

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20220616

Staff Sergeant (E-6)

JOEL A. CORRINARD

United States Army,

Appellant

Tried at Fort Hood, Texas, on 23
January, 13 June, and 29 November-2
December 2022, before a general
court-martial appointed by the
Commander, 1st Cavalry Division,
Colonel Maureen A. Kohn, Military
Judge, presiding.

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

Assignments of Error¹

**I. WHETHER THE “COMPOSITION” BLOCK MARKED AS
“MILITARY JUDGE ALONE” IN THE ENTRY OF JUDGMENT
SHOULD BE CORRECTED TO “ENLISTED PANEL.”²**

**II. WHETHER DEFENSE COUNSELS WERE INEFFECTIVE
FOR FAILING TO INVESTIGATE THE ALLEGED VICTIM’S
MEDICATION HISTORY.**

¹ Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in the Appendix.

² This assignment of error consists only of the headnote and this footnote. The Entry of Judgment erroneously marked the composition of court as military judge alone, although appellant was tried by an enlisted panel. The Judgment of the Court should be corrected accordingly. See *United States v. Walker*, No. 20210325, 2022 CCA LEXIS 273, at *1 n.* (Army Ct. Crim. App. 10 May 2022) (short form aff.).

III. WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION IN ADMITTING MIL. R. EVID. 413 EVIDENCE.

Statement of the Case

On 2 December 2022, an enlisted panel sitting as a general court-martial convicted appellant, Staff Sergeant (SSG) Joel A. Corrinard, contrary to his pleas, of two specifications of sexual assault and one specification of abusive sexual contact.³ (R. at 602; Charge Sheet). The same day, the military judge sentenced appellant to seventy-two months confinement and a dishonorable discharge. (R. at 632).

On 12 January 2023, the convening authority took no action. (Convening Authority Action). On 20 January 2023, the military judge entered Judgment. (Judgment of the Court). This court docketed appellant's case on 7 June 2023. (Referral and Designation of Counsel).

³ The panel found appellant not guilty of one specification of assault consummated by a battery.

II. WHETHER DEFENSE COUNSELS WERE INEFFECTIVE FOR FAILING TO INVESTIGATE THE ALLEGED VICTIM'S MEDICATION HISTORY.

Facts Relevant to Assignment of Error

██████████⁴ met appellant in June 2020 at the Navy Lodge on Joint Base Pearl-Harbor-Hickam, Hawaii. (R. at 160; 164). Upon meeting, ██████████ offered to show appellant around and gave him her cell phone number. (R. at 176). They casually interacted every other day in person or through text message. (R. at 175;177). On 7 June 2023, appellant joined ██████████ walking her two Pitbull mixes. (R. at 184; 500). Soon thereafter, they returned and went into ██████████ hotel room. (Pros. Ex. 17). Appellant and ██████████ sat on the bed closest to the door and talked. (R. at 63–64); *See also* (Pros. Ex. 28, pg. 7). The events following this conversation diverge.

A. ██████████ testimony

██████████ testified that during this period she was undergoing a separation process with her husband due to fertility issues and was experiencing depression.⁵ (R. at 161). For the past two years, she and her husband had been

⁴ At the time of the trial, ██████████ had changed her name to ██████████.

⁵ In her CID interview, she said she was still married and loved her husband at the time of the incident. (R. at 239).

trying to have a baby. (R. at 240). She stated she had been taking a lot of medications for the treatment, and, at some point, was on hormones. (R. at 241).

She testified that after coming back from the walk, they went into her room because “we weren’t quite done talking.” (R. at 184). Appellant proposed to set up her TV for movie watching on the TV screen, a change from her usual practice of using her tablet for this purpose. (R. at 185). She described feeling uncomfortable due to his personal questions about her preferences, although she admitted these questions were merely about her favorite food, activities, and coffee. (R. at 185; 214).

She stated appellant grew angry, stood in front of her, pushed her down onto the bed, and forcibly removed her shorts and underwear without speaking. (R. at 186-87). She clarified appellant used both hands to push her on the shoulders. (R. at 187).⁶ He then forced her legs open and “started fingering.”⁷ (R. at 187). She further testified he jerked up her top and sports bra, then kissed and licked her breasts. (R. at 188).

⁶ In her initial [REDACTED] statement, she said “I remember him laying me back...” (Pros. Ex. 6, pg. 4). She later told CID she wasn’t sure how she laid down on the bed. (R. at 226).

⁷ The [REDACTED] note also states that [REDACTED] was “not sure if he penetrated me with his fingers.” (Pros. Ex. 6, pg. 5).

When she dodged his attempt to kiss her lips, [REDACTED] testified, appellant kissed her neck⁸ and started to penetrate her with his penis. (R. at 189). She said he next flipped her over and continued to assault her. (R. at 190). She described her position as laying on her stomach with feet hanging towards the ground and sometimes touching. (R. at 191; 228). From this position, she testified she was able to push herself up, and in the process, knock appellant backwards. (R. at 191-92). She testified:

I pushed, you know, I continued the movement to push him off, and he pushed me towards the entrance of the—because all this had been placed in front of this bed. [pointing at the exhibit published on the screen.] So, the entrance—there was the door in the mirror and after he pushed me over, I went against the mirror wall, and when I turned over, he was standing close to the door between the bed and the crate.

(R. at 191). She testified, he fell backwards, “Also, around the mirror—doorframe area.” (R. at 192; *See also* Pros. Ex. 17). She added, after appellant was off her, she “continued the momentum of the push, and he pushed me back, and I hit the wall with the mirror” with her face. (R. at 192). On cross, she added that she was able to partially spin mid-push “facing him enough for him to be able to push me from my breast-chest area.” (R. at 230). She could not explain how appellant’s

⁸ [REDACTED] initially stated, “Maybe my neck. I don’t know, I fell dead.” (Pros. Ex. 6, pg. 5).

push away from the direction of the mirror wall resulted in her hitting her forehead in the mirror behind appellant. (R. at 234-35).

Afterwards, she opened the door and started screaming at appellant that he hurt her and he needed to leave. (R. at 192).

She couldn't remember some details and stated that she reviewed her prior statement yesterday, "but didn't memorize it." (R. at 216-17). Although she testified earlier that she told him to stop, she later denied being able to move and speak stating, "I'm pretty sure if I were able to speak and move, I would have screamed and I would have fought him, and I would have stopped him from hurting me." (R. at 227). She also admitted saying that she did not know how she ended up laying on the bed. (R. at 226). She also admitted to submitting only certain portions of the text message exchanges through her SVC and deleting some of the messages. (R. at 219; 223).

B. Accused's testimony

Appellant did not contest whether the alleged sexual acts happened. Rather, he asserted that he was sexually assaulted by [REDACTED]. (R. at 484). Appellant testified that [REDACTED] ran into him earlier and asked if he could install a system to allow her to watch movies on the hotel TV screen as opposed to on her iPad, as

discussed in previous meetings.⁹ (R. at 479-481; 500; *see also* R.182). Appellant stated he needed to finish some in-processing tasks and he would let her know when he's done. (R. at 479). This is corroborated by his text message to [REDACTED] that says, "I'm done with my online setup. Do you want company now?" (Pros. Ex. 11, pg. 5).

Appellant testified that after he finished the set-up, she made sexual advances asking, "How should we do this? Should I take my clothes off now?" and grabbed his hands and pulled him closer to her. (R. at 482-83). She pulled his shirt-off¹⁰ and unzipped his pants. (R. at 483-85). She continued to wrap her legs around him assuring that "It's Okay," "I haven't been fucked in two years."¹¹ (R. at 485).

Appellant testified she then pulled appellant's penis through the opening of his shorts. (R. at 486). She started rubbing herself against him, trying to arouse him. (R. at 488; 491). She also stuck her fingers in her vagina and put it in his

⁹ [REDACTED] stating, "I had seen the accused earlier from that evening." (R. at 182)

¹⁰ When asked by the government, [REDACTED] admitted that she does not remember when appellant took his shirt off stating I must have had my eyes closed. (R. at 190).

¹¹ This lines up with [REDACTED] timeline about her fertility treatment and marriage falling apart.

mouth telling him to taste her and rubbing her nipples afterwards with those fingers. (R. at 491). The dogs were barking, and one jumped on the bed. (486).

As a black male in a compromising situation with a white female, appellant did not feel comfortable resisting or causing a disturbance. (R. at 484). Instead, appellant started hyperventilating and “distanced” himself from the situation. (R. at 485). He snapped out of this state when, [REDACTED] mood suddenly changed and she started yelling. (R. at 486; 493). She repeatedly said, “How could you do this to me?” and eventually ordered him to leave. (R. at 486).

Afterwards, appellant attempted to talk to the first responders about what happened but was told not to speak to them. (R. at 488). He proceeded to have a panic attack and was treated by a medical team. (R. at 512). Since appellant had not in-processed yet, he did not have the unit SHARP representative information. (R. at 490). He called a 1-800 number he found from Googling and spoke to a National Guard representative. (R. at 490). When he eventually learned about a SAFE exam, after contacting his unit SHARP, he was able to get a SAFE exam done. (R. at 491; Pros. Ex. 12).

C. Omitted Evidence

[REDACTED] testified she was depressed for a bit, (R. 161), and was taking lot of medications and on hormones. (R. at 240-241). She was on a

variety of medications including sedatives, sleep aid, antipsychotic, antidepressant, smoking cessation aids, contraceptives, and hormone replacement medications.

(Def. App. Ex. A). A psychiatrist and a forensic psychiatrist from Walter Reed concluded that:

To a reasonable degree of psychiatric certainty, the prescribed medication regimen from April 2020 – June 2020 carries a significant clinical risk of behavioral and cognitive impairments including but not limited to amnesia, mood swings, sedation, complex sleep behaviors, restlessness, agitation, disinhibition, and similar, pronounced withdrawal effects. These effects may not manifest in all individuals and cannot be readily predicted based solely on review of a medication history without other clinical information, especially without the ability to conduct an independent medical examination of an individual including review of their longitudinal health records.

(Def. App. Ex. A).

Standard of Review

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

United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012); *Strickland v.*

Washington, 466 U.S. 668, 690 (1984).

Law

The Sixth Amendment guarantees an accused the right to the “effective assistance of counsel.” *United States v. Cronin*, 466 U.S. 648, 653–56 (1984).

A. Ineffective Assistance Generally

“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009) (quoting *Strickland*, 466 U.S. at 686).

“To prevail on an ineffective assistance claim, the appellant bears the burden of proving that the performance of defense counsel was deficient and that the appellant was prejudiced by the error.” *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) (citing *Strickland*, 466 U.S. at 698).

To prove deficient performance of counsel, appellant must overcome the presumption of reasonable professional assistance. *Strickland*, 466 U.S. at 689. This may be done by demonstrating specific errors fell outside of prevailing professional norms. *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001).

Next, appellant must establish prejudice by showing “a reasonable probability that, but for counsel’s [deficient performance] the result of the proceeding would have been different.” *Captain*, 75 M.J. at 103 (citations and quotations omitted). This does not mean appellant is “required to show that counsel’s deficient conduct more likely than not altered the outcome . . . but rather

. . . establish a probability sufficient to undermine confidence in [that] outcome.”

United States v. Akbar, 74 M.J. 364, 436 (C.A.A.F. 2015) (citing *Porter v. McCollum*, 558 U.S. 30, 44 (2009)). “The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” *Strickland*, 446 U.S. at 694.

B. Failure to Investigate and Introduce Corroborating Evidence for Appellant’s testimony.

In any case, “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691. “Whether the counsel’s omission served a strategic purpose is a pivotal point in *Strickland* and its progeny” and that this “crucial distinction between strategic judgment calls and plain omissions has echoed in the judgments of this court.”). *See Loyd v. Whitley*, 977 F.2d 149, 158 (5th Cir. 1992) (finding defense counsel’s decision “not to pursue an independent psychological analysis [...] was neither a strategic choice made after investigation, nor a strategic choice made in light of limits on investigation.”).

Familiarity with the facts and applicable law are fundamental responsibilities of defense counsel. *United States v. Davis*, 60 M.J. 469, 470 (C.A.A.F. 2005) (citing *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Strickland*, at 690-91

(“Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.”). The “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, at 691, quoted in *United States v. Loving*, 41 M.J. 213, 242 (1994); *see also United States v. Polk*, 32 M.J. 150, 153 (CMA 1991); *See also Richards v. Quarterman*, 566 F.3d 553, 570 (5th Cir. 2009) (finding ineffectiveness in defense counsel’s failure to introduce medical records, when the reason for not to do so had been developed without proper investigation into the record); *United States v. Colbert*, 2023 CCA LEXIS 536, *24 (Army Ct. Crim. App. 2023)(mem. op.)(finding defense counsel’s failure to investigate appellant’s background ineffective).

Argument

This was a “he said, she said” case. In this case, however, the need for the corroboration of appellant’s testimony was greater because he maintained she was the aggressor in the incident. Therefore, credibility and corroboration evidence were of utmost importance for the dueling stories.

The CID Investigation file contained [REDACTED] medication history. (Def. App. Ex. A). Moreover, [REDACTED] testified that she was depressed and on medications and hormones during or close to the alleged incident. (R. at 162). The defense counsel simply inquired about these records but did not request an expert to interpret the possible effects.

The defense counsel cannot demonstrate this failure was a strategic decision. Despite having factual impossibilities in her testimony and acquitting appellant of the Article 128 charge, the panel still found appellant guilty of the related sexual assault charges. (R. at 602). It was crucial for defense to explain the [REDACTED] erratic behavior appellant described during his encounter with her. An expert witness could have explained how the medications may have caused [REDACTED] mood changes and strange acts to factfinders. The defense's failure to at a minimum investigate these medications constitute ineffective assistance.

Without these possible explanations, appellant was deprived of effectively cross-examining [REDACTED]. In addition, employing an expert witness to explain her seemingly bizarre behavior would have provided powerful corroboration for appellant's version of events. Without these, appellant had a manifestly unjust proceeding where only one side was able to bolster their weak case with unhelpful DNA analysis, speculative and extraneous latent hand-print analysis, and a Mil. R.

Evid. 413 witnesses to attempt to corroborate [REDACTED] story. More compelling evidence that directly corroborated appellant's accounts were not presented.

Denying appellant the opportunity to contextualize [REDACTED] erratic behavior and cast doubt as to her credibility renders the proceedings unreliable and counsel's deficient performance prejudicial. *See Strickland*, 446 U.S. at 694 (finding proceedings rendered unreliable "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."); *see also Akbar*, 74 M.J. at 436 (setting burden for establishing prejudice below preponderance).

III. WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION IN ADMITTING MIL. R. EVID. 413 EVIDENCE

Facts Relevant to Assignment of Error

On or about 10-11 July 2014, eight years prior to the trial, [REDACTED],¹² alleged that appellant pushed his way and tried to kiss her in her room and ended up kissing her on the cheek and succeeded in kissing her on the lips in a server room the next day. (App. Ex. V-A and B). The investigation concluded with a finding of probable cause for kissing [REDACTED] *on the cheek*. (App. Ex. V-C) (emphasis added).

¹² At trial, the witness testified as [REDACTED].

Upon government's notice, the defense moved to exclude it, partly on the grounds of insufficient notice due to missing statements from [REDACTED]. (App. Ex. IV). The confusion arose from the government's response to an initial email, using the same file name, instead of sending a separate email. (R. at 14; App. Ex. V-A, and VIII). Regardless, the defense emphasized the low probative value, arguing "very different interaction, a simple kiss on the cheek, is all that is supported by the very low standard of probable cause..." (R. at 20). On 6 July 2022, the military judge ruled to exclude the evidence focusing on appellant's statement, (App. Ex. XII), but defense counsel clarified they had received [REDACTED] statements at the same as appellant's statements.¹³ (App. Ex. XIII).

On 8 November 2024, less than a month before the trial, the judge reversed her decision sua sponte, thereby allowing the evidence. (App. Ex. XIV). This time, she focused on [REDACTED] statements, but did not address appellant's statement or the CID's findings.

¹³ The military judge highlighted the defense's failure to object to government's violation of Mil. R. Evid. 404(b) notice and her PTO deadline and declined to address this issue. (App. Ex. XII). She also did not find good cause for the notice, which she perceived as given on 24 May 2022, the date the motion was filed, rather than on 11 May 2022, the actual date of notice. (App. Ex. XII). Due to just few days of discrepancies between these notices, had they raised the issue there was a strong probability they would have been successful. This highlights the strength of Assignment of Error II.

At trial, [REDACTED] testified appellant kissed her all over her face while pinning her to the wall. (R. at 252). She became highly emotional while testifying and needed a minute to compose herself. (R. at 252). She expanded beyond her initial statements and expressed that she feared that he was actually going to rape her. (R. at 252-258). She also testified that appellant grabbed her and kissed her on her lips on the next day. (R. at 257). The government heavily emphasized this testimony in their opening and closing statements. (R. at 153; 950-52).

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013). When a military judge abuses his discretion in conducting the Mil. R. Evid. 403 balancing test, the error is non-constitutional. For a non-constitutional error, the government has the burden of demonstrating that the error did not have a substantial influence on the findings. *Id.* at. 182.

Law

In a court-martial for a sexual offense, the military judge may admit evidence of other sexual offenses for relevant purposes. Mil. R. Evid. 413. The judge must *also* balance the evidence under Mil. R. Evid. 403. *Solomon*, at 180. The military judges consider following non-exhaustive factors to conduct this

balancing test: 1) strength of proof of the prior act; 2) probative weight of the evidence; 3) potential for less prejudicial evidence; 4) distraction of the factfinder; 5) time needed for proof of the prior conduct; 6) temporal proximity; 7) frequency of the acts; 8) presence or lack of intervening circumstances; and the 9) relationship between the parties. *Id.* (citing *United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2000)). If the “balancing test requires exclusion of the evidence, the presumption of admissibility is overcome.” *United States v. Berry*, 61 M.J. 91, 95 (C.A.A.F. 2005), *See also, Wright*, 53 M.J. at 482-83.

Depending on the disposition of the previous offense, the courts must use proper limits. *United States v. Griggs*, 51 M.J. 418, 420 (C.A.A.F. 1999) (holding that the military judges should employ “*great sensitivity* when making the determination to admit evidence of prior acts that have been the subject of an acquittal.”) (emphasis added). *See also United States v. Henderson*, 83 M.J. 735, 749 (Army Ct. Crim. App. 2023) (holding “military judge abused his discretion by not treating the acquittal evidence with the required care and sensitivity.”). The CAAF held that “admission of propensity evidence requires more” than a finding of probable cause. *United States v. Yammine*, 69 M.J. 70, 75 (C.A.A.F. 2010) (internal citation omitted) (referring to Mil. R. Evid. 412, 413, and 414).

A military judge abuses her discretion when she fails to give adequate weight to an acquittal in conducting the 403 balancing test or when she allows the 413 evidence to become a distraction. *Solomon*, 72 M.J. at 182 (C.A.A.F. 2013); *See also United States v. Berry*, 61 M.J. 91, 97 (C.A.A.F. 2005) (finding a “distracting mini-trial” occurred where trial counsel’s opening statement began with reference to the Mil. R. Evid. 413 prior act and his closing argument emphasized the prior act) (citation and internal quotation marks omitted); *cf. United States v. James*, 63 M.J. 221, 222 (C.A.A.F. 2006) (the military judge limited the scope of admissible propensity evidence to brief testimony); *United States v. Bailey*, 55 M.J. 38, 41 (C.A.A.F. 2001) (the military judge kept the witness testimony abbreviated and focused to ensure a minimum amount of time would be spent on Mil R. Evid. 413 evidence); *United States v. Nelms*, No. NMCCA 201400369, 2015 CCA LEXIS 522, at *9 (N-M Ct. Crim. App. Nov. 19, 2015) (the military judge issuing a limiting order setting up the specific facts to be elicited at the trial).

When a military judge’s fails to conduct proper analysis, this court looks for harmlessness by weighing: (1) the strength of the government’s case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4)

the quality of the evidence in question. *United States v. Berry*, 61 M.J. 91, 98 (C.A.A.F. 2005).

Argument

A. The Military Judge Abused Her Discretion in Failing to Conduct a Thorough Analysis and Set Proper Limitation for 413 Evidence.

The military judge abused her discretion admitting the M.R.E. 413 evidence without proper findings and appropriate limitations. Although the military judge cited correct authorities, she failed to apply these factors carefully. (App. Ex. XIV). Specifically, the military judge concluded “the factfinder could find that the accused committed a sexual offense as defined by M.R.E. 413 against [REDACTED] on or about 11 and 12 July 2014.” (App. Ex. XIV). However, she does not specify whether the allegation of kissing on the lips the next day rose to a preponderance of the evidence even though the act failed to pass the lesser burden of probable cause by government’s own assessment. *See United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007) (holding “Probable cause requires more than bare suspicion, but something less than a preponderance of the evidence.”). She continued to be unclear in her balancing test findings.

1. The strength of proof of the prior act was wrongfully applied.

The military judge initially based her decision on the appellant’s statement alone, neglecting [REDACTED] testimony on a misunderstood notice ground. (App.

Ex. App. Ex. XII). In reversing her decision several months later, she shifted her analysis with an undue reliance on [REDACTED] statements. (App. Ex. XIV).

Crucially, the judge ignored the fact that the Brigade Judge Advocate and the investigators concurred the act of kissing on the lips were unfounded when assessing the strength of proof. *See supra*, at 15. This dismissal of CID's findings, which involved assessment of direct interviews with both parties and other witnesses, was a critical oversight. *Solomon*, 72 M.J. at 182 (C.A.A.F. 2013).

Just like in *Solomon*, where the military judge ignored the acquittal and failed to give sensitive consideration for the previous incident, the military judge failed to weigh the lack of finding of probable cause for [REDACTED] more serious allegation of kissing on the lips. Given that the government fully investigated the matter in real time and found no probable cause, the strength of proof of the lip kissing allegation was even weaker than evidence of an acquittal.

2. Probative weight of the evidence was weak.

The military judge concluded the probative weight of evidence was “average” because “the evidence has a tendency to show the accused pushed his way into [REDACTED] room.” (App. Ex. XIV). However, the evidence in the instant case showed appellant was invited into the room, because they “weren’t quite done talking.” (R. at 184). The only specification that describes pushing is the Article

128 evidence that was not covered by this rule. Therefore, this factor is more prejudicial than probative because the judge failed to distinguish between relevant facts and prejudicial extraneous details. This is one of the most crucial factors that begged for a more thorough analysis. The military judge abused her discretion by reaching a conclusion without thorough findings.

3. Potential for less prejudicial evidence was available.

Despite acknowledging only an “average” probative value, the judge did not thoroughly assess the necessity of this extrinsic evidence. Even if there was a necessity of such extrinsic evidence, the judge missed an opportunity to limit the evidence to initial statement or only to the investigative findings from the time of the incident. The duty of the judge as a gatekeeper was to balance the perspectives of the prosecution and defense, favoring more reliable and contemporaneous evidence like the victim’s initial statement about the first incident only.

4. Distraction of the factfinder.

The military judge promised that the factfinder will not be distracted and “This Court will ensure, through limiting instructions and tailored examinations of the witnesses, that there is no mini-trial on collateral issues.” (App. Ex. XIV). However, the military judge only issued the boilerplate instruction on extrinsic evidence. (R. at 557). There was no limitation of the evidence in any manner.

Because the military judge did not set guardrails required by *Solomon*, the presentation of the cheek incident morphed into an attempted rape incident. (R. at 254).

The presentation of extrinsic act evidence was presented immediately after [REDACTED]. (R. 246-47). However, there were no tailored examinations. In fact, [REDACTED] testimony was more emotional than [REDACTED] testimony. (R. at 254-54). She also went beyond what was in her initial statements. The description of the entrance and ensuing conversation was much more violent and menacing. She went on to blurt out “I’m trying to get him off of me. As I am turning my head, he’s like kissing all over my face---Oh, God, I’m sorry.” (R. at 253). At that point, counsel assured her “It’s all right” and she apologized, “Jesus, I am so sorry.” (R. at 253).

After this dramatic pause, she went onto say appellant had gripped her and she was searching for her knife stating, “I am looking—I’m like--I—like ‘he’s really gonna try to rape me.’” (R. at 254). Later, the trial counsel tried to add fuel to the fire by asking “while he was kissing you. You mentioned to do this or do that. You mentioned for example, were those also sexual comments that he was making towards you?” (R. at 255). Although [REDACTED] was hesitant to commit to this, the implication was clear.

Instead of what the law enforcement found as an incident of appellant kissing [REDACTED] on the cheek on this day, she ended up testifying to him kissing her “all over” her face while saying “sexual comments” and pinning and gripping her to the point she was looking for a knife to defend herself from rape was what was testified at trial.

Therefore, her dramatic and emotional and hyperbolic testimony without any guard rails was extremely distracting to the fact finders. Given the discrepancy between [REDACTED] two statements, the military judge should have restricted the presentation to only that which was supported by probable cause, at the very least.

5. Temporal proximity was weak.

The temporal proximity finding of fact was incomplete and incorrect. The military judge corrected a portion of her factual finding, “the court referred to the accused and the alleged victim as co-workers when there was no evidence that they work together.” (R. at 29). Also, it was not the proper factor to consider under this prong. Therefore, the military judge should have found that the temporal proximity for events far apart from each other cannot not have a strong causal connection.

6. Frequency of acts analysis is not supported by the record.

The military judge's finding that "The uncharged misconduct occurred on multiple occasion within a short period of time which appears similar to the charged offenses" is patently wrong and not supported by the record. (App. Ex. XIV). Both appellant and [REDACTED] testified that this was the first and only sexual encounter between the two. (R. at 184;199;482).

7. The relationship between the parties was weak

The military judge "in favor of admission" because both victim "knew and worked with the accused." Although the military judge corrected this mistake, she did not change her ruling because they "knew each other prior to the alleged incident." (R. at 29). Since most Article 120 cases involve individuals who know each other, this factor was weak.

The military judge concluded that the probative value of the sexual offense against [REDACTED], "while not extremely high, is not substantially outweighed by the danger of unfair prejudice to the accused..." Based on foregoing, this conclusion was erroneous.

The military judge's ambiguous ruling, permitting allegations of Article 120 offenses allegedly occurring on 10-11 July 2014, created significant potential for

misuse. This decision, in turn, paved the way for the use of the attempted rape charge, further exacerbating the risk of prejudice.

B. The Government Made the Mil R. Evid. 413 Evidence Special Importance, and thus it had a Substantial Impact on the Outcome of the Case.

To determine if improper Mil. R. Evid. 413 evidence was harmless, military courts look to the strength of the rest of the case. *Solomon*, 72 M.J. at 182.

Here, the strength of the government's remaining case was weak. [REDACTED] admitted to deleting text messages, that indicated she had not been truthful, and admitted to not being able to explain the factual impossibility of the description of the incident where appellant supposedly pushed her into a mirror behind him while they were facing each other and where he pushed her on her chest. (R. at 684). The testimony that appellant suddenly got angry out of nowhere was incredible and was only corroborated [REDACTED] spin on her version of the event.

[REDACTED] was the one who asked for appellant's phone number and initiated conversations with him. (R. at 959). Appellant's last text to [REDACTED] confirms that she expressed her wish to meet him that day in person. (R. at 927). She also confirmed that they met in person earlier.

There were no eyewitnesses or independent corroboration of victim's testimony. The government spent unreasonable amount of time and attention to the handprint analysis just to concede at closing that this was not dispositive

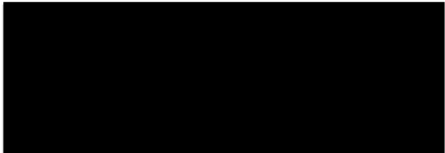
evidence. Moreover, the witness was not able to explain the mechanisms of the handprint transfer based on the configuration of the room and her description of what transpired. Finally, DNA evidence corroborated both parties' description of the events and the military judge admitted appellant's prior consistent statement regarding his description of the transference of the DNA on [REDACTED] nipple.

The quality of the government's Mil. R. Evid. 413 evidence was low. And when a military judge fails to consider this in her Mil. R. Evid. 403 analysis, she has erred. *See Solomon*, 72 M.J. at 181 (finding error when a military judge failed to consider that an alibi defense and an ultimate acquittal from the previous case greatly reduces the probative weight of the prior act). Here, much like in *Solomon*, the lack of probable cause for the kiss on the lip greatly reduced the strength of proof and probative value of the prior act. The courts often use unfounded rumors as far limits of Mil. R. Evid. 413 exceptions. Here, the allegations were investigated and were unfounded. Therefore, the strength and probative value were arguably lower than an uninvestigated rumor. Temporal proximity and dissimilarity of the acts also weaken the necessity of admission of such evidence. Most importantly, lack of specificity in the military judge's ruling caused the victim to add extraneous and prejudicial details.


Due to the inflammatory nature of the testimony and the government's argument, the evidence was highly likely considered by the members as much more than propensity evidence. The government argued in its opening, "The accused had her pressed against a wall and her arms were trapped between their two bodies. The accused ended up kissing her multiple times on the face and other parts of her body." (R. at 151). And in closing the government argued that appellant's sudden demeanor before sexual assault was same with [REDACTED] incident. (R. at 573). The initial description of kissing on the cheek turned into a violent incident of attempted rape by the time of the trial. The admission and presentation of this Mil. R. Evid. 413 evidence was erroneous, the government cannot prove that "the error did not have a substantial influence on the findings." *See Berry*, 61 M.J. at 98. In this "he said, she said" case, the [REDACTED] testimony improperly tipped the balance of the evidence. Therefore, the charge and its specifications must be set aside.

Conclusion

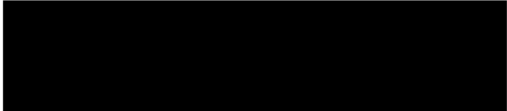
Wherefore, appellant respectfully asks this Honorable Court to set aside the findings and sentence.




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APPENDIX A

Appendix A: Matters Submitted Pursuant to *United States v. Grostefon*

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant, through appellate defense counsel, personally requests this court consider the following matter:

I. WHETHER DEFENSE COUNSEL WERE INEFFECTIVE FOR FAILING TO INTRODUCE CORROBORATING EVIDENCE FOR APPELLANT’S TESTIMONY.

Facts Relevant to Assignment of Error

On 7 June 2020 at 23:35, Hawaiian Emergency Medical Service (EMS) responders were able to record [REDACTED] initial description of the incident.

She said that she was forced around and that was when she “thinks” she struck her face (specifically pointing at forehead) on possibly a wall...again no visible trauma. She said that her bottom garments were pulled and there was brief penetration (*possibly just a few seconds*). She said that the assailant tried to turn her over (*to face each other*) and during that time, she was able to push/fight him off.

(Pros. Ex. 19 for ID)(emphasis added). [REDACTED] also wrote in his notes, “she pushed SSG Corrinar *d with her legs* which made him ball back and hit the mirror.” (Def. Ex. D for ID, pg. 2)(emphasis added).

At trial, [REDACTED] testified that right after she got pushed to the mirror, she opened the door and started screaming at appellant that he hurt her and he needed to leave. (R. at 192). She also testified, “I just collapsed right there at the door. I started crying, fixed my clothes, called- - I called 911 because I was scared that he

was going to come back.” (R. at 193). She testified that she made the phone call “No more than 10 seconds” after appellant’s departure. (R. at 194). However, the investigation records show that she called [REDACTED] first, and it was he who urged [REDACTED] to call 911. (Def. Ex. D for ID, pg. 1). He was a close friend and a mentor to whom she confided about her marital problems. (R. 239).

However, this evidence never came in. Instead, defense counsel adopted [REDACTED] version of the events and asked her, “You also reached out, I think after you called 911, you reached out to a friend of yours, correct?” (R. at 238).

The government called [REDACTED] who testified he met [REDACTED] at the ER. (R. at 464). He described [REDACTED] statement as “she had to go to a room, and he followed her into the room and pretty much overpowered her. Threw her against the mirror and raped her.” (R. at 465). Defense Counsel objected to hearsay and the military judge sustained the objection and struck the testimony. (R. at 468). Defense counsel was offered an opportunity to cross the witness but declined. (R. at 469).

The team of emergency medical personnel arrived soon after the 911 call. [REDACTED] testified that appellant approached him and inquired about why they were there. (R. at 274). At trial, [REDACTED] testified appellant reapproached him and stated he was involved, and he was essentially describing a consensual event. (R. at 274). However, [REDACTED] testimony excluded

certain parts of appellant's statement from this encounter. (Pros. Ex. 18 for ID). Appellant told [REDACTED] "...She approached me asking me to take her clothes off. She then said, 'I said stop, stop.' So I did." (Pros Ex. 18 for ID.). These portions of appellant's statements were never mentioned in the record. She tried to calm him down but was called to [REDACTED] room. (Pros Ex. 18 for ID.). Appellant had a panic attack and passed out after speaking to [REDACTED]. (R. at 512).

Standard of Review

Allegations of ineffective assistance of counsel are reviewed *de novo*. *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012); *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

Law

Whether "'counsel's omission served a strategic purpose is a pivotal point in *Strickland* and its progeny' and that this 'crucial distinction between strategic judgment calls and plain omissions has echoed in the judgments of this court.'"). *See Loyd v. Whitley*, 977 F.2d 149, 158 (5th Cir. 1992).

"It would be manifestly unfair to an accused to permit the prosecution to pick out the incriminating words in the statement or discussion and put them in evidence while at the same time excluding the remainder of the statement or conversation." *United States v. Harvey*, 8 U.S.C.M.A. 538, 546, 25 C.M.R. 42, 50

(1957). Consequently, Mil. R. Evid. 304(h) establishes, “[i]f only part of an alleged admission or confession is introduced against the accused, the defense, by cross examination may introduce the remaining portions of the statement.”

Argument

Appellant’s credibility was critically undermined by [REDACTED] statement that appellant’s description of the event sounded “consensual.” (R. at 274). However, [REDACTED] written statement contained a phrase, “She approached me asking me to take her clothes off.” (Pros. Ex. 18 for ID.). This statement corroborates appellant’s testimony that she was the aggressor and stated, “Should I take my clothes off, now?” (R. at 482). Instead, only [REDACTED] spin “It sounded consensual” and “I guess they had started getting intimate in some way,” were admitted at trial. (R. at 274). The defense counsel had a duty to clarify this statement or move to admit the entire statement under Mil. R. Evid. 304(h). This was a serious oversight.

This failure cannot be explained as a strategic choice due to extremely prejudicial nature of [REDACTED] interpretation. *Wiggins*, 539 U.S. at 526-27. Instead of corroborating appellant’s testimony, this testimony had the opposite effects seriously undermining appellant’s claim as a victim of [REDACTED] attacks. [REDACTED] further wrote that she told him not to speak to her anymore. She did not give appellant a chance to seek immediate help or make report and instead

went to tend [REDACTED] although she noticed that he was distressed. (R. at 274-75) (Pros. Ex. 18 for ID.).

The defense attorney conceded in his opening, “We know that he reported a sexual assault 2 days after it happened.” There was no mention of him approaching the law enforcement stating “She approached me, asking me take my clothes off” immediately after the assault. This also corroborates appellant’s testimony that he tried to report the assault to the law enforcement but was warned not to speak to them. However, this explanation was not given to the panel members, and they were led to believe appellant’s initial statement to [REDACTED] clearly described a consensual encounter. This negative spin made appellant lose all his credibility about his testimony about his alleged attempts of reporting the incident immediately.

In addition, the defense counsel unreasonably adopted [REDACTED] false statement about her immediate call to 911. The government spent significant time dwelling on and highlighting the fact that she called within 10 seconds of appellant’s departure. This fact greatly bolstered [REDACTED] claim for victimhood and made it harder to believe appellant’s claim that she was the aggressor. Undoubtedly, the immediate call to 911 made it unlikely that she was the aggressor and described immediacy of the call made her claim even more credible. However, CID records indicate that [REDACTED] was the first person she

called, and she had no intentions of reporting the events until [REDACTED] convinced her. (Def. Ex. D for ID, pg. 1). The counsel not only failed to cross [REDACTED] on this fact, but they also adopted her version of events. (R. at 238). Had they impeached her, this would have decreased [REDACTED] credibility and would have created possible motive to fabricate. Instead, this evidence became the crown jewel of the government's case. The government played the portion of her 911 call at its closing and powerfully argued that she *immediately* called 911 and "Listen for a motive to fabricate what the accused did to her. There is none." (R. at 575).

The defense also ignored Hawaii EMS's record of [REDACTED] description of events including an alternate version of event where "she was forced around and that was when she 'thinks' she struck her face." (Pros. Ex. 19 for ID).¹ The report continued, her bottom garments were pulled and was briefly penetrated "(possibly just a few seconds)." (Pros. Ex. 19 for ID). She then told them that he then tried to turn her over to face each other but she was able to push him off. *Id.* [REDACTED] also wrote in his note that [REDACTED] pushed him off with her legs.² (Def. Ex. D for

¹ This description matches [REDACTED] statement, that appellant "Threw her against the mirror and raped her."

² At trial, [REDACTED] maintained, either he hit the wall with mirror, or I didn't push him far enough for him to keep going backwards or I don't remember if he hit the wall or not. (R. at 230;233). During her SAFE examination [REDACTED] stated that when she pushed him, appellant "fell back to the wall. That's when he pushed me, and I hit the wall." (Pros. Ex. 6). The defense did not use these statements to impeach.

ID, pg. 2). Impeaching [REDACTED] with these version of events would have greatly reduced her credibility.

It was “manifestly unfair” for appellant to contest [REDACTED] allegations—when only the worst spin of his story made it into the record. *See Harvey*, 25 C.M.R. 42, 50 (establishing importance of Mil. R. Evid. 304(h)).

II. WHETHER CHARGE I WAS FACTUALLY SUFFICIENT.

This court must conduct a de novo review and may “affirm only such findings of guilty” as we find are “correct in law and fact.” Article 66(d), UCMJ; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency is, “whether after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this court is] convinced of [appellant’s] guilt beyond a reasonable doubt.” *Id.*, at 395.

Under court’s Article 66 mandate, this court cannot affirm the finding of guilty because there was not sufficient evidence to conclude that appellant penetrated [REDACTED] with his finger. [REDACTED] never described penetration by finger to EMS respondents. Furthermore, during her SAFE exam when she was explicitly asked, she answered, “I know he was moving around down there but not sure if he penetrated me with his finger.” (Pros. Ex. 6, pg. 5). However, at trial she testified he fingered her and “it hurt really bad.” (R. at 188). In crossing, she

admitted that she said to the SAFE examiner she wasn't sure about the fingering. If the pain was as bad as she was describing it is hard to believe she forgot about that at her SAFE exam shortly after the incident. Therefore, this court cannot find guilt beyond a reasonable doubt.

The other two remaining specifications were also factually insufficient. [REDACTED] account of events displayed inconsistencies. While she asserted lapses in memory for certain aspects, she provided additional details for other sections. Deleting portions of text messages and submitting an incomplete picture to CID raised concerns. Her assertion that the appellant unexpectedly reached out to her around 2100 to meet up seemed implausible considering her own depiction of their relationship. Furthermore, the appellant's message, "I'm done with my online setup. Do you want company now?" indicates an ongoing discussion about meeting up later, contradicting her claim. She also admitted that she met appellant earlier in the evening. (R. at 182).

Without unlawfully admitted Mil. R. Evid. 413 evidence, there was no explanation for why appellant would have pushed [REDACTED] on her shoulder all of a sudden. On cross, she admitted to telling CID that she didn't know how she laid down. (R. at 226). She also testified she doesn't know how appellant's shirt came off, "she must have closed her eyes." (R. at 190). Although she said she repeatedly stated, "No. I don't want this." throughout the incident (R. at 188), she

later testified she wasn't able to speak stating "I'm sure if I were able to speak and move, I would have screamed." (R. at 227). She was unsure about fingering and denied having been orally assaulted at her first SAFE exam. (Pros. Ex. 6).

However, at trial she was able to describe these events with numerous details. It is apparent the only reason she stayed consistent on some facts were because she reviewed her testimony but failed to memorize it, by her own admission. (R. at 216).

The prosecution failed to establish any discernible motive for appellant to assault a single "white female" in a military hotel equipped with CCTV and occupied by others, especially with the presence of barking dogs. The inconsistency and factual impossibility in her testimony regarding the initiation and conclusion of the events cast doubt on her credibility. Her repeated assertion of being pushed by the appellant while standing in front of a mirror, resulting in her face hitting the mirror, lacks coherence. Considering her use of multiple medications, hormonal factors, ongoing divorce, and depression, it is plausible that she may have misinterpreted the sequence of events. Therefore, this court cannot find appellant's guilt beyond a reasonable doubt based on these inconsistent and impossible factual basis.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court and Government Appellate Division on 1 February 2024.



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