

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**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^{1, 2}

**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.**

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 Given the nature of the assigned errors, appellant's prejudice argument is consolidated at the end of this brief.

Statement of the Case

On 11 March 2022, an enlisted panel sitting as a general court-martial convicted appellant, Specialist [SPC] Jade W. Johnson, contrary to his pleas, of two specifications of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920.³ (R. at 813; Charge Sheet). The next day, the military judge sentenced appellant to confinement for nine months and a bad-conduct discharge.⁴ (R. at 871). On 31 March 2022, the convening authority disapproved the adjudged forfeiture of pay. (Action). On 7 April 2022, the military judge entered Judgment. (Judgment). This court docketed appellant's case on 14 September 2022. (Referral and Designation of Counsel).

Facts

In April 2021, appellant and [REDACTED] then a civilian, met on Tinder.⁵ (R. at 386). Before ever meeting in person, appellant asked [REDACTED] for nude photographs, which [REDACTED] declined to send. (R. at 387). After messaging for a week, appellant asked [REDACTED] to meet in person. (R. at 389). At that time [REDACTED] was staying in the barracks with a friend, Corporal [CPL] [REDACTED]. (R. at 390). Before meeting, [REDACTED] told

³ The panel acquitted appellant of two specifications of sexual assault and one specification of abusive sexual contact. (R. at 813; Charge Sheet).

⁴ The military judge sentenced appellant as follows:

The Charge, Specification 2	4 months
The Charge, Specification 4	5 months

The military judge ordered all confinement to be served consecutively. (R. at 871).

⁵ According to [REDACTED] Tinder is "mostly used for dating . . ." (R. at 459).

appellant she was willing to cuddle but did not want to have sex. (Pros. Ex. 30, p. 5). After appellant invited her to spend the night, ■■■ responded, “lol yeah okay I’m down.” (R. at 416, 430, Pros. Ex. 30, p. 5).

On 20 April 2021, appellant picked up ■■■ and drove her to his house on post. (R. at 432). After arriving they went directly to appellant’s bedroom. (R. at 432). Appellant, while cuddling with ■■■ began kissing her. (R. at 435). She testified that she moved her head a little and told him no after he bit her lip. (R. at 436). Appellant then allegedly touched ■■■ breast over and under her bra. (R. at 401–02). Then ■■■ stated she wanted to leave and got up, which surprised appellant. (R. at 403, 437). He apologized and told ■■■ he thought she wanted it, and then he then drove her back to the barracks. (R. at 405, 673).

I. WHETHER THE MILITARY JUDGE ERRED IN ADMITTING HEARSAY.

Facts Relevant to Assignment of Error

While alone with appellant in his bedroom, ■■■ told appellant she wanted to leave. (R. at 402–03). She got up and walked out to appellant’s car. (R. at 403). She “wait[ed]” for appellant. (R. at 403). After appellant came down to the car, ■■■ remembered that she forgot her air pods in appellant’s room. (R. at 403). On her own, ■■■ returned upstairs and retrieved her air pods. (R. at 403). Then ■■■ returned to appellant’s car. (R. at 403).

She accepted a ride from appellant because it was cold, and [REDACTED] did not want to walk all the way back to the barracks. (R. at 404). She also believed all her [REDACTED] were already asleep because it was late and that “a lot of them had work in the morning.” (R. at 404, 465). In the car ride back to the barracks, appellant apologized to [REDACTED] (R. at 405). During the drive, [REDACTED] gazed out the window and did not say anything. (R. at 405).

Before going upstairs to CPL [REDACTED] room, [REDACTED] stood outside to “take a breather.” (R. at 441). This probably took a minute. (R. at 441).

A. Corporal [REDACTED] testimony

When CPL [REDACTED] saw [REDACTED] something “seemed off,” and he followed her into his room. (R. at 471). At the time, [REDACTED] was crying, which intensified throughout their conversation. (R. at 471–72). The government asked CPL [REDACTED] what [REDACTED] told him, and the defense objected on hearsay [REDACTED] (R. at 472). Although the military judge believed that [REDACTED] had collected herself, (R. at 474) he nevertheless overruled the objection and admitted the statement as an excited utterance. (R. at 478, 472). Corporal [REDACTED] testified that [REDACTED] told him she had been sexually assaulted. (R. at 478).

B. Specialist Steven Viau’s testimony

After speaking with CPL [REDACTED], [REDACTED] called her friend—SPC [REDACTED]—who she knew was a military police officer. (R. at 407, 479, 492). Specialist [REDACTED] testified

that [REDACTED] was crying and hard to understand at first, but she became easier to understand as the discussion progressed. (R. at 492). Again, the government asked him what [REDACTED] said. (R. at 492). Again, the defense objected that this question called for hearsay. (R. at 492). The military judge again overruled the objection. (R. at 493–97, 492). Specialist [REDACTED] then testified that [REDACTED] “insinuated” she may have been sexually assaulted. (R. at 497–98).

C. Staff Sergeant [REDACTED] testimony

After her conversation with CPL [REDACTED], [REDACTED] spent thirty to forty minutes in his room, which coincides with her conversation with SPC [REDACTED]. (R. at 479). At some point, [REDACTED] approached Staff Sergeant [SSG] [REDACTED], who was the charge of quarters (CQ) that evening. (R. at 500–01). He testified that [REDACTED] “seemed very normal” and she asked him if she was at the CQ. (R. at 501). When SSG [REDACTED] confirmed that she was, [REDACTED] told SSG [REDACTED] that she had been sexually assaulted and then broke down. (R. at 501). The defense did not object or question SSG [REDACTED].

Standard of Review

A military judge’s decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Bowen*, 76 M.J. 83, 87 (C.A.A.F. 2017). A military judge abuses his discretion when his findings of fact are clearly erroneous or the military judge erroneously applies the law. *Id.*

“Where an appellant has not preserved an objection to evidence by making a timely objection, that error will be forfeited in the absence of plain error.” *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007). “To demonstrate that relief is warranted under the plain error doctrine, an appellant must show that: (1) there was error; (2) the error was plain or obvious; and (3) the error was materially prejudicial to his substantial rights.” *Id.*

Law

The hearsay rule is a general rule of exclusion. Mil. R. Evid. 802. An excited utterance is an exception to this rule. Mil. R. Evid. 803(2). To determine whether a statement qualifies under this exception, the Court of Appeals for the Armed Forces [CAAF] adopted a three-part test. *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003). For a statement to qualify the following must be true: “(1) the statement relates to a startling event; (2) the declarant makes the statement while under the stress of excitement caused by the startling event; and (3) the statement is “spontaneous, excited or impulsive rather than the product of reflection and deliberation.”” *Id.* (quoting *United States v. Feltham*, 58 M.J. 470, 474 (C.A.A.F. 2003).

“As a general proposition, where a statement relating to a startling event does not immediately follow that event, there is a strong presumption against admissibility under M.R.E. 803(2).” *Donaldson*, 58 M.J. at 484 (citing *Jones*, 30

M.J. at 129). “The degree of excitement is not the key to admissibility. Rather it is the spontaneity of the statement.” *United States v. Fink*, 32 M.J. 987, 990 (A.C.M.R. 1991) (citing *United States v. Urbina*, 14 M.J. 962, 965 (A.C.M.R. 1982), *pet. denied*, 15 M.J. 380 (C.M.A. 1983)). “There is a difference between the stress or excitement caused by the original event and that caused by the trauma of having to retell what happened after initially calming down. Only the former is admissible as an excited utterance.” *United States v. Green*, 50 M.J. 835, 840 (Army Ct. Crim. App. 1999).

Argument

“The evidence elicited at trial demonstrated that [REDACTED] statements were] the product of reflection and thoughtful deliberation as opposed to being spontaneous and impulsive.” *United States v. Alsobrooks*, ARMY 20200598, 2023 CCA LEXIS 47, at *12 (Army Ct. Crim. App. 30 Jan. 2023) ([mem. op.](#)). Each later statement to each successive individual became less spontaneous every time the statement was made.

A. Statement to CPL [REDACTED]

During the alleged sexual assault, [REDACTED] was first able to articulate to appellant that she wanted to leave. Then, [REDACTED] left and waited for appellant by his car. There she had the time and the opportunity to reflect on what happened in appellant’s bedroom and ultimately remembered that her air pods were still there. Next, [REDACTED]

had the presence of mind to return to the scene of the alleged assault to retrieve her belongings. She voluntarily put herself not only back in appellant's house—but in his bedroom—by herself because of her desire to retrieve her missing air pods. Appellant remained at the car until she returned. Rather than operating spontaneously, ■■■ made careful, deliberate, and reasoned decisions.

After retrieving her air pods, ■■■ returned to and got in the car with appellant. (R. at 404). She testified she did not speak at all on the trip back to the barracks. (R. at 405). This offered ■■■ more opportunity to reflect and deliberate.

Next, ■■■ took some time to compose herself before entering the barracks. In her own words she “took a breather”—i.e. reflected and composed herself—before talking to CPL ■■■. Further, it was not a short breather of just a few seconds; ■■■ testified that she remained outside for a minute. (R. at 441).

Indeed, the military judge found that ■■■ had collected herself before her statement to CPL ■■■. (R. at 474). If collecting oneself does not present the opportunity and serve the purpose of reflecting and deliberating, then what could it mean? Just because ■■■ later became upset while talking to CPL ■■■ does not mean her statement was spontaneous. In fact, ■■■ own later actions demonstrate that the retelling of the story was still upsetting her even after she had calmed

down.⁶ The military judge recognized [REDACTED] collected herself, however, he found she was “in a state of nervous excitement.” (R. at 474). As noted in *Green*, people can often become emotional after composing themselves following startling events; [REDACTED] exhibited this. Nervous excitement does not equate to an excited utterance. The military judge abused his discretion in admitting this statement.

B. Statement to SPC [REDACTED]

When [REDACTED] made her statement to SPC [REDACTED], a military police officer, she had reflected and deliberated through statement to CPL [REDACTED], in addition to all the previously highlighted time and opportunities. The military judge erroneously admitted [REDACTED] statement to SPC [REDACTED] over defense objection.

C. Statement to SSG [REDACTED]

By the time the government called SSG [REDACTED] to bring in [REDACTED] hearsay, the defense had learned it was better off not drawing any more attention to evidence the military judge was going to erroneously admit. This proved prescient, as the president of the panel later quipped, “[y]our honor, the excited utterances behind me say press on” when asked if the panel wanted a dinner break. (R. at 544). Still, even without objection it was plain and obvious to the military

⁶ Staff Sergeant [REDACTED] testified when he first saw [REDACTED] she seemed perfectly normal. (R. at 501). Only after she told him she was sexually assaulted did she break down. (R. at 501). *Green*, 50 M.J. at 840 (finding the trauma caused by retelling a startling event does not qualify as an excited utterance).

judge that the government intended to elicit [REDACTED] statement that she was sexually assaulted and he erred in allowing it.

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

Facts Relevant to Assignment of Error

After her report the night of the alleged sexual assault, a military police officer questioned [REDACTED] (R. at 678–79). Using the military police officer's Snapchat and social media, [REDACTED] identified appellant. (R. at 681–82).

Several weeks later, on 11 May 2021, investigators again interviewed [REDACTED] (R. at 585; Pros. Ex. 25 for Identification). During that interview, [REDACTED] was frustrated. (Pros. Ex. 25 for Identification). Early in the interview, [REDACTED] identified appellant by name. (Pros. Ex. 25 for Identification at 14:15). Later, [REDACTED] explained to the investigator that she did not want to “relive” everything. (Pros. Ex. 25 for Identification at 28:25). In response to a question from the investigator, [REDACTED] snapped, “he put his hands inside me how is that a hard question for someone to comprehend.” (Pros. Ex. 25 for Identification at 31:55). While in the interview room by herself, [REDACTED] sat with her head in her hands. (Pros. Ex. 25 for Identification at 51:45).

Towards the end of the interview, [REDACTED] identified appellant in a photo array with two investigators present. (R. at 584, 605; Pros. Ex. 53). Both investigators

then left the room and [REDACTED] again became visibly upset, removed a mask she was wearing, and placed her head in her hands. (Pros. Ex.72). Both investigators returned to have [REDACTED] initial the photo she selected, and the original investigator remained behind and attempted to ask [REDACTED] more questions. However, [REDACTED] first asked—then demanded—to leave. (Pros. Ex. 25 for Identification at 1:07:00).

At trial, the government evinced its intent to introduce a snippet of [REDACTED] interview. (R. at 549). However, it only desired to introduce the identification portion of the recording for the purpose of the “clear, visceral reaction when [REDACTED] sees [appellant].” (R. at 548).

The military judge noted, “there’s a lot that’s subject to interpretation” in the recording, and he was concerned with having the panel sit through it. (R. at 551). The government placated his concern by offering only to play a short portion of the video. (R. at 552–53). However, when the defense argued the snippet bolstered [REDACTED] and brought up similar concerns about interpretation, the military judge believed it was “something [appellant could] handle in advocacy.” (R. at 553–55).

The military judge admitted the recording under Mil. R. Evid. 321, even after appellant later pointed out that the rule only discusses *testimony*. (R. at 562, 564, 575–76, 580–81). He noted that [REDACTED] could have reacted “to maybe the time, maybe the room temperature, maybe to this chair is not comfortable, maybe impatience or impertinence with CID, I don’t know.” (R. at 562). Even with the

myriad alternative sources of [REDACTED] reaction, the military judge believed there was a nexus between her reaction and her identification of appellant. (R. at 562).

After the military judge made his ruling, the defense asked in the alternative for the entire video to be admitted under Mil. R. Evid. 106. (R. at 564). The trial counsel stated, “I believe the defense has the ability to do that. I think we may have a discussion regarding our decision then as far as . . .” (R. at 564). The military judge interrupted and stated that, because the government was admitting the recording under Mil. R. Evid. 321, the rule of completeness would not apply—even though he later stated he did not watch the entire video. (R. at 564, 620). The military judge seemed particularly concerned, and twice noted, that permitting the defense to introduce the interview would somehow allow for the entire investigation to be admitted or other agents to testify. (R. at 567, 622). After a brief analysis under Mil. R. Evid. 403, the military judge admitted the video. (R. at 581–82, 622).

Standard of Review

If a military judge fails to adequately record an analysis under Mil. R. Evid. 403 his decision is entitled to less deference. *United States v. Brooks*, ARMY 20180567, 2020 CCA LEXIS 394, at *13 (Army Ct. Crim. App. 29 Oct. 2020) ([mem. op.](#)). If he conducts no analysis, his ruling receives no deference, and this court conducts its own balancing and examines the evidence anew. *Id.*

Law

“*Testimony* concerning a relevant out-of-court identification by any person is admissible . . . if such testimony is otherwise admissible under these rules.” Mil. R. Evid. 321(a) (emphasis added). This court applies the plain text of the law. “If uncertainty does not exist, . . . [t]he regulation then just means what it means—and the court must give it effect, as the court would any law.” *United States v. Bergdahl*, 80 M.J. 230, 235 (C.A.A.F. 2020) (citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (alterations in original)).

“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Mil. R. Evid. 401. “The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence.” Mil. R. Evid. 403.

“If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.” Mil. R. Evid. 106.

Argument

A. Admission of the video snippet

The plain language of Mil. R. Evid. 321(a) permits *testimony*. Here, the military judge used that rule to admit a video. This court's superior court recently held that a video with pictures and music is not an oral or written statement.

United States v. Edwards, 82 M.J. 239, 241 (C.A.A.F. 2022). Likewise, a video of an emotional reaction is not testimony. Admission of this video snippet under of Mil. R. Evid. 321 violated the plain language of the rule.

Because the military judge relied erroneously applied Mil. R. Evid. 321(a) he is entitled to no deference. When reviewed de novo, the video was inadmissible. It showed a reaction by [REDACTED] to a photo of her alleged assailant—whom she had already identified to law enforcement the night of the alleged assault—several weeks later. Were this to be deemed appropriate, law enforcement could take a break in the middle of every emotional interview, show an alleged victim a photo of an alleged assailant, and the government would be able to introduce a video of the reaction. This is not a standard that would be appropriate for every case, and it was inappropriate here.

B. Refusing to admit the entire video

Appellant's alternative request that the entire unedited video be admitted was not "speaking out of both sides of [his] mouth"⁷ but rather an attempt to advocate within the landscape the military judge's ruling created. (R. at 564, 611, 615). Once appellant lost his hearsay objection, the best possible outcome was admission of the entire video to put the snippet into context—that's the whole point of the rule of completeness. This request was reasonable. As the military judge correctly noted, "there's a lot that's subject to interpretation" in the snippet of the video. (R. at 551). Throughout the interview, not just when looking at appellant, ■■■ was upset, emotional, and agitated. (Pros. Ex. 25 for Identification). Contrary to what the government argued at trial, the video snippet did not speak for itself, and the military judge even noted other sources of possible distress. (R. at 551, 562).

The military judge told appellant he could address ■■■ reaction through advocacy but made him do it with one hand tied behind his back. Without evidence, appellant would be left appearing to speculate about other sources of frustration for ■■■ Had the entire video been introduced appellant could have noted that: (1) early on ■■■ made clear she did not want to relive everything; but

⁷ An ironic claim from the government, given at one point it believed the entire video could be admitted and only argued against this after hearing the military judge was disinclined to grant appellant's request. (R. at 564, 615).

the interviewer continued to ask questions; (2) well before the identification, ■ became so frustrated with the interviewer that she snapped at her; and (3) ■ was distraught throughout the entire interview. Without the complete recording appellant had nothing.

The government's argument at trial that the identification was a separate and discrete part of the interview is not persuasive. (R. at 614). The entire process occurred in one room, which ■ never left, and the original interviewer remained present any time another agent was in the room. Additionally, the original interviewing agent attempted to further question ■ after the identification. The interview only ended because ■ was so upset that she demanded to leave.

The military judge's broad concerns—about a video that he admittedly did not review in its entirety—were baseless. It is unclear why the military judge was concerned that admitting a single unedited video would lead to the entire law enforcement investigation and the testimony of every agent involved coming into evidence. (R. at 622). Here, the government wanted an emotional snippet of a video, presented out of context, to be introduced. The defense reasonably wanted to introduce an unedited version of the—only one hour long—video. That is the extent of any larger effects and in accordance with Mil. R. Evid. 106.

Finally, the military judge indicated that appellant may have had options for this video during his case-in-chief. (R. at 622). This is similarly unpersuasive. It

is unclear what evidentiary basis for admission appellant would have for admitting an out of court interview of the complaining witness. The military judge erred in admitting the video snippet at all, and he further erred by not admitting the video in its entirety.

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

This assigned error involves separate instructions related to two separate victims.

Facts Relevant to Assignment of Error

A. Prior Inconsistent Statement Instruction

During cross examination, the defense asked [REDACTED] if, after she told appellant she needed to leave, appellant looked shocked, asked why, and said, "I'm sorry, I thought we were going to do this." (R. at 438). She denied this occurred. (R. at 438). Later, during appellant's case in chief, the defense called Special Agent [SA] [REDACTED], who had previously testified for the government. (R. at 651). The defense began to ask SA [REDACTED] about [REDACTED] interview with law enforcement. (R. at 653). The government objected because appellant did not properly confront [REDACTED] with her law enforcement interview. (R. at 653, 655). The military judge took a break to look at the uncertified transcript and determined the government was correct but still overruled the objection as premature. (R. at 657–58, 659–60).

The defense recalled [REDACTED] and asked her about her interview with law enforcement, and she denied saying to law enforcement that appellant stated “Oh, okay. I’m sorry. I thought you wanted this. I thought we were going to.” (R. at 669). The defense again recalled SA [REDACTED] and asked how [REDACTED] described her interaction with appellant. (R. at 672–73). Special Agent [REDACTED] testified that [REDACTED] said appellant “apologized and said that he thought she did [want that] or words similar to that.” (R. at 673). The government did not object. (R. at 673).

During the discussion about instructions, the government requested a prior inconsistent statement instruction for [REDACTED] statement during her CID interview. (R. at 703). The defense counsel agreed. (R. at 704). The military judge told the panel it could only consider [REDACTED] prior statement in determining whether to believe her in-court testimony. (R. at 739–40).

Appellant leaned into a mistake of fact as to consent defense during his closing argument: “That’s not the behavior of somebody who just tried to force himself on her. That’s the behavior of somebody who realized [he] misread a situation, she wasn’t into what was going on and he stopped when he realized that.” (R. at 783). But [REDACTED] prior statement was not referenced.

B. Mil. R. Evid. 412 Instruction

The government charged appellant with sexually assaulting and abusively sexually contacting his wife, [REDACTED], during the same sequence of events one night in

late November of 2019. (Charge Sheet; R. at 300). The government alleged that appellant touched [REDACTED] breast and buttocks with his hand to gratify his sexual desire and that he penetrated her vulva with his finger to gratify his sexual desire, all without [REDACTED] consent. (Charge Sheet; R. at 300). Both alleged offenses appear to have occurred within moments of each other. (R. at 300). The defense noted—and introduced evidence—that [REDACTED] often initially indicated she did not want to have sex and then consented to having sex with appellant after he began touching her and after she told him no. (R. at 309, 337).

The military judge told the parties he intended to provide an instruction to the panel regarding Mil. R. Evid. 412(b)(2) for the alleged offenses regarding [REDACTED]. (R. at 692–93). He provided the following instruction:

Past sexual behavior of sex offense victim. Evidence has been introduced indicating that Mrs. [REDACTED] has engaged in past acts of consensual sexual behavior with the accused. This evidence should be considered by you on the issue of whether Mrs. [REDACTED] consented to these sexual acts with which the accused is charged.

(R. at 740–41; App. Ex. XXV, p. 14). The military judge also provided instructions which distinguished sexual assault—requiring a sexual act—from abusive sexual contact—requiring sexual contact. (R. at 727–28, 732; App. Ex. XXV, p. 1, 4).

The panel acquitted appellant of sexual assault but convicted him of abusive sexual contact of [REDACTED]. (Charge Sheet; R. at 813–14).

Standard of Review

This court recently reviewed a military judge's erroneous prior inconsistent statement instruction for plain error. *See United States v. Powell*, ARMY 20200006, 2022 CCA LEXIS 144, at *5 (Army Ct. Crim. App. 8 March 2022) ([mem. op.](#)). *But see United States v. Rodriguez*, ARMY 20210213, 2022 CCA LEXIS 744 (Army Ct. Crim. App. 30 Dec. 2022) ([mem. op.](#)) (finding the issue of an erroneous instruction as to the elements of an offense waived in the absence of an objection but choosing to pierce waiver and award relief) *and United States v. Davis*, 79 M.J. 329, 332 (C.A.A.F. 2020) (holding an appellant waived a claim regarding instructions by not objecting at trial).

Law

“A military judge has a ‘duty to provide appropriate legal guidelines to assist the jury in its deliberations.’” *United States v. Killion*, 75 M.J. 209, 213 (C.A.A.F. 2016) (quoting *United States v. Wolford*, 62 M.J. 418, 419 (C.A.A.F. 2006). “Court members are presumed to follow the military judge’s instructions.” *United States v. Matthews*, 53 M.J. 465, 471 (C.A.A.F. 2000).

A. Prior Inconsistent Statement Instruction

“Prior inconsistent statements are generally only admissible for impeachment purposes but ‘may be considered [as substantive evidence] for any relevant purpose’ when ‘admitted without objection.’” *Id.* At *5–6 (quoting Dep’t

of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 7-11-1, n.2 (10 Sep. 2014) [Benchbook].

In *Powell*, the parties did not object to prior inconsistent statements at the time they were introduced. 2022 CCA LEXIS, at *4. The government requested an instruction regarding prior inconsistent statements. *Id.* The defense did not object “to the court giving the general instruction,” but did not want the court to comment on the credibility of each witness. *Id.* Without further objection from either party, the military judge instructed the panel that prior statements could only be considered when evaluating a witnesses in-court testimony. *Id.* At *5.

This court first determined a debate over whether the defense preserved a non-waived error for appeal to not be relevant because, “the military judge committed plain error by providing, in contrast to a correct legal instruction, a 360 degree completely erroneous instruction.” *Id.* Even though the government was the “genesis for the instructional error,” the “military judge possessed a duty to provide appropriate legal instructions to aid the panel in deliberations.” *Id.* At *7. Indeed, the appropriate instruction was in the Benchbook. *Id.*

In evaluating prejudice, this court noted the corroborating evidence “was not strong” and it was more of a “she said/he said case.” *Id.* At *8. While this court noted a medical examination corroborated a sexual act, the alleged victim’s “trial testimony as to her non-consent, and incapacitation, was undoubtedly the lynchpin

in securing appellant’s conviction.” *Id.* At 9. It therefore found “the erroneous instruction prejudiced appellant” and set aside the findings. *Id.* At 10.

B. Mil. R. Evid. 412 Instruction

Military Rule of Evidence 412 generally makes evidence of an alleged victim’s past sexual behavior inadmissible. However, the past behavior may be admissible if it is offered by an appellant to prove consent. Mil. R. Evid.

412(b)(2). If that exception applies, it may be used in any proceeding involving an alleged sexual offense for someone accused of sexual misconduct. Mil. R. Evid.

412(a), (b)(2). Abusive sexual contact is a sexual contact committed that would have been a sexual assault if the sexual contact had been a sexual act. 10 U.S.C. § 920(d).

Argument

A. Prior Inconsistent Statement Instruction

Appellant’s belief that ■ consented was a central tenet of his defense. His statement—made immediately after ■ said she wanted to leave—that he thought ■ “wanted it” was crucial. (R. at 673). The government did not object to this statement at the time appellant offered it and the panel should have been able to consider his statement for “any relevant purpose.” *Powell*, 2022 CCA LEXIS, at *4 (quoting Benchbook, para. 7-11-1, n.2). However, at the government’s request—just like in *Powell*—the military judge hamstrung the panel’s ability to do

this by informing them they could *only* consider the information for how it affected [REDACTED] credibility. *Id.* At *7; (R. at 739–40). This faulty instruction carried even more weight because it was immediately followed by an instruction related to [REDACTED], where the panel was told they could consider her prior consistent statements for “the truth of the matters expressed therein.” (R. at 740). The military judge should have told the panel they could consider the statement in deciding whether to believe [REDACTED] in-court testimony *and* along with other evidence in the case. Benchbook, para. 7-11-1, n.2 (29 Feb. 2020).

B. Mil. R. Evid. 412 Instruction

The military judge’s instruction, admittedly in accordance with the Benchbook, regarding sexual encounters improperly limited the panel’s ability to consider her possible consent only as to the charge of sexual assault. This evidence—and argument—are so highly regulated that the President requires specific exceptions for it to even be discussed. Here, the evidence was found to be admissible and relevant in appellant’s case. However, the military judge told the panel to only consider this evidence for the sexual assault charge. This was error.

Appellant satisfied the plain language of Mil. R. Evid. 412, which permits evidence—if it meets an exception—to be used “in any proceeding involving an alleged sexual offense.” Therefore, the evidence of [REDACTED] past behavior was relevant to both specifications. Appellant was entitled to receive an instruction that

properly informed the panel the extent to which they could consider this relevant evidence. The military judge did not provide one.

The panel's findings indicate it mattered. Appellant was acquitted of sexual assault but convicted of this abusive sexual contact. Both specifications: (1) hinged entirely on [REDACTED] credibility; (2) centered around one night, and possibly just several [REDACTED] (3) share the same corroborating evidence from [REDACTED] family; (4) involve appellant touching [REDACTED] without her consent; and (5) the exact same *mens rea* by appellant. However, per the military judge's instructions, the panel could consider [REDACTED] past sexual behavior for the sexual assault specification but not for the abusive sexual contact specification.

Finally, the military judge improperly called [REDACTED] and [REDACTED] sex offense victims both in his verbal instruction and in the header of the written instructions he provided to the panel. (R. at 740; App. Ex. XXV, p. 14). He should have omitted the heading or included the word "alleged" to maintain appellant's presumption of innocence.

Even if this court determines that appellant waived his instructional claims, it should pierce waiver in the interest of only approving a finding that "should be approved." *See generally* Article 66, UCMJ; *United States v. Chin*, 75 M.J. 220 (C.A.A.F. 2016). Appellant's attorneys had no strategic reason for wanting erroneous instructions as opposed to correct and complete instructions. The

correct instruction would have still told the panel that [REDACTED] inconsistent statement could be considered for her credibility but also for any relevant purpose.

Appellant's attorney overlooked the proper instruction, which appeared lower in the Benchbook, and did not realize the military judge's instruction was legally incorrect. Likewise with the erroneous Mil. R. Evid. 412 instructions, this was not an intentional relinquishment of a known right, but a mistake.

Prejudice

“A finding or sentence of 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.” Article 59 (a), UCMJ. In determining the prejudice from an erroneous admission of evidence, the court must weigh: (1) the strength of the government's case; (2) the strength of the defense's case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019).

Each error independently contributed to appellant's convictions. The government's case was weak and relied entirely on the credibility of the alleged victims (whom it impermissibly bolstered). The government presented no eyewitnesses, no DNA, and a mere acknowledgement by appellant that he misread the situation. To convict appellant, the panel members had to find both alleged victims credible. They believed them enough to convict appellant on two of the

five specifications, but appellant's acquittal on the rest shows that the margin was razor-thin.

Appellant's case was, on the other hand, strong. Appellant elicited [REDACTED] motive to fabricate and the inconsistencies in her and [REDACTED] prior statements. While providing her statement to law enforcement, [REDACTED] joked about how dumb appellant was and wished she could see the look on his face when he learned of her allegations. (R. at 343–44). For both alleged victims, appellant also presented significant evidence of mistake of fact as to consent. His attorneys drew out that consensual sexual intercourse between appellant and [REDACTED] often began the way she alleged he abusively sexually contacted her. His attorneys also highlighted that, when [REDACTED] said she wanted to leave, appellant was genuinely surprised. Appellant presented more than sufficient evidence, in the absence of each error, to prevent the panel from finding guilt beyond a reasonable doubt.

A. Hearsay Statements

An alleged victim is entitled to tell her story at a court-martial. However, barring an exception, an alleged victim is permitted to tell her story once. Because of the military judge's errors, [REDACTED] told her story to the panel *four separate times*. The materiality and quality of this impermissible evidence was strong. Three individuals, with no interest in the case, repeated [REDACTED] allegation of sexual assault to the panel members. Their testimony on the stand was as compelling as [REDACTED]

B. Video Snippet

The introduction of the video snippet impermissibly bolstered [REDACTED] testimony. Its edited form only showed that she was distressed upon seeing appellant. The panel had the ability to take this very short video back into the deliberation room and watch it over and over and over. The materiality and quality of a video, of good quality itself, is high. It's ability to be reviewed multiple times makes its materiality and quality higher.

Likewise, the panel's inability to see the entire video deprived them of evidence of high quality and materiality. The unedited video showed [REDACTED] tone and demeanor throughout the interview. It would have allowed the panel to interpret that [REDACTED] frustration was not from a singular viewing of appellant—whom she had already identified—but from the process of being essentially held by law enforcement against her will. It would have showed a scared, frustrated young woman who just wanted to be done, but law enforcement kept asking for more.

C. Prior Inconsistent Statement Instruction

The materiality and quality of appellant's statement to [REDACTED] admitted through SA SN, was high. As [REDACTED] testified, it was not something appellant said to coerce her. (R. at 439). Rather, it was a statement of genuine and immediate surprise. Like an excited utterance, his statement, made at the exact time she expressed lack

of consent, had a high indicium of reliability and, had the panel been properly instructed, his defense of mistake of fact would have prevailed.

D. Mil. R. Evid. 412 Instruction

Finally, the materiality and quality of the military judge's erroneous Mil. R. Evid. 412 instruction was high. The panel members considered, for a specification of which it acquitted appellant, his past sexual history with his wife. But they were instructed they could not consider that evidence for the abusive sexual contact specification. The weight that the President believes a panel may give past sexual history is evident in the strict limitations in the rule. Appellant satisfied the rule, received the benefit of the instruction for the sexual assault specification (in both the instruction and the acquittal), but was deprived of it for the abusive sexual contact specification. With this instruction properly provided the panel would have acquitted appellant of the abusive sexual contact of [REDACTED].

E. Cumulative Error

Each error viewed individually prejudiced appellant. However, if this court disagrees, it reviews the effect of preserved and plain errors⁸ de novo and sets aside


⁸ If this court determines that appellant waived his claim of instructional errors, and declines to pierce waiver, it should still consider the errors as part of its cumulative error analysis under ineffective assistance of counsel (raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982)). A requirement to consider erroneous decisions at trial by an appellant's counsel with no possible strategic basis (even without prejudice) as part of the overall cumulative error analysis is

findings if the cumulative errors denied appellant a fair trial. *United States v. Pope*, 69 M.J. 328, 334 (C.A.A.F. 2011). Taken as a whole, the numerous evidentiary and instructional errors made appellant’s trial fundamentally unfair. In a “she said/he said case,” *Powell*, 2022 CCA LEXIS, at *8, appellant suffered the errors of: (1) three witnesses testifying to inadmissible hearsay;⁹ (2) the introduction of a misleading snippet of a video that the government, in whiplash fashion, successfully argued could not be viewed in its entirety; (3) the panel being prohibited from considering appellant’s contemporaneous statement of perceived consent; (4) the panel being told they could only consider [REDACTED] prior sexual history as to consent for a specification of which they acquitted appellant; and (5) the military judge eroding appellant’s presumption of innocence.


consistent with the requirement in *Pope* to consider both preserved and unpreserved errors (without independent prejudice) together. 69 M.J. at 334.

⁹ If this court is unwilling to find plain error or deficient performance with the introduction of hearsay through SSG [REDACTED] it should still address the error. To decline to do so would set a precedent that a judge’s repeated errors—reasonably acquiesced to by counsel following previous objections and the panel’s presence—could never be reviewed.


Given the multitude of issues, appellant's convictions should be set aside.




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I certify that a copy of the foregoing was electronically submitted to the
Army Court and the Government Appellate Division on 9 February 2023.



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