

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**REPLY BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20220117

Specialist (E-4)

JADE W. JOHNSON

United States Army

Appellant

Tried at Fort Hood, Texas, on
24 January, 14 February, and 9–12
March 2022, before a general
court-martial appointed by the
Commander, III Corps, Colonel
Matthew Fitzgerald and Lieutenant
Colonel Tiffany Pond, military judges,
presiding.

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

Assignments of Error

**I. WHETHER THE MILITARY JUDGE ERRED IN
ADMITTING HEARSAY.**

**II. WHETHER THE MILITARY JUDGE ERRED IN
ADMITTING A PORTION OF THE ALLEGED
VICTIM’S CID INTERVIEW.**

**III. WHETHER THE MILITARY JUDGE’S PANEL
INSTRUCTIONS WERE ERRONEOUS.**

Statement of the Case

Appellant filed his brief on 9 February 2023. The government filed its
response on 9 June 2023. This is appellant’s reply.

I. WHETHER THE MILITARY JUDGE ERRED IN ADMITTING HEARSAY.

Law and Argument

The government—like the military judge—focuses on the second prong of the excited utterance test to the neglect of the third prong. (Appellant’s Br. 10–13; R. at 474). It is not enough for an excited utterance to be a statement that relates to a startling event or that the declarant is under the stress of the event. The statement must also be spontaneous or impulsive—not the product of reflection and deliberation. *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003).

In its explanation of how ■ fulfilled its expected behavior of a sexual abuse victim, the government overlooks a key point in appellant’s argument: ■ took time to gather herself and consider her options. (Appellee’s Br. 10). Contrary to the government’s suggestion, appellant relies not just on the time that has passed, but on the choice made by ■ to spend time alone deliberating before telling her friends what happened. In minimizing this fact, the government suggests there is no evidence regarding what ■ reflected on. (Appellee’s Br. 10). But the record notes the weather was cold, (R. at 404, Appellee’s Br. 11, n.7), and ■ believed she was just assaulted. It is likely these are her reflections as she stands outside—alone in the cold—and deliberates on what to do.

Additionally, the government evinces key misunderstandings in its explanation of ■ actions. It states she immediately removed herself from the

situation, (Appellee’s Br. 10), but she went up to his room to retrieve her air pods before returning to where appellant was waiting at his car. (R. at 403).

The government states that “█ was unable to articulate what had happened to her beyond just being sexually assaulted.” (Appellee’s Br. 12). However, based on the record, it appears that she opted not to disclose further information or that Corporal [CPL] █ simply cannot recall the remainder of the conversation. (R. at 479). Moreover, the government suggests that █ “merely blurted out what had just happened to her,” (Appellee’s Br. 12), but the record reflects that CPL █ began the conversation by “asking her what happened.” (R. at 472).

The government disputes that the military judge found that █ collected herself, but it relies on a later clause in the same sentence as a favorable finding. (Appellee’s Br. 12, n.8). The government cannot have it both ways. If the military judge did not make a finding that █ collected herself—which he later mentions again (R. at 476)—then he likewise did not find that she was in a state of nervous excitement. This weighs against any deference this court should afford the military judge. *United States v. Alsobrooks*, ARMY 20200598, 2023 CCA LEXIS 47, at *12 (mem. op.) (noting the military judge’s failure to address the factor relating to spontaneity entitled him to less deference).

Regarding █ statements to Specialist [SPC] █ the government suggests that even if her conversation with SPC █ was a deliberation, it was not the

product of deliberation. (Appellee’s Br. 13). But the government forgets the earlier discussion with CPL [REDACTED] which produced [REDACTED] conversation with SPC [REDACTED]. After hearing [REDACTED] say she was sexually assaulted, CPL [REDACTED] “started laying out her options” and “told her she could go to the [military police [MPs]].” (R. at 479). Ultimately taking a middle road, [REDACTED] called her friend, SPC [REDACTED] who was an MP. (R. at 491–92). She deliberated before she spoke to CPL [REDACTED] and then—following further deliberation with CPL [REDACTED] called a friend in law enforcement to deliberate even further. Her statements were the product of reflection and deliberation.

Finally, regarding [REDACTED] statement to Staff Sergeant [SSG] [REDACTED], the government persists in focusing on the stress [REDACTED] was under and neglecting whether—even at that point—she had deliberated. (Appellee’s Br. 14). At that time, following her decision to collect herself in the cold, her conversation with CPL [REDACTED] and her phone call to her MP friend, any further statements to SSG [REDACTED] were plainly and obviously the product of reflection and deliberation. Therefore, the statements were not excited utterances, and the panel should not have heard them.

In arguing lack of prejudice, the government directs this court to an inapposite case regarding legal and factual sufficiency. (Appellee’s Br. 16); *United States v. Stanley*, 43 M.J. 671 (Army Ct. Crim. App. 1995). The

government is correct that, after hearing the improper evidence, the panel must have deemed ■ credible. (Appellee’s Br. 16). Because the panel would not have done so without the improper evidence—and even with the improper evidence the panel did not find her credible enough to convict appellant of sexual assault—the finding should be set aside.

II. WHETHER THE MILITARY JUDGE ERRED IN ADMITTING A PORTION OF THE ALLEGED VICTIM’S CID INTERVIEW.

Law and Argument

The military judge—and the government, at trial and on appeal—demonstrated a misunderstanding of Mil. R. Evid. 321. The government relies on the military judge’s acknowledgement that videos must be authenticated through testimony to bootstrap them into Mil. R. Evid. 321. (Appellee’s Br. 26). But just because a video must be authenticated through testimony does not mean the video itself qualifies as testimony. Under the rule, the government could have had a witness *testify* as to the identification process, results, and potentially even to ■ demeanor. But the plain language of the rule does not contemplate the use of other evidence besides testimony for out-of-court identifications. Mil. R. Evid. 321. Therefore, because he erroneously relied on Mil. R. Evid. 321, the military judge’s ruling is not entitled to deference and the video, under a *de novo* standard of review, does not survive Mil. R. Evid. 403.

In terms of admitting the entire video under Mil. R. Evid. 106, the government relies on the length of the video—which is shorter than seventy minutes—to deem it a waste of the panel’s time. (Appellee’s Br. 27–28). The government’s argument contemplates neither editing the video to remove anything superfluous, nor that ■ became frustrated and impatient because of the time she spent alone in the interview room. Finally, the government avers that the rules of evidence would have precluded it from admitting portions of the exchange between law enforcement and ■ and then faults appellant for failing to make this same effort. (Appellee’s Br. 28). Again, the government cannot have it both ways. The rule that entitled appellant to the entire video’s admission was Mil. R. Evid. 106. The military judge erred in deciding otherwise.

Finally, the government minimizes appellant’s request for the entire video as some “vague, unarticulated notion of fairness.” (Appellee’s Br. 28). This criticism is misplaced. The language of Mil. R. Evid. 106 specifically states that the standard is “fairness.” The military judge erred in admitting the video at all, and he erred further by refusing to admit the entire video.

III. WHETHER THE MILITARY JUDGE’S PANEL INSTRUCTIONS WERE ERRONEOUS.

A. Prior Inconsistent Statement

The government suggests that an improper foundation objection has the same effect as a hearsay objection. (Appellee’s Br. 35). But this is not true.

United States v. Reynoso, 66 M.J. 208, 210 (C.A.A.F. 2008) (“[I]t is not clear that the objection was intended to challenge the hearsay nature of the underlying figures. Given the numerous bases on which a foundational objection might be lodged, some further indication of the defense counsel’s specific concern was necessary.”). Here, the government objected on the grounds that appellant had not adequately confronted [REDACTED] which is an objection to foundation, not hearsay. (R. at 656). Therefore, once that foundation was laid and—following appellant recalling [REDACTED] and Special Agent [REDACTED]—the evidence was “admitted without objection” it may be considered for the truth of the matter asserted. Dep’t of Army, Pam. 27-9, Legal Services: Military Judges’ Benchbook, para. 7-11-1, n.2 (29 Feb. 2020) [Benchbook].

The government demonstrates its confusion by noting that appellant “during closing argument . . . plainly” referenced [REDACTED] prior statement. (Appellee’s Br. 36). But the excerpt the government cites just highlights, per the military judge’s instructions, [REDACTED] inconsistency. What appellant was actually entitled to was the substance of [REDACTED]—and therefore appellant’s—prior statements that in the bedroom appellant “apologized and said that he thought she did [want that] or words similar to that.” (R. at 673). It was also, then, entitled to argue how appellant’s words evinced his mistake of fact as to consent.

Finally, the government minimizes [REDACTED] denial of her prior statement, chalking it up to her faulty memory. (Appellee’s Br. 37). According to the record, when initially asked if appellant asked “why” when he got off the bed, [REDACTED] said “No.” (R. at 437). Later, during further questioning where the defense offers the possibility of memory issues, [REDACTED] makes several more denials. (R. at 438). And then again, after being recalled by the defense, when asked if she told law enforcement that appellant apologized and said he thought they were going to, [REDACTED] again responded with one word, “No.” (R. at 669). Only later did she claim she could not remember. (R. at 670). [REDACTED] denied her prior statement and—when appellant completed the impeachment through law enforcement—the government failed to object. Therefore, [REDACTED] statement to law enforcement about what appellant said in the bedroom should have been considered for the substance of the statement.

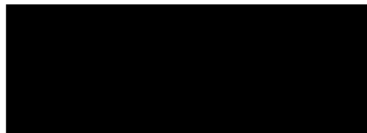
B. Mil. R. Evid. 412 Instruction

The military judge’s instruction to the panel—and the Benchbook—should read as follows: “This evidence should be considered by you on the issue of whether Mrs. [REDACTED] consented to these sexual acts *or touchings*, with which the accused is charged.” Alternatively, “acts” could have just been replaced with “conduct.” Any of these—or other—changes would have avoided the issue of the military judge carefully distinguishing a sexual act from a sexual contact, and then

providing an instruction regarding consent limited solely to sexual acts. The military judge's instructions were erroneous.

The government correctly observes that appellant acknowledged this instruction was in accordance with the Benchbook. (Appellee's Br. 38). However, while a failure to follow the Benchbook may be used as a sword against a military judge, it cannot be a shield for an otherwise erroneous instruction. *Cf. United States v. Hukill*, 76 M.J. 219, 222–23 (C.A.A.F. 2017) (reasoning that a “military judge cannot be faulted for applying the accepted law at the time” but acknowledging that interpretation of laws can change).

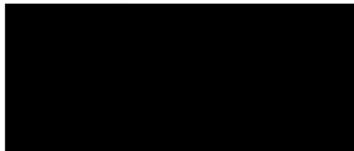
Given the above errors, and their individual and cumulative effect, appellant's convictions should be set aside.



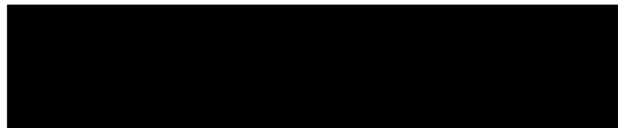
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I certify that copies of the foregoing were electronically submitted to the Court
and the Government Appellate Division on 15 June 2023.



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