IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**APPELLANT'S REPLY BRIEF ON SPECIFIED ISSUES**
v.	Docket No. ARMY 20220200
Specialist (E-4) **ESTEBAN OLAH PRADO** United States Army Appellant	Tried at Joint Base Lewis-McChord, Washington on 15 November 2021, 23 February 2022, 18-21 April 2022, before a general court-martial convened by the Commander, 7th Infantry Division, Lieutenant Colonel Jessica R. Conn, military judge, presiding.

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

Statement of the Case

On 20 December 2023, this court ordered briefing on two specified issues. Appellant filed his initial brief on 28 December 2023, and the government filed their brief on 10 January 2024. This response only addresses Specified Issue I. For Specified Issue II, appellant relies on his original Specified Issue Brief.

Panel 3

Specified Issue I

WHETHER THE MILITARY JUDGE ERRED BY ALLOWING THE MEMBERS TO CONSIDER PROSECUTION EXHIBIT 12 IN THEIR FINDINGS DELIBERATIONS.

The government acknowledges it carries the burden to rebut the presumption of prejudice which attaches when erroneous evidence goes back with the panel for deliberations. (Gov't Br. at 10) (citing *United States v. Straight,* 42 M.J. 244, 249–51 (C.A.A.F. 1995); *United States v. Bassler*, 651 F.2d 600, 603 (8th Cir. 1981)).

Further, the government assumes allowing the panel to consider Prosecution Exhibit 12 constituted plain error. (Gov't Br. at 11).

The government *only* contests whether the error caused prejudice. They make two interrelated arguments: (1) Prosecution Exhibit 12 only concerned Specification 8 of Charge I, and the panel was instructed Specification 8 was no longer before them, which was supported by the spillover instruction; and (2) the government had a strong case.

These arguments are both incorrect. First, the panel was told they were to no longer consider Specification 8 of Charge 1, but they were *never* told not to consider Prosecution Exhibit 12. The spillover instruction compounded this error because the instruction only concerned the *charged* offenses. Once a finding of not guilty was entered for Specification 8 it became uncharged, the instruction implied the conduct in Specification 8, and the evidence, was back before them for

consideration and it did nothing to alleviate the prejudicial impact of allowing Prosecution Exhibit 12 going back to the panel as evidence for deliberations on the remaining findings. Second, as the government acknowledges, it had a testimony alone case, which was weak without the pictures in Prosecution Exhibit 12.

A. Instructions

The two instructions in this case combined to ensure Prosecution Exhibit 12 was considered for an improper purpose.

1. The Instruction to Disregard Specification 8 Did Not Instruct on the Exhibit

Following the successful Rule for Courts-Martial (R.C.M) 917 motion for a finding of not guilty on Specification 8 of Charge I, the only instruction given by the military judge was to line out that specification on the findings worksheet since the panel "no longer [had] to deliberate on that one." (R. at 772; App. Ex. LIV). The military judge erred because she failed to provide the panel with further guidance, and yet the government argues the implied task was for the panel to also ignore Prosecution Exhibit 12. (Gov't Br. at 13).

Despite carrying the burden, the government offers no precedent to this Court which suggests a panel can follow the instructions of the military judge while simultaneously reading-in the implied task of disregarding underlying evidence. The government grasps at federal case law, which is easily distinguishable from the instant case. In *Sababu*, there was no error because the

jury acquitted the appellant of the charges related to the erroneous evidence. *United States v. Sababu*, 891 F.2d 1308, 1334 (7th Cir. 1989). That precedent is inapplicable, here, the *military judge* acquitted appellant of Specification 8 *before* it went back with the panel, who rather than acquitting, convicted on the remaining domestic violence specifications against [redacted] Therefore, this court should come to the opposite conclusion as the court in *Sababu*. Rather than determining that the panel must have disregarded Prosecution Exhibit 12, this Court must "presume that the panel members viewed and considered all the evidence presented to them, including Prosecution Exhibit 12." (Gov't Br. at 11)(citing, *United States v. Yohe,* 2015 CCA LEXIS 380, at *27 (A.F. Ct. Crim. App. 3 Sep. 2015)).

United States v. Kerr is similarly distinguishable. There, the panel was provided, a "carefully crafted and detailed limiting instruction" on how they should treat the evidence, not just the specification. *United States v. Kerr*, 51 M.J. 401, 406-07 (C.A.A.F. 1999) (holding erroneous admission of testimony was not prejudicial because it did not relate to the charged acts and the panel was instructed to only use the evidence to rebut a defense.). No such instruction—limiting or otherwise—informed the panel they were prohibited from considering Prosecution Exhibit 12 after appellant was found not guilty by the military judge of Specification 8.

2. The Spillover Instruction Was Only for Charged Conduct

This spillover instruction was created in recognition that when "similar *offenses* are tried at the same time, there is a possibility that the court members may use evidence relating to one offense to convict of *another offense*. Another danger is that the members could conclude that the accused has a propensity to commit crime." Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 7–17 (29 Feb. 20) (emphasis added).

The harm this instruction was meant to obviate was using one *charged* offense as proof of another *charged* offense. This is borne out in the language of the instruction, "[E]ach *offense* must stand on its own, and you must keep *the evidence of each offense separately*. Stated differently, if you find or believe that [appellant] is guilty of *one offense*, you may not use that finding or belief as a basis for inferring, assuming, or proving that he committed any *other offense*." *Id.* (emphasis added).

Other instructions, including the one addressing Mil. R. Evid. 404b for example, are meant to limit the harm of considering uncharged evidence as proof of a charged offense. Benchbook, para 7-13-1. This was not given in this case.

In this case, the spillover instruction did nothing to alleviate the problem with Prosecution Exhibit 12 as it related to Specification 8 of Charge I. Once appellant was acquitted of that offense the panel no longer had to keep Prosecution

Exhibit 12 separate. The guidance to keep each "*offense* seperat[e]" does not apply when there is no longer an offense on the charge sheet.

The timing of the delivery of the instruction also bears this out. The panel was given the spillover instruction *before* closing argument, and *before* the R.C.M. 917 motion. (R. at 768-72). By the time the exhibit went back with the panel, the intervening events meant the instruction no longer had any meaning as to Specification 8. Prosecution Exhibit 12 remained and was sent back with them, so the panel must have concluded the exhibit was relevant to the remaining specifications.

Again, the government can offer no caselaw to help carry their burden and buttress their contention the instructions limited the prejudice. They weakly offer *United States v. Bruscino*, 687 F.2d 938, 942 (7th Cir. 1982), evaluating if the district court judges evaluation that newspaper reports and a Bureau of Prisons report going back with the fact-finder caused prejudice. There, the trial court judge ruled in that case, so that court, unlike this one, was applying an abuse of discretion standard. Also, the court determined the erroneous materials were not prejudicial because they did not offer anything new, and to the extent they did, it didn't prove motive or intent. *Id.* This is a far cry from the instant case, where Prosecution Exhibit 12, if believed, corroborated with photographs that appellant committed domestic violence against [redacted] on other occasions. The prejudicial

effect is apparent on its face—it leads to the belief that he did it again, and thus [redacted]s claims should be believed because they are corroborated.

Once appellant was acquitted of Specification 8 and it was removed as an offense for the panel's consideration, without an uncharged misconduct Mil. R. Evid. 404b instruction, the guiderails were removed.

B. It is Unclear Prosecution Exhibit 12 Only Related to Specification 8

The government is confident it can somehow pierce the deliberative process of the panel, arguing the panel viewed and considered Prosecution Exhibit 12 *only* for Specification 8. (Gov't Br at 12). This ignores [redacted]'s testimony and the offense alleged in Specification 10 of Charge I. [redacted] alleged appellant slapped her in the face and, according to her, "[she] had a mark on [her] face." (R. at 569). The pictures in Prosecution Exhibit 12 present [redacted] in different locations—some in a car and some in a room, but with marks on her face. The panel improperly considered these pictures to prove, at a minimum, the slap specification and the mark it supposedly left.

C. Testimony Alone Case

The government states, "Given the absence of documentary or physical evidence, the sole basis of the evidence against appellant as it related to Specifications 9–11 of Charge I was [redacted]'s testimony. . . ." (Gov't Br. at 16). When evaluating the prejudicial effect of erroneously admitted evidence, military

courts routinely determine cases built on testimony alone are weak, and overturn because the court cannot be confident the erroneous evidence did not have a substantial impact on the findings. *See, e.g. United States v. Pablo*, 53 M.J. 356, 359 (C.A.A.F. 2000) (finding inadmissible hearsay improperly bolstered a testimony alone case); *United States v. Hendrix*, 76 M.J. 283, 292 (C.A.A.F. 2017)(holding improper voice identification evidence prejudicially bolstered a testimony alone case); *United States v. Hamilton*, No. ARMY 9600200, 2001 CCA LEXIS 451, at *33 (Army. Ct. Crim. App. Apr. 4, 2001) (mem. op.) (holding 404(b) evidence improperly bolstered a testimony alone case because the uncharged misconduct was more serious than the charged offenses).

Even among testimony alone cases, the instant case was especially weak. [redacted] was so inconsistent in the dates she alleged the incidents occurred that the government needed a variance instruction for each of her allegations. (R. at 709-10).

In fact, the entire basis for this court needing to specify issues was generated by the military judge denying the variance instruction for Specification 8 and ultimately granting the R.C.M. 917 motion. [redacted]'s credibility should have been diminished by the need for a variance instruction, instead it was impermissibly bolstered by the pictures.

Conclusion

The government cannot meet their burden to demonstrate Prosecution Exhibit 12, which was considered by the panel, did not impact the findings for Specifications 9-11 of Charge I. Those specifications must be set-aside, as well as the sentence related to Specifications 9-11 of Charge I—the reprimand and 120 days of confinement.

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I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on 18 January 2024

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