IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,	Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.		Docket No. ARMY 20220347
Specialist (E-4) **RAYMOND A. PRICE,** United States Army,	Appellant	Tried at Camp Humphreys, Korea, on 1 February, 20 May, and 28 June - 3 July 2022, before a general court-martial convened by the Commander, Eighth Army, Colonel Christopher E. Martin and Colonel Matthew S. Fitzgerald, Military Judges, presiding.

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

Assignment of Error I[1]

APPELLANT'S CONVICTION WAS NOT SUPPORTED BY FACTUALLY SUFFICIENT EVIDENCE.

Assignment of Error II

THE MILITARY JUDGE'S DENIAL OF A DIGITAL FORENSIC EXPERT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS.

[1] The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits they lack merit. Should this Court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

Assignment of Error III

THE MILITARY JUDGE'S RULINGS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM.

Assignment of Error IV

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Statement of the Case

On 3 July 2022, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of assault with an unloaded firearm and six specifications of assault consummated by a battery in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928 [UCMJ].[2] (Charge Sheet; Statement of Trial Results [STR]; R. at 1455). The panel sentenced appellant to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for three years, and a dishonorable discharge. (STR; R. at 1617). On 28 July 2022, the convening authority approved appellant's requests for deferment of automatic forfeitures and suspension of adjudged forfeitures and took no other action on the findings or sentence. (Action). On 8 August 2022, the military judge entered judgment. (Judgment).

Statement of Facts

Appellant and his first wife, Specialist [SPC] [redacted], began dating from afar after he reached out to her through social media in February 2016 while she was a

[2] Appellant's conviction for assault with an unloaded firearm was a lesser-included offense of the charged assault with a loaded firearm. (STR; R. at 1455). Appellant was acquitted of one specification of assault by strangulation, three specifications of assault consummated by a battery, and one specification of extra-marital sexual conduct. (STR; R. at 1455).

high school senior and he was stationed at Camp Casey, Korea.[3] (R. at 571–72). The couple did not meet in person until the summer of 2016, at which time appellant proposed to SPC [redacted]. (R. at 572–73). Appellant and SPC [redacted] married in February of 2017 and moved in together at Fort Bragg, North Carolina[4] on 1 May of that year. (R. at 576, 579).

The couple fell into a routine where appellant would return from work, they would eat dinner, and then play video games. (R. at 582). When playing the two would sit next to each other, shoulder to shoulder, both looking at their own computer. (R. at 605). In September 2017 SPC [redacted] "didn't play [the game] as well as [appellant] wanted" so he reached over and "backhanded" her in the face. (R. at 603). Specialist [redacted] understood he did this "to show he wants me to know that he didn't like what I just did, and so he punished me." (R. at 603). Due to the assault SPC [redacted] wanted to stop playing the game but this too angered appellant and he punched her in the thigh. (R. at 603). Specialist [redacted] took a photo of herself crying with "a busted lip" after the incident. (Pros. Ex. 4; R. at 602). She also

[3] [redacted] was not in the Army at the time of meeting appellant to the offenses, but subsequently joined and achieved the rank of specialist by the time of trial. (R. at 861).

[4] At that time, the installation was named Fort Bragg. Effective 2 June 2023, the installation was officially redesignated as Fort Liberty: https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN38392-AGO_2023-13-000-WEB-1.pdf.

took a series of photos showing her thigh immediately after the attack and a bruise which formed a "couple days later." (Pros. Ex. 5; R. at 604).

In an attempt to improve their relationship the couple went on a "Strong Bonds" marriage retreat in early February 2018. (R. at 607). Although appellant was "adamant against doing any sort counseling or any sort of therapy," SPC [redacted] believed this chaplain-led retreat could help them "learn and . . . fix it because things were so bad, so bad." (R. at 607). In order to attend the retreat appellant and SPC [redacted] had to board their dog. (R. at 608). When they went to retrieve their dog the boarding company would not accept a coupon, causing them to be charged fifty dollars. (R. at 608). Upon returning to the car appellant became enraged, yelled at SPC [redacted], and proceeded to punch her in the face "as hard as he could."[5] (R. at 608–09). In May 2018 appellant again backhanded SPC [redacted]'s face "just like normal" when she upset him during their video game playing session. (R. at 613). However, this time SPC [redacted]'s nose began to bleed so she got up and went to the bedroom. (R. at 613). Appellant followed her into the bedroom, looked her "dead in the eyes," laughed, and punched her again in the face. (R. at 613). Specialist [redacted] tried to get away but appellant again followed, this time with his gun. (R. at

[5] At trial SPC [redacted] testified: "[Appellant] is so mad. He's so mad, he starts yelling at me, and I'm apologizing, I'm so sorry, like, it's just fifty dollars. I'll give you fifty dollars. And he's sitting in the passenger seat, and he reaches over and he punches me in the face, because I wasted fifty dollars to board the stupid dog, he said." (R. at 608).

613–14). Appellant then cornered SPC [redacted] as she cowered on the ground attempting to make herself "as small as possible" while pleading with him to stop yelling at her and not to hurt her. (R. at 614). Appellant, "yelling and screaming at [her], telling [her] how much he hates [her] . . . [took] the gun, and he put[] it to the side of [SPC [redacted]'s] head . . . he takes his other hand and holds [her] head, and he's on top" of her while "telling [her] how much he wants to kill [her] and that he could if he wanted to."[6] (R. at 614). Specialist [redacted] then went limp believing that appellant was going to kill her. (R. at 614). After the incident SPC [redacted] took a picture of herself crying with an injured mouth. (Pros. Ex. 6; R. at 616).

Specialist [redacted] informed appellant of her desire to divorce in July 2018. (R. at 621, 640; Pros. Ex. 11). During and after their relationship SPC [redacted] challenged appellant as to why he abused her. (Pros. Exs. 47, 49, 50, 51, 58). In those text exchanges appellant either attempted to justify his actions or apologized for them, but never denied the abuse. (Pros. Exs. 47, 49, 50, 51, 58). At trial, appellant specifically admitted to sending the messages. (R. at 1228–39). The divorce was finalized on 1 November 2018. (R. at 741). After joining the Army and receiving a Sexual Harassment and Assault Response Program (SHARP) brief, SPC [redacted] reported on 16 January 2020 the abuse she suffered. (R. at 862; 971–72).

[6] The weapon is referred to interchangeably as a gun, firearm, or handgun throughout trial.

Appellant met his second wife, [redacted], on a dating application in August 2018.[7] (R. at 377). Appellant proposed to [redacted] on 25 August 2018 and they were married on 10 November 2018. (R. at 377). Around the time of the wedding, [redacted] was contacted by SPC [redacted], but "brushed [her] off." (R. at 379). After living with appellant's mother for some time, [redacted] joined appellant, again stationed in Korea, in early 2019. (R. at 382). The relationship continued to progress quickly when [redacted] became pregnant in April 2019. (R. at 384).

In May 2019 appellant and [redacted] had an argument that escalated to physical abuse. (R. at 387). While arguing in the bedroom, [redacted] backed herself into a corner where appellant "raised his hand and slapped [her] across the face." (R. at 387). The "pretty forceful slap" stung "for a while after" and left a red mark that [redacted] had to hide with makeup. (R. at 388). [redacted] quickly called appellant's chain of command and reported the abuse. (R. at 387). Appellant then yelled at [redacted] for calling his chain of command. (R. at 389).

In response to this abuse, and feeling trapped, [redacted] reached out to SPC [redacted]. (R. at 390). Specialist [redacted] gave [redacted] advice on how to get out of Korea and resources she may be able to use. (R. at 390; Pros. Ex. 59). [redacted] did not follow

[7] [redacted] is listed as "[redacted]" on the charge sheet and referred to by both names at trial, prior to counsel being instructed to call her by her maiden name to avoid confusion. (R. at 1038). Appellant uses [redacted] in his brief and therefore, to avoid confusion, the government will do the same here.

through with this advice because she and appellant "worked it out." (R. at 390). However, the abuse continued when, in June of 2019, appellant and [redacted] again got into an argument. (R. at 391). While [redacted] was "crying inconsolably" appellant forced her on to their bed, hold her down, and yelled at her to calm down. (R. at 391). [redacted] was able to get out from under him and attempted to flee the room. (R. at 391). However, appellant grabbed her ponytail, yanked her back to the bed, got on top of her, and again yelled that she needed to calm down. (R. at 391–92). The hair pull was so violent it caused [redacted] to lose balance and fall to the ground. (R. at 392). The pain from the assault lasted for "an hour or two" after the assault. (R. at 393). [redacted] left Korea, and the relationship, in September 2019. (R. at 417). At trial appellant testified and denied all allegations against him. (R. at 1169–1263).

Additional facts are incorporated below.

Assignment of Error I

APPELLANT'S CONVICTION WAS NOT SUPPORTED BY FACTUALLY SUFFICIENT EVIDENCE.

Standard of Review

Courts of Criminal Appeals review factual sufficiency of a conviction de novo. *United States v. Rosario*, 76 M.J. 114 (C.A.A.F. 2017) (citation omitted).

Law

This court reviews factual sufficiency of court-martial convictions and only affirms findings of guilty that are correct in fact and based on the record should be

approved. Article 66(d)(1), UCMJ; 10 U.S.C. § 866(d).[8] "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." *United States v. Craion*, 64 M.J. 531, 534 (Army Ct. Crim. App. 2006) (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). To sustain appellant's conviction, a court of criminal appeals "must find that the government has proven all essential elements and, taken together as a whole, the parcels of proof credibly and coherently demonstrate that appellant is guilty beyond a reasonable doubt." *United States v. Gilchrist*, 61 M.J. 785, 793 (Army Ct. Crim. App. 2005). Under this analysis, "reasonable doubt . . . does not mean the evidence must be free from conflict." *United States v. Cardenas*, 2019 CCA LEXIS 479, ARMY 20180416 (Army Ct. Crim. App. 27 Nov. 2019) (mem. op.) at *7.A court applies "neither a presumption of innocence nor a presumption of guilt," but "must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). While weighing the evidence, a reviewing court

[8] All of the specifications in this case predate the change to the Article 66, UCMJ standard for factual sufficiency review, effective 1 January 2021 via by the National Defense Authorization Act for Fiscal Year 2021. Pub. L. No. 116-283, § 542(b), 134 Stat. 3611–12.

must be mindful that it did not personally observe and hear the witnesses. UCMJ art. 66; *Turner*, 25 M.J. at 325.

Factfinders "are expected to use their common sense in assessing the credibility of testimony as well as other evidence presented at trial." *United States v. Frey*, 73 M.J. 245, 250 (C.A.A.F. 2014). "In weighing and evaluating the evidence, [the factfinder is] expected to use [his] own common sense and [his] knowledge of human nature and the ways of the world. In light of all the circumstances in the case, [the factfinder] should consider the inherent probability or improbability of the evidence." Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 2-5-12 (29 February 2020) [Benchbook].

"One risk of testifying, recognized long ago, is that the trier of fact may disbelieve the accused's testimony and then use the accused's statements as substantive evidence of guilt 'in connection with all the other circumstances of the case.'" *United States v. Nicola*, 78 M.J. 223, 227 (C.A.A.F. 2019) (citing *Wilson v. United States*, 162 U.S. 613, 620-21 (1896)). As the Supreme Court has said, "False testimony, knowingly and purposely invoked by [the] defendant, [may] be used against him." *Id.* (quoting *Allen v. United States*, 164 U.S. 492, 500 (1896)).

Argument

This court can be confident in affirming the convictions as they are factually sufficient. Both SPC [redacted] and [redacted] testified to the abuse the suffered at appellant's

hands, and did so in such a way as to convince the panel of their credibility. A panel utilizing even a small degree of common sense would see that the evidence in the case, such as photographs and messages, served to corroborate the victims' testimony. *See Frey*, 73 M.J. at 250. Conversely, appellant's explanation of the text messages he sent to SPC [redacted] defies believability and impeaches his own credibility. *See Nicola*, 78 M.J. at 227. This court's independent review of the evidence, making allowances for not having personally observed the witnesses, will show beyond a reasonable doubt that appellant's convictions are factually sufficient. *See Craion*, 64 M.J. at 534 (citing *Turner*, 25 M.J. at 325).

A. Specialist [redacted]'s testimony was both credible and corroborated.

Specialist [redacted] testified credibly over the course of two days. (R. at 570–1018). She explained in detail how appellant, angry with her video game playing, struck her with the back of his hand. (R. at 602–03, 605–06). She further explained that when she moved to leave appellant again became violent, punching her thigh and leaving a bruise. (R. at 603, 605–06; Pros. Ex. 5). Specialist [redacted] testified how, although she was optimistic for the relationship after attending a retreat, appellant became irate over the cost of boarding their dog. (R. at 608–09). She explained to the panel that although she apologized for the cost and offered to pay, appellant punched her as hard as he could "because [she] wasted fifty dollars to board the stupid dog." (R. at 608–09). Finally, SPC [redacted] testified in detail how

another video game error lead to appellant striking her in the face "just like normal." (R. at 613). She further explained that appellant would not stop there, but cornered her and punched her again in the face, laughing as he did so. (R. at 613). Specialist [redacted] explained that she desperately tried to get away but appellant grabbed his Desert Eagle handgun and followed her "yelling and screaming," telling her "how much he hates" her. (R. at 614). Despite her begging for him to stop, SPC [redacted] testified to how appellant placed the gun against her head and told her how much "he want[ed] to kill" her. (R. at 614). Specialist [redacted] explained, understandably, that she believed her husband was going to kill her in that moment. (R. at 614).

Importantly, the panel was able to see and hear SPC [redacted] and found her to be credible.[9] Specialist [redacted] was extensively cross-examined by defense counsel. (R. at 747–881). The panel heard her challenged on her lack of reporting at the time.

[9] Appellant's argument that the acquittal for the strangulation charge means the panel did not find SPC [redacted] credible defies logic and is contrary to case law. (Appellant's Br. 14). First, the panel convicted appellant, contrary to his denials, of the remaining five specifications of abuse against SPC [redacted]. (STR). Second, as the Air Force Court noted "we view his acquittal [of one offense] as proof that the member's critically examined the evidence in accordance with the judge's instructions." *United States v. Powell*, 55 M.J. 633, 637 (A.F. Ct. Crim. App. 2001) (citing *United States v. Powell*, 469 U.S. 57, 66 (1984)); *see also*, . *Nicola*, 78 M.J. at 230("We follow the Supreme Court's admonition that it is 'imprudent and unworkable' to allow an accused 'to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them.'")

(R. at 747–57). She was challenged in front of the panel about why she did not run away when appellant threatened her with the handgun. (R. at 799–800). Defense counsel challenged her on the listed reason for her divorce from appellant and the lack of a restraining order. (R. at 825, 828). However, the panel also heard her explain these decisions in an extensive redirect. (R. at 949–1002.) The panel, seeing and hearing SPC [redacted] during both direct and cross, clearly believed her to be credible in her description of five instances of domestic violence. *See Turner*, 25 M.J. at 325.

Specialist [redacted] became emotional several times in her extensive testimony, which supported her credibility with the panel.[10] *See United States v. Dock*, 35 M.J. 627, 632 fn. 5 (A.C.M.R. 1992) ("we believe that witness demeanor plays a significant role in the court's credibility determination…Accordingly, where the trial court's credibility determinations are affected by the demeanor of witnesses, we will defer to them.") Specialist [redacted] described for the panel the pictures she took of her injuries, showing them the toll it took, further corroborating her testimony. *Turner*, 25 M.J. at 325 (R. at 602, 603, 616). Prosecution Exhibits 4

[10] The transcript even notes "[The witness is crying extensively throughout her testimony.]" (R. at 608). The transcript further notes SPC [redacted] was crying when describing the 1 May 2018 assault on direct and three times during cross-examination, including once when defense counsel challenged her on why she did not run away when appellant threatened her with the gun. (R. at 613, 799, 808, 816).

and 5, showing a crying SPC [redacted] with an injured lip and a bruise located on a thigh respectively, corroborate the allegations of Specifications 2 and 3 of Charge I. (R. at 602–05; Pros. Ex. 4, 5). Likewise, Prosecution Exhibit 9, again showing injuries to her face, corroborated backhanded slap and punch appellant delivered leading up to the gun incident as described by SPC [redacted]. (R. at 616–17; Pros. Ex. 9).

Likewise, the panel was able to hear SPC [redacted] describe the messages she sent to appellant during and after their relationship.[11] (Pros. Ex. 47, 49, 50, 51, 58). Appellant's admissions, supplications, apologies, and lack of denial reinforced SPC [redacted]'s testimony. (Pros. Exs. 47, 49, 50, 51, 58). The messages generally confirmed abuse, and specifically corroborated the allegations of Specifications 1 and 4 of Charge I. (Pros. Exs. 47, 49, 50, 51, 58). When confronted by SPC [redacted], asking, "you put a gun to my head and told me you wanted to kill me, do you think thats [sic] right?" appellant responded "you wont (sic) let me file a divorce and put me in a position where I will do something extreme." (R. at 732; Pros. Ex. 48). Similarly, when confronted with the allegation he punched SPC [redacted] over the dog boarding costs, appellant simply apologized and expressed he could not change the past. (R. at 721; Pros. Ex. 51). These simple screenshots

[11] Appellant claims that these messages were "unreliable digital evidence." (Appellants Br. 14–16). As discussed in depth *infra* pursuant to appellant's second assignment of error, there is no evidence before the trial court or this court to support that claim.

corroborate SPC [redacted]'s already credible testimony. Taken as a whole, her testimony and the corroborating evidence proves appellant's guilt beyond a reasonable doubt. *See Craion*, 64 M.J. at 534.

B. [redacted] credibly testified to appellant's abuse.

At trial, [redacted] credibly testified that after an argument appellant slapped her across the face. (R. at 387). She described that after she backed herself into a corner, appellant slapped her hard enough to sting "for a while after" and to leave a red mark. (R. at 387–89). [redacted] also testified credibly that after another argument, she was "crying inconsolably" on their bed and appellant forced her down and yelled at her to calm down.[12] (R. at 391). She described that when she escaped from appellant and attempted to run out of the room, appellant forcibly pulled her hair to drag her back to the bed.[13] (R. at 391). He again straddled her on the bed and yelled that she needed to calm down and that they "needed to work this out." (R. at 391). The panel, seeing and hearing [redacted], clearly believed her to be credible in her description these instances of domestic violence. *See Turner*, 25 M.J. at 325.

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[12] As he did with SPC [redacted], Appellant claims that the acquittals for three offenses means the panel did not find [redacted] credible. (Appellant's Br. 14). For the same reasons as discussed above in footnote 9, this argument lacks merit. *Powell*, 55 M.J. at 637.

[13] Appellant incorrectly claims that he was acquitted of Specification 3 of Charge II, the hair pull. (Appellant's Br. 14). Appellant was found guilty of that offense. (R. at 1455; STR).

The panel was able to see and hear [redacted] challenged by defense counsel in an extensive cross. (R. at 420–510). The defense counsel highlighted potential motives to fabricate, such as a custody proceeding and a retraction she made. (R. at 447, 488). Importantly, the panel was able to hear and see her explain why she recanted, specifically that she was told by members of appellant's family that abuse "is supposed to be handled in the household", and appellant begged her to recant. (R. at 510–11). Additionally, she rationally disputed the child custody motive to fabricate by explaining that appellant had never wanted to see his daughter. (R. at 513). The fact that [redacted] reached out to SPC [redacted] after the abuse does not create a "specter of collusion" as appellant suggests. (Appellant's Br. 14). Rather, because [redacted] "brushed off" SPC [redacted]'s initial attempts at contact and only reengaged *after* the abuse, this evidence actually corroborates her testimony. (R. at 379, 390; Pros. Ex. 59). A review of her testimony will show his court, like the panel, that [redacted] credibly testified and rationally explained any attacks on her credibility and proved appellant's guilt beyond a reasonable doubt. *See Craion*, 64 M.J. at 534.

C. Appellant's testimony was not credible or reasonable.

Appellant took the stand at trial and testified he was a verbally, but not physically, abusive husband. (R. at 1169–1216). Appellant denied any physical altercations outside of his unreasonable claim that he acted in self-defense which

caused the photographed injuries to SPC [redacted]. (R. at 1176–77). The contradictory testimony between appellant and both SPC [redacted] and [redacted] comes down to credibility. The panel viewed both witnesses testify and weighed the credibility of each. *See Turner*, 25 M.J. at 325. Conversely, the panel weighed appellant's credibility, and saw that it was undercut by his own testimony and by the evidence.

On cross-examination appellant admitted to manipulating SPC [redacted], asking her to hide her black eye, and, most importantly, admitted to sending the messages presented during the government's case-in-chief.[14] (R. at 1218, 1227–28). When confronted with the messages referencing the dog boarding incident, appellant admitted he could have denied ever hitting SPC [redacted], but instead apologized to her. (Pros. Ex. 51; R. at 1229). When confronted with a message where SPC [redacted] asked him not to hit her anymore, appellant conceded not denying the allegation. Rather he said "I just don't want you to disrespect me anymore" but unconvincingly, given the conversation, claimed that this was in reference to the pending divorce. (Pros. Ex. 50; R. at 1232, 1234). Likewise, when shown messages where SPC [redacted] asked for an explanation for his violence, appellant did not claim self-defense as he

[14] At no point in his testimony, on direct or cross, did appellant claim the messages introduced by the government were not accurate representations of his conversations with SPC [redacted]. Rather, he repeatedly admitted the messages he sent were accurate. (R. at 1218–40).

testified to on direct, but rather listed off other purported justifications for his actions. (Pros. Ex. 58; R. at 1237).

The panel heard appellant admit to sending messages to SPC [redacted] that directly contradicted his testimony. (R. at 1238–40). Despite his testimony to the contrary, appellant conceded that he sent messages where he admitted to hitting SPC [redacted] because he did not think she would leave him. (R. at 1236). When confronted with hitting SPC [redacted], appellant admitted to sending a message explaining, "[w]ith how stressful work was and how much you disrespected, I didn't know what to do or how to handle my emotions." (R. at 1238; Pros. Ex. 47). He further admitted he sent her messages explaining, "I knew it was wrong. In the heat of the moment, I didn't" and "I've become the exact person I hated." (R. at 1239; Pros. Ex. 47). His explanation on redirect that he did not deny or fight the allegations because he "felt beaten" and "didn't know what to do" further strains credulity. (R. at 1243).

These messages, which appellant admitted he sent, directly contradict his claims of innocence. The clearly false testimony given on direct was rightly used against appellant and irrevocably damaged his credibility. *See Nicola*, 78 M.J. at 227. When weighing appellant's credibility against that of SPC [redacted] and [redacted], this court will see that the convictions are factually sufficient.

Assignment of Error II

THE MILITARY JUDGE'S DENIAL OF A DIGITAL FORENSIC EXPERT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS.

Additional Facts

Appellant requested the aid of Mr. PE, a digital forensic expert, as an expert consultant on 17 February 2022. (App. Ex. II–SE, pp. 25–27). The general court-martial convening authority (GCMCA) denied that request on 23 February 2022. (App. Ex. II–SE, pp. 33). Appellant motioned the court to compel the appointment of Mr. PE on 13 May 2022. (App. Ex. II). In support of his motion, appellant attached a Criminal Investigation Division (CID) Agent's Investigation Report (AIR), SPC [redacted]'s consent to have her phone and computer extracted, photos of messages between SPC [redacted] and appellant, an extraction report from SPC [redacted]'s phone showing one photo message, several photos of SPC [redacted]'s injuries, the government witness list, his request for appointment of Mr. PE with PE's curriculum vitae (CV) and fee schedule, and the GCMCA's denial of that request. (App. Ex. II–SE). In his motion, appellant focused on photos of SPC [redacted]'s injuries and the related metadata, claiming that they may not have been taken around the time of the charged offenses. (App. Ex. II). He claimed "this *potential* evidence *could* lead to information . . . that other photos . . . weren't provided or that the photos showing the alleged abuse were altered." (App. Ex. II) (emphasis added).

The government opposed the motion to compel via a written pleading on 18 May 2022. (App. Ex. IV).

An Article 39(a) session was held on 20 May 2022 to aid in this motion. (R. at 22). At that hearing appellant offered no additional evidence and did not call any witnesses. (R. at 42). During argument appellant's counsel stated appellant was "entitled to, kind of, dig into these photos . . . and look at the veracity, and the validity of them."[15] (R. at 43). When specifically asked if he had "any evidence or reason to believe that the photos were altered in this case?" appellant answered "no." (R. at 44). Later in the argument appellant claimed, without explanation or citing to any particular evidence, that "it appears that there are missing [messages]." (R. at 46). Appellant then argued the metadata could establish when the alleged offenses occurred which "is super important" to his case. (R. at 45). Citing confidentiality, appellant denied making any inquiry with SPC [redacted] or CID to determine if there were other parts of the messages available. (R. at 47, 50). Appellant claimed, again without evidence or explanation, that Mr. PE used a different version of the software CID used to conduct its extraction, with better functionality. (R. at 53).

[15] It is unclear from appellant's argument at the Article 39(a) session whether "photos" means the photos of the injuries, photos of the text conversations, or both. (R. at 43).

The government argued that the request "amounts to a fishing expedition" and reiterated that appellant had not inquired with CID or attempted to access the metadata themselves. (R. at 51–52). The trial counsel noted that the defense had not shown how they cannot do what they were requesting the expert to do, even noting that he was able to access the metadata himself. (R. at 52). The government then argued that the defense had not met their burden. (R. at 52).

On 27 May 2022 the military judge denied appellant's motion to compel in a written ruling. (App. Ex. XV). In his ruling the military judge determined that the defense had not met their burden. (App. Ex. XV). He noted "the mere existence of photos does not justify the need for expert assistance" and appellant offered "no evidence, or even a reasonable showing, that these photos were altered, corrupted, or are other than what they purport to be." (App. Ex. XV). The military judge went on to rule that the request "never gets past the mere possibility of assistance." (App. Ex. XV). He determined the digital media was not a linchpin of the government's case, rather pointed to witness testimony as being the key evidence. (App. Ex. XV). The military judge determined that appellant failed to show, with evidence to support, how Mr. PE could aid in preparation. (App. Ex. XV). He noted there was "no showing, beyond re-checking the Government's evidence, that [Mr. PE's] assistance will uncover tangible results for the Defense." (App. Ex. XV). Finally, the military judge noted that while there may be digital evidence in

the case, "this is not a case about digital evidence" and "defense has not demonstrated that they cannot exploit any inconsistencies through their own case preparation and cross-examination." (App. Ex. XV).

After SPC [redacted] produced more messages on the eve of trial, appellant renewed his motion to compel Mr. PE as an expert consultant.[16] (R. at 308). Defense counsel argued, without evidence, that the messages could have been fabricated. (R. at 308). He again asked that the request to compel be granted "to ensure that these messages aren't . . . fabrications." (R. at 308). Citing appellant's deletion of his own account, counsel argued "we have no way of verifying that any of this is really real." (R. at 308). The government argued that appellant was re-raising the same issues as in his earlier request, but again was putting forth no evidence that the messages were unreliable or not authentic. (R. at 336). When specifically asked by the military judge if he had any evidence that the messages were edited or inauthentic, appellant was unable to do so. (R. at 342). The military judge granted defense several hours to review the messages and interview SPC [redacted] about them, but did not grant their motion to compel the expert consultant, continue the trial, or exclude the messages. (R. at 344).

[16] The military judge at trial was a different judge from the one who arraigned appellant and ruled on pre-trial motions, to include appellant's request to compel production of Mr. PE as an expert consultant. (R. at 79–81).

Standard of Review

A military judge's ruling on a request for expert assistance is reviewed for an abuse of discretion." *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010). An abuse of discretion occurs when a military judge's findings of fact are "clearly erroneous," if the trial judge's decision is "influenced by an erroneous view of the law," or if the decision is "outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008); *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)).

Law

To be entitled to expert assistance provided by the government, an accused must demonstrate necessity. *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986); *United States v. Tinsley*, 81 M.J. 836, 841 (Army Ct. Crim. App. 2021). "The accused has the burden of establishing that a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial." *Freeman,* 65 M.J. 451,

458 (C.A.A.F. 2008) (citing *United States v. Gunkle*, 55 M.J. 26, 31–32 (C.A.A.F. 2001). With respect to the first "assistance" requirement, the defense must provide sufficient justification to answer three separate inquiries: "(1) Why is the expert needed? (2) What would the expert accomplish for the defense? and (3) Why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop?" *Gunkle*, 55 M.J. at 32; *United States v. Gonzalez*, 39 M.J. 459, 461 (C.A.A.F. 1994).

Argument

The military judge did not abuse his discretion in determining that appellant failed to provide sufficient justification to meet any of the three *Gonzalez* factors for expert assistance. Appellant's claim that expert assistance was needed amounts to "a mere possibility" to show that the photos or messages were incomplete or altered. Likewise, appellant has failed to show a reasonable probably that the denial resulted in a fundamentally unfair trial.

A. Appellant failed to show a reasonable probability that expert assistance was necessary.

In denying appellant's motion to compel, the military judge cited the correct test for the "assistance" prong of the necessity analysis. (App. Ex. XV). Specifically, the military judge's reliance on *Gonzalez* demonstrates that his decision was not influenced by an erroneous view of the law. 39 M.J. at 461. The

military judge then applied that law to the facts, finding that the defense failed to establish why expert assistance was needed, what the expert could accomplish, or why they were unable to gather the information themselves. (App. Ex. XV). This decision was well within a range of reasonable choices based on the facts before him. *Gunkle*, 55 M.J. at 31 (holding that the accused has the burden to establish an expert would be of assistance).

The military judge did not abuse his discretion when, citing *Lloyd*, he determined that appellant had raised "a mere possibility of assistance." 69 M.J. at 99 (App. Ex. XV). He noted that defense had offered no evidence, "or even a reasonable showing," that the photos were altered or not reliable. (App. Ex. XV). This point was proven when defense counsel was unable to point to any evidence or reason to believe the photos were altered. (R. at 43). Even appellant's motion to compel supports the military judge's finding. (App. Ex. II). By his own admission, appellant was looking for "*potential* evidence" that evidence was missing, altered, or outside the charged timeframe.[17] (App. Ex. II). *See United States v. Hennis,* 79 M.J. 370, 383 (C.A.A.F. 2020) (holding the military judge did not abuse his discretion in denying expert assistance when appellant "wanted to

[17] On the contrary, the metadata evidence presented to the military judge by appellant indicated the opposite — that the photos were within the charged timeframe. The extraction report showing the data for IMG 0303 indicates the photograph of SPC [redacted]'s injured lip was captured on 01 May 2018, the date of the assault in Specification 5 of Charge 1. (Charge Sheet; App. Ex. II–SE, pp. 18).

explore the possibility" of finding inculpatory evidence through "additional forensic testing [that] *might* result" in said evidence.) (emphasis in original). Likewise, appellant failed to meet his burden to show necessity when he offered no evidence, other than the digital evidence itself, that the evidence was altered or unreliable. *See United States v. Cannon,* 74 M.J. 746, 751 (Army Ct. Crim. App. 2015) (finding that defense failed to meet their burden when they "offered some suggestions that appellant's confession may have been false (including appellant's self-serving affidavit disavowing his confession) [but] ultimately admitted the request for expert assistance was needed to help them determine the voluntariness and trustworthiness of the appellant's confession.") (emphasis and parenthetical in original). The military judge did not abuse his discretion in determining appellant's request fails the first *Gonzalez* prong. 39 M.J. at 461.

Appellant must likewise meet his evidentiary burden to demonstrate what an expert can accomplish, and again he failed to present any evidence thereof. (App. Ex. II; R. at 42). As the military judge correctly noted, appellant failed to provide "any affidavit or information . . . from [Mr. PE] explaining the functions he would perform and what he expects to find." (App. Ex. XV). As in *Cannon*, appellant here failed to demonstrate, via evidence or testimony, any link between his case and what the expert would accomplish, relying instead on a mere possibility that Mr. PE could accomplish anything. 74 M.J. at 751–752. As such, the military

judge did not abuse his discretion in determining that the defense failed to articulate — or provide evidence of — what functions Mr. PE would perform or what he would expect to find, the second *Gonzalez* prong. (App. Ex. XV).

Finally, the military judge did not abuse his discretion in determining that defense failed to "demonstrate anything that needs to be done . . . [defense] cannot do on its own." (App. Ex. XV). Counsel did not show that they could not view the metadata themselves, something trial counsel was able to do, which would alleviate the need for an expert. (R. at 45). Similarly, defense counsel denied making any effort to determine if the messages were altered or incomplete, relying on "confidentiality" as an explanation for not inquiring with CID.[18] (R. at 47, 50). The military judge correctly determined that defense failed to explain how they could not cross examine SPT OT or call a CID agent as a witness to explain any claimed unreliability of the evidence. (App. Ex. XV). The military judge did not abuse his discretion in holding defense to the burden required to satisfy the third *Gonzalez* prong. 39 M.J. at 461; *See United States v. Leyba*, 2018 CCA LEXIS 394, ARMY 20160159 (Army Ct. Crim App. 13 August 2018) (sum. disp.) at *6 (holding the military judge did not abuse his discretion when "defense counsel provided virtually no evidence as to what efforts they made and why they were

[18] It is unclear how confidentiality would be broken by asking SPC [redacted] or CID questions about the messages, especially since appellant openly argued his theory that the evidence was altered or incomplete at the Article 39(a) session.

thus unable to understand, gather, develop, or present evidence" and "defense counsel attempted to meet their burden through unsupported assertions that they lacked the necessary education and experience to even attempt such a task.")

The military judge was within "the range of choices reasonably arising from the applicable facts and the law" when he determined that defense counsel did not meet his burden on any of the *Gonzalez* prongs. *Miller*, 66 M.J. at 307. Since failing even one of the three prongs would be enough to deny the motion to compel, the military judge did not abuse his discretion in denying appellant the expert consultant where appellant failed all three prongs. *See Gonzalez*, 39 M.J. at 461; *Freeman*, 65 M.J. at 458.

B. Even if he had met the *Gonzalez* factors, appellant failed to show a reasonable probability that denial of the expert consultant would result in a fundamentally unfair trial.

In addition to finding that appellant's motion to compel failed the "assistance" prong, the military judge also correctly found "The Defense has not shown . . . that denial of an expert consultant will result in a fundamentally unfair trial." (App. Ex. XV). In his motion to compel the production of expert consultants appellant referenced the three *Gonzalez* factors but failed to reference, or analyze, the fundamental fairness test under *Freeman*, 65 M.J. at 458. (App. Ex. II). There was no analysis of the *Freeman* test or specific reference to the

Gonzalez factors during appellant's brief argument at the Article 39(a) session. (R. at 42–53). By making no showing, appellant clearly failed to carry his burden.

Even had appellant made such a showing, he could not prove a reasonable probability that the denial would result in a fundamentally unfair trial. *Freeman*, 65 M.J. at 458. This case does not involve novel, complex, or evolving technology that is the linchpin of the government's case. *C.f. United States v. Lee*, 64 M.J. 213 (C.A.A.F. 2006) (where the issue at trial was whether child pornography, the linchpin of the government's case, was real or virtually created, and thus the denial of the expert witness resulted in a fundamentally unfair trial). Unlike *Lee*, and contrary appellant's claim, digital evidence was not the linchpin of the government's case. *Id.* (Appellant's Br. 14). The government acknowledges that the injury photos and screenshots of messages — that appellant admitted he sent and were accurate — served as corroboration. (R. at 1218–43). Rather, this case is settled on the testimony of the witnesses. (R. at 1218–43). That testimony and corroborating evidence overwhelmingly showed that appellant committed the offenses.

C. Appellant's renewal request was insufficient.

When appellant made his request to renew the emotion to compel he did not provide any new evidence, argument, or support to warrant appointment of an expert consultant. (R. at 308, 336, 342–44). The justification that appellant

needed "to ensure that these messages aren't . . . fabrications" or verify "that any of this is really real" is no different than the speculative "mere possibility" raised, and rejected by the court, in his motion to compel. (R. at 308); *see Gonzalez*, 39 M.J. at 461. The military judge was well within his discretion to deny the motion to renew, as the new evidence would not impact the rationale or determinations without a specific showing by defense pursuant to *Gonzalez* and *Freeman*. 39 M.J. at 461; 65 M.J. at 458 (R. at 341, 343). Since no showing was made by appellant, reconsideration and reversal of the ruling was not warranted.

D. **Any error was harmless beyond a reasonable doubt.**

Even if this court finds that the military judge erred in denying the expert consultants and the error implicates appellant's due process rights, the error was harmless beyond a reasonable doubt. As discussed *supra* pp. 8–14 both SPC [redacted] and [redacted] were credible witness who detailed the domestic abuse perpetrated by appellant. Appellant's admissions on cross examination eliminate any doubt that he sent the messages in question, thus corroborating the victim's testimony. The facts prove beyond a reasonable doubt that, even with expert assistance, appellant would have been convicted. Accordingly, he is not entitled to relief. *See United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005) ("The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is 'whether, beyond a reasonable doubt, the error did not contribute to the defendant's

conviction or sentence.'" (quoting *United States v. Kaiser*, 58 M.J. 146, 149 (C.A.A.F. 2003))).

Assignment of Error III.

THE MILITARY JUDGE'S RULINGS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM.

Additional Facts

A. Appellant's cross examination of [redacted].

1. The "welfare check" evidence.

At trial, defense counsel crossed examined [redacted] on a "welfare check" that was done in August of 2019. (R. at 420). When government objected to relevance, defense counsel stated, "This is in August, I believe that was just testified this was during the charged misconduct. It's the defense's position that this is contemporaneous with one of the—with the charges." (R. at 420–21).[19] The objection was overruled, and defense counsel continued his cross-examination regarding that incident. (R. at 421). [redacted] subsequently admitted that she was "in the bathroom with a knife" and had cut herself when military police (MPs) arrived. (R. at 421). The government objected based on Mil. R. Evid. 401 and 403, to

[19] Defense counsel never specified which specification; however, the only charge covering August 2019 was Specification 5 of Charge II. (Charge Sheet). Appellant was found not guilty of that specification. (R. at 1455; STR).

which defense counsel again explained 'I believe this is one of the charged conducts." (R. at 421).

An Article 39(a) session was held to resolve the objection, wherein defense counsel explained:

> So, this is indicative of a pattern that I think will play out, and you'll see in this relationship that around every time that she's talking about — or she makes an allegation that there was domestic violence, she's actually self-harming at the time, Your Honor, and she is — she's threatening. And then when the MPs or the authorities arrive, she then makes this, kind of, like, outcry to the police or to the command and then later rescinds it and says essentially she was having this episode and it's untrue.

(R. at 423). The government contended that the proper foundation had not been laid connecting the self-harm to any charged conduct. (R. at 423). The military judge agreed and wondered what nexus had been established. (R. at 424). When defense counsel was unable to give more of a connection beyond a welfare check happened, the military judge stated "It doesn't seem there's a foundation to go into this line of questioning. I'll give you an opportunity to continue to lay the foundation." (R. at 424). Defense counsel then claimed "we established that the MPs arrived on 23 August" but the military judge rejected that, saying "it's not very clear" what date this occurred on.[20] (R. at 424). Ultimately, the military

[20] The exact date of the MP welfare check had not been established on the record — [redacted] testified only that it occurred in August. (R. at 420).

judge sustained the objection and ruled: "If you want to ask about a specific event on a specific date as a specific response and there's a nexus between that and an allegation on the charge sheet, then you have to lay the foundation for that." (R. at 425).

After a brief discussion regarding his ruling, the military judge summarized "what the government is fearful that you're doing, that you're smuggling in impermissible character evidence, extrinsic acts to articulate her character and that she's acting in character and propensity with that character" and advised defense, "I would just refer you to [Mil. R. Evid.] 608(b). That's what I'm specifically referring to regarding character evidence of a witness." (R. at 428). Defense countered, saying he "was seeking partially to establish the credibility and the ability of her to actually perceive and then accurately relay events later on." (R. at 428). The military judge then explained the importance of foundation if that was the defense's approach: "if you would like to [attack] her for perception, memory, or bias, which you're allowed to do, you have to tie it to an event on an allegation [contemporaneous] to that allegation." (R. at 429).

After the Article 39(a) session defense counsel questioned [redacted] about the August 2019 welfare check but did not re-ask any questions regarding any self-harm during the August incident. (R. at 431–32). Defense instead questioned her on her lack of reporting any of the abuse to the MPs at that time but rather waiting

four days to report.[21] (R. at 431–32). Defense counsel then asked "and they ended finding you were actually the abuser in that situation." (R. at 432). The government objected on Mil. R. Evid. 401, 403, and 608(b) grounds. (R. at 432–33). Defense counsel argued:

> So, Your Honor, as far as 401 and 403—want me to do this now, Your Honor? I mean, so it's the defense's position that there is a tumultuous—that there is a custody dispute here, that she's been titled and found to be an abuser. It would certainly enhance her position now—

(R. at 433). The military judge immediately stopped counsel, dismissed the members, and held an Article 39(a) session. (R. at 433). The military judge admonished defense counsel for continuing to speak after government's objection and, in responding to that objection, offering extrinsic evidence in the presence of the panel. (R. at 434–37). The military judge explained the question "appears to be [Mil. R. Evid.] 608(b) evidence without having a proper foundation laid as to how you intend to use it to impeach. It's an extrinsic act. That is my concern." (R. at 437). Defense counsel countered and claimed the evidence was admissible under Mil. R. Evid. 608, not as "evidence of her character for truthfulness. This is—this goes to her motive and bias to fabricate [sic)."[22] (R. at 438). The military

[21] The welfare check was requested by [redacted]'s mother who was concerned because she "had not heard" from her daughter. (R. at 431).
[22] Defense counsel appeared to be arguing Mil. R. Evid. 608(c). Defense counsel did not explain how the finding of abuse — rather than the underlying act — applied to that rule.

judge and defense counsel continued their discussion of the probative value of the alleged "finding," or opine by a military justice advisor that [redacted] had committed the offense of assault. (R. at 439–40). Unable to tie this alleged assault specifically to any of the charged specifications and instead arguing its relevance in terms of child custody dispute, the military judge ruled the defense "attempts to use it are not allowed under [Mil. R. Evid.] 403, and you're still bringing up extrinsic acts to demonstrate a character." (R. at 444).

Defense counsel eventually cross examined [redacted] on the July 2019 assault.[23] After [redacted] denied being able to specifically date the assault, defense counsel asked her about an "episode" on 10 July 2019 where appellant "had to try to calm" her. (R. at 494–95). Defense then asked "and you were having some self-harm ideations" which prompted a government objection based on Mil. R. Evid. 403. (R. at 495). At an Article 39(a) session defense counsel explained they believed the self-harm attempt was an "alternate source of injury." (R. at 497–98). The military judge "I don't recall there was any testimony about physical indications of injury." (R. at 498). Defense counsel then clarified this evidence was "an alternate source of the confrontation." (R. at 498). The military judge rejected that, determining the defense was again attempting to smuggle in impermissible evidence. (R. at 499). The military judge noted "If you have some questions

[23] Specifications 3 and 4 of Charge II.

which you can ask her . . . and she denies it and you're going to use to impeach her, that's one thing," and "cross-examination has to be limited to crossing her about questions she was asked in direct examination. You can impeach her . . . but what you can't do is lay out testimony." (R. at 501–02).

2. The Family Advocacy Program Evidence.

During cross-examination, defense counsel attempted to delve into a Family Advocacy Program (FAP) case into appellant and [redacted]'s relationship. (R. 460). Government immediately objected on Mil. R. Evid. 401 and 403 grounds as well as a lack of foundation. (R. at 460). An Article 39(a) session was held where the military judge articulated his concerns regarding a lack of foundation and impermissible character evidence. (R. at 461–62).

The military judge then inquired why the FAP case was relevant, which defense explained that it was "another outcry opportunity" where she did not "mention anything on the charge sheet." (R. at 464). The military judge noted "that seems relevant, that she never informed a Family Advocacy Program counselor" and asked the government for their response, where they raised a potential privilege issue.[24] (R. at 465). The military judge then asked [redacted]'s Special Victim's Counsel (SVC) "[d]o you know this FAP counselor would have

[24] The military judge noted they had not raised this concern when objecting but rather only raised Mil. R. Evid. 401 and 403 concerns. (R. at 464).

been privileged communications?" (R. at 467–68). The SVC denied knowing if there was a privilege, but asserted any privilege that would apply. (R. at 468). Defense stated they "did everything we [could] to find. . . who [redacted] spoke to" but were unsuccessful. (R. at 469). Defense also admitted that they did not file a motion to compel the FAP records, but explained that they only sought to inquire whether [redacted] declined to report appellant's abuse when given the opportunity at FAP. (R. at 470–71).

The government conceded that defense could ask if [redacted] ever spoke to FAP and if she made a domestic violence report. (R. at 470–71). [redacted] denied remembering if a FAP case was opened in 2019. (R. at 474). She denied remembering "ever talking to anybody at FAP." (R. at 474). No FAP worker was called to testify during appellant's case-in-chief. (R. 1040–1282).

B. Specialist [redacted]'s testimony.

1. The evidence of verbal abuse.

The original military judge on the case issued a written ruling regarding Mil. R. Evid. 404(b) evidence on 9 June 2022. The first noticed conduct was:

> [on] divers occasions throughout the [appellant]'s marriage to [SPC [redacted]], the [appellant] would act aggressively toward [SPC [redacted]] when she did not comply with his wishes, when she was disrespectful to him, and when she "nagged" him. Specifically, when [SPC [redacted]] spent money the [appellant] didn't approve of, asked him to help with household chores, or failed to play video

> games well enough, he screamed at her and called her names which would often escalate into physical violence.

(App. Ex. XVIII). The military judge ruled this evidence was not subject to a Mil. R. Evid. 404(b) analysis as it was *res gestae* of the charged offenses. (App. Ex. XVIII). He further noted "in terms of 'divers occasions,' there is no evidence of similar conduct by the accused involving [SPC [redacted]] apart from these charged offenses, so there is no other conduct here to which to apply [Mil. R. Evid.] 404(b) analysis." (App. Ex. XVIII). The military judge excluded the other noticed uncharged conduct. (App. Ex. XVIII).[25]

At trial, SPC [redacted] testified on direct that "there was a lot of instances of verbal abuse" which drew a defense objection based on Mil. R. Evid. 404(b). (R. at 574). The military judge sustained the objection and advised the government to ask more pointed questions. (R. at 574). Later in her direct, SPC [redacted] was asked "when was the next time you were assaulted by the accused?" (R. at 586). Defense objected based on Mil. R. Evid. 404(b), the government withdrew the question, and defense then asked for an article 39(a) session. (R. at 586). In that

[25] At trial, appellant argued the military judge's ruling excluded "more generalized uncharged evidence" would only confuse the panel. (R. at 591). The military judge did hold that concern, however it was with the excluded uncharged misconduct that was subject to a Mil. R. Evid. 404(b) analysis, not the verbal abuse in question. (App. Ex. XVIII). Similarly here, appellant points to the military judge's Mil. R. Evid. 403 analysis for the fourth noticed uncharged conduct, which dealt with appellant's reaction to [redacted]'s pregnancy, rather than the ruling on the verbal abuse directed at SPC [redacted] which was at issue. (Appellant's Br. 41–42).

session the military judge reminded trial counsel that they will comport with the written Mil. R. Evid. 404(b) ruling. (R. at 588). He also noted: "the court's ruling that would allow some testimony to come in, and that's in the analysis, the first paragraph where the court found it was not uncharged conduct subject to [Mil. R. Evid.] 404(b) because it constitute *res gestae* of charged offense." and "[s]o some verbal abuse can come in." (R. at 588). Defense noted that the sustained objection was to general verbal abuse not tied to specific offenses. (R. at 589). Although, at trial, the military judge ruled that general statements that throughout the marriage appellant was verbally abusive towards SPC [redacted] would not be excluded, that evidence was never elicited. (R. at 570–1018). Rather, SPC [redacted] only testified to the abuse that was *res gestae* of the charged offenses. (R. at 579–82, 602–05, 608–09, 613–16).

2. Specialist [redacted]'s SHARP testimony.

Specialist [redacted] was cross-examined about her delayed reporting of the abuse. (R. at 747–57). Defense counsel also specifically asked SPC [redacted] about the circumstances of her reporting when she arrived at Defense Language Institute [DLI] after joining the Army. (R. at 861–62). After establishing that SPC [redacted] reported "shortly within class starting," defense counsel asked "[a]nd you reported these allegations because you didn't know how wrong they were until you joined the Army?" (R. at 862). Specialist [redacted] confirmed "that was one of the reasons,

yes." (R. at 862). Defense counsel then asked "Okay, and initially, you reported this as a SHARP [Sexual Harassment/Assault Response and Prevention] allegation?" which SPC [redacted] confirmed. (R. at 863).

Prior to re-direct examination, the government requested an Article 39(a) session regarding the introduction of "uncharged misconduct based on the cross-examination of the defense." (R. at 883). The government summarized that defense had "opened the door" to this misconduct by crossing SPC [redacted] on her delayed report and that it was initially a SHARP complaint. (R. at 884). Government stated:

> It's relevant to rebut the assertion that she initially reported this is a SHARP case. The fact finder is going to be wondering—the defense could argue that she made a completely separate allegation that you heard nothing about. Also the timing of it. So, they extensively asked her about how many opportunities she had to make a report. Why she—how bad she thought domestic violence was. All of those types of questions, and then they specifically asked her about the fact that she didn't report it until she got DLI and she learned about the [re]sources and what those resources specifically were.

(R. at 884–85). In response, defense counsel argued that their one question "you initially reported these as SHARP allegations?" did not open the door.[26] (R. at 887). When the military judge rejected that argument, defense counsel shifted to Mil. R. Evid. 403, which the military judge also rejected noting that defense

[26] As noted *infra* p. 51–52, the line of questioning was more substantial.

believed the report to SHARP was relevant.[27] (R. at 888). On redirect, SPC [redacted] testified that she reported the allegations to SHARP because there had been "sexual violence that was part of the relationship." (R. at 970). She then explained that the SHARP brief finally allowed her to be "comfortable enough" to report. (R. at 971). Finally, SPC [redacted] confirmed that the sexual violence was not part of the court-martial, but that was not her decision. (R. at 971–72). Defense objected to the testimony that it was not her decision. (R. at 972). The military judge determined, on the record, that the probative value was not substantially outweighed by the danger of unfair prejudice and overruled the objection. (R. at 972).

C. KC's testimony about appellant's character.

During his case-in-chief appellant called his friend KC to testify on his behalf.[28] (R. at 1144). He testified that the two were in advanced individual training (AIT) and stationed in Korea together before being in the same platoon at Fort Bragg. (R. at 1123). KC testified that appellant has a character for peacefulness and a character of respect for women. (R. at 1130–31). In response, prior to their cross-examination, government sought to ask questions regarding

[27] When questioned, defense counsel admitted they believed it was relevant to SPC [redacted]'s motive, bias, and "credibility to fabricate." (R. at 888)

[28] KC was a civilian at the time of trial but had previously served in the Army. (R. at 1123).

uncharged misconduct and KC's basis for his opinion. (R. at 1133). The government proffered that the "is he aware or has he heard" questions would challenge the foundation for KC's opinion. (R. at 1134). Defense objected on Mil. R. Evid. 404(b) and notice grounds. (R. at 1134). After a full proffer of the uncharged conduct, defense also raised a Mil. R. Evid. 403 objection. (R. at 1135–37). The military judge noted that "have you heard" questions are an appropriate method for "opposing counsel to test that character trait and the opinion of that character trait." (R. at 1139–38). Prior to allowing government to ask the questions, the military judge also did a Mil. R. Evid. 403 balancing test and determined:

> Having made that determination, that this is an appropriate mechanism to impeach an opinion testimony, the court finds that the probative value is not substantially outweighed by any danger of unfair prejudice. Prejudice, because this is, in fact, the means for testing and impeaching opinion evidence as to character traits. That's the [Mil. R. Evid.] 403 analysis. So, overruled on the [Mil. R. Evid.] 403 objection, as well.

(R. at 1142–43). On cross examination, government counsel questioned KC on his many biases against the military justice system and for appellant. (R. at 1147). The government used the uncharged act of sexual violence, among other acts, to

challenge KC's basis for his opinions of appellant's character were also challenged.[29] (R. at 1147–49).

D. Appellant's prior statements.

In response to the government's introduction, and use during cross, of the text messages appellant sent to SPC [redacted], appellant attempted to admit his own prior text messages sent in December 2018 as prior consistent statements. (R. at 1245). Government noted these messages between appellant and his mother were hearsay that postdated the messages sent to SPC [redacted]. (R. at 1245–46; Pros. Ex. ZZ for ID). Appellant argued that the government raised, "by inference . . . a recent fabrication." (R. at 1246). The military judge ultimately ruled "this is not a prior consistent statement to the text messages already entered" and sustained the government's objection. (R. at 1247).

Standard of Review

A military judge's decision to exclude evidence is reviewed for an abuse of discretion. *United States v. Sullivan*, 70 M.J. 110, 114 (C.A.A.F. 2011). An abuse of discretion occurs when a military judge's findings of fact are "clearly erroneous," if his decision is "influenced by an erroneous view of the law," or if it

[29] KC testified he was unaware appellant had threated to kill the family dog or [redacted]'s family. (R. at 1147–48). He also stated his opinion would change if he "found out it was true" that appellant told his wives to commit suicide. (R. at 1149).

is "outside the range of choices reasonably arising from the applicable facts and the law." *Miller*, 66 M.J. at 307; *Freeman*, 65 M.J. at 453. "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *McElhaney*, 54 M.J. at 130 (quoting *Miller*, 46 M.J. at 65; *Travers*, 25 M.J. at 62).

Law

The Confrontation Clause preserves the right of an accused 'to be confronted with the witnesses against him.'" U.S. Const. amend. VI; *United States v. Moss,* 63 M.J. 233, 236 (C.A.A.F. 2006). "This right includes the right to cross-examine witnesses, including on issues of bias and credibility." *Id.* Mil. R. Evid. 608(b) states "extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. The military judge may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness of . . . the witness." *United States v. Hukill,* 2020 CCA Lexis 79, ARMY 20140939 (Army Ct. Crim. App. 09 Mar 2020) (sum. disp.) at *6. Mil. R. Evid. 608(c) states, "Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Nevertheless, "trial judges retain wide latitude insofar as the Confrontation Clause

is concerned to impose reasonable limits on such cross-examination based on concerns about . . . interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

Argument

The military judge's decisions throughout the proceeding did not violate appellant's right to a fair trial. Rather, the military judge acted within his discretion when limiting evidence and applying the Mil. R. Evid. 403 balancing test. Any error that may have occurred was harmless and cumulatively did not amount to error warranting relief.

A. The military judge appropriately limited the "welfare check" evidence.

1. Appellant failed to lay a proper foundation for the evidence.

The military judge was within his wide latitude to limit appellant's questions on cross examination. *See id.*; *Miller*, 66 M.J. at 307. The military judge's concern that the connection to the charged offenses was not clear was reasonable given appellant's questions. (R. at 424). Further, the limitation imposed was not drastic — the judge was requiring that a nexus be established between the welfare check evidence and a charged offense. (R. at 425). This is a reasonable restriction given the obvious Mil. R. Evid. 403 concerns with the self-harm evidence and the confusion the probable cause opine or "finding" of assault could cause. *Olden v. Kentucky*, 488 U.S. 227, 232 (1988) ("bias evidence, like any evidence, is subject

to reasonable restrictions to take account of such factors as harassment, prejudice, confusion of the issues, the witness safety, or interrogation that would be repetitive or only marginally relevant.") (internal quotations omitted).

The military judge correctly noted that the self-harm could be considered extrinsic acts to show character, which would be prohibited under Mil. R. Evid. 404(b). (R. at 428). In order to combat that concern, the judge reasonably required the act be connected to a charged act. *Id.* (R. at 429). The self-harm evidence, without a further foundation, lacked probative value. The danger of unfair prejudice here significantly outweighed the probative value of mental health episode occurring at some time in August, though not necessarily connected to the charged offenses. The military judge was well within his discretion to limit appellant as such. *Miller*, 66 M.J. at 307.

The military judge likewise did not abuse his discretion in determining that the "finding of abuse" was an extrinsic act to show character failed the Mil. R. Evid. 403 balancing test. *See id.*; (R. at 444). Although he did not state his rationale explicitly in the record, his discussion with defense counsel shows that he viewed a probable cause determination to be of low probative value.[30] (R. at 440–43). That low value was placed against the high risk of undue prejudice,

[30] Even if this court applies less deference to the military judge's ruling in this regard, there is still no prejudice.

specifically that [redacted] had a propensity for violence, given that the incident was not tied to a charged act or offered in defense thereof. (R. at 445). The military judge seemed to acknowledge that could the act be tied to charged conduct it may have been relevant — perhaps for a self-defense claim — but absent that showing, it was rightfully excluded. (R. at 444). Importantly, the military judge noted that defense could "certainly talk about whether there was an assault" but not the police report. (R. at 444). The military judge clearly considered many of the factors outlined in *United States v. Solomon* when he weighed the strength of proof of the act, the probative weight of the evidence, the potential for less prejudicial evidence, the distraction of the factfinder, time needed for proof of the prior conduct, and the temporal proximity. 72 M.J. 176, 180 (C.A.A.F. 2013). As such, this was not a clear abuse of discretion. *See id.*

Finally, the military judge did not abuse his discretion in limiting cross examination of the 10 July 2019 episode of "self-harm." (R. at 501–02). Appellant was attempting to use an extrinsic act, self-harm, to show "an alternate source of the confrontation." (R. at 498). This evidence was not being offered to show bias, prejudice, or motive to misrepresent allowed under Mil. R. Evid. 608(c).[31] Rather, it was being used to contradict [redacted]'s testimony that the hair

[31] Appellant has not claimed here, or at trial, that this specific evidence could show bias, prejudice, or motive to misrepresent under Mil. R. Evid. 608(c). (Appellant's

pulling alleged Charge II Specification 3 occurred when she was upset after an argument.[32] (R. at 391). However, because [redacted] testified she could not remember what the argument was about, this is improper impeachment. (R. at 391). The military judge correctly determined that appellant could ask her about the "episode" but would need to impeach her properly if she denied it. (R. at 501–02). This would require appellant to properly lay the foundation for the impeachment by confirming [redacted]'s testimony on direct, then confronting her with the evidence to affirm or deny, before impeaching her through a prior statement or other witness testimony. *See United States v. Sojfer*, 47 M.J. 425, 427–28, (C.A.A.F. 1998) (noting, in the context of impeachment through bias, "before the proponent may introduce evidence under [this] theory, he or she must lay a foundation that establishes the legal and logical relevance of the impeaching evidence."). As that was not done here, the military judge did not abuse his discretion in imposing the reasonable limitation on cross examination. *See Van Arsdall*, 475 U.S. at 679; *Miller*, 66 M.J. at 307.

2. Any error was harmless.

Even if the military judge abused his discretion, appellant was acquitted of the only offense alleged to have occurred in August 2019, and therefore any error

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Br. 35–39; R. at 491–502). Even when reviewing the record as a whole, it is unclear how the alleged self-harming could do so.

regarding the "welfare check" is harmless. (R. at 1455). The record is very clear that the welfare check evidence, and the self-harm it was apparently for, occurred in August 2019. (R. at 420, 424). Defense counsel even went as far as to distinguish this event from the charged conduct in July 2019 which involved the hair pull and "Febreeze" spray. (R. at 420). Therefore, the only charge that could have been connected to this welfare check was the allegation that appellant kneed [redacted] in the stomach, an offense he was found not guilty of. (R. at 1455). Therefore, there is no harm to any error in excluding appellant's line of questioning. *See Moss*, 63 M.J. 236 ("the appellant has the burden of showing that a reasonable jury might have reached a significantly different impression of the witness's credibility if the defense counsel had been able to pursue the proposed line of cross-examination") (citing *Van Arsdall*, 475 U.S. at 680); *United States v. Henderson*, 2014 CCA LEXIS 261 (N.M. Ct. Crim. App. 24 April 2014) at *6 (finding that appellant's acquittal rendered any error harmless beyond a reasonable doubt).

Likewise, any error in limiting the 10 July 2019 self-harm evidence was also harmless. Appellant was able to elicit his alternate cause of the confrontation through witness testimony in his case-in-chief. Appellant's mother, KP, testified that she was on a video chat with her son and observed [redacted] "yelling, screaming, and taking a big knife and stabbing their . . . brand new table." (R. at 1071). She

described appellant as "trying to see what he could do to assist her, to calm her down." (R. at 1072). Appellant then connected his mother's testimony to the hair pulling charge. (R. at 1211-12). He claimed that he would call or video chat with his mother during these episodes. (R. at 1211-12). During that particular episode, appellant claimed "I pleaded for her to calm down. I asked her how I can help, what I could do to help, and she just got angry and angry (sic)" but denied any basis for her claim that he pulled her by the hair. (R. at 1211).

Through this testimony, appellant was able to elicit the alternative source of confrontation and provide an innocent explanation for the events. *See United States v. Collier,* 67 M.J. 347, 356 (C.A.A.F. 2009) (To find that [error] warrants relief "the inquiry should focus on whether the military judge's ruling 'essentially deprived Appellant of [his] best defense.'") (citing *Moss*, 63 M.J. at 239). Here appellant was not deprived of his best defense, as he did, in fact, raise it. (R. at 1072, 1211-12). In fact, appellant here was able to raise the defense more effectively than had [redacted] denied the self-harm, which was possible, as she had already denied remembering the cause of the argument. (R. at 391). Despite this, the panel, rightly, rejected that appellant's denials of the hair pulling assault. (R. at 1455).

B. There was no determination of privilege for the FAP evidence.

Contrary to appellant's claim, the military judge did not categorically opine "that a licensed clinical social worker is covered under [Mil. R. Evid.] 513 defense." (Appellant's Br. 47). Rather, he read the definition of covered providers from Mil. R. Evid. 513(b)(2) and raised concerns that the privilege *may* apply because "a social worker *in some context*, especially a licensed clinical social worker, is covered under [Mil. R. Evid.] 513."[33] (R. at 469) (emphasis added). After a discussion with defense and [redacted]'s SVC, the military judge still allowed defense limited inquiry into whether [redacted] had the opportunity to report to a FAP provider and declined to do so. (R. at 468–74). It is clear, therefore, that the military judge did not determine the privilege existed and there was no error.

Assuming, *arguendo*, that the military judge erred in determining the communications between [redacted] and the FAP counselor may be privileged or inappropriately shifted the burden to the defense, the error was harmless. The record is clear that defense only intended to ask a limited question set to determine if [redacted] spoke to FAP and if she reported the domestic abuse—a line of questioning unobjected to by the government. (R. at 470–71). Regardless of any privilege that may or may not have applied, the military judge allowed those questions to be

[33] The government does not concede these communications were not privileged under Mil. R. Evid. 513. Without knowing who [redacted] spoke to it is impossible to determine the answer to that question. (R. at 468–70).

asked. (R. at 474). The evidence that [redacted] did not report the abuse to FAP in August 2019 could not be elicited without her remembering her conversation with a FAP provider or a FAP personnel testifying to them. (R. at 464). When [redacted] denied remembering "ever talking to anybody at FAP," that line of inquiry closed one avenue to that information. (R. at 474). Likewise, when appellant failed to call any FAP personnel to testify that a conversation occurred, the other path to the evidence was foreclosed.[34] (R. at 1040–1282). Put simply, appellant did not have an avenue to enter in the conversations after [redacted]'s denial of memory of the event. The error, if any, was harmless. *See Moss*, 63 M.J. at 236.

C. The military judge properly applied Mil. R. Evid. 403 to the evidence before him.

Mil. R. Evid. 403 requires "a military judge to decide whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Collier*, 67 M.J. at 353. A military judge receives wide discretion in conducting balancing under Mil. R. Evid. 403, but military judge's rulings receive less deference if they fail to articulate their analysis on the record. *Id*. However, "an absence on the

[34] Appellant admitted at trial that he did not attempt to compel the production of the FAP records. (R. at 470). Appellant cannot now claim that there was prejudice from a military judge's decision when he could have, with due diligence, presented the evidence through other witnesses but failed to do so.

record of a military judge's reasoning does not—by itself—provide a basis for finding error. Unless there are contrary indications, we must assume a military judge properly considered an accused's claim consistent with the law." *United States v. St. Jean*, 83 M.J. 109, 113 (C.A.A.F. 2023) (citing *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012). Mil. R. Evid. 403 addresses prejudice to the integrity of the trial process, not prejudice to a particular party or witness. *Collier*, 67 M.J. at 354.

The military judge did not abuse his discretion in determining that appellant "opened the door" to lines of questioning during SPC [redacted]'s and KC's testimony and that Mil. R. Evid. 403 did not require exclusion of the evidence.[35] *See id.; Turner*, 25 M.J. at 325. The sexual violence evidence was not more prejudicial than probative and did not have a risk of unfair prejudice to the proceeding. *See id.*

The military judge agreed with trial counsel and determined that the probative value of both the SHARP questions was not outweighed by the danger of unfair prejudice. (R. at 972). In doing so he noted the limited scope of the line of

[35] In addition to the decision discussed below, appellant seems to claim—without any explanation or analysis—that the military judge erred in applying Mil. R. Evid. 403 during his testimony. He asks this court to "Query how this understanding of Mil. R. Evid. 403 squares with the same military judge not allowing appellant to testify that [redacted] shouted at him, 'I'm going to kill this fucking baby' to establish her rage at a time she tried to get him in trouble with his chain of command." (Appellant's Br. 44–45). However, that statement was non-responsive hearsay and not otherwise admissible evidence being subjected to a Mil. R. Evid. 403 balancing test.

questioning, just five questions, blunted any prejudicial impact. *See United States v. Nelms*, 2016 CCA LEXIS 227 at *9–10 (N.M. Ct. Crim. App. 14 April 2016) (noting that limiting the scope of questions avoids the "mini trial" concerns). Appellant opened the door to the evidence that SPC [redacted] initially made a SHARP allegation and that the government chose not to go forward when he cross-examined her extensively on her delayed report. (R. at 861–62). Defense asked questions clearly intended to cast doubt on SPC [redacted]'s report, calling into question the believability of her not knowing "how wrong [the allegations] were until [she] joined the Army" and insulating a false sexual violence allegation. (R. at 862–63).

It is clear that appellant believed the fact that SPC [redacted] initially made a sexual allegation was relevant and probative. Trial counsel correctly argued that the panel may be confused about the sexual allegation and why SPC [redacted] did not report until after the SHARP brief at DLI, which may impact her credibility, and thus an exploration of that was probative. (R. at 883–84, 972). The risk of "misapprehension or false assumption" is extremely low, especially since the underlying facts of the allegation were never discussed. (R. at 970–72) (Appellant's Br. 43). These questions, especially in light of appellant's cross of SPC [redacted], has little chance of luring "the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Collier*, 67 M.J. at 354. The panel undoubtedly heard that appellant asked questions about the report and SPC

[redacted] provided context to her answers on re-direct. This evidence would not cause the panel to ignore the instructions of the military judge and find appellant guilty based on uncharged acts. (R. at 1353); *See United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991) (panels are presumed to follow the instructions, until demonstrated otherwise). The military judge was well within his discretion to determine that the probative value of these questions outweighed the danger of unfair prejudice. *See Collier*, 67 M.J. at 354; *Turner*, 25 M.J. at 325.

Likewise, when KC testified that appellant had a character for peacefulness and for respecting women, defense opened the door to "have you heard" questions challenging the basis of that opinion. (R. at 1130–31, 1133–37); *See United States v. Pearce*, 21 M.J. 991, 992 (A.C.M.R. 1986) (noting generally "defense [character] evidence opened the door to prosecution inquiry into the defendant's character. One of the techniques thus made available to the prosecution was the use of 'Have you heard?' questions during cross-examination of defense reputation witnesses.") (citing *Michelson v. United States*, 335 U.S. 469 (1948).[36] Once the door was open, the military judge only needs to apply the Mil. R. Evid. 403

[36] *See also United States v. King*, 2020 CCA LEXIS 316 at *20–21 (A.F. Ct. Crim. App. 14 Sep. 2020) ("'Do you know' or 'have you heard' type questions, including reference to specific instances of conduct, are a recognized method of testing a witness's opinion concerning the character or a trait of character of a person, presuming there is a good faith basis for asking the question and it is otherwise admissible under our rules of evidence (which in most cases would include a [Mil. R. Evid.] 403 balancing analysis) (parenthetical in original).

balancing test to the "have you heard" question regarding the allegation of appellant's past sexual violence. *United States v. Pearce*, 27 M.J. 121, 125 (C.M.A. 1988) ([Mil. R. Evid.] 403's balancing test must be applied to 'Have you heard?' or 'Do you know?' questions.)

The military judge determined, on the record, "that the probative value [of the uncharged acts] is not substantially outweighed by any danger of unfair prejudice." (R. at 1142–43). This is a reasonable determination well within his wide discretion. *See Turner*, 25 M.J. at 325. Importantly, the allegation of uncharged sexual violence was already before the members. (R. at 970–72). The danger of unfair prejudice to the proceeding, based on one "did you know" question, is extremely low when the panel was already aware SPC [redacted] made the allegation. *See Collier*, 67 M.J. at 354; *see also United States v. Acton*, 38 M.J. 330, 334 (C.A.A.F. 1993) (When applying Mil. R. Evid. 403 in a Mil. R. Evid. 404(b) context, the court stated "[a]ny prejudicial impact based on the shocking nature of the evidence was diminished by the fact the same conduct was already before the court members.").

Even if the allegation had not already been before the panel, the military judge would still have been correct to allow the question. There is little prejudicial effect, contrary to appellant's claims, to KC's opinion being tested. (Appellant's Br. 44). KC's opinion was that appellant was both peaceful and respectful of

women. (R. at 1130–31). The challenge on the foundation of those opinions is relevant and the alleged sexual violence against SPC [redacted] encapsulates both peacefulness *and* respect for women. (R. at 1148–49).[37] The probative value of the question is clear while any prejudicial effect is not.[38] Appellant has failed to show how this question impacted "the integrity of the trial process," likely because he cannot do so. *Acton*, 38 M.J. at 334. The military judge was well within his wide discretion to determine the question was permissible. *Id.*

D. Any error in excluding appellant's prior consistent statement was harmless.

The government's cross-examination of appellant with his messages to SPC [redacted] raised an implied charge that he recently fabricated, i.e., his denial of abuse on the stand. *United States v. Finch,* 79 M.J. 389, 394 (C.A.A.F. 2020). As such, appellant should have been permitted to rebut that inference with statements made prior to the alleged recent fabrication. *Id.* Appellant correctly made this argument at trial, noting "and now, by inference, they're saying now you come here to this

[37] KC noted that his opinion would change *if the allegation were to be true*, but notably did not change his opinion. (R. at 1149). The lack of concrete changing of opinion renders any prejudice moot. *United States v. Donnelly*, 13 M.J. 79, 83 (C.M.A. 1982) (finding that prejudice from improper cross-examination on prior instances of conduct to be 'illusory' when witness refuses to change opinion.).
[38] This is substantially more valuable than "peppercorn" as appellant claims. (Appellant's Br. 44). Appellant offered KC as a character witness, meaning he believed his opinion had significant value. The strength or weakness of the foundation of that opinion cannot, by extension, have little value.

court and you're saying this, essentially implying a recent fabrication" and the messages "predate this court-martial." (R. at 1246). The military judge found that the text messages used to cross appellant predated his statement to his mother, and therefore it is not a prior consistent statement. (R. at 1247). His failure to address appellant's theory, consistent with *Finch*, that the recent fabrication was appellant's testimony renders the military judge's ruling error. 79 M.J. at 394.

However, the military judge' error in excluding appellant's prior consistent statement was harmless. "For preserved nonconstitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings." *United States v. Frost*, 79 M.J. 104, 111 (C.A.A.F. 2019) (cleaned up). In determining the prejudice from an erroneous exclusion of evidence, the court weighs: "(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. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (citing *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

As discussed *supra* pp. 8–14, the government's case, especially in regards to SPC [redacted], was very strong. Specialist [redacted] was a credible witness who testified consistently about the abuse she suffered. Further, her allegations were corroborated by photographic evidence. (Pros. Exs. 4, 5). Meanwhile, as discussed *supra* pp. 14–16, the defense case was very weak. Appellant's testimony

lacked credibility and was, frankly, unreasonable. *See Nicola*, 78 M.J. at 227. The messages he sent to SPC [redacted] directly contradicted his testimony and undermined any credibility. (R. at 1238–40). Additionally, defense relied on character evidence which was challenged and lacked credibility. (R. at 1050–1168).[39] Ultimately, the first two *Kohlbek* factors weigh heavily against a finding of prejudice.

The materiality of the evidence neither weighs in favor or against a finding of prejudice. The denial of an allegation is relevant, however appellant's denial was only to one of the assaults and not a wholesale denial of abuse. (Def. Ex. ZZ for ID). As there were two assaults when SPC [redacted] and appellant played video games, the materiality of the non-specific denial is lessened. (R. at 603–605, 613).

The quality of this evidence was low, favoring a finding of no prejudice. *Kohlbek*, 78 M.J. at 334. The messages were between appellant and his mother, already calling into question the veracity of his statements. Def. Ex. ZZ for ID). He only reached out to his mother *after* SPC [redacted] made public allegations against him. (Def. Ex. ZZ for ID). At this point, appellant has been confronted by SPC [redacted] via text message and seen that she has gone public with allegations domestic

[39] Appellant's character was vouched for by KC, whose own lack of foundation and bias was evident, and his third wife. (R. at 1050–1168). Conversely, appellant was only able to provide his mother as a witness against either victim's character. (R. at 1040–1075).

violence. Appellant denying the offenses to his mother carries very little, if any, weight.[40] Finally, appellant's subsequent messages to his mother do not contradict the admissions, apologies, and justifications he made in the messages to SPC [redacted]. (Pros. Exs. 47, 49, 50, 51, 58; R. at 1228–39). The quality of the evidence is also lessened when considering that the panel heard appellant deny any abuse and they rejected that claim. (R. at 1455). Given those messages to SPC [redacted] and appellant's at trial denial, it is clear one single, post-allegation denial of abuse would have had little bearing on the outcome of appellant's trial**.**

E. There was not cumulative error.

The cumulative effect of all plain errors and preserved error is reviewed de novo. *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011). "Under the cumulative-error doctrine, a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding." *Id.* (cleaned up). Appellate courts may "reverse only if it finds the cumulative errors denied [a]ppellant a fair trial." *Id.*

As argued *supra* pp. 55–58, the only potential error present in the trial was the military judge's exclusion of appellant's prior consistent statement, but that

[40] This is especially true as the earlier messages in the exhibit indicate he only made allegations of abuse to his mother *after* SPC [redacted] posted on Facebook. (Def. Ex. ZZ for ID).

error was not prejudicial to appellant. A single non-prejudicial error did not deny appellant a fair trial and should not merit reversal. *Pope*, 69 M.J. at 335. Accordingly, this court should reject the cumulative error claim. *United States v. Gray,* 51 M.J. 1, 61 (C.A.A.F. 1999) ("Assertions of error without merit are not sufficient to invoke this doctrine."); *see also United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993) ("the errors, in the aggregate, do not come close to achieving the critical mass necessary to cast a shadow upon the integrity of the verdict.").

Assignment of Error IV.

THE MILITARY JUDGE'S DEPARTURE FROM IMPARTIALITY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS.

Additional Facts

As discussed *supra* pp. 29–34 and 43–46, appellant's counsel made a proffer during [redacted]'s cross that she had been titled and "found to be the abuser." (R. at 433). During the subsequent Article 39(a) session, the military judge admonished counsel and advised him to "use discretion" when speaking in front of the panel or, alternatively, ask to be heard outside the presence of the panel. (R. at 434–35). The military judge raised concerns that "found" has a specific legal meaning and may confuse the panel, especially when a probable cause opine is not a "finding." (R. at 440). Defense counsel stated "I didn't mean to mislead

anyone" but did contest the error, and meaning of "finding," before ultimately conceding he would not use the word "finding."[41] (R. at 441–42). The military judge wondered as to relevance of the line of questioning. (R. at 442). Appellant's counsel claimed that there was an "ongoing custody dispute" which made the question relevant.[42] (R. at 442–43). The military judge noted that appellant had not laid the proper foundation for the custody dispute and expressed concerns of "litigating the custody dispute" and "creating a trial within in a trial" in violation of Mil. R. Evid. 403. (R. at 443). Ultimately, however, the military judge did not allow defense counsel to ask about the purported "finding," but did allow him to question [redacted] on the underlying conduct. (R. at 442, 444).

During the course of the trial the military judge engaged in discussions with both counsel about the admissibility of evidence, and ruled properly on a plethora of objections. At one point the military judge sought to clarify an earlier ruling where he misspoke and cited the wrong military rule of evidence. (R. at 461). He explained that character evidence was not permitted for the propensity inference

[41] In acquiescing defense counsel stated "If that is the court's definition of 'finding', I will use that." (R. at 442).

[42] The "custody dispute" appears to be [redacted] attempting to get appellant to relinquish his parental rights after he questioned their daughter's paternity. (R. 419, 443). It does not appear from the record there was a court proceeding involved.

under Mil. R. Evid. 404(a) rather than Mil. R. Evid. 608(b) as he had cited in his earlier oral ruling. (R. at 428, 461).

At another point, the military judge offered an alternative avenue of admissibility for a members' questions as prior consistent statements. (R. at 537–41). The government argued [redacted] had been challenged on several recent motives to fabricate. (R. at 539). When the military judge asked "So are you arguing [Mil. R. Evid. 801(d)(1)(B)(i) and (ii)]? Seems kind of like you are, based on what you just said," the government responded initially that it was arguing for admission under Mil. R. Evid. 801(d)(1)(B)(i) before immediately reconsidering stating "Although now looking at it, she could be rehabilitated on the issue of inconsistency by claiming something, [and] recanting it . . ." and "I am now, saying, yes, Your Honor, [Mil. R. Evid. 801(d)(1)(B)(i) and (ii)]." (R. at 539–40). In response to this claim, defense counsel stated "If the government can articulate a more solid basis or which one they think it specifically rebuts." The military judge noted he was the one who believed the evidence was potential admissible under either theory. (R. at 541). The military judge and defense counsel then had a discussion about the evidence to determine if it was prior to the motive to fabricate. (R. at 541–45).

After the third day of trial the military judge held an R.C.M. 802 session with the parties where he "gave a very clear instruction that any other pretrial

matters, and trial preparation, any discussion between counsel, should all be conducted prior to 0800." (R. at 945–46). At an Article 39(a) session at 1012 the next morning the military judge noted he was "extremely frustrated that I could not call the panel members in at 0800, as this court had promised I would do, when I spoke to them last." (R. at 946). He further noted he had "let the parties know how frustrated the court was with the defiance to this court's order" and he held "all parties, all counsel, responsible for defying that order." (R. at 946). The military judge noted that *he* may have frustrated one counsel more than others with his admonishment, but reiterated his frustration was with all counsel. (R. at 946). The military judge expressed frustration with how the trial was proceeding, including late discovery, numerous breaks and recesses, and "reshuffling of evidence and reorganization of materials." (R. at 947). He again noted that both government and defense contributed to his frustration. (R. at 947).

During appellant's case-in-chief his counsel asked for an Article 39(a) session to request an instruction indicating the government "failed to produce" a telephonic defense witness, AT. (R. at 1157, 1168). The military judge expressed surprise at this and stated "I'm not sure now's the time to tell me the government has failed to produce a witness for trial." (R. at 1157). He also expressed confusion about how the government failed to produce the telephonic witness. (R. at 1157). Defense asserted "[the government] agreed to produce [the witness] and

have failed to do so" but did not explain how the government failed.[43] (R. at 1158). Defense counsel could not cite caselaw or a rule for courts-martial to support the assertion the burden was on the government to produce telephonic defense witnesses. (R. at 1158). The military judge determined that the defense must "point to…somehow where the government's acted in a manner to impede their ability to be reached" or provide authority for the claim. (R. at 1159–60). Ultimately, appellant and the government agreed to stipulate to AT's expected testimony. (R. at 1162, 1168; App. Ex. XXXIX).

When the military judge learned that the government intended to call a previously unlisted rebuttal witness, IK, in the unit of a panel member, Lieutenant Colonel (LTC) OS, he called an Article 39(a) session. (R. at 1265). The military judge questioned LTC OS on whether he knew IK and then allowed both government and defense counsel to voir dire her. (R. at 1267–70). Neither trial counsel nor defense counsel challenged LTC OS, but both were hesitant about the witness testifying.[44] (R. at 1272). When the government told the court they did

[43] The government granted the witnesses but "limited to remote testimony only." (App. Ex. VI–B). During the Article 39(a) session appellant's counsel seemed to imply they attempted to have AT compelled along with other witnesses. (R. at 1158). However, she was not the subject of the motion to compel. (App. Ex. VI–B, App. Ex. VII).

[44] The military judge did not interrupt trial counsel's explanation "evidently not wanting to hear any expression of concern about the appearance of fairness in the proceeding" but rather to limit the inquiry into LTC OS' fitness rather than the government's concern with calling a witnesses. (Appellant's Br. 70; R. at 1272).

not intend to call the witness, the military judge noted they seemed hesitant and clarified "I'm not issuing any ruling about who you call as a witness" but did determine the issue was resolved. (R. at 1274).

On the fourth day of trial, Friday 1 July 2022, appellant testified, on direct, from roughly 1900 to 2000. (R. at 1169, 1216). The military judge called for a brief recess, noting the trial would continue into appellant's cross-examination. (R. at 1216). He then explained that he was not stationed in Korea and had a flight to Washington State "scheduled for 0930 on Sunday morning." (R. at 1216). He then continued:

> I don't want to rush anybody. I don't want to create any concerns. The counsel know this. I just want to make you aware of that. It is 2000. There is a cross-examination and a redirect. Are the members still able to take evidence tonight or is there concern?

(R. at 1217). The panel president responded, "We're good to continue, Judge." (R. at 1217). After appellant was convicted at 1933 on Saturday, 2 July 2022 the military judge noted the panel "had some anticipation that you would want to recess for the night, start in the morning" and noted the counsels' efforts and "fatigue level." (R. at 1455, 1460). The military judge then stated the government would put on their pre-sentencing case that night and the defense would proceed in the morning. (R. at 1460–61). He further noted that his flight timing was no longer a concern. (R. at 1460–61). The panel president asked for a recess until the

next day before any pre-sentencing case, which the military judge agreed to. (R. at 1461–62). The pre-sentencing portion of the proceeding started at 0915 3 July 2022 and ended when the court-martial was adjourned at 1707 that same day. (R. at 1473, 1617).

Standard of Review

When an appellant does not raise the issue of disqualification until appeal, the claim is examined under for plain error. *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011) (citing *United States v. Jones*, 55 M.J. 317, 320 (C.A.A.F. 2001). Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice. *Id.* (citing *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008)).

Law

"An accused has a constitutional right to an impartial judge." *Martinez*, 70 M.J. at 157 (quoting *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999). This neutrality ensures "that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed against him." *Marshall v. Jerico, Inc*., 446 U.S. 238, 242 (1980). Accordingly, military judges "must avoid undue interference with the parties' presentations or appearance of partiality" when exercising reasonable control over the proceedings. Rule for Courts-Martial [R.C.M.] 801(a)(3)

discussion. This requirement of impartiality does not mean that the military judge should act as "simply an umpire in a contest between the government and the accused." *United States v. Quintanilla*, 56 M.J. 37, 43 (C.A.A.F. 2001) (citing *United States v. Kimble*, 49 C.M.R. 384, 386 (C.M.A. 1974). Military judges must also exercise control of the proceedings by ensuring "that the dignity and decorum of the proceedings are maintained" as "courts-martial should be conducted in an atmosphere which is conducive to calm and detached deliberation and determination of the issues presented and which reflects the seriousness of the proceedings." R.C.M. 801(a)(2) discussion. The Court of Appeals for the Armed Forces (CAAF) has analogized the military judge's role to walking on a tightrope, "exercising evenhanded control of the proceedings without veering, or appearing to veer, too far to one side or the other." *Quintanilla*, 56 M.J. at 43.

The validity of the military justice system and the integrity of the court-martial process "depend on the impartiality of military judges in facts and in appearance." *Hasan v. Gross*, 71 M.J. 416, 419 (C.A.A.F. 2012); *United States v. Uribe*, 80 M.J. 442, 446 (C.A.A.F. 2021). R.C.M. 902(a) mandates that a military judge "shall disqualify himself or herself in any proceedings in which the military judge's impartiality might be reasonably questioned." *Uribe*, 80 M.J. at 446. The test for identifying an appearance of bias is "whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might

be reasonably questioned." *United States v. Sullivan*, 74 M.J. 448, 453 (C.A.A.F. 2015). This test is under an objective standard. *Id.*

A military judge "has as much obligation not to disqualify himself when there is no reason to do so as he does to disqualify himself when the converse is true." *United States v. Kincheloe*, 14 M.J. 40, 50 n.14 (C.M.A. 1982) (internal quotation marks omitted) (quoting *United States v. Bray*, 546 F.2d 851, 857 (10th Cir. 1976)). "A party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings." *Quintanilla,* 56 M.J. at 44. Accordingly, a strong presumption exists that a military judge is impartial. *Id.*

"[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it." *United States v. Lopez*, 76 MJ 151, 154 (C.A.A.F. 2017) (citation omitted). "[W]hen a military judge's impartiality is challenged on appeal, the test is whether, taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions." *Quintanilla,* 56 M.J. at 44. (citing *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000)) (internal quotations omitted). "The appearance of impartiality is reviewed on appeal objectively" and applies the test of "any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the

judge's disqualification." *Martinez*, 70 M.J. at 157–58 (citing *Kincheloe*, 14 M.J. at 50.) "Expressions of impatience, dissatisfaction, annoyance, and even anger" do not establish bias or partiality. *Liteky v. United States*, 510 U.S. 540, 555–56 (1994).

Military courts have "adopted the standards announced by the Supreme Court in *Liljeberg* to determine whether a military judge's conduct warrants that remedy to vindicate public confidence in the military justice system." *Id.* "[Courts] conduct both inquiries even if [it] conclude[s] that there is no Article 59(a) prejudice as it is possible that an appellant may not have suffered any material prejudice to a substantial right, but that reversal would still be warranted under *Liljeberg*." *Id*. (citing *United States v. Butcher*, 56 M.J. 87, 92 (C.A.A.F. 2001)). In *Liljeberg* the Supreme Court established three prongs to determine whether a judgement should be vacated; "[1] the risk of injustice to the parties in the particular case, [2] the risk that the denial of relief will produce injustice in other cases, and [3] the risk of undermining the public's confidence in the judicial process." *Id.*, at 159 (Citing *Liljeberg*, 486 U.S. at 864).

Argument

As a preliminary matter, appellant did not make a motion for the military judge to recuse himself at trial. (R. at 365–1617). As such, appellant's claim of bias should be reviewed for clear error. *See Martinez*, 70 M.J. at 157. In this case

the military judge was impartial and showed no bias, let alone enough to overcome the high burden. *See Quintanilla,* 56 M.J. at 44. Furthermore, appellant was not hindered or prejudiced by the military judge's actions or rulings. *Martinez,* 70 M.J. at 159. Finally, an objective observer knowing all the circumstances of this case would not lose confidence in the military justice system. *See id.*; *Liljeberg,* 486 U.S. at 865.

A. The military judge was impartial.

Appellant's assertions of partiality by the military judge all center on judicial decisions made over the course of trial.[45] (Appellant's Br. 53–70). However, appellant falls well short of overcoming the "high hurdle" when alleging bias on actions "taken in conjunction with judicial proceedings." *Quintanilla,* 56 M.J. at 44. As discussed *supra*, many of the military judge's mid-trial decisions appellant rely upon were not even error, let alone evidence of bias. Other claims are simply judicial decisions rendered by a military judge throughout trial that are far from "extraordinary circumstances involving pervasive bias." [46] *Id.*

[45] Appellant raises a concern that the military judge prioritized "expedience over patience and prudence" but does not seem to claim this showed partiality, rather only undermined public confidence in the proceeding. (Appellant's Br. 68–70).
[46] For instance appellant claims, through his trial defense counsel's affidavit, that "on nearly every Government objection, he would sustain, and nearly every Defense objection would be overruled." (Appellant's Br. 61). Not only is this unsupported by the record, even if it was, it falls well under the hurdle required by *Quintanilla* for judicial decisions. 56 M.J. at 44.

Additionally, appellant points to the military judge's expressions of frustration or admonishments at his counsel — and government counsel — outside the presence of the panel as evidence of bias or partiality.[47] (Appellant's Br. 55–56, 61, 63–64, 66–67). All of these statements deal specifically with the judicial proceedings, whether it be speaking objections, formality and decorum, or efficiency of the proceedings. These are no more than the "expressions of impatience, dissatisfaction, annoyance, and even anger" which the Supreme Court has held does not establish bias or partiality. *Liteky* 510 U.S. at 555–56. "[E]ven a stern and short-tempered judge's ordinary efforts at courtroom administration remain immune." *Id.* at 556. Here, all of the admonishments towards both government and defense counsel revolved around courtroom administration and the efficient adjudication of the case. (R. at 442–43, 945–46, 1157, 1168). Like the admonishments in *Liteky*, the ones here "neither relied upon knowledge acquired outside such proceedings nor displayed deep-seated and unequivocal antagonism that would render fair judgment impossible." *Liteky*, 510 U.S. at 555–56; *see also United States v. Reynolds*, 24 M.J. 261, 264 (C.M.A. 1987) (where the record reflected a breakdown in decorum by all parties, including "harsh"

[47] The military judge admonished government counsel several times throughout trial, including for using informal language while addressing the court on two occasions, not comporting questions with the rules of evidence, failing to abide by the court's orders regarding proving redacted copies of a document to the defense, and not conducting proper pre-trial preparation. (R. at 464, 593, 945–46, 956–57).

comments by military judge in an effort to control the proceeding, and chastisement of a witness for "playing with words," "did not show an abandonment of the requisite judicial impartiality."); *United States v. Leahr*, 73 M.J. 364, n.1 (C.A.A.F. 2014) (comments by military judge insinuating appellant was guilty did not present "deep-seated favoritism or antagonism" after applying objective test for judicial impartiality); *United States v. Foster,* 64 M.J. 331, 339 (C.A.A.F. 2007) (comments made by the military judge about a defense expert were inappropriate but did not prejudice the appellant as they were made outside the presence of the members.)

Appellant's claim that the military judge "act[ed] as counsel for the government" is not supported by the record. (Appellant's Br. 58–62). When appellant objected to the admission on hearsay grounds the military judge correctly acted in his role as gatekeeper to determine if the evidence was admissible. (R. at 537–41); *See Quintanilla*, 56 M.J at 43 (military judges need not "simply an umpire in a contest between the government and the accused."); *see also United States v. Kaspers*, 47 M.J. 176, 178 (C.A.A.F. 1997) ("the judge's role is to screen all evidence for minimum standards of admissibility and to let the factfinder determine which evidence is more persuasive.") The military judge was not acting as a proponent of the government's evidence in asking, based on the evidence, if trial counsel was arguing that both Mil. R. Evid. 801(d)(1)(B)(i) and (ii) may

apply. (R. at 539–40). Rather, he was fulfilling his designated role as gatekeeper. *Id.* Further, appellant points to instances when the military judge and defense counsel would discuss evidentiary rulings without active input from trial counsel as evidence of the military judge's assuming the role of prosecutor. (Appellant's Br. 54, 58, 67). The simple explanation here is not an inappropriate assumption of the government's role by the military judge, but an appropriate application of his gatekeeping responsibilities coupled with a defense counsel utilizing "a school of advocacy" that created long, and at times overly argumentative, back-and-forth conversations between himself and the court.[48] (Def. App. Ex. A para 3(f)).

Appellant has failed to show how the military judge's actions showed a clear error in failing to recuse himself especially given the absence of a request from the defense or government. A reading of the record, taken as a whole, shows that the court-martial's legality, fairness, and impartiality were not in question. *See Martinez*, 70 M.J. at 157. Appellant has pointed to nothing beyond normal adjudication of a court-martial and control of the courtroom by a military judge, all of which certainly fall well short of the "high hurdle" he needs to overcome.

[48] Trial defense counsel described his advocacy and practice as "when the judge makes a ruling, then I can move on, but until there is a ruling, do not just concede a point just because the Judge pushes back. You argue until the judge rules, make them make a ruling." (Def. App. Ex. A para 3(f)). Defense counsel's theory was evident thought the many, and often repetitive, Article 39(a) sessions.

Quintanilla, 56 M.J. at 44. Simply put, appellant has not, and cannot, overcome the presumption of impartiality.

B. Appellant was not prejudiced.

As appellant has not raised this issue of disqualification until this appeal, the error must result in material prejudice in order for plain error to occur. *See Martinez*, 70 M.J. at 157 (citing *Maynard*, 66 M.J. at 244.) A review of the record shows that appellant received a fair trial. That panel was able to see and hear the witnesses, including both victims and appellant, and make a credibility determination. *See United States v. Campbell* 50 M.J. 154, 166 (C.A.A.F. 1999) (stating in a review of sufficiency "we give great deference to the factfinder's ability both to draw logical inferences from the evidence presented and to assess the credibility of the witnesses."). Here, as discussed *supra* pg. 8–16 the government's case was strong, especially for the specifications for Charge I (involving SPC [redacted]), while the defense case was weak.

The mere fact that a military judge adversely ruled on some of appellant's motions and objections does not necessarily demonstrate any risk of injustice. *Uribe*, 80 M.J. at 449. As discussed *supra*, any errors in rulings did not prejudice appellant. *See Marcavage v. Bd. of Trs. of Temple Univ. of the Commonwealth Sys. of Higher Educ*., 232 F. App'x 79, 84 (3d Cir. 2007) (finding no risk of injustice when the trial judge's rulings "were all correct" and there was "no

prejudice . . . as a result of these rulings.")

Importantly, appellant was tried and sentenced by a panel. (R. at 1455, 1617). That panel was actively engaged throughout the trial, evidenced by the submission of twenty-six members' questions for witnesses. (App. Exs. XIX–XXXVIII, App. Exs. XL–XLVII). The military judge was careful to excuse the panel before issuing any admonishments to counsel. (R. at 434–35, 441–43, 945–47, 1157–60). Likewise, the vast majority of the discussions regarding evidence admissibility and witness production were done outside the presence of the panel. (see R. at 399–1313). The military judge's participation was limited to instructions and evidentiary rulings because a panel convicted and sentenced appellant. *See Butcher*, 56 M.J. at 92. There is no evidence that the military judge, or any alleged impartiality, impacted the panel's ability to fairly try and sentence appellant, evidenced by the findings of not guilty for specification 6of Charge I, specifications 1, 4, 5 of Charge II and the specification of Charge III and a sentence lighter than requested by the government. (R. at 1455, 1581, 1617); *see United States v. Elzy*, 25 M.J. 416, 419 (C.M.A. 1988) (explaining there was no prejudice to appellant from military judge's failure to recuse himself where "the military judge acquitted appellant of one of the charges.").

Appellant was not materially prejudiced by any alleged partiality displayed by the military judge. A review of the record, taken as a whole, reveals that any

error by the military judge in failing to disqualify himself was harmless beyond a reasonable doubt. *Martinez*, 70 M.J. at 157.

C. Reversal is not warranted under *United States v. Liljeberg.*

Appellant briefly argues that "the injustice to the defense merits reversal under the first *Liljeberg* factor" but only connects that argument to the material prejudice alleged earlier in his brief. (Appellant's Br. 71). As discussed *supra* pp. 73–75 appellant was not prejudiced and therefore there was no injustice to appellant. *Liljeberg*, 486 U.S. at 862. Further, appellant does not allege reversal is required under the second *Liljeberg* prong.[49] *See Uribe*, 80 M.J. at 450 ("Because Appellant has not presented any argument on this point, we are convinced that it is 'not necessary to reverse the results of the present trial in order to ensure that military judges exercise the appropriate degree of discretion in the future.'") (quoting *Butcher*, 56 M.J. at 93).

Appellant's claim that the military judge prioritized "expedience over patience and prudence" is simply not supported by the record. (Appellant's Br. 68–70). The trial lasted for six days, concluding on a Sunday evening. (R. 79,

[49] Even if appellant did make such a claim, the military judge's actions were not so egregious, or even inappropriate, to require this court to reveal to encourage a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose when discovered. *See Selkridge v. United of Omaha Life Ins. Co.*, 360 F.3d 155, 171 (3d Cir. 2004) ("[O]ur determination that a violation of [the recusal statute] occurred will provide virtually the same encouragement to other judges and litigants as would a remand.").

1617). Throughout trial the military judge deferred to the panel regarding starting times for the day, stopping times for the day, and recess lengths. (R. at 495–96, 645, 882, 1019, 1122, 1156, 1217, 1264, 1316, 1377, 1431, 1459, 1461–1462, 1502, 1605). The military judge liberally used Article 39(a) session to discuss objections rather than ruling from the bench. (R. at 399–1313). Finally, although he mentioned his original flight it is clear from the record that the military judge changed his flight without issue once it became apparent the trial would require more time. (R. at 1216, 1460–61). No reasonable member of the public, looking at the trial as a whole, would believe the military judge was favoring expedience over patience and prudence; rather, they would have greater confidence in the military justice system seeing the military judge's willingness to take as long as needed to ensure a fair trial. *See Uribe*, 80 M.J. at 450; *Elzy*, 25 M.J. at 419.

Appellant argues that the military judge departed from impartiality in a way that undermines public confidence in the military justice system and therefore requires reversal under the third part of the *Liljeberg* test. (Appellant's Br. 70–72). Upon examination of the entire proceedings, the third *Liljeberg* factor favors affirming the court-martial findings and sentence. In *Quintanilla*, the Court of Appeals for the Armed Forces turned to the American Bar Association Model Code of Judicial Conduct for guidance on proper conduct in criminal trials. 56 M.J. at 42. The *Quintanilla* court recognized the importance of judicial patience,

dignity, and courteous conduct. *Id*. However, it also recognized the aspirational nature of this code, and that violators typically did not face judicial disqualification or reversal:

> Such standards generally are regarded as principles to which judges should aspire and are enforced primarily through disciplinary action and advisory opinions, rather than through disqualification in particular cases. (citation omitted). In many jurisdictions, particularly in the federal courts, actions that violate codes of conduct do not necessarily provide a basis either for disqualification of a judge or reversal of a judgment unless otherwise required by applicable law.

Id. at 42–43.

Although the *Quintanilla* court set aside the findings and sentence related to the judicial misconduct, the case involved allegations that the military judge assaulted a witness and made *ex parte* communications. *Id.* These allegations arose after the military judge decided to act as a bailiff and confront a witness in the hallway for disrupting the proceedings. *Id*. at 49–52. In appellant's case, differing from *Quintanilla*, the military judge made only a few admonishments of both sets of counsel, all outside the presence of the members, and made several evidentiary rulings.

Further, the panel acquitted appellant of one assault by strangulation, three specifications of assault consummated by a battery, and one specification of extra-marital conduct. (R. at 1455). This gives assurance that an objective observer

would still have confidence in the military justice system. *Uribe*, 80 M.J. at 450; *Elzy*, 25 M.J. at 419.

Appellant points to a supposed belief by "more than one" unnamed court reporter who allegedly asked appellant's defense counsel "why [the military judge hates him] so much."[50] (Appellant's Br. 70). Appellant alleges that this non-neutral statement from his trial defense counsel citing unnamed court reporters is proof enough to show the public would lose confidence in the military justice system.[51] (Appellant's Br. 70). However, as discussed *supra* pp. 69–72 the military judge simply admonished all four counsel for lapses in professional decorum and failure to follow the court's orders. This is not the singular bullying of appellant's counsel as he would like to suggest, but rather a military judge exercising control of the proceedings by ensuring the efficiency, "dignity, and decorum of the proceedings are maintained." R.C.M. 801(a)(2) discussion. Had a reasonable member of the public seen the military judge interact with all counsel, the panel, and the witnesses and understood the circumstances of the case in

[50] Appellant's trial defense counsel acknowledged that the court reporters did not cite specific instances when making this comment. (Appellant's Br. 70).
[51] The government acknowledges it did not file a reply to appellant's motion Pursuant to Rule 23(c) of this court's Rules of Appellate Procedure. However, the government notes this statement is neither an affidavit nor an unsworn declaration and should be rejected pursuant to Rule 23(b) of this court's Rules of Appellate Procedure. *See United States v. Gunderman*, 67 M.J. 683, 686–88 (Army Ct. Crim. App. 2009) (affirming the legal importance of the oath or swearing process).

totality, rather than the narrow and slanted version presented by appellant here, that objective observer would have concluded the military judge was impartial. *Martinez*, 70 M.J. at 159.

Accordingly, the public's confidence in the military justice system would not be undermined. *Id.* at 160. On the other hand, a decision to reverse the findings and sentence would increase the risk that the public would lose faith in the judicial system. *See Uribe*, 80 M.J. at 450 (finding that, after the court of criminal appeals found no merit in appellant's challenges to the court-martial proceedings and that the sentence was legally correct and appropriate under Article 66(c), UCMJ, (2012), "a decision to affirm the findings and sentence under these circumstances would not upset public confidence in the judicial process. To the contrary, a decision to reverse the findings and sentence would increase the risk 'that the public will lose faith in the judicial system.'" (quoting *United States v. Cerceda*, 172 F.3d 806, 815 (11th Cir. 1999)). Under these circumstances, the *Liljeberg* factors do not support reversal, and therefore, appellant is not entitled to relief.

Conclusion

WHEREFORE, the government respectfully requests this honorable Court affirm the findings and sentence as approved by the convening authority.

[redacted]

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CERTIFICATE OF SERVICE

UNITED STATES v. RAYMOND A. PRICE

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

[redacted]
ANGELA R. RIDDICK
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APPENDIX

United States v. Henderson

United States Navy-Marine Corps Court of Criminal Appeals

April 24, 2014, Decided

NMCCA 201300140

Reporter
2014 CCA LEXIS 261 *

UNITED STATES OF AMERICA v. GERALD O. HENDERSON, LIEUTENANT JUNIOR GRADE (O-2), U.S. NAVY

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Subsequent History: Motion granted by United States v. Henderson, 73 M.J. 422, 2014 CAAF LEXIS 692 (C.A.A.F., 2014)

Review denied by United States v. Henderson, 2014 CAAF LEXIS 1069 (C.A.A.F., Nov. 5, 2014)

Prior History: [*1] GENERAL COURT-MARTIAL. Sentence Adjudged: 19 December 2012. Military Judge: CAPT John Waits, JAGC, USN. Convening Authority: Commander, Navy Region Southeast, Jacksonville, FL. Staff Judge Advocate's Recommendation: CAPT M.C. Holifield, JAGC, USN.

Counsel: For Appellant: Capt David Peters, USMC.

For Appellee: Capt Matthew Harris, USMC.

Judges: Before R.Q. WARD, J.R. MCFARLANE, K.M. MCDONALD, Appellate Military Judges.

Opinion

OPINION OF THE COURT

PER CURIAM:

The appellant entered mixed pleas at a trial by general court-martial with officer members. Pursuant to his pleas, the military judge found the appellant guilty of one specification of violating a lawful general order in violation of Article 92, Uniform Code of Military

Justice, 10 U.S.C. § 892. The members then convicted the appellant, contrary to his pleas, of one specification of attempted wrongful sexual contact and, as a lesser included offense to the charged offense of aggravated sexual contact, one specification of wrongful sexual contact in violation of Articles 80 and 120, UCMJ (2008), 10 U.S.C. §§ 880 and 920. The members sentenced the appellant to three months' confinement, forfeiture of all pay and allowances, and a dismissal. The convening authority [*2] (CA) approved the sentence as adjudged, and except for the dismissal, ordered the sentence executed.

The appellant raises two assignments of error: (1) that the military judge abused his discretion by failing to instruct the members on the affirmative defense of consent, and; (2) that the appellant was denied due process of law because the CA failed to consider ethnicity when selecting the court-martial members.

After careful consideration of the record of trial, the appellant's assignments of error, and the pleadings and oral arguments of the parties, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

In November of 2011, while serving aboard USS THE SULLIVANS (DDG 68), the appellant left the ship for a night ashore in Rota, Spain, with several fellow officers. After returning to the ship intoxicated, he encountered Fireman (FN) CL, a junior Sailor who had also been drinking earlier that evening. During this encounter, the appellant told FN CL that he wished he had more to drink, at which time she offered him vodka that she [*3] had hidden in her backpack. They went to the weapons office, shared a drink, and engaged in conversation that FN CL described as "flirting." Record at 453. As the conversation progressed, FN CL stood up to get her bag from elsewhere in the room, walking past the appellant while doing so. As she passed, the appellant pulled her into his lap and kissed her. FN CL testified that at this point she kissed him back "for a second," but then turned away and said she needed to leave. *Id.* at 423. After she turned her head, the appellant continued to kiss her on the neck and cheek, and then pushed her shirt up and kissed her breasts. *Id.* FN CL told the appellant to stop, attempted to push his head away with her hands, and stood up to leave. *Id.* at 424. The appellant pulled her back into his lap and attempted to put his hands down the front of her pants. *Id.* FN CL eventually pushed herself away from the appellant and exited the room. *Id.* at 425.

Additional facts necessary for the resolution of particular assignments of error are included below.

Instructions on Consent

The appellant contends that the military judge's failure to instruct the members on the affirmative defense of consent created constitutional [*4] error that was not harmless beyond a reasonable doubt. We disagree.

At trial, the military judge discussed his intentions for instructions. Although trial defense counsel requested an instruction on both the affirmative defense of consent and mistake of fact as to consent, ultimately the military judge decided to only give the mistake of fact instruction, finding that "while mistake of fact as to consent might be a reasonable inference from the evidence, I don't see where, as it relates to the charges and specifications, that the issue of consent was raised by some evidence." *Id.* at 654. However, the military judge's ruling was, for all practical purposes, limited to the charged offense of aggravated sexual contact under Article 120(e), UCMJ. *Id.* at 658. The lesser included offense of wrongful sexual contact has as an element that the act was committed "without that other person's permission . . . ." Article 120b(13)(b), UCMJ (2008). When instructing the member's on this element the military judge stated:

> The term "without permission" in the elements of wrongful sexual contact, alleged to have been attempted in the Specification of Charge I, and in the lesser included offense of Charge [*5] III, means without consent.

Id. at 690. The military judge then gave the members the standard definitions and instructions as to what does and does not constitute consent. *Id.* at 690-91.

Whether a panel was properly instructed is a question of law this court reviews *de novo*. *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007). A military judge is required to instruct the members on affirmative defenses "in issue." *Id.* A matter is considered "'in issue' when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose." RULE FOR COURTS-MARTIAL 920(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Discussion; *see also United States v. Gillenwater*, 43 M.J. 10, 13 (C.A.A.F. 1995). When the instructional error raises constitutional implications, the error is tested for prejudice using a "harmless beyond a reasonable doubt" standard. *Lewis*, 65 M.J. at 88. The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is "'whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence.'" *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005) [*6] (quoting *United States v. Kaiser*, 58 M.J. 146, 149 (C.A.A.F. 2003)).

Assuming without deciding that the appellant met the "some evidence" standard, and that the military judge erred by not instructing the members that consent was an affirmative

defense to aggravated sexual contact, the appellant's acquittal to that offense rendered any such error harmless beyond a reasonable doubt.

We reach this conclusion by noting first that the statutory defense of consent listed in Article 120(r), UCMJ, distinguishes wrongful sexual contact from those other offenses under the statute involving force or circumstances where the victim cannot or is unable to consent to the sexual conduct. Second, and keeping in mind the burden allocation under the 2008 Manual, we find it illogical that Congress would first require the prosecution to prove lack of consent beyond a reasonable doubt, only to then require an accused to shoulder the burden of proving consent by a preponderance of the evidence, and then require the prosecution to disprove the affirmative defense of consent beyond a reasonable doubt—essentially the same burden the prosecution carried at the onset. *See* Article 120(r) and (t)(16), UCMJ. We presume [*7] that Congress did not intend such an illogical interpretation of the offense under Article 120(m), and the affirmative defense under Article 120(r) and t(16), UCMJ. *See, e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 580, 129 S. Ct. 2658, 174 L. Ed. 2d 490 (2009) (holding that courts must avoid interpreting a statutory provisiion in a way that renders other provisions of the statute meaningless or "a dead letter") (citing *United States v. Atlantic Research Corp.*, 551 U.S. 128, 137, 127 S. Ct. 2331, 168 L. Ed. 2d 28 (2007)). Instead, we find that Congress intended to except the affirmative defense of consent from the offense of wrongful sexual contact.

Lastly, assuming that the affirmative defense of consent was available for Article 120(m), UCMJ, we would find no prejudice to the appellant. The military judge instructed the panel that, to find the appellant guilty of the attempted offense in Charge I and the lesser included offense in Charge III, they must be convinced beyond a reasonable doubt that the sexual contact either attempted or committed was without the consent of FN FC. Record at 687-90. The panel's guilty finding to this element forecloses the possibility of any reasonable doubt that FC consented to the sexual contact.

Selection of Members

The appellant [*8] next asserts that the CA deprived him of a fair and impartial panel by refusing to consider potential panel members' race when weighing the experience requirement set forth in Article 25, UCMJ. Again, we disagree.

The appellant, an African-American, was originally scheduled to be tried before a panel that included one officer who identified his race as both "African-American (Black)" and "Caucasian (White)," a second officer who identified his race only as "African-American (Black)," Appellate Exhibit XVII at 1, 14, and seven "Caucasian" officers. However, on the eve of trial, the appellant fired his civilian attorney, thus forcing a three-month delay in his court-martial. During the delay, both officers with African-American heritage became

unavailable and were replaced. Upon learning that the new panel consisted entirely of white officers, the appellant requested that the CA detail new members that included "racial diversity." Record at 144. The CA denied that request. AE XV at 4.

The appellant then filed a motion challenging the selection of members as violative of Article 25, UCMJ, and requested that the military judge stay the proceedings and order the CA to detail two members of [*9] the appellant's race to the court-martial. AE XVI. After hearing testimony from both the CA and his staff judge advocate that the members were selected on a race-neutral basis, and that neither of them was aware of the appellant's ethnicity, or the racial composition of either panel until the motion was filed, the military judge denied the appellant's motion, specifically finding no evidence of systematic exclusion or that the panel was improperly selected. On appeal, the appellant now argues that "[r]ace and ethnicity are inexorably a part of an individual's experience" and that CA's must "consider race to give full effect to the meaning of 'experience' as an Article 25 criteria." Appellant's Brief of 3 Sep 2013 at 31-32.

Whether a panel is properly selected is a matter of law that this court reviews *de novo*. *United States v. Gooch*, 69 M.J. 353, 358 (C.A.A.F. 2011) (citing *United States v. Dowty*, 60 M.J. 163, 171 (C.A.A.F. 2004)). A defendant has both a constitutional and regulatory right to a fair and impartial panel. *Id.* at 357 (citation omitted). When selecting a panel, a CA must select members who, in the CA's opinion, are best qualified for the duty by reason of age, education, [*10] training, experience, length of service and judicial temperament. Art. 25, UCMJ.

We know of no authority that requires a CA to consider a potential member's race when choosing a court-martial panel. Although such consideration is permissible as part of "'good faith attempts to be inclusive and to require representativeness,'" the consideration of race is not required. *Gooch*, 69 M.J. at 358 (quoting *Dowty*, 60 M.J. at 171). Accordingly, we decline the appellant's invitation to find that the race-neutral approach used by the CA amounts to improper member selection. Because the record shows that the CA utilized the proper Article 25 criteria when selecting the panel, we reject the appellant's contention that his right to a fair and impartial panel was violated.

Conclusion

The findings and the sentence as approved by the CA are affirmed.

United States v. Nelms

United States Navy-Marine Corps Court of Criminal Appeals

April 14, 2016, Decided

NMCCA 201400369

Reporter
2016 CCA LEXIS 227 *

UNITED STATES OF AMERICA v. ADAM S. NELMS CONSTRUCTION MECHANIC THIRD CLASS (E-4), U.S. NAVY

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Subsequent History: Motion granted by United States v. Nelms, 75 M.J. 373, 2016 CAAF LEXIS 489 (C.A.A.F., June 14, 2016)

Motion granted by United States v. Nelms, 75 M.J. 441, 2016 CAAF LEXIS 686 (C.A.A.F., Sept. 6, 2016)

Motion granted by United States v. Nelms, 75 M.J. 446, 2016 CAAF LEXIS 753 (C.A.A.F., Sept. 16, 2016)

Review granted by United States v. Nelms, 75 M.J. 460, 2016 CAAF LEXIS 828 (C.A.A.F., Oct. 12, 2016)

Affirmed by United States v. Nelms, 76 M.J. 126, 2017 CAAF LEXIS 97 (C.A.A.F., Feb. 13, 2017)

Prior History: [*1] GENERAL COURT-MARTIAL. Sentence Adjudged: 4 June 2014. Military Judge: Col James K. Carberry, USMC. Convening Authority: Commander, Navy Region Hawaii, Pearl Harbor, HI . Staff Judge Advocate's Recommendation: LCDR J.S. Ayeroff, JAGC, USN.

United States v. Nelms, 2015 CCA LEXIS 522 (N-M.C.C.A., Nov. 19, 2015)

Counsel: For Appellant: Maj Michael Magee, USMC; LT Jessica Ford, JAGC, USN.

For Appellee: Maj Suzanne Dempsey, USMC; LCDR Keith Lofland, JAGC, USN; Capt Cory Carver, USMC.

Judges: Before J.A. FISCHER, B.T. PALMER, T.H. CAMPBELL, Appellate Military Judges. Judge PALMER and Judge CAMPBELL concur.

Opinion by: J.A. FISCHER

Opinion

OPINION OF THE COURT

FISCHER, Senior Judge:

An officer panel, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of two specifications of sexual assault and one specification of adultery, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The members sentenced him to reduction to pay grade E-1, total forfeitures, confinement for 5 years, 8 months, and 24 days; and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the punitive discharge, ordered it executed.

The appellant raises five assignments of error (AOE): (1) the military judge abused his discretion in admitting [*2] evidence of the appellant's prior sexual misconduct; (2) the appellant's individual military counsel request was improperly denied; (3) the sexual assault convictions constitute an unreasonable multiplication of charges; (4) the sexual assault convictions are legally and factually insufficient;[1] and (5) his adultery conviction violates the Due Process clause of the Fifth Amendment to the United States Constitution.[2] Although not raised as error, we find the court-martial promulgating order does not accurately reflect the court-martial findings and direct corrective action in our decretal paragraph. We conclude the findings and sentence are correct in law and fact, and no error materially prejudicial to the appellant's substantial rights was committed.[3] Arts. 59(a) and 66(c), UCMJ.

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[1] The appellant raises the fourth AOE pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[2] The appellant raises this AOE for the first time in a Motion for Reconsideration of this court's 19 November 2015 opinion in this case. On 19 January 2016 the appellant's Motion for Reconsideration was granted. In light of this court's decision in *United States v. Hackler*, 75 M.J. 648, 2016 CCA LEXIS 168 (N.M.Ct.Crim.App. 17 Mar 2016) (*en banc*) we find this AOE to be without merit. *United States v. Clifton*, 35 M.J. 79, 81-82 (C.M.A. 1992).

[3] Although not raised as error, we note that the appellant did not elect a forum on the record. At his arraignment [*3] on 28 February 2014, after being advised of his forum rights, the appellant reserved forum selection and entry of pleas. Record at 11, 13. On 28 March 2014 and 6 May 2014, a second military judge presided at full-day pretrial motion sessions, but did not address forum selection or pleas. From 2-4 June 2014, the second military judge presided over the 3-day trial. Prior to calling the members, the appellant entered pleas of not guilty to all charges and specifications, but he did not formally enter a forum selection. *Id.* at 219. The appellant, through counsel, fully participated in *voir dire*, challenges, and presentation of evidence before the officer member panel without objection to the court's composition. We are satisfied that the appellant was tried by a court composition of his choosing. We find that the military judge's failure to obtain the forum election on the record was a procedural error that did not materially prejudice a substantial right of the appellant. *See United States v. Alexander*, 61 M.J. 266, 270 (C.A.A.F. 2005); *see also United States v. Morgan*, 57 M.J. 119, 122 (C.A.A.F. 2002).

Background

In September 2013, two female petty officers, Yeoman Second Class (YN2) CM[4] and Logistics Specialist Second Class (LS2) DK, invited the appellant to go with them to a local bar in Hawaii for a night of [*4] drinking and celebration.[5] All three drank heavily at the bar, consuming approximately 9-12 drinks each over a 4 1/2 to 5 hour period. Relying on bar receipts and witness testimony, a Government expert witness estimated YN2 CM's blood alcohol content (BAC) peaked between .37 and .40 on the night in question while a defense expert witness estimated it peaked at .28.[6] YN2 CM testified that she blacked out at the bar, and her next memory was of lying on the ground outside the bar.[7]

Eventually, all three returned to LS2 DK's house.[8] Once there, YN2 CM slept on a couch and the appellant slept on the far side of the same couch.[9] YN2 CM testified that her next memory of the night was waking up in a dark house with a man on top of her with his penis inside her vagina.[10] She also testified that she could not move from underneath him; the man told her to roll over and then [*5] pushed her onto her stomach.[11] YN2 CM testified that she did not remember anything after that until the next morning when she awoke lying face down on the couch with her skirt "bunched up" to her thighs and her underwear on the floor.[12]

That evening YN2 CM went to a local hospital emergency room and reported that she thought she had been raped the prior night.[13] A nurse performed a sexual assault forensic examination on YN2 CM. DNA testing from that exam identified the appellant as the source of semen found on vaginal and cervical swabs taken from YN2 CM.[14]

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[4] YN2 CM was no longer in the Navy at the time of the appellant's trial.

[5] All were friends who worked at the same command and were celebrating the appellant getting off restriction. YN2 CM was married to another Sailor who was stationed aboard a ship homeported in San Diego. The appellant was also married. Record at 486-87 and 520.

[6] *Id.* at 662-63; 774.

[7] *Id.* at 489-90.

[8] *Id.* at 436.

[9] *Id.* at 437-38.

[10] *Id.* at 490.

[11] *Id.* at 490-91.

[12] *Id.*

[13] *Id.* at 497.

[14] *Id.* at 606-07. The DNA expert testified that the probability of selecting a random individual to match this evidence was approximately 1 in 19 quintillion Caucasian individuals and that a quintillion is a number with 18 zeroes behind it. *Id.* at 607.

Discussion

I. *Evidence Admitted of the Appellant's Prior Sexual Misconduct*

The appellant avers the military judge abused his discretion by admitting evidence relating to a prior sexual assault allegation against him. He maintains that since the Government repeatedly referenced the allegation to bolster an otherwise weak case, the evidence failed the MILITARY RULES OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) balancing [*6] test because it resulted in a "distracting mini-trial."[15]

The military judge allowed Ms. GC to testify that the appellant sexually assaulted her two years earlier, despite the appellant having been acquitted of this offense at a prior court-martial. Specifically, Ms. GC testified that after a night of heavy drinking with the appellant and his wife, she passed out at the couple's house. She later awoke to the appellant performing oral sex on her. Ms. GC also testified to memories of the appellant "forcing himself into [her]" and the appellant "being so violent" that her leg hurt because he was grabbing it so hard.[16] The military judge admitted this evidence under MIL. R. EVID. 413.[17]

We review "a military judge's decision to admit evidence [*7] for an abuse of discretion." *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013) (citing *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010)). "'The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (quoting *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010)).

MIL. R. EVID. 413(a) provides, "In a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense. The evidence may be considered on any matter to which it is relevant." Thus, "[i]nherent in M.R.E. 413 is a general presumption in favor of admission." *United States v. Berry*, 61 M.J. 91, 95 (C.A.A.F. 2005) (citation omitted).

Before admitting evidence under MIL. R. EVID. 413, three initial threshold requirements must be met: (1) the accused is charged with a sexual offense within the meaning of MIL.

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[15] Appellant's Brief of 20 Jan 2015 at 7.

[16] Record at 708.

[17] *Id.* at 220, 696-97. On 22 June 2015, the military judge issued five documents concerning matters raised at trial, one of which is captioned "Findings of Fact and Conclusions of Law Concerning the Admission of Evidence under MIL. R. EVID. 413 and MIL. R. EVID. 404(b)" (hereinafter "Ruling on Admission") at 5. These documents were attached to the record prior to authentication and are located in front of the Article 32 Report. The documents are not marked as appellate exhibits.

R. EVID. 413(d); (2) the proffered evidence is evidence that the appellant committed another sexual offense within the meaning of MIL. R. EVID. 413(d); and (3) the proffered evidence is logically relevant under both MIL. R. EVID. 401 and 402. *Solomon*, 72 M.J. at 179 (citing *Berry*, 61 M.J. at 95 and *United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2000)). To meet the second requirement, the military judge must conclude that the members "could find by [a] preponderance of the evidence that the offenses occurred[.]" *Wright*, 53 M.J. at 483 (citing *Huddleston v. United States*, 485 U.S. 681, 689-90, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988)).

Once the threshold requirements are met, "the military judge is constitutionally required to also apply a balancing [*8] test under M.R.E. 403." *Solomon*, 72 M.J. at 179-80 (citing *Berry*, 61 M.J. at 95). In conducting the MIL. R. EVID. 403 balancing test, "the military judge should consider the following non-exhaustive factors":

> strength of proof of the prior act (i.e., conviction versus gossip); probative weight of the evidence; potential for less prejudicial evidence; distraction of the factfinder; time needed for proof of the prior conduct; temporal proximity; frequency of the acts; presence or lack of intervening circumstances; and the relationship between the parties.

Id. at 180 (citation omitted). "When a military judge articulates his properly conducted M.R.E. 403 balancing test on the record, the decision will not be overturned absent a clear abuse of discretion." *Id.* (citing *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000)).

In this case, the military judge found sufficient evidence in Ms. GC's expected testimony to meet the required preponderance standard.[18] He also found the evidence relevant because of commonalities between the two alleged sexual assaults, including: (1) YN2 CM and Ms. GC each became intoxicated while drinking with the appellant; (2) both alleged victims were married to Sailors deployed at the time of the alleged assaults; and (3) both were assaulted while they were asleep or substantially incapable of consenting due [*9] to their intoxication.[19] The appellant contends that the military judge failed to conduct an adequate balancing test under MIL. R. EVID. 403 and that the proper balancing test requires exclusion of Ms. GC's testimony. We disagree with both contentions.

In his written conclusions the military judge stated:

> I further find that the evidence is relevant and that its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the members, or by consideration of undue delay. In reaching this conclusion, I considered the fact that the [appellant] was acquitted of the prior sexual assault and sodomy involving [Ms. GC]; the credibility of her testimony-which I found

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[18] Record at 220.

[19] Ruling on Admission at 4.

> to be credible; the similarities between the two incidents-which are striking, and possibility of confusion of the issue to the members.[20]

Contrary to the appellant's assertion that admitting this evidence created "a distracting mini-trial," we find the military judge properly narrowed the Government's presentation of this evidence, stating, "I do not intend that there be another trial on the merits regarding this. It's going to be very limited in scope, [*10] it will be the date on which this event occurred, the fact that the underlying facts that they went out, had drinks together, came back to the--her home, and she has a fragmented memory, woke up to the [appellant] having sexual intercourse with her or performing sexual acts upon her, and it was subsequently reported."[21] The record reveals that the Government adhered to the military judge's narrow parameters in presenting Ms. GC's testimony.[22] The military judge permitted the defense significantly more latitude in cross-examination.[23]

We also find that the military judge addressed the bulk of the *Solomon* MIL. R. EVID. 403 balancing factors in concluding it was proper to admit Ms. GC's testimony. Although he did not specifically address temporal proximity of the prior alleged sexual assault, this factor weighs in favor of admission because only two years separated the offenses. The sole factor supporting exclusion—the lack of frequency of the prior acts—is overcome by the other factors that weigh substantially in favor of admission. Finally, the military judge properly instructed the members with regard to the use of this evidence.[24] Accordingly, we find the military judge did not abuse his [*11] discretion in admitting this evidence under MIL. R. EVID. 413.

II. *Individual Military Counsel Request*

A military judge's ruling on an individual military counsel (IMC) request is a mixed question of fact and law. We review the findings of fact under a clearly erroneous standard and the conclusions of law *de novo. United States v. Spriggs*, 52 M.J. 235, 244 (C.A.A.F. 2000). Here we concur with the military judge's factual findings and adopt them as our own.

Prior to the Article 32 hearing in his case, the appellant requested Lieutenant (LT) Mishonda Mosley, JAGC, USN as an IMC under RULE FOR COURTS-MARTIAL 506,

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[20] *Id.* at 4-5.

[21] Record at 220-21.

[22] *Id.* at 698-709.

[23] *Id.* at 221.

[24] *Id.* at 882-83. The military judge also exercised the "sensitivity [required] when making the determination to admit evidence of prior acts that have been the subject of an acquittal," *United States v. Griggs*, 51 M.J. 418, 420 (C.A.A.F. 1999), as he properly instructed the members about the appellant's acquittal on the allegations by Ms. GC. Record at 883.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) and the Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7F § 0131 (26 Jun 2012) (JAGMAN). At the time, LT Mosley was assigned to Defense Service Office Pacific—headquartered in Yokosuka, Japan with branch offices in Hawaii, Guam, and Sasebo, Japan. All proceedings in this case were scheduled in the Navy-Marine Corps Trial Judiciary's Hawaii [*12] Judicial Circuit. The special court-martial convening authority determined LT Mosley was not reasonably available under the applicable JAGMAN provision and denied the IMC request. Following referral of the charges, the appellant renewed his request via the general court-martial convening authority who similarly determined LT Mosley was not reasonably available and denied the appellant's request. At trial, the appellant filed a motion with the court again seeking appointment of LT Mosley as his IMC, which the military judge denied.[25]

Article 38(b), UCMJ, permits an accused to be represented by an IMC of his own selection if that counsel is "reasonably available" and further provides for the Secretary of each Military Department to define "reasonably available" as well as establish procedures for determining whether a requested IMC is "reasonably available." JAGMAN § 0131 is the governing regulation for the Department of the Navy and provides that counsel are not "reasonably available" if they are assigned to commands located outside the Trial Judicial Circuit where the proceeding is to be held, unless the requested counsel is permanently assigned within 500 miles of the situs of the proceeding. [*13] Despite the requested IMC's command possessing a branch office in Hawaii, LT Mosley was permanently stationed at a command outside the Hawaii Judicial Circuit and more than 500 miles from the situs of the proceeding. From a clear and plain reading of the governing regulation, LT Mosley was not "reasonably available," and denial of the appellant's request for her as IMC was proper. Thus we deny the appellant relief on this ground.[26]

III. *Legal and Factual Sufficiency*

The appellant also claims that the evidence is legally and factually insufficient to support the members' guilty findings, specifically that the evidence presented did not show that YN2 CM was too intoxicated to consent or was asleep at the time of the alleged sexual assault.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable [*14] doubt. *United States v. Turner*, 25 M.J. 324, 324-25

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[25] *Id.* at 216.

[26] In his Motion for Reconsideration the appellant additionally argues, for the first time, that JAGMAN § 0131 violates Article 38, UCMJ and unconstitutionally violates his right to equal protection under the law. We also find these arguments meritless. *United States v. Clifton*, 35 M.J. 79, 81-82 (C.M.A. 1992).

(C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ. Proof beyond a reasonable doubt does not mean that the evidence must be free from conflict. *United States v. Goode*, 54 M.J. 836, 841 (N.M.Ct.Crim.App. 2001). The fact finder may believe one part of a witness' testimony and disbelieve another. *Id.* When weighing the credibility of a witness, this court, like a fact finder at trial, examines whether discrepancies in witness testimony resulted from an innocent mistake, such as a lapse of memory, or a deliberate lie. *Id.* at 844.

Here, there is sufficient evidence in the record to prove both sexual assault charges. LS2 DK and Mr. JR[27] testified that YN2 CM was asleep on the couch shortly after returning to LS2 DK's house and that the appellant was also on the couch. YN2 CM testified that she awoke to a man engaging in sexual intercourse with her. DNA evidence identified the appellant's semen from swabs taken from YN2 CM during her sexual assault examination. The bar receipts, percipient witness testimony, and [*15] expert testimony provide sufficient evidence to conclude that YN2 CM was incapable of consenting to sexual intercourse due to her alcohol impairment.

After carefully reviewing the record of trial and considering the evidence in the light most favorable to the prosecution, we are convinced that a reasonable fact finder could have found all the essential elements beyond a reasonable doubt. Furthermore, after weighing all the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt [*16] of the appellant's guilt.

IV. *Unreasonable Multiplication of Charges*

The members convicted the appellant *inter alia* of a single specification of committing a sexual act upon YN2 CM while she was asleep and a single specification of committing a sexual act upon YN2 CM while she was incapable of consenting due to alcohol impairment. After findings, the military judge and counsel engaged in the following discussion on the record:

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[27] Mr. JR was LS2 DK's former boyfriend and he also stayed at LS2 DK's house the night in question. Earlier that night he attempted, at LS2 DK's request, to pick up the group and drive them to LS2 DK's house after they left the bar. But he was unable to do so because LS2 DK did not answer his phone calls while he waited for them outside the bar. He testified that he became angry at his inability to contact LS2 DK and that he eventually left and drove back to LS2 DK's house. He testified that when he arrived at LS2 DK's house he observed YN2 CM asleep on the L-shaped couch and a man asleep on the other end of the couch. *Id.* at 436-38.

MJ: Okay, I want to discuss with counsel the fact that the government presented two theories of liability.

TC: I think the max punishment is 31 years, sir.

MJ: I'm getting there, but what I was—what I propose to do was to merge the two specifications into one specification.

TC: No objection, Your Honor.

MJ: Defense?

CDC: No objection.[28]

. . . .

MJ: What we're going to do is we've also calculated the maximum permissible punishment at 31 years; that's based on the merger of Specifications 1 and 2 of Charge I. And [civilian defense counsel], have you seen the merger?

CDC: I have, sir.

MJ: Any objection to that?

CDC: No, sir.

MJ: Okay, very well. Let's provide the members with a copy of the new cleansed charge sheet, the—go ahead, you can put that on the folder of each member's [*17] desk.[29]

The appellant avers and the Government agrees[30] that the military judge merged the specifications for sentencing purposes. But, we find nothing in the military judge's statements or otherwise in the record to conclude that he merged the specifications solely for sentencing. "When a 'panel return[s] guilty findings for both specifications and it was agreed that these specifications were charged for exigencies of proof, it [is] incumbent' either to consolidate or dismiss a specification." *United States v. Mayberry*, 72 M.J. 467, 467-68 (C.A.A.F. 2013). Prior to merging the specifications, the military judge recognized that the Government presented two theories of liability for the appellant's single act of sexual assault. Thus, we conclude the military judge actually intended to consolidate the two specifications into a single specification. We note the CA's action fails to reflect the consolidation and the appellant is entitled to accurate records. *United States v. Crumpley*,

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[28] *Id.* at 898.

[29] *Id.* at 905; Appellate Exhibit LXVIII.

[30] Government Brief at 31.

49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). Consequently we direct corrective action in our decretal paragraph.

Conclusion

The supplemental court-martial order will reflect that the appellant was found guilty of the following specification under Charge I:

> In that Construction Mechanic Third Class Adam [*18] S. Nelms, U.S. Navy, Construction Battalion Maintenance Unit THREE ZERO THREE, on active duty, did, on the island of Oahu, Hawaii, on or about 7 September 2013, commit sexual acts upon C.J.M. by penetrating C.J.M.'s vulva with his penis when the said CM3 Nelms reasonably should have known that C.J.M. was asleep and when C.J.M. was incapable of consenting to the sexual act because she was impaired by an intoxicant, to wit: alcohol, and that condition reasonably should have been known by the said CM3 Nelms.

The findings and sentence as approved by the convening authority are affirmed.

Judge PALMER and Judge CAMPBELL concur.

United States v. King

United States Air Force Court of Criminal Appeals

September 14, 2020, Decided

No. ACM 39654

Reporter
2020 CCA LEXIS 316 *; 2020 WL 5526411

UNITED STATES, Appellee v. William N. KING, Major (O-4), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by United States v. King, 2020 CAAF LEXIS 615, 2020 WL 7064008 (C.A.A.F., Nov. 9, 2020)

Review denied by United States v. King, 2021 CAAF LEXIS 19 (C.A.A.F., Jan. 12, 2021)

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Jefferson B. Brown. Approved sentence: Dismissal. Sentence adjudged 11 November 2018 by GCM convened at Offutt Air Force Base, Nebraska.

Counsel: For Appellant: Major Mark J. Schwartz, USAF.

For Appellee: Lieutenant Colonel Brian C. Mason, USAF; Captain Kelsey B. Shust, USAF; Mary Ellen Payne, Esquire.

Judges: Before J. JOHNSON, POSCH, and KEY, Appellate Military Judges. Chief Judge J. JOHNSON delivered the opinion of the court, in which Senior Judge POSCH and Judge KEY joined.

Opinion by: J. JOHNSON

Opinion

J. JOHNSON, Chief Judge:

A general court-martial composed of officer members convicted Appellant, contrary to his pleas and by exceptions, of one specification of willful dereliction of duty and one specification of fraternization, in violation of Articles 92 and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 934, respectively.[1] The court-martial

[1] All references in this opinion to the Uniform Code of Military Justice, Rules for Courts-Martial, and Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2016 ed.).

sentenced Appellant to a dismissal, and the convening authority approved the adjudged sentence.

Appellant raises two issues on appeal: (1) whether the evidence is legally and factually sufficient to support his convictions; and (2) whether the military judge erred by precluding [*2] cross-examination regarding the complainant's prior allegation of sexual harassment.[2] We find no error materially prejudicial to Appellant's substantial rights, and we affirm the findings and sentence.

I. BACKGROUND

Appellant was a psychiatrist who joined the Air Force in July 2015. He was stationed at Offutt Air Force Base (AFB), Nebraska, where he served in the base mental health clinic.

In October 2015, CC began visiting the Offutt AFB mental health clinic due to stress caused by problems at her workplace. At the time, CC was an active duty Air Force staff sergeant. Appellant was one of three mental health providers she saw at the clinic. CC saw Appellant for a total of five appointments between 29 October 2015 and 5 February 2016. Appellant recorded his "termination summary" for his treatment of CC on 7 September 2016.

CC later testified that she found Appellant "very nice" and "very attractive," and during her treatment she began to "see him in a sexual way." In February 2016, CC found Appellant's profile on the Tinder online dating application; after she "swiped" on the profile to indicate her interest, she and Appellant were "matched" on the site, indicating Appellant had swiped [*3] on her profile as well. According to CC, Appellant then contacted her using the Tinder messaging system. CC responded to Appellant, and Appellant indicated that he knew who she was.

According to CC, the Tinder conversation led to communication by other means, including instant messages, Snapchat,[3] and Facetime.[4] At trial, the Government introduced a 94-page exhibit consisting of text messages between Appellant and CC apparently commencing on 13 February 2016. In a message dated 14 February 2016, Appellant acknowledged that "initiat[ing] a conversation with a girl" who was a prior patient was "[c]ompletely against every ethic[al] principle" and "[c]ould ruin [his] career forever actually." Nevertheless, Appellant continued to engage in the text conversations, a predominant theme of which was CC's desire to engage in a romantic and sexual relationship with Appellant. Some of

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[2] Appellant personally asserts the second issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[3] At trial, CC explained that Snapchat was "a picture and video messaging application that has an option to message with words as well."

[4] At trial, CC described Facetime as a "video messaging application."

Appellant's own messages were also sexual in nature. For example, between 14 February 2016 and 29 February 2016, Appellant joked that when he was drunk he might send her nude photos of himself; asked CC if she "look[ed] better with clothes on or off;" responded positively to CC's description of her breasts and buttocks; [*4] described himself performing oral sex on CC; and requested a video of CC having an orgasm. At one point CC commented on the size of Appellant's penis, which implied he had sent her a naked photo of himself. CC's messages were consistently more frequent and longer than Appellant's messages, but Appellant continued to converse with her when it was very clear she sought an intimate relationship.

In addition to the messages, CC would later testify that on one occasion in February 2016 she went to Appellant's home where she engaged in various consensual sexual acts with him. In addition, CC stated that in the course of their relationship, Appellant had sent CC a naked photograph of himself that depicted his penis, and she had sent him photos of herself topless and wearing lingerie.

Over time, after the sexual encounter CC described, Appellant's text messages indicate increasing caution and unwillingness to commit to any continuing relationship. CC continued to send Appellant messages attempting to maintain some sort of association with him—sometimes angry, sometimes plaintive, sometimes attempting to continue conversation by turning the subject to topics such as music or gardening. Appellant [*5] responded intermittently with terse, although generally not unfriendly, replies. On 29 February 2016, in response to CC's complaint that Appellant "just seem[s] all about the chase and I'm looking for my copilot," Appellant texted, "The chase isn't fun for me. I want something real and I dig you a lot. Just with all the variables [I]'m hesitant that's all." In a message dated 7 March 2016, in response to CC's continuing anxious messages, Appellant texted: "I told you that we could never have any sort of relationship." In a series of messages dated 18 April 2016, Appellant and CC engaged in the following exchange:

> [CC:] I think we should hangout at some point during this week. If after that you want to continue freezing me out ... You may do so.
>
> . . . .
>
> [Appellant:] Why so keen on hanging out?
>
> [CC:] It's been a long time since we've seen each other. We have many similarities and the [sic] proves true even now. Why are you so opposed to hanging out?
>
> . . . .
>
> [Appellant:] The fact that you are a former patient
>
> [CC:] That barrier has already been broken. And I believe I have proved my trustworthiness.
>
> . . . .

> [CC:] You're not scared because I'm a former patient. You're scared because if we hang [*6] out, you might see what I see and then you wouldn't hold that other fact as high as you did.
> [Appellant:] No it's solely because you're a patient. I'm sorry.
> [CC:] What changed that you were initially okay with breaking that rule and now you're not?
> [Appellant:] A lot of time to think about it

(First omission in original.) In response to additional messages from CC, in a text dated 3 May 2016 Appellant told her: "[N]o we can't be anything, not even friends, so it's best we say good bye and good luck." Appellant's final brief text exchange with CC was dated 23 June 2016 and related to an upcoming musical performance.

CC separated from the Air Force in January 2017 for reasons unrelated to her mental health counseling with Appellant. In September 2017, CC reported Appellant's conduct to the Air Force Office of Special Investigations (AFOSI). At trial, CC explained that in July 2017 she resumed seeing a mental health therapist, but she realized she was not going to be able to get "closure" on her experience with Appellant unless she reported what happened.

When CC went to the AFOSI in the fall of 2017 she did not still possess the phone she had used to communicate with Appellant in early 2016. [*7] AFOSI agents told her that the text messages would be "very valuable" and not having them would be a "challenge" to the investigation. However, in March 2018 CC found text messages with Appellant on her laptop computer, which had been synchronized with her phone at the time she sent the messages in 2016. She provided the computer to AFOSI and gave the agents a limited consent to search for messages between herself and Appellant. As a result, the AFOSI was able to recover the 94 pages of text messages described above. However, no photos or other media exchanged between Appellant and CC were recovered from either the laptop or other sources.

II. DISCUSSION

A. Legal and Factual Sufficiency

1. Law

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). Our assessment of legal and factual

sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (citation omitted). "[I]n resolving questions of legal sufficiency, we are bound [*8] to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). As a result, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (alteration in original) (citation omitted).

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, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (alteration in original) (quoting *Washington*, 57 M.J. at 399).

The elements of the specification of willful dereliction of duty in violation of Article 92, UCMJ, for which Appellant was convicted include: (1) that Appellant had a certain duty, that is, to refrain from seeking[5] sexual activity with a patient who was receiving or had previously received his psychological services and treatment; (2) that [*9] Appellant knew of the duty; and (3) that on the dates and at the location prescribed, Appellant was willfully derelict in the performance of that duty by seeking sexual activity with CC who was receiving or had previously received his psychological services and treatment. *See Manual for Courts-Martial, United States* (2016 ed.) (*MCM*), pt. IV, ¶ 16.b.(3).

The elements of the specification of fraternization in violation of Article 134, UCMJ, for which Appellant was convicted include: (1) that on the dates alleged Appellant was a commissioned officer; (2) that on the dates and at the location alleged Appellant fraternized on terms of military equality with CC by sending CC messages of a sexual nature;[6] (3) that Appellant then knew CC was an enlisted member; (4) that such fraternization violated the custom of the Air Force; and (5) that under the circumstances

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[5] The court members found Appellant not guilty by exceptions to the words "and engaging in."

[6] The court members found Appellant not guilty by exceptions to several other charged activities, including *inter alia* "having sexual relations" with CC.

Appellant's conduct was to the prejudice of good order and discipline in the armed forces. *See MCM*, pt. IV, ¶ 83.b.

2. Analysis

Taken together, the essence of the two specifications for which Appellant was convicted is that he sent CC messages of a sexual nature and sought a sexual relationship with her, which was wrongful because [*10] she was a patient or former patient and because she was an enlisted member. The Government introduced sufficient evidence to support both convictions. CC, an enlisted member, testified as to how she met Appellant in an official capacity as his patient at the on-base mental health clinic; that he contacted her through the Tinder dating application; how they exchanged messages of a sexual nature; and how he sent her a naked picture of himself and she sent him partially nude and scantily clad photos of herself. It is true that there were several potential sources of bias or a motive to misrepresent on CC's part that the Defense explored at trial and which are discussed below. However, CC's testimony regarding the offenses for which Appellant was convicted was powerfully reinforced by the messages between her and Appellant recovered from her computer that the Government introduced at trial. The Government also introduced phone records indicating Appellant received more than 20 phone calls from CC in February and March 2016, the longest of which apparently lasted over 23 minutes. In addition, CC was able to describe the interior layout of Appellant's home, and was aware of tattoos on Appellant's [*11] shoulder, back, and ankles; and CC's mother testified to a prior consistent statement CC made to her on 26 February 2016 that CC was having an intimate relationship with her psychiatrist.

The Government also introduced the testimony of Lieutenant Colonel (Lt Col) VW, an Air Force psychiatrist who testified as an expert in the field of forensic psychiatry. Lt Col VW testified that as a matter of professional ethics, psychiatrists are prohibited to have personal relationships with patients and former patients, to include sexual relationships. In addition, she testified the prohibition on sexual relationships with patients was also stated in Air Force Instruction (AFI) 36-2909, *Professional and Unprofessional Relationships* (1 May 1999). Lt Col VW testified that an Air Force psychiatrist would have been trained on this prohibition both as part of general medical training and during residency, and that an Air Force psychiatrist would "absolutely" be aware of the prohibition. The military judge took judicial notice that paragraph 3.6 of AFI 36-2909 stated, *inter alia*, that personnel providing medical or psychological treatment "will not seek or engage in sexual activity with, make sexual [*12] advances to, or accept sexual overtures from persons who are receiving their services." Furthermore, Appellant's messages to CC indicate he was well aware his personal, nonprofessional contact with her was prohibited.

Appellant attacks the sufficiency of the evidence on several bases. He argues there is insufficient corroboration for CC's testimony. Appellant notes the sexual photos he allegedly exchanged with CC were not recovered, and argues there is no proof of the sexual encounter she describes at his home. He argues, as the Defense did at trial, that her knowledge of his tattoos, his home, and other details of his life such as his dog's name and a trip he took to Colorado in February 2016 were information CC could have obtained from viewing Appellant's social media accounts.

With regard to the 94 pages of messages, at trial the Defense suggested CC may have fabricated or tampered with these texts. On appeal, Appellant suggests it is suspicious that CC was able to "magically" recover the messages from the laptop over five months after she told the AFOSI she did not have them. The Government's expert witness in the field of digital forensics, MC, conceded that it was possible to falsely [*13] create two sides of an exchange of messages, and that it is possible to edit or alter after-the-fact metadata associated with messages. However, he also testified he saw no indication the messages in the exhibit had been modified, and that they appeared to have been created on the dates indicated in the exhibit. In addition, the content of the messages suggests their authenticity. With a few exceptions concentrated relatively early in the exchange, Appellant's statements are much briefer, noncommittal, and more guarded than CC's emotional, often pleading messages. Appellant's messages suggest an individual who transgressed professional boundaries, knew it, and regretted it, rather than a partner engaged in the intimate relationship CC desired. In short, they have a ring of truth, rather than conveying the impression of fabrications by an infatuated or embittered individual. We find no persuasive reason to doubt that the messages are what they appear to be, Appellant's speculation notwithstanding. In addition, Appellant has little answer for the phone records indicating he received a number of phone calls from CC during the time frame she testified he was having inappropriate contact [*14] with her.

At trial, the Defense attempted to suggest CC had been suffering from delusions. It called Dr. KN to testify as an expert in forensic psychology. Although Dr. KN had not examined CC and offered no diagnoses, his testimony focused on the phenomenon of "erotomanic delusion," which Dr. KN summarized as the false belief "that there is a loving relationship with another person that is not in love with the person holding the delusion." The Defense elicited testimony from Dr. KN that certain aspects of this situation were "consistent" with erotomanic delusion. For example, such delusions typically develop during periods of heightened emotional stress, develop rapidly, and commonly involve drawing unwarranted conclusions from innocuous behavior or events—such as a psychiatrist's attentive and supportive behavior during treatment being interpreted as romantic or sexual interest. However, this theoretical explanation for CC's behavior is unconvincing. To begin with, Dr. KN did not and could not diagnose CC with such a condition based on the limited information available to him. Moreover, the three mental health professionals (including

Appellant) who treated CC for several months entirely [*15] failed to detect or document such a condition. Indeed, their termination notes indicate CC concluded her course of treatment because her condition had improved and the goals of the treatment had been met. In addition, as explained by Dr. KN, the essence of erotomanic delusion is a false belief that the object of the delusion is in love with the person experiencing the delusion. The messages exchanged between Appellant and CC clearly indicate CC understood only too well that Appellant did not share the strong attraction to her that she felt toward him. Attraction, even infatuation, is not the same as delusion.

Appellant cites other potential sources of bias or motive to misrepresent. By her own description, CC had been "infatuated" with Appellant, but after their sexual encounter she felt "ghosted" by him, which made her "really upset." In addition, in February 2018, CC filed a claim against the Government under the Federal Tort Claims Act[7] for over $68,000 based on lost wages and the need for continued mental health therapy that she attributed to her mistreatment by Appellant. However, these potential biases do not defeat her credibility with respect to the offenses for which Appellant [*16] was convicted in light of the corroborating evidence, particularly the messages and phone records.

Drawing every reasonable inference from the evidence of record in favor of the Government, we conclude the evidence was legally sufficient to support Appellant's conviction of Charges I and II and their specifications beyond a reasonable doubt. *See Robinson*, 77 M.J. at 297-98. Additionally, having weighed the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt. *See Turner*, 25 M.J. at 325.

B. Evidence of Prior Sexual Harassment Complaint

1. Additional Background

Before trial, the Government submitted a motion in limine to exclude testimony the Defense intended to elicit regarding CC's character for truthfulness. The military judge conducted a hearing on the motion and received the testimony of Master Sergeant (MSgt) CT, a member of CC's squadron at Offutt AFB. MSgt CT was not in CC's direct chain of supervision, but he worked in the same area and had frequent contact with CC and her supervisor. MSgt CT testified that he had formed the opinion that CC was "not very truthful." MSgt CT described multiple circumstances that [*17] contributed to this opinion, including his belief CC had made untrue statements regarding arriving for duty on time and completing her assigned work. However, foremost among the bases for MSgt

[7] 28 U.S.C. §§ 2671 et seq.

CT's opinion was his understanding that CC had made a complaint that MSgt CT had verbally sexually harassed CC; MSgt CT denied that he made the alleged comment.

The Defense sought to have MSgt CT testify to his opinion regarding CC's character for truthfulness. The Government objected on the grounds that MSgt CT had an inadequate foundation for his opinion. The military judge overruled the Government's objection; however, he further held that if MSgt CT did testify the military judge would instruct the members that CC had previously made an allegation of workplace harassment against MSgt CT, which MSgt CT consistently denied, and this allegation was the primary basis for MSgt CT's' opinion. Ultimately, the Defense elected not to call MSgt CT.

The Government called three witnesses who knew CC at her prior assignment at Cannon AFB, New Mexico, to testify regarding her character for truthfulness.[8] CC's former squadron commander, former squadron superintendent, and a retired master sergeant testified [*18] to the effect that, in their opinions, CC was a truthful person. However, each of the witnesses had been out of contact with CC for between three and six years.

The Defense sought to cross-examine these witnesses regarding, *inter alia*, their knowledge that CC had made an unsubstantiated claim of sexual harassment. The Government objected to any characterization of the sexual harassment claim as "false." The military judge did not permit cross-examination of the character witnesses regarding the sexual harassment claim. The military judge explained that although he found the Defense had a good faith basis to inquire about a false sexual harassment allegation, the falsity of the claim had not been established. The substance of the issue was simply an allegation and a denial. Moreover, the alleged harassment occurred after the point in time where the witnesses ceased having contact with CC, and therefore could not form part of the basis for their opinions. Accordingly, the military judge found the probative value of asking the witnesses about something they had no knowledge of was "minimal to nonexistent," and was substantially outweighed by the danger of unfair prejudice.

Trial defense [*19] counsel did cross-examine each of the three character witnesses regarding whether they knew CC had lied to her superiors at Offutt AFB about being late for duty and failing to complete assigned work. Each of the witnesses testified to the effect that they did not know about these incidents, but this information would not change their opinions based on their contact with CC at Cannon AFB.

Trial defense counsel did not attempt to cross-examine CC regarding the harassment allegation against MSgt CT.

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[8] CC's mother also testified to her opinion that CC was "always truthful."

2. Law

We review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. Bowen*, 76 M.J. 83, 87 (C.A.A.F. 2017) (citation omitted). "An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact." *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003) (citing *United States v. Humpherys*, 57 M.J. 83, 90 (C.A.A.F. 2002)). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)).

After a witness's character for truthfulness has been attacked, that "witness's credibility may be . . . supported . . . by testimony in the form of an opinion about that character." Mil. R. Evid. 608(a). "'Do you know' or 'have [*20] you heard' type questions, including reference to specific instances of conduct, are a recognized method of testing a witness'[s] opinion concerning the character or a trait of character of a person, presuming there is a good faith basis for asking the question and it is otherwise admissible under our rules of evidence (which in most cases would include a [Mil. R. Evid.] 403 balancing analysis)." *United States v. Saul*, 26 M.J. 568, 572 (A.F.C.M.R. 1988) (citations omitted).

A military judge may exclude otherwise admissible relevant evidence if its probative value is substantially outweighed by a countervailing danger, including but not limited to unfair prejudice or confusion of the issues. Mil. R. Evid. 403. Where a military judge conducts a proper balancing test under Mil. R. Evid. 403 on the record, an appellate court will not overturn the ruling absent a clear abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (citation omitted).

3. Analysis

On appeal, Appellant personally asserts trial defense counsel "moved to be able to question CC about her [previous] false allegation and was denied this opportunity." He contends "[t]he military judge's ruling . . . prevent[ed] them from conducting an effective cross-examination of CC and presenting evidence to show CC's character for untruthfulness and motive to fabricate the allegations [*21] . . . ." Appellant's contentions are without merit.

To begin with, trial defense counsel did not attempt to cross-examine CC regarding the prior harassment allegation, and the military judge did not prevent them from doing so. Moreover, the military judge did not preclude MSgt CT from testifying regarding his

opinion of CC's character for truthfulness. Therefore, there is no factual basis for Appellant's specific claim on appeal.

To the extent Appellant's argument is intended to address the military judge's ruling preventing the Defense from cross-examining the three character witnesses regarding the harassment allegation, we find no clear abuse of discretion in the military judge's application of Mil. R. Evid. 403. The military judge could reasonably conclude such a question had minimal probative value in impeaching the basis for the witnesses' opinions regarding CC's truthfulness because (a) the allegation occurred after CC transferred from Cannon AFB, and (b) the falsity of the allegation was not established. On the other side of the balance, the military judge could reasonably conclude permitting references to an unrelated, allegedly false allegation of sexual harassment risked exposing the court [*22] members to distraction, confusion of the issues, and unfair prejudice to the Government's case. We conclude the military judge's ruling was neither clearly unreasonable nor clearly erroneous.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).

Accordingly, the findings and sentence are **AFFIRMED**.
