coerced into staying in the taxi against her will, the C.A.A.F. considered that appellant, a non-commissioned officer (NCO), told the victim's boyfriend, "I saw [victim] drinking, if she doesn't get in a cab and go back to base,

I'm going to report her for drinking." At that time, the victim was a 19-year-old junior service member. *Id*. at 188. The NCO's threat of reporting the victim placed her in a vulnerable position because she was new to the military, the threat of disciplinary action could have been career-ending, and there was a significant rank disparity. *Id*. Similar to the facts in *United States v. Acevedo*, SFC [redacted] felt coerced into getting into appellant's truck. *Id*. Appellant's angry demeanor, threatening body language, and harsh language, all made SFC [redacted] feel as if he had no choice but to get into appellant's truck. (R. at 129–31). Furthermore, appellant's own words provide the strongest evidence of SFC [redacted] being seized. He admitted to two different witnesses that he either "forced" (R. at 198) or "put" (R. at 225) SFC [redacted] in his truck.

This case is easily distinguishable from the facts of *United States v. Camacho*. ARMY 20140495, 2018 CCA LEXIS 607 (Army Ct. Crim. App. 30 Nov 2018) (mem. op.). In *Camacho*, this court held that the offense of kidnapping was factually insufficient. *Id*. at *22. The court found that none of the modes of detention listed in the *MCM*, pt. IV, ¶ 74.c.(3) were present in the case. *Id*. at *21–22. Not only did the victim have several opportunities to leave, appellant actually requested she leave twice, and he was asleep or unconscious for her third opportunity. *Id*. at *22. Furthermore, the court found that the victim was in their marital home, knew several neighbors, and the only threat appellant made was to

injure himself, not the victim. *Id*. In the case at hand, appellant used threatening language towards SFC [redacted] and never asked him to leave. Sergeant First Class [redacted] was held against his will, and appellant had no legal justification. Appellant argues that SFC [redacted] walked to the passenger side of appellant's truck voluntarily, and there was no physical interference from appellant. (Appellant's Br. 10–11). However, SFC [redacted] testified that he felt he had no choice to enter the truck so that he could avoid a physical confrontation with appellant. (R. at 131). This is reasonable based on appellant's demeanor and threatening words towards the victim, and it is further supported by the two additional statements he made to other individuals about forcing SFC [redacted] into his truck. (R. at 198, 225).

B. Appellant's conviction for kidnapping is legally sufficient.

Because appellant's conviction for kidnapping is factually sufficient, it would certainly endure a legal-sufficiency review, which "involves a very low threshold to sustain a conviction," *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal quotation marks omitted), and which requires a review of the evidence in the light most favorable to the prosecution, *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018).

Assignment of Error II

WHETHER APPELLANT'S CONVICTION FOR CHARGE IV AND ITS SPECIFICATION IS FACTUALLY AND LEGALLY INSUFFICIENT.

Standard of Review

This court conducts a de novo review of legal and factual sufficiency. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

The elements of provoking speeches or gestures, Article 117, UCMJ, are as follows: (1) That the accused wrongfully used words or gestures toward a certain person; (2) That the words or gestures used were provoking or reproachful; and (3) That the person toward whom the words or gestures were used was a person subject to the UCMJ. *MCM*, pt. IV, ¶ 55.b.

"Provoking and reproachful describe those words or gestures which are used in the presence of the person to whom they are directed and which a reasonable person would expect to induce a breach of the peace under the circumstances." *MCM*, pt. IV, ¶ 55.c.(1).

The Army Court of Military Review [A.C.M.R.] stated that "[i]t is not necessary that the words have to be a challenge to do violence…Insulting words can also be provoking." *United States v. Davis*, 34 M.J. 849, 851 (A.C.M.R. 1992). The C.A.A.F. has found that the "provocative nature of speech for purposes

of Article 117, UCMJ, thus depends in part upon the context in which they are spoken and the audience to whom they are addressed." *United States v. Killion*, 75 M.J. 209, 211 (C.A.A.F. 2016) (citing *United States v. Thompson*, 22 C.M.A. 88, 90, 46 C.M.R. 88, 90 (C.M.A. 1972)).

Argument

A. The Specification of Charge IV is factually and legally sufficient to support a finding of guilty.

The government charged appellant with the wrongful use of provoking and reproachful words, to include "You're a little fucking bitch," "You're a fucking stupid moron," "You and your wife are bad parents," and "You and your family are fucking racists," or words to that effect. (Charge Sheet). The military judge found appellant guilty of using the following words, "You're a little fucking bitch," "You're a fucking stupid moron," and "You and your family are fucking racists," or words to that effect. (STR). The government concurs with appellant, in part, in that the evidence admitted at trial did not support all of the language that appellant was convicted of. The phrase "You're a little fucking bitch" was never mentioned during the testimony of SSG [redacted] (R. at 246–67) or the appellant (R. at 325–76) and was not supported by any other evidence in the record. The word "fucking" (in the context of calling SSG [redacted] and his family racists) is not supported by any evidence in the record.

However, sufficient evidence exists to support the crux of the remaining two phrases. SSG [redacted] testified that appellant called "myself, my family, my children 'racist'." (R. at 249). He further stated that "beyond 'stupid' and cussing at me" appellant did not call him any other names. (R. at 250). "I don't think there was anything, just, 'You're stupid.' But then, again, that's when it led into the 'racist' thing. And, again, that's -- that's where the – that's where my brain got stuck with was those things because the rest of it was just somebody angry because his child got hurt, and I wasn't concerned about the screaming and yelling at that point[.]" (R. at 250–51). Staff Sergeant [redacted] also testified that appellant's hands were "balled up" in fists for a period of the argument. (R. at 251–52). Furthermore, he stated "…I didn't immediately take it as a threat … [W]hen he started calling myself and my family the names, he was getting closer and closer to my face … [T]here was no physical altercation … But, as somebody is getting into your face, it does become more threatening over that time." (R. at 252).

Appellant even admitted during his testimony that he told SSG [redacted] that "You look like a fucking moron" (R. at 334) and that he was a "racist" (R. at 335). Appellant's testimony, taken with that of SSG [redacted]', supports that appellant said "You're a fucking stupid moron" or words to that effect. These words, while not physically threatening, are "provoking and reproaching to a reasonable person because of their tendency to lead to quarrels, fights, or other disturbances." *U.S. v.*

Davis, 37 M.J 152, 155 (C.M.A. 1993) (holding that the military judge did not err in refusing to grant appellant's motion for a finding of not guilty when appellant said "Fuck you, Sergeant," and "Fuck the MPs" to a military policeman).

It is also without dispute that appellant called SSG [redacted] "racist." (R. at 249, 335). Appellant argues that "[t]he omission of 'fucking' creates a material variance between the specification as alleged and the evidence…because the term, 'racist,' by itself does not connote provoking or reproachful speech." (Appellant's Br. 17–18).[4] The government would ask this court to reject that assertion and look to the context of the language and the individual who the language was directed. *See Killion*, 75 M.J. at 211. While there are certainly instances where identifying actions or statements as "racist" are not provocative or reproachful, that is not the case at hand. The context of the interaction matters. In *Killion*, the appellant was restrained by Air Force security forces and medical staff when he verbally accosted several medical providers. *Id*. at 212. *Killion* is distinguishable from this case in that the medical providers in that case "did not consider responding to Appellant violently" and the medical personnel testified that "they were trained to treat

[4] While appellant does not allege as a defense that his words were provoked by SSG [redacted] or his family, the government would argue that replying to provocative language with provocative or reproachful language is not a defense. *See United States v. Richardson*, 7 M.J. 320, 322 (C.M.A. 1979) ("[W]ords alone do not justify an assault…Likewise, the use of provoking speech is not justified because it is a reply to similar language.").

unruly patients and to maintain their composure." *Id*. In this case, appellant outranked SSG [redacted] at the time of the confrontation (R. at 247–48); the conversation turned to screaming and had to be moved (R. at 249); SSG [redacted] yelled back after being called "racist" (R. at 250); and appellant had his hands balled up in a fist for part of the conversation and kept getting closer to SSG [redacted]' face (R. at 251–52). Staff Sergeant [redacted] was not acting as a member of law enforcement or a medical provider in a medical setting when appellant was confronting him. There is no evidence that he had any particularized training in how to respond to unruly or aggressive persons. When looking at the circumstances surrounding the speech, the conviction for provoking speeches or gestures should be upheld because the evidence establishes beyond a reasonable doubt that appellant's conduct met the three elements of the offense.

B. Appellant's conviction for using provoking and reproachful words is legally sufficient.

Because appellant's conviction for using provoking and reproachful words is factually sufficient, it would certainly endure a legal-sufficiency review, which "involves a very low threshold to sustain a conviction," *King*, 78 M.J. at 221, and which requires a review of the evidence in the light most favorable to the prosecution, *Robinson*, 77 M.J. at 297–98.

Assignment of Error III

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED PRODUCTION OF A NECESSARY AND RELEVANT WITNESS.

Additional Facts Relevant to Assignment of Error

Before trial, appellant's defense counsel moved the court to compel production of Master [redacted]. (App. Ex. IVA, p. 4). Defense counsel proffered that Master [redacted] would testify he observed SFC [redacted] throw a flag-football flag into appellant's daughter's face, and SFC [redacted] smelled of alcohol while playing flag-football. (App. Ex. IVA, p. 4). On 3 April 2023, the military judge denied the motion to compel Master [redacted]. (App. Ex. IVC, p. 2). In support of his ruling, the military judge found that Master [redacted]'s testimony was not relevant to any charged offense because it would not have the tendency to make a fact of consequence more or less likely, and it would not support an affirmative defense for any charged offense. (App. Ex. IVC, p. 2). The military judge also found that whether SFC [redacted] smelled of alcohol at the flag-football game was "irrelevant as to his credibility as a witness because there was no evidence that he was impaired by alcohol at the game or that he smelled like alcohol or was under the influence of alcohol during the alleged misconduct later that day." (App. Ex. IVC, p. 2). Furthermore, the military judge found that Master [redacted]'s proffered testimony was cumulative with at least two other witnesses. (App. Ex. IVC, p. 2).

On 11 April 2023, defense counsel moved the court to reconsider its production request for Master [redacted]. (App. Ex. XA). The military judge denied the defense motion for reconsideration on 18 April 2023. (App. Ex. XC).

Standard of Review

A military judge's ruling on a request for a witness is reviewed for an abuse of discretion. *United States v. McElhaney*, 54 M.J. 120, 126 (C.A.A.F. 2000) (citing *United States v. Rockwood*, 52 M.J. 98, 104 (C.A.A.F. 1999)). "We will not set aside a judicial denial of a witness request unless [we have] a definite and firm conviction that the [trial court] committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Id*. "A military judge's ruling constitutes an abuse of discretion if it is arbitrary, fanciful, clearly unreasonable or clearly erroneous, not if this Court merely would reach a different conclusion." *United States v. Uribe*, 80 M.J. 442, 446 (C.A.A.F. 2021) (cleaned up).

Law

"The Sixth Amendment to the United States Constitution grants to an accused in a criminal prosecution the right to have compulsory process for obtaining witnesses in his favor." *United States v. Hinton*, 21 M.J. 267, 269 (C.M.A. 1986). An accused has the right to a witness's testimony when such testimony is material to an issue before the court. *United States v. Combs*, 20 M.J.

441, 442 (C.M.A. 1985) (citing *United States v. Scott*, 5 M.J. 431 (C.M.A. 1978)). Testimony is material if it "negate[s] the government's evidence or . . . support[s] the defense." *United States v. Fisher*, 24 M.J. 358, 361 (C.M.A. 1987). The C.A.A.F. recognizes that the military judge has the "discretion to determine which witnesses are cumulative and to exclude them." *United States v. Breeding*, 44 M.J. 345, 349 (C.A.A.F. 1996) (citing *United States v. Harmon*, 40 M.J. 107, 108 (C.M.A. 1994).

Requests for production of witnesses are governed by procedural and evidentiary rules set out in the Rules for Courts-Martial [R.C.M.] and Military Rules of Evidence [Mil. R. Evid.]. *Id*. All parties to a court-martial "shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." UCMJ art. 46. Each party is entitled to production of a witness who is relevant and necessary for a matter in issue on the merits. R.C.M. 703(b)(1).

Evidence is relevant if it tends to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action. Mil. R. Evid. 401. A military judge may exclude relevant evidence if its probative value is substantially outweighed by being needlessly cumulative. Mil. R. Evid. 403.

Article 53, UCMJ, states that a "finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." For nonconstitutional evidentiary errors, the court looks to whether "the error had a substantial influence on the findings." *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (cleaned up). The C.A.A.F., in its prejudice analysis, will weigh: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Id*.

Argument

The military judge did not abuse his discretion in denying production of Master [redacted], because the witness' potential testimony was not relevant and necessary and would have been cumulative with other witnesses who testified. Even assuming the military judge did abuse his discretion, the error was harmless beyond a reasonable doubt.

A. The military judge did not abuse his discretion in denying production of Master [redacted].

The military judge was correct in denying production of Master [redacted] because his testimony was not relevant. Appellant argues that Master [redacted] was relevant and necessary because his testimony about the flag-football game would impeach SFC [redacted], make it less likely he was forced into appellant's truck, and make it more likely that appellant had an honest and reasonable belief that SFC [redacted] voluntarily

entered his truck. (Appellant's Br. 24).[5] Contrary to appellant's assertion, his ability to present his defense was not "hamstrung." (Appellant's Br. 23). Whether SFC [redacted] threw a flag or not at appellant's daughter is not relevant to the charged offenses. Furthermore, even if it is mitigating, the evidence came in through multiple witnesses. Two of appellant's children, [redacted] and [redacted], both testified to the flag throwing incident. (R. at 312–14; 319–20). Mr. [redacted] also testified for the government and stated, without objection, that he had a conversation with appellant and his spouse about the flag-football game and SFC [redacted] throwing a flag at their daughter. (R. at 194–95). Mr. [redacted] also testified on cross-examination that SFC [redacted] told him he could not remember what happened on the field during the flag-football game, and SFC [redacted] did not confirm or deny throwing the flag. (R. at 215–16). Furthermore, the government did not attack the defense's allegation that SFC [redacted] threw a flag at appellant's daughter. The government did not mention the incident during their closing argument (R. at 413–24) and in their rebuttal

[5] Before trial, defense counsel argued that Master [redacted] was also relevant because he would testify that appellant was drunk or smelled of alcohol. (App. Ex. IVA, p. 5; App. Ex. IVB1, pp. 1–2). However, neither defense or government counsel asked SFC [redacted] or appellant, during their testimonies, whether SFC [redacted] had consumed alcohol the day or night of the incident. (R. at 127–90; 325–76). In appellant's argument, he also appears to abandon this justification for Master [redacted]'s production. (Appellant's Br. 23–25). The government would argue that Master [redacted]'s potential testimony about whether the victim smelled like alcohol during the flag-football game is not relevant because appellant never established whether SFC [redacted] smelled of alcohol during the incident or was otherwise under the influence of alcohol at the time of the incident as to affect his ability to recall the incident.

argument acknowledged that the flag-football game incident did not matter, and even if SFC [redacted] was "guilty as sin about whatever happened on (sic) the flag football game," it did not create an excuse or plausible reason to fabricate the story. (R. at 445).

Sergeant First Class [redacted] testified on direct that he offered to apologize to appellant's children. (R. at 131). What is actually in dispute is whether that offer was voluntarily or forced by appellant's words and actions. The alleged flag throwing incident has no relevance to whether or not appellant forced SFC [redacted] into his truck so that he would apologize to his children. Therefore, Master [redacted]'s testimony was not relevant, and the military judge did not abuse his discretion in denying his production.

B. Even if this court finds the Military Judge abused his discretion, the error was harmless beyond a reasonable doubt.

Even if this court finds the military judge abused his discretion, the error was harmless beyond a reasonable doubt. The government's case was strong. *See Kohlbek*, 78 M.J. at 334. Sergeant First Class [redacted]'s testimony was corroborated by two different witnesses. Mr. [redacted] testified that appellant told him that he "forced" appellant to apologize to his daughter and that he never said appellant volunteered to apologize. (R. at 212). He also told Mr. [redacted] that he "slapped his bitch ass in front of his family" and forced him into his truck. (R. at 198). Sergeant [redacted] testified that appellant told him he "smacked his bitch ass up…put him in [his]

truck," and made him apologize to his daughter. (R. at 225). The strength of the defense's case was weak. *Id*. At trial, appellant testified to his version of events. (R. at 325–75). However, his testimony was directly contradicted by the testimonies of SFC [redacted] (R. at 129–37), Mr. [redacted] (R. 196–98), and SGT [redacted] (R. at 225–226). Appellant even conceded during his testimony that he had no history with Mr. [redacted] had never had an argument with him, and had never done anything to harm him. (R. at 368–69). Mr. [redacted]'s lack of bias or motive to fabricate further add to his credibility.

The materiality and quality of Master [redacted]'s proposed testimony was lacking. *Id*. Master [redacted]'s testimony would only address his observations during a flag-football game that occurred hours before the kidnapping. (App. Ex. IVA, p. 4). Nothing in the record indicates he observed the interaction between appellant and SFC [redacted] or ever spoke to either individual about the kidnapping. All four factors established in *Kohlbek* weigh in favor of the government, and if this court should find that the military judge abused his discretion, the error was harmless beyond a reasonable doubt. *Kohlbek*, 78 M.J. at 334

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court deny relief and affirm the findings, except for the words "You're a little fucking bitch," and "fucking" (as it relates to "fucking racist") and affirm the sentence. No

sentence reassessment is necessary for the excepted language since no punishment was adjudged.



CHASE C. CLEVELAND
MAJ, JA
Branch Chief, Government
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CHRISTOPHER B. BURGESS
COL, JA
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JACQUELINE J. DEGAINE
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Appendix

Caution
As of: February 7, 2024 3:31 PM Z

United States v. Camacho

United States Army Court of Criminal Appeals

November 30, 2018, Decided

ARMY 20140495

Reporter
2018 CCA LEXIS 607 *

UNITED STATES, Appellee v. Captain RICHARD M. CAMACHO, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by United States v. Camacho, 78 M.J. 324, 2019 CAAF LEXIS 55 (C.A.A.F., Jan. 31, 2019)

Motion granted by United States v. Camacho, 78 M.J. 364, 2019 CAAF LEXIS 103 (C.A.A.F., Feb. 21, 2019)

Motion granted by United States v. Camacho, 2019 CAAF LEXIS 181 (C.A.A.F., Mar. 11, 2019)

Review granted by United States v. Camacho, 2019 CAAF LEXIS 370 (C.A.A.F., May 23, 2019)

Prior History: [*1] Headquarters, 82d Airborne Division. Deidra J. Fleming, Military Judge. Colonel John N. Ohlweiler, Staff Judge Advocate.

Case Summary

Overview
HOLDINGS: [1]-Simply because the Army had a Sexual Harassment/Assault Response and Prevention (SHARP) program and instituted training did not constitute unlawful command influence (UCI) in violation of UCMJ art. 37(a) where appellant failed to demonstrate any nexus between the SHARP program generally and any issue of consequence that occurred in his trial; [2]-Nor was evidence presented to show that anyone in a position of authority over his case was influenced by the SHARP program or training, or by comments made by senior leaders and politicians; [3]-With respect to the offense of ***kidnapping***, UCMJ art. 134, the evidence was insufficient to prove beyond a reasonable doubt that appellant held his wife against her will; [4]-Evidence supporting his conviction for indecent language was factually insufficient because the language was intended to express his rage, not any sexual desire.

Outcome
The findings of guilty for the offenses of ***kidnapping*** and indecent language were set aside and dismissed. The remaining findings of guilty were affirmed. The sentence as adjudged was affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Evidence > Burdens of Proof > Allocation

HN1[] **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice. When challenging the performance of counsel, the defense bears the burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance.

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN2 **Courts Martial, Convening Authority**

A military court of criminal appeals reviews allegations of unlawful command influence de novo.

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Findings

HN3 **Courts Martial, Convening Authority**

A military court of criminal appeals reviews a military judge's findings of fact made in ruling on an unlawful command influence motion under a clearly erroneous standard. Where a military judge made detailed findings of fact and these findings are clearly supported by the record, the court adopts them in its analysis.

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > Military Justice > Courts Martial > Trial Procedures

HN4 **Courts Martial, Convening Authority**

Unif. Code Mil. Justice art. 37(a), *10 U.S.C.S. § 837(a)*, states in part that no person subject to this chapter may attempt to coerce or influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case.

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > Military Justice > Courts Martial > Trial Procedures

HN5 **Courts Martial, Convening Authority**

Even if there was no actual unlawful command influence, there may be a question whether the influence of command placed an intolerable strain on public perception of the military justice system. The appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

HN6 **Trial Procedures, Burdens of Proof**

On appeal, an appellant bears the initial burden of raising unlawful command influence (UCI). Appellant must show: (1) facts, which if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that the unlawful command influence was the cause of the unfairness. Thus, the initial burden of showing potential unlawful command influence is low, but is more than mere allegation or speculation. The quantum of evidence required to raise unlawful command influence is "some evidence." Prejudice is not presumed until the defense produces evidence of proximate causation between the acts constituting UCI and the outcome of the court-martial. Once an appellant has presented some evidence of UCI, the burden shifts to the government to demonstrate to this court beyond a reasonable doubt that: (1) the predicate facts do not exist; (2) the facts do not constitute unlawful command influence; or (3) the unlawful command influence did not affect the findings or sentence.

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > Military Justice > Courts Martial > Trial Procedures

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN7 **Courts Martial, Convening Authority**

There must be more than command influence "in the air" to justify action by a military court of criminal appeals.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > Military Justice > Courts Martial > Trial Procedures

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

HN8 **Trial Procedures, Burdens of Proof**

While most claims under Unif. Code Mil. Justice art. 37(a), 10 U.S.C.S. § 837(a), allege the unlawful influence was committed by someone wearing the mantle of command authority, that is not a prerequisite to establishing a claim that the proceedings were unlawfully influenced by a member subject to the Uniform Code of Military Justice. Both unlawful command influence and unlawful influence are proscribed by § 837(a), but the latter does not require the act be done with the mantle of command authority. Actual unlawful influence occurs when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case. The test for unlawful influence is the same as the test for unlawful command influence, including the requirement, if appellant meets his burden, that the government prove any improper influence was harmless beyond a reasonable doubt.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN9 **Judicial Review, Standards of Review**

Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. § 866(c), establishes a military court of criminal appeals' statutory duty to review a record of trial for legal and factual sufficiency de novo. Under § 866(c), the court may affirm only such findings of guilty that it finds correct in law and fact and determines, based on the entire record, should be affirmed. In weighing factual sufficiency, the court takes a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt. After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the court must be convinced of the appellant's guilt beyond a reasonable doubt. The evidence must leave no fair and reasonable hypothesis other than appellant's guilt.

Military & Veterans Law > Military Offenses > ***Kidnapping***

HN10 **Military Offenses, *Kidnapping***

The Unif. Code Mil. Justice art. 134, 10 U.S.C.S. § 934, offense of ***kidnapping*** required, inter alia, proof beyond a reasonable doubt that appellant held the victim against her will. Manual Courts-Martial pt. IV, para. 92.b.(2) (2012).

Military & Veterans Law > Military Offenses > ***Kidnapping***

HN11 **Military Offenses, *Kidnapping***

With respect to the offense of ***kidnapping***, an involuntary detention may result from force, mental or physical coercion, or from other means, including false representations. Manual Courts-Martial pt. IV, para. 92.c.(3).

Military & Veterans Law > Military Offenses > General Article > Indecent Language

HN12 **General Article, Indecent Language**

A conviction for the delivery of indecent language can be upheld when the language used 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. Manual Courts-Martial pt. IV, para. 89.c. In a nutshell, the Manual presents two separate definitions by which to measure speech that, depending on the context in which it is spoken may be a crime.

Counsel: For Appellant: Captain Daniel C. Kim, JA; John N. Maher, Esquire (on brief); Captain Steven J. Dray, JA; John N. Maher, Esquire (on reply brief).

For Appellee: Lieutenant Colonel Eric K. Stafford, JA; Major Austin L. Fenwick, JA; Captain Joshua Banister, JA (on brief).

Judges: Before BURTON, HAGLER, and

SCHASBERGER, Appellate Military Judges. Judge HAGLER and Judge SCHASBERGER concur.

Opinion by: BURTON

Opinion

MEMORANDUM OPINION

BURTON, Senior Judge:

In this case, we explore a mélange of unlawful command influence claims, encompassed in appellant's first two assignments of error. These claims involve statements by politicians and senior leaders concerning sexual assault in the armed forces, the Sexual Harassment/Assault Response and Prevention (SHARP) program, and a meeting by the convening authority and the victim in the case after referral of charges. We find, under the facts of this case, that neither unlawful command influence nor unlawful influence tainted these proceedings. We also address appellant's assertion that the evidence is legally and factually insufficient to support the findings of **[*2]** guilty in the case; on this issue we provide appellant some relief by dismissing the ***kidnapping*** and indecent language specifications.[1]

A panel of officers sitting as a general court-martial, convicted appellant contrary to his pleas, of one specification of aggravated sexual contact and one specification of abusive sexual contact, seven specifications of assault, one specification of ***kidnapping***, and one specification of indecent language in violation of *Articles 120*, *128*, and *134*, Uniform Code of Military Justice, *10 U.S.C. §§ 920*, *928*, *934 (2012)* [UCMJ]. The panel acquitted appellant of one specification of aggravated sexual contact, two specifications of aggravated assault, one specification of simple assault, and three specifications of communicating a threat, charged under *Articles 120*, *128* and *134*, UCMJ. The panel sentenced appellant to a dismissal, confinement for two years, and forfeiture of all pay and allowances. The convening authority approved the sentence as adjudged.

BACKGROUND

Appellant and CPT AA started dating while they were cadets at the United States Military Academy (USMA). They married after both graduated from flight school in 2009.

In 2011, CPT AA informed appellant that she

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[1] After due consideration, we find the remaining seven assignments of error lack merit.

One of these assigned errors claims appellant's trial defense counsel were ineffective in failing to show the members a videotaped interview of the victim, Captain (CPT) AA, by the Army Criminal Investigation Command (CID). During this approximately ninety-minute interview, CPT AA stated "there was no sexual force, or anything." Appellant also asserts counsel were deficient in failing to request or obtain the metadata for the photographs of CPT AA's injuries admitted at trial or use that information to verify the timeline of events reported by CPT AA.

HN1[↑] "In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green, 68 M.J. 360, 361-62 (C.A.A.F. 2010)* (citing *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*). "When challenging the performance of counsel, the defense bears the burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance." *United States v. Tippit, 65 M.J. 69, 76 (C.A.A.F. 2007)*; (citing *United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)*.

Appellant's claims are not supported by any evidence in the record of trial (*see* Rule for Court-Martial (R.C.M.) 1103(b)(2)(D)), or properly admitted on the appellate record. The recording of the CID interview was neither marked nor admitted at trial or during the post-trial *Article 39(a)*, UCMJ, session. A ten-second excerpt was contained in the appellant's R.C.M. 1105 matters, but that is not the record before us on review. Likewise, the metadata for the photographs was not marked or admitted on the record. Finally, appellant's claims are not supported by affidavits or sworn statements. Without evidence before us in a manner we can consider, we are left with appellant's naked assertions of trial defense counsel's deficiencies. In a claim of ineffective assistance of counsel, the burden lays solely on appellant to prove the claim. When the claim relies entirely on evidence not included as part of the authenticated record, failure to meet the burden may be fatal. We therefore find appellant has not met his burden in establishing deficient performance by his trial defense counsel.

Even if we were to consider the excerpt of the CID interview in appellant's R.C.M. 1105 submission, we would still reject appellant's ineffective assistance of counsel claim. Simply put, this short clip extracted from the interview is not contextualized in relation to the entire interview. Appellant has not shown how this clip, in context, would have resulted in a different outcome at trial.

wanted **[*3]** a divorce. Appellant opposed dissolution of their marriage. Later in the year, CPT AA and appellant both deployed to Afghanistan, but to different forward operating bases (FOB). While deployed, CPT AA engaged in an extra marital affair with a noncommissioned officer (NCO).

Upon redeployment in September 2012, CPT AA continued to push for a divorce. On or about 8 November 2012, during a verbal disagreement at their residence, appellant threw a set of keys, hitting CPT AA in the back. Captain AA called her friend CPT YD. When CPT YD arrived at the residence, CPT AA was outside waiting for her. On the drive to work, CPT AA told CPT YD about the incident involving the keys. Once they arrived at work, CPT YD suggested that they take photographs of CPT AA's back to document the injury and so that CPT AA could see the injury to her back. This incident was not reported to law enforcement or the military chain of command, as CPT AA did not want to negatively impact appellant's career.

On 18 November 2012, CPT AA again told appellant she wanted a divorce.

On 19 November 2012, the NCO's wife reported the extramarital affair to the NCO's chain of command. After receiving a text from the NCO, CPT **[*4]** AA told appellant about the affair while they were having lunch at a local restaurant. Appellant stormed out of the restaurant, got in his car, threw CPT AA's purse out of the window, and began to drive out of the parking lot. Appellant then backed up and told CPT AA to get into the car. As they drove back to Fort Bragg, appellant was visibly angry and drove erratically. He called a friend, JS,[2] and requested that he accompany them to the trial defense service (TDS) office.

When they arrived at Fort Bragg, appellant picked up JS. As they drove to TDS, CPT AA was crying and appellant was very upset. At TDS, JS told appellant he should remain in the car because appellant was still very upset, loud, and verbally abusive. Captain AA went in to meet with an attorney. When she was done, they all returned to drop JS off at the company area. Before leaving the car, JS told appellant and CPT AA they should not be together that night.

Appellant and CPT AA proceeded to their residence. Once there, appellant became even more agitated, throwing CPT AA's belongings from the car. He initially refused to let CPT AA into the residence, but then pulled her inside. Once inside, he demanded that CPT AA write **[*5]** down all of her passwords for her computer, bank accounts, and emails. Appellant also took CPT AA's phone.

Appellant called CPT YD on speaker phone and demanded she come over to pick up a gift that had been purchased for her son. Captain YD and her husband, CPT DD, came over about two hours later. They witnessed appellant screaming at CPT AA. They testified that appellant referred to CPT AA as "a filthy whore, a cunt, a slut," "a fucking whore," and "a fucking bitch." Captain YD attempted to calm appellant down. When CPT YD's attempts failed, she tried to get CPT AA to leave with her. Captain AA shook her head no and stated, "No, I can't leave," "I can't go," and "I don't want to go." Appellant responded by informing CPTs YD and DD that they were trespassing and needed to get out of his house.

After CPT YD and DD left the residence, appellant's rage continued to grow. At different times that night, appellant struck CPT AA with his hands on various parts of her body, to include her legs, thighs, buttocks, torso, ribs, chest, eye, and head. At some point, he threw an ottoman and a pillow at her, touched her buttocks and genitalia against her will, and forced her to touch his penis. Appellant **[*6]** told CPT AA that if she left, he would harm himself.

Throughout the night CPT YD called CPT AA numerous times. Eventually appellant answered the phone and stated, "stop fucking calling." Appellant did allow CPT YD to speak to CPT AA via speaker phone, and CPT AA stated that she was okay.

When appellant woke up the next morning, he resumed hitting CPT AA.

Upon arriving to her unit later that morning, CPT AA told CPT YD about the events of the previous evening and that morning. Captain YD photographed CPT AA's numerous injuries. Against CPT AA's wishes, CPTs YD and DD reported these injuries to the chain of command and a protective order was implemented.

A commander's inquiry relating to adultery and fraternization had already been initiated in reference to CPT AA and the NCO.[3]

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[2] JS was previously CPT JS. He knew both appellant and CPT AA from USMA.

[3] Captain AA ultimately received a locally-filed General Officer Memorandum of Reprimand (GOMOR) and a negative officer

LAW AND DISCUSSION

A. Unlawful Command Influence

Appellant's UCI claims fall broadly into two categories. First, appellant avers Army officials, fearful of the perception of being weak on sexual assault, deprived appellant of protections guaranteed by the *Fifth* and *Sixth Amendments to the U.S. Constitution*. Second, appellant asserts the Army's application of the SHARP program in appellant's case constituted UCI. This includes a general assertion that the convening **[*7]** authority's favorable disposition of an adverse action against the victim, CPT AA, was proof of UCI. In these broad claims, appellant largely reasserts the same UCI arguments litigated in three motions at various stages at the trial level.

HN2[↑] We review allegations of unlawful command influence de novo. *United States v. Salyer, 72 M.J. 415, 423 (C.A.A.F. 2013)* (citations omitted).

1. Motions at the Trial Level

HN3[↑] We review the military judge's findings of fact made in ruling on a UCI motion under a clearly erroneous standard. *United States v. Villareal, 52 M.J. 27, 30 (C.A.A.F. 1999)*. Where a "military judge made detailed findings of fact . . . and these findings are clearly supported by the record," we adopt them in our analysis. *Id.* With that said, we briefly examine the three UCI motions and rulings at trial.

a. Political Leaders, Senior Military Officials, and DoD Policy

During an *Article 39(a)*, UCMJ, session on 3 April 2014, appellant claimed statements in the media by the President, Members of Congress, and senior Army leadership concerning sexual assault in the military, combined with the Department of Defense (DoD) SHARP policy and training, constituted apparent UCI and tainted the accusatory stage of the proceedings. In support of the allegations, defense counsel introduced statements by various senior **[*8]** leaders and politicians about sexual assault in the military. The defense also introduced slides from various SHARP training presentations. Defense counsel averred that these statements put pressure on the battalion commander, Lieutenant Colonel (LTC) BC, to recommend proceeding to a court-martial on charges preferred after a year-long investigation.

During the pretrial motion, LTC BC testified that he did not feel any pressure from his superiors to take a particular action in appellant's case, nor did he believe that there was a climate that all sexual assaults had to be charged. No further evidence was presented.[4]

After considering the evidence presented, to include LTC BC's testimony, the military judge found defense counsel failed to present evidence showing that actual or apparent UCI impacted the proceedings. Specific to her finding, the military judge found LTC BC, in acting on the charges, did not receive pressure from his superiors to take a particular action in this case. Noting defense counsel had conceded no actual UCI in the case, the military judge concluded there was no evidence that publicity concerning sexual assault in the military or sexual assault training impacted **[*9]** the "preferral, pretrial investigation, or referral" in the case. Specifically, the military judge found defense had failed to demonstrate a logical connection or nexus between this publicity and appellant's case in terms of potential to cause unfairness. The military judge further concluded the actions of LTC BC in directing additional investigations into the case and, later, recommending the case proceed to trial, were not the product of actual or apparent UCI, but rather the "permissible actions of a Battalion Commander exercising his authority to appoint a commander's inquiry and to recommend trial by court-martial."

b. Claims of a Former Chief of Justice

During an *Article 39(a)*, UCMJ, session on 6 June 2013, appellant raised a supplemental motion to dismiss for UCI, this time asserting that the Deputy Staff Judge Advocate (DSJA) commanded subordinates to recommend preferral of charges for all allegations of sexual assault, thus preventing the Chief of Military Justice (COJ), Brigade Judge Advocate and Trial

evaluation report for this inappropriate relationship.

[4] Though not raised by the appellant, we note that appellant did voir dire the panel members about their exposure to SHARP training as well as comments from senior leaders and politicians. None of the panel members felt pressure to find appellant guilty. One panel member was challenged by appellant and excused on an unrelated matter.

Counsel from making independent and informed appraisals and recommendations to the commanders of the 82d Combat Aviation Brigade. In support of this allegation Major Erik Burris, **[*10]** [5] the former COJ testified that he was told by the Staff Judge Advocate (SJA) and the DSJA that if there is probable cause in a sexual assault case, then charges must be preferred. Major Burris further testified that he felt pressure to charge sexual assault cases and that he informed his subordinates of this requirement to prefer all allegations of sexual assault.

In response to MAJ Burris, the government called the then current COJ, CPT RL, who testified that he was a senior trial counsel when MAJ Burris was the COJ. He attended most meetings with MAJ Burris and MAJ Burris never informed him of any policy or guidance on the disposition of sexual assault cases. According to CPT RL, neither the SJA nor the DSJA provided such guidance to him. Similarly, CPT RL never informed his subordinate trial counsel of such a policy. More importantly, CPT RL stated that he did not feel any pressure to pursue sexual assault cases and that the trial counsel assigned to appellant's case were not assigned to the office when MAJ Burris was the COJ.

In denying this motion, the military judge noted, "Based on the Court's ability to observe these two witnesses, **[*11]** the Court found CPT [RL's] testimony credible as opposed to MAJ Burris' testimony." The military judge found MAJ Burris, in his testimony, did not "remember exactly how he shared the [DSJA's] guidance, to whom he shared the guidance, at what location he shared the guidance, and when he shared the guidance." Even accepting everything MAJ Burris stated at face value, the military judge concluded trial defense counsel failed to produce some evidence of actual UCI and that apparent UCI did not affect the proceedings.

c. The Convening Authority met with Captain AA

After the trial adjourned, appellant hired a civilian attorney to represent him in the post-trial stages.[6] On 3 April 2015, appellant's civilian defense counsel requested a post-trial article *Article 39(a)*, UCMJ, session to address several issues, to include UCI. The military judge ruled that a post-trial hearing would be held to address the appellant's allegations that possible UCI occurred through email exchanges, various oral communications, or in-person meetings between the SJA, CPT AA, CPT AA's civilian attorney (Mr. TC), the Special Victim's Counsel (SVC), and the Commanding General, who was also the convening authority in **[*12]** appellant's case.[7] Appellant asserted, among other things, that preferential treatment afforded by the convening authority to CPT AA in addressing her misconduct was yet more proof of UCI.

In four *Article 39(a)*, UCMJ, sessions held over seven months from October 2015 to May 2016, the military judge examined evidence submitted by the parties and heard from ten witnesses, to include the convening authority.[8]

During his testimony, the convening authority was not asked about his decision to refer the charges in appellant's case; instead he was asked about his decision to locally file a General Officer Memorandum of Reprimand (GOMOR) CPT AA received for her inappropriate relationship with the male NCO. The convening authority's response to a congressional inquiry filed by appellant was submitted for the post-trial *Article 39(a)*, UCMJ, session, which stated, "Regarding CPT Camacho's concern that UCI played a role in this case, I can assure you that I considered only the facts of the case when I made my decision to refer it to a General Court-Martial."

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[5] At the time of appellant's court-martial, MAJ Burris had been relieved of his duties as the COJ and was pending court-martial for charges similar to those faced by appellant. Major Burris was subsequently convicted of disobeying a superior commissioned officer as well as rape, sodomy, and assault consummated by battery of his wife. His case is pending appellate review. *See United States v. Burris, ARMY 20150047, 2017 CCA LEXIS 315 (Army Ct. Crim. App. 8 May 2017)*, *reconsidered 2017 CCA LEXIS 507 (Army Ct. Crim. App. 28 Jul. 2017)*; *vacated and remanded*, ***78 M.J. 56 (C.A.A.F. 2018)***. We did not consider any matters from the case of *U.S. v. Burris* in deciding appellant's case.

[6] Appellant released his counsel who had represented him during the trial on the merits. The civilian counsel, Mr. Maher, also represents appellant before this court.

[7] Appellant also filed a motion to dismiss, or in the alternative, for a new trial. This request was properly denied by the military judge.

[8] We applaud the military judge for conducting these post-trial sessions in order to address potential issues before the case was forwarded to this court. Not only does this practice serve the interests of judicial economy, it allows the military judge most familiar with the case to address the issues.

The military judge also considered evidence that between 8 November 2013 through on or about 14 April 2014, Mr. TC began email communication with the **[*13]** SJA, DSJA, TC, SVC, and Special Victim Prosecutor (SVP). These emails included disparaging remarks about appellant and comments such as "I do see some concerns reprimanding a domestic violence victim." In their testimony, the SJA and DSJA acknowledged receipt of the emails from Mr. TC, but both denied ever discussing or showing the emails to the convening authority.

Based on the evidence and testimony, the military judge made several factual findings. First, the military judge found the charges were preferred against appellant on 6 November 2013. Second, on 11 February 2014, the convening authority referred the charges in appellant's case to a general court-martial based on the *Article 32*, UCMJ, investigation and the Investigating Officer's recommendation. Third, on 31 March 2014, the following people met with the convening authority: the SJA, CPT AA, Mr. TC, the SVC, and COL MM (all of these individuals, except CPT AA, testified at the post-trial *Article 39(a)*, UCMJ, session).[9] The purpose of this meeting was to discuss the filing of the GOMOR that CPT AA received on 6 November 2013 for adultery and fraternization. There was no discussion during this meeting concerning appellant's case. **[*14]**

The military judge considered all of the testimony and found defense counsel had failed to establish a logical connection between appellant's various claims of UCI based upon CPT AA's meeting with the convening authority and the alleged preferential treatment received by CPT AA from the convening authority and others in addressing her fraternization and adultery with the male NCO. Specifically, the military judge found no linkage between Mr. TC's correspondence with the SJA and the convening authority's decision to refer charges against appellant to trial.

We find the military judge's findings of fact in each of these motions were not clearly erroneous and we agree with the military judge's resolution in each instance.

2. Appellant's Claims on Appeal

Before us, appellant makes several arguments as to why UCI pervaded this case. We need not address many of these allegations as we find the military judge correctly decided these UCI claims each time they were raised. Nonetheless, some of appellant's arguments warrant a brief discussion, but no relief.

a. Unlawful Command Influence

As an overall claim, appellant asserts CPT AA was vested with a special victim status that, in various **[*15]** ways, unfairly tilted the proceedings against appellant. This status allowed CPT AA to change duty stations to Fort Leonard Wood, where she was awarded a slot in the Engineer Captain's Career Course (ECCC), and effectively allowed her to ***escape*** punishment. Appellant asserts the application of the SHARP program to CPT AA constituted UCI and prejudiced his trial. We disagree.

HN4[↑] *Article 37(a)*, UCMJ, states in relevant part: "No person subject to this chapter may attempt to coerce or . . . influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case . . . ." ***HN5***[↑] "Even if there was no actual unlawful command influence, there may be a question whether the influence of command placed an intolerable strain on public perception of the military justice system." *United States v. Lewis, 63 M.J. 405, 415 (C.A.A.F. 2006)* (quoting *United States v. Stoneman, 57 M.J. 35, 42-43 (C.A.A.F. 2002))* (internal quotation marks omitted). "[T]he appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Lewis, 63 M.J. at 415*.

HN6[↑] On appeal, appellant bears the initial burden of raising unlawful command influence. "Appellant **[*16]** must show: (1) facts, which if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that the unlawful command influence was the cause of the unfairness." *Salyer, 72 M.J. at 423*

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[9] Defense counsel were not notified about this meeting until after the trial adjourned. In the post-trial *Article 39(a)*, UCMJ, session, appellant asserted the government's failure to notify defense of this meeting and provide related correspondence between CPT AA's attorney and the government constituted a violation of Rule for Court-Martial 701(a)(6) and *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*. The military judge—correctly, in our view—determined that even if the government's failure to provide this information violated R.C.M. 701(a)(6) or *Brady*, the defense failed to establish reasonable probability that there would have been a different result at trial. *See Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)*.

(citing United States v. Richter, 51 M.J. 213, 224 (C.A.A.F. 1999)) (quoting United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F. 1999)). "Thus, the initial burden of showing potential unlawful command influence is low, but is more than mere allegation or speculation." *Id.* (citing Stoneman, 57 M.J. at 41). "The quantum of evidence required to raise unlawful command influence is "'some evidence.'" *Id.* (citing Stoneman, 57 M.J. at 41) (quoting Biagase, 50 M.J. at 150). Our superior court has further held that "prejudice is not presumed until the defense produces evidence of proximate causation between the acts constituting [UCI] and the outcome of the court-martial." Biagase, 50 M.J. at 150 (citing United States v. Reynolds, 40 M.J. 198, 202 (C.M.A. 1994)).

Once an appellant has presented some evidence of UCI, the burden shifts to the government to demonstrate to this court beyond a reasonable doubt that: "(1) the predicate facts do not exist; (2) the facts do not constitute unlawful command influence; or (3) the unlawful command influence did not affect the findings or sentence." Salyer, 72 M.J. at 423 (citing Biagase, 50 M.J. at 151).

Simply because the Army has a SHARP program and instituted training does not constitute UCI. Appellant fails to demonstrate any nexus between the SHARP program, generally, **[*17]** and the any issue of consequence that occurred in his trial. Further, no evidence was presented, in particular, to show that anyone in a position of authority over appellant's case was influenced by the Army's SHARP program, training they may have attended, or comments made by senior leaders and/or politicians. ***HN7***[↑] There must be more than command influence "in the air" to justify action by an appellate court. United States v. Allen, 33 M.J. 209, 212 (C.M.A. 1991) (citations omitted). Appellant's claims, taken in totality, do not pass this measure, particularly given that the evidence and testimony presented during the three UCI motion hearings compellingly demonstrated that the commanders who recommended action or took action in appellant's case were not improperly influenced in making their decisions.

Overall, we find appellant has failed to present "some evidence" of actual or apparent unlawful command influence on appellant's proceedings. Even if we had found appellant met this initial low burden of proof, we are convinced beyond a reasonable doubt that no unlawful command influence affected the findings or sentence.

b. Unlawful Influence

As another overarching theme, appellant claims the convening authority's meeting with CPT AA and Mr. **[*18]** TC on 31 March 2014, and the lack of any meaningful punishment for CPT AA for fraternization and adultery, somehow injected unlawful command influence into appellant's trial. Although we view this not as a UCI claim, but rather an unlawful influence claim, we still resolve this issue against appellant.

We are mindful that, ***HN8***[↑] while most claims under Article 37(a), UCMJ, allege the unlawful influence was committed by someone wearing the mantle of command authority, that is not a prerequisite to establishing a claim that the proceedings were unlawfully influenced by a member subject to the UCMJ. Both unlawful command influence and unlawful influence are proscribed by Article 37, UCMJ, but the latter does not require the act be done with the mantle of command authority. Actual unlawful influence occurs "when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case." United States v. Barry, 78 M.J. 70, 77 (C.A.A.F. 2018) (quoting United States v. Boyce, 76 M.J. 242, 247 (C.A.A.F. 2017). The test for unlawful influence is the same as the test for unlawful command influence, including the requirement, if appellant meets his burden, that the government prove any improper influence was harmless beyond a reasonable doubt. **[*19]** Barry, 78 M.J. at 77 n.4.

First, appellant tries to reason that CPT AA's lack of meaningful punishment for fraternization and adultery are proof of the unlawful influence pervading his trial. Again, we see no nexus between the resolution of CPT AA's GOMOR, her move to Fort Leonard Wood, or attendance at the ECCC and the results of appellant's trial. As explained by the convening authority, CPT AA's GOMOR was locally-filed because the issuance of a negative Officer Evaluation Report would have the same detrimental effect on her career. CPT AA's permanent change of station was something permitted by DoD policy, which also had no nexus to the charges against appellant. Finally, CPT AA's attendance at ECCC was authorized by a completely different command, not the convening authority.

Second, we find no evidence of unlawful influence exerted by Mr. TC or CPT AA simply because they requested and were granted a routine meeting with the convening authority to discuss a GOMOR filing

determination. Appellant's courtmartial was not a topic raised during the meeting. While the record is replete with messages and comments by Mr. TC to members of the SJA's staff that disparaged appellant, none of these communications were **[*20]** shared with the convening authority. Finally, and more importantly, this meeting occurred well after the convening authority referred charges. Unlawful influence did not occur, nor was there an appearance of unlawful influence, in the referral stage of appellant's trial. A meeting between the convening authority and CPT AA to discuss the filing of a GOMOR did not create actual or apparent unlawful influence in decisions previously made by the convening authority.

Overall, as with UCI, we find appellant has failed to present "some evidence" of actual or apparent unlawful influence on appellant's proceedings. Even if we had found appellant met this initial low burden of proof, we are again convinced beyond a reasonable doubt that any of the alleged unlawful influence did not affect the findings or sentence.

B. Factual and Legal Sufficiency

HN9[↑] *Article 66(c)*, UCMJ, establishes our statutory duty to review a record of trial for legal and factual sufficiency de novo. *United States v. Walters, 58 M.J. 391, 395 (C.A.A.F. 2003)*. Under *Article 66(c)*, UCMJ, we may affirm only such findings of guilty that we find correct in law and fact and determine, based on the entire record, should be affirmed. In weighing factual sufficiency, we take "a fresh, impartial **[*21]** 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)*. "[A]fter weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we must be] convinced of the [appellant's] guilt beyond a reasonable doubt." *United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)*. The evidence must leave "no fair and reasonable hypothesis other than appellant's guilt." *United States v. Billings, 58 M.J. 861, 869 (Army Ct. Crim. App. 2003)* (citation omitted).

1. ***Kidnapping***

As charged in Specification 1 of Charge III, the *Article 134****HN10***[↑] , UCMJ offense of ***kidnapping*** required, *inter alia*, proof beyond a reasonable doubt that appellant held CPT AA against her will. *See Manual for Courts-Martial, United States* (2012 ed.) [MCM], pt. IV, ¶ 92.b.(2). We find the evidence insufficient on this element.

There is no dispute that appellant and CPT AA were in their marital home on 19 November 2012. However, we cannot find beyond a reasonable doubt that appellant held CPT AA against her will. In making this determination we considered that ***HN11***[↑] an involuntary detention "may result from force, mental or physical coercion, or from other means, including false representations." *MCM*, pt. IV, ¶ 92.c.(3).. We find none of these modes of detention here. In making this assessment, we have also **[*22]** factored in the "availability or nonavailablity" to CPT AA of a means of ***exit*** or ***escape*** and evidence of threats or force (or lack thereof). *See id.* We conclude that CPT AA had at least three opportunities to leave; twice when CPT YD and DD requested she leave; and then when appellant was asleep or unconscious. Additionally, CPT AA was not in a remote location where help could not be obtained. Instead she was in her marital home in a neighborhood where she knew several of her neighbors, to include her closest neighbor whom she met at USMA. The only threat appellant made was to injure himself, which under the unique circumstances of this case, was not sufficient to prove appellant held CPT AA against her will. Therefore, we find the evidence factually insufficient for the offense of ***kidnapping***.

2. Indecent Language

We also find the evidence supporting appellant's conviction for indecent language factually insufficient.

HN12[↑] A conviction for the delivery of indecent language can be upheld when the language used 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." **[*23]** *MCM*, pt. IV, ¶ 89.c.; *see also United States v. Green, 68 M.J. 266, 269 (C.A.A.F. 2010)*; *United States v. Negron, 60 M.J. 136, 142 (C.A.A.F. 2004)*. In a nutshell, the Manual presents two separate definitions by which to measure speech that, depending on the "context in which it is spoken" may be a crime. *Negron, 60 M.J. at 144*; *see also United States v. Johnson, NMCCA 20090041, 2009 CCA LEXIS 298, at *7-*8 (N.M. Ct. Crim. App. 25 Aug. 2009)*.

The opprobrium appellant spewed at his unfaithful spouse "was clearly calculated or intended to express

his rage, not any sexual desire." *United States v. Brinson, 49 M.J. 360, 364 (C.A.A.F. 1998)*. Put another way, there was clearly no "libidinous message" conveyed. *Id. at 368* (Cox, C.J., concurring).

Examining the words used by the cuckolded appellant to describe his wife, *in context*, we do not find them to meet the definition of "indecent language," nor to be service discrediting or prejudicial to good order and discipline. Appellant's abusive language was directed at a fellow captain (his wife) at an off-post private residence shortly after discovering CPT AA had an adulterous affair with a noncommissioned officer while both she and appellant were deployed. The victim of appellant's tirade was neither a minor, *see, e.g.*, *United States v. Avery, ARMY 20140202, 2017 CCA LEXIS 739 (Army Ct. Crim. App. 30 Nov. 2017)* (unpub.), nor a subordinate, *see, e.g., United States v. Caver, 41 M.J. 556 (N.M. Ct. Crim. App. 1994)*. The presence of two other officers of equal rank during appellant's profanity-laced tirade is of no moment here. In a different setting, it can not[10] be gainsaid that appellant's outrageous description of a fellow human being would be so grossly offensive to decency as to meet all elements **[*24]** of the offense of indecent language. However, under the facts of this case, we are unable to affirm appellant's conviction and accordingly set aside and dismiss Specification 5 of Charge III as factually insufficient.

CONCLUSION

The findings of guilty for Specifications 1 and 5 of Charge III are set aside and dismissed. The remaining findings of guilty are AFFIRMED.

We are able to reassess the sentence on the basis of the errors noted and do so after conducting a thorough analysis of the totality of circumstances presented by appellant's case and in accordance with the principles articulated by our superior court in *United States v. Sales, 22 M.J. 305 (C.M.A. 1986)*, and *United States v. Winckelmann, 73 M.J. 11, 15-16 (C.A.A.F. 2013)*.

In evaluating the *Winckelmann* factors, we first find a significant change in the penalty landscape, as the maximum period of confinement dropped from life without the possibility of parole to twenty-nine years and six months. However, this one factor is not dispositive. *Id. at 15*. Second, we note that appellant elected to be tried by members, a factor which can weigh against a sentence reassessment. However, "this factor could become more relevant where charges address service custom, service discrediting conduct, or conduct unbecoming." *Id. at 16*. The remaining charges, in our view, **[*25]** truly capture the gravamen of appellant's offenses. That is, the charges in this case primarily focused on appellant's brutal assaults, aggravated sexual contact, and abusive sexual contact with his wife. We have extensive experience and familiarity with these types of offenses as they are the subject of many of the cases we review, and can reliably determine that appellant would have received a dismissal, confinement for two years and forfeiture of all pay and allowances even without the dismissed specifications. We therefore AFFIRM the sentence as adjudged.

All rights, privileges, and property, of which appellant has been deprived by virtue of those portions of the findings set aside by our decision, are ordered restored.

Judge HAGLER and Judge SCHASBERGER concur.

End of Document

[10] Corrected

CERTIFICATE OF SERVICE, U.S. v. WILSON (20230233)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on the 27th day of February, 2024.

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