IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,	Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.		Docket No. ARMY 20220162
Captain (O-3) **BRETT M. HANSEN,** United States Army,	Appellant	Tried at Fort Gordon,[1] Georgia, on 9 November 2021, 25 March 2022, and 28 March – 1 April 2022, before a general court-martial convened by the Commander, Headquarters, U.S. Army Cyber Center of Excellence & Fort Gordon, Lieutenant Colonel Albert G. Courie, III, Military Judge, presiding.

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

Assignments of Error[2]

I. DID TRIAL COUNSEL MISCONDUCT SUBSTANTIALLY PREJUDICE THE APPELLANT, TO INCLUDE ELICITING HUMAN LIE DETECTOR (HLD) TESTIMONY FROM A VICTIM?

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[1] Fort Gordon was officially redesignated Fort Eisenhower on 27 October 2023.

[2] The government has reviewed appellant's four assignments of error raised pursuant to *Grostefon* and agrees with appellate defense counsel that they do not warrant full briefing as an assignment of error. Furthermore, the government respectfully submits that they lack merit. The government recognizes this court's authority to elevate *Grostefon* matters deserving of increased attention. *United States v. Grostefon*, 12 M.J. 431, 437 (C.M.A. 1982). Should this court exercise such authority, finding any of appellant's *Grostefon* matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

II. WERE THE TRIAL DEFENSE COUNSEL CONSTITUTIONALLY INEFFECTIVE TO THE APPELLANT'S PREJUDICE WHEN THEY COMMITTED A NUMBER OF SIGNIFICANT ERRORS?

Statement of the Case

On 1 April 2022, an officer panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920. (Statement of Trial Results [STR]; R. at 932).[3] The panel sentenced appellant to 18 months confinement and a Dismissal. (STR; R. at 965). On 15 April 2022, the convening authority took no action on the findings or sentence, and on 19 April 2022, the military judge entered judgment. (Action; Judgment).

Statement of Facts

[redacted] retired from the United States Air Force in 2018 after twenty-four years of combined enlisted and commissioned service. (R. at 292–93). During her service, she conducted multiple overseas missions to

[3] Appellant was found not guilty of five specifications of abusive sexual contact in violation of Article 120, UCMJ, 10 U.S.C. § 920. (STR). One specification of fraternization, in violation of Article 134, UCMJ, 10 U.S.C. § 934 was dismissed by the court pursuant to Rule for Courts-Martial (R.C.M.) 917. (STR).

[4] For ease of reference, appellee will use a uniform naming convention for all witnesses, and will refer to the victim as [redacted]. (R. at 293).

combat terrorism and, as a result, suffered from migraines and continuous hip pain. (R. at 294).

On 30 August 2018—her last day on active duty—[redacted] went to the Traumatic Brain Injury (TBI) clinic at the Dwight D. Eisenhower Army Medical Center (DDEAMC) to receive Botox treatment for her migraines from appellant, a neurologist. (R. at 294, 299). She informed appellant that she was also experiencing constant hip pain and he offered Osteopathic Manipulative Therapy (OMT) to alleviate her pain. (R. at 295). At trial [redacted] testified that she and appellant were the only two people in the room during this visit and that she was never offered a chaperone. (R. at 296). She further testified that while laying on her back with her eyes closed, appellant reached under her pants, put his hand on her vagina, and rubbed it vigorously. (R. at 296). After [redacted] told appellant to stop, he told her, "I wouldn't have performed this if we weren't close friends." (R. at 298). [redacted] testified that she was treated by appellant on three different occasions and that she did not have any other interactions with him outside of these medical treatments. (R. at 294).[5]

[redacted] testified that after the assault, as she left this visit, appellant asked her for a hug. (R. at 299). Regarding the assault, [redacted]

[5] Appellant attended [redacted] retirement ceremony and reception, but "it was a blanket [invitation] to all the doctors" at DDEAMC who had "put [redacted] back together." (R. at 294).

testified that she told appellant to "make sure that's in my record." (R. at 299). This prompted the following exchange between trial counsel (TC) and [redacted]:

> TC: Ma'am, were you ever able to look at your records?
>
> [redacted]: It took me about 30 days to actually get a copy of my records, and when I saw it, he had lied in it.
>
> TC: What do you mean by, he lied in the records?
>
> [redacted]: He said that there was a chaperone in the room, and there was not. And it wasn't documented properly. Then I thought, well I'm not a medical professional, maybe I'm reading my records wrong. . . . So I had somebody else look at it, and then I took it to Womack, and I said, "Can you please tell me if this says that there's a chaperone in my record," and they said yes.
>
> TC: Do you recall who [redacted] said was the chaperone at that appointment?
>
> [redacted] I think – I'm not a hundred percent sure – I think it was [redacted]. I don't know her last name. But it takes a deliberate action to type in somebody's medical records, after a medical procedure, that somebody was in the room, and they were not.

(R. at 299–300). There was no objection by defense, nor any curative instruction by the military judge.

Immediately following [redacted] testimony, the government called [redacted] as its next witness. (R. at 334). [redacted] testified, in relevant part, that she was

[6] [redacted] testified at trial as [redacted] (R. at 334).

the only nurse assigned to assist appellant, as well as "four or five other doctors" in the DDEAMC Neurology/TBI Clinic in August 2018. (R. at 334–35, 338). She testified that she never served as a chaperone while appellant performed OMT on a patient, and that she would have been the only person available to serve in such a role. (R. at 336, 339).

Appellant's general theory at trial was that each alleged sexual assault, in context, would sow reasonable doubt—or, as he put it, "light" vs. "darkness." (R. at 290–91; 870–914). Specific to the allegation involving [redacted], appellant elicited testimony from [redacted], fellow doctor who had completed part of his residency with appellant, regarding appellant's practice of inviting other providers in to treatment sessions for training purposes (R. at 591); appellant elicited evidence to challenge the reliability of [redacted] and [redacted] memories and the accuracy of the medical records (R. at 873–75, 879, 895, 901–03, 906); he elicited testimony from another alleged victim regarding signage offering chaperones if desired (R. at 351); and presented expert testimony regarding the use of OMT and its occasional requirement for a provider to put his hands in intimate places to assist his patients. (R. at 878).

Additional facts are incorporated below.

Assignment of Error I

DID TRIAL COUNSEL MISCONDUCT SUBSTANTIALLY PREJUDICE THE APPELLANT, TO INCLUDE ELICITING HUMAN LIE DETECTOR (HLD) TESTIMONY FROM THE VICTIM?

Standards of Review

Claims of prosecutorial misconduct are reviewed *de novo*. *United States v. Andrews*, 77 M.J. 393 (C.A.A.F. 2018).

If there is no objection made to Human Lie Detector Testimony (HLD), the error is forfeit and the court will review for plain error. *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014). To prevail under a plain error standard, an appellant must prove (1) that there was error, (2) that the error was clear or obvious, and (3) that the error materially prejudiced a substantial right of appellant. *Id.*

Law

A. Prosecutorial Misconduct

Prosecutorial misconduct is behavior by a prosecutor in violation of some legal norm or standard. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F 2019). It is behavior by the prosecuting attorney that oversteps the bounds of decency and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense. *Id.* Prosecutors have a duty to refrain from improper methods calculated to produce a wrongful conviction. *United States v. Andrews*,

77 M.J. 393 (C.A.A.F. 2018). Relief will be granted if the trial counsel's misconduct impacted a substantial right of the accused. *Id*.

In assessing prejudice in cases of prosecutorial misconduct, courts have looked at three factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *United States v. Fletcher*, 62 M.J. 175., 184 (C.A.A.F. 2005).

B. "Human Lie Detector" Testimony

The Court of Appeals for the Armed Forces (CAAF) has described HLD testimony as "an opinion as to whether the person was truthful in making a specific statement regarding a fact at issue in the case." *Knapp*, 73 M.J. at 35 (quoting *United States v. Kasper*, 58 M.J. 314, 315 (C.A.A.F. 2003) (internal citation omitted). The CAAF has been "resolute in rejecting the admissibility of so-called human lie detector testimony." *Id*. "If a witness offers human lie detector testimony, the military judge must issue prompt cautionary instructions to ensure that the members do not make improper use of such testimony." *Id.*

Improper admission of HLD testimony, without objection from defense, is tested for prejudice. *Knapp*, 73 M.J. at 36. "An obvious error prejudices the substantial rights of [appellant] when it has 'an unfair prejudicial impact on the [court members'] deliberations.'" *Id.* at 37 (citing *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998) (additional citation omitted). In conducting the

prejudice analysis, the court looks at "(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 MJ 326, 327 (C.A.A.F. 2019).

Argument

The TC did not commit prosecutorial misconduct by examining [redacted] on her review of her medical records, and [redacted] responses are not HLD testimony. Even if this court disagrees, there is no material prejudice to a substantial right of appellant.

A. The TC's Questions are not Prosecutorial Misconduct.

At the outset, it is clear that the TC did not violate any legal norm or standard, as appellant charges. [redacted] testified to the details concerning her assault by appellant and the events that occurred after the assault. She testified that after she was assaulted, she told appellant to "make sure that's in my record." (R. at 299). Continuing the direct examination, the TC then asked [redacted] whether she had the opportunity to review her records. Her response was, "It took me 30 days to actually get a copy of my records, and when I saw it, he had lied." (R. at 299).

[redacted] response confirmed that she had, in fact, reviewed her records, but provided more information than that mere confirmation. The TC

continued the direct examination by asking: "What do you mean by, he lied in the records?" [redacted] went on to clarify that although the records indicated there was a chaperone in the room, there was not, and that the record was not documented properly. (R. at 299). The TC's follow up was a natural response to [redacted] testimony. There is no indication in the record that this testimony was deliberately elicited by the TC in a calculated attempt to use improper methods to secure a conviction. Accordingly, this court should decline appellant's invitation to find prosecutorial misconduct based on [redacted] testimony as it was elicited and delivered at trial.

In assessing prejudice in cases of prosecutorial misconduct, courts have considered at three factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Fletcher*, 62 M.J. at 184.

Even assuming that there was misconduct in this case, it was negligible. There is no evidence to support appellant's contention that [redacted] testimony was deliberately elicited to secure a particular response or deny appellant a fair trial. (Appellant's Br. 11). As such, and as discussed below regarding her testimony that appellant had lied in her records, her testimony falls short of the usual concerns with HLD testimony and hence no remedial measures were necessary—there was nothing to cure. Finally, the government put on a strong

case with [redacted] testimony of appellant's sexual assault, backed by [redacted] testimony that she was appellant's nurse at the time of the assault, was the only person who could have served as a chaperone, and had never been present when appellant performed OMT on any patient. (R. at 334–38). Appellant has failed to meet any of the factors necessary to prove prejudice stemming from prosecutorial misconduct.

B. [redacted] Testimony is not HLD Testimony.

Human lie detector testimony is generally inadmissible because it "invades the unique province of the court members to determine the credibility of witnesses, and the substance of the testimony leads the members to infer that the witness believes the victim is truthful or deceitful with respect to an issue at trial." *United States v. Martin*, 75 M.J. 321 (C.A.A.F 2016). "Determination of truthfulness exceeds the scope of a witness' expertise, for the [witness] lacks specialized knowledge of whether the declarant was telling the truth." *United States v. Tovar*, 63 M.J. 637, 640 (N.M. Ct. Crim. App. 2006) (citing *Kasper*, 58 M.J. at 315). Although [redacted] accused appellant of lying in her medical records, her testimony does not raise any of the concerns usually seen in CAAF precedent concerning HLD testimony.[7]

[7] "There is no litmus test for determining whether a witness has offered 'human lie detector' evidence. Not surprisingly, the outcomes in reported cases have hinged

For example, in *Knapp*, the law enforcement agent who testified highlighted their experience in "divining the truth from the demeanor of the suspect." *Knapp*, 73 M.J. at 37. Similarly, in *Kasper*, the agent's testimony was that they were a trained investigator, who had interrogated many suspects, and that they were able to conclude the suspect was lying. *United States v. Kasper*, 58 M.J. 315, 316. These cases highlight instances where law enforcement agents presumed to be able to discern truth from lies while interviewing suspects or witnesses merely based on those agents' training and expertise.

The same is true in cases involving expert testimony. In *United States v. Harrison*, relied upon by appellant, the government leaned heavily on their clinical psychologist's testimony of the presence of symptoms indicative of child sexual abuse, followed by that expert witness's opinion on whether the child victim had been sexually assaulted. In reversing Harrison's conviction, the Court of Military Appeals found that the expert witness' testimony amounted to a declaration that the victim "was a credible and reliable witness." 31 M.J. 330, 332 (C.M.A. 1990).[8]

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on their particular facts." *United States v. Jones*, 60 M.J. 964, 969 (A.F. Ct. Crim. App. 2005).

[8] Contrary to appellant's assertion, however, there is nothing in *Harrison* to support the notion that a court "may reasonably infer an intent to undermine a fair trial . . . by having one of the primary victims testify that the appellant is a liar." (Appellant's Br. 11). Even if *Harrison* could be read to support such a notion, appellant's case is bereft of any evidence to suggest such intent or conclusion that government counsel "had" [redacted] testify in the manner she did.

On the other hand, [redacted] testified to her personal experience—sworn facts based on the assault she personally endured. She then contrasted that assault with the documented version of events, which she had also personally reviewed. By testifying to the discrepancy between two things she had personal knowledge of, albeit in an inartful and likely emotionally charged manner, she was not giving an opinion or speculating as to the truth or falsity of appellant's statement in her medical records. Thus, her testimony neither exceeded the scope of her knowledge, nor did it usurp the role of the panel in determining appellant's credibility. For the same reason, no curative instructions from the military judge were necessary.

C. There is no Prejudice to Appellant's Substantial Rights

Even if this court finds [redacted] testimony was HLD, there is no prejudice to appellant's substantial rights. The test for prejudice is whether the error had a substantial influence on the findings. *Knapp*, 73 M.J. at 37; *Kohlbek*, 78 MJ at 327. First, the government had a strong case buoyed by [redacted] testimony of the encounter and corroborated by through [redacted] testimony that she was not present during appellant's examination of [redacted] on 30 August 2018. Second, defense presented a weak case regarding the assault on [redacted]. Specifically, [redacted], a former neurology resident at DDEAMC testified to observing appellant's interactions with patients during the last two weeks of

August 2018, but not to any interactions between appellant and [redacted] specifically; defense elicited testimony from a different alleged victim regarding the display of chaperone signage nearly ten months prior to appellant's assault of [redacted]; and the defense expert witness testified regarding patient consent and the need to occasionally touch patients' breasts, but did not testify to any requirement to manipulate the genitalia in order to perform OMT therapy. Finally, the quality and materiality of the testimony was low. The records themselves were not admitted, though what mattered is what happened in the exam room between appellant and [redacted]—not what was documented. A cold review of the record also suggests [redacted] was testifying in an emotional manner, as evidenced by the manner in which her answers exceeded the questions asked. Her testimony was, at its core, that appellant had ensured that her records did not reflect reality—not that the panel should subrogate its assessment of appellant's credibility wholesale.

As there was no HLD testimony elicited or provided—or, even if there was, there was no prejudice to appellant's substantial rights—this court should affirm the findings and sentence.

Assignment of Error II

WERE THE TRIAL DEFENSE COUNSEL CONSTITUTIONALLY INEFFECTIVE TO THE APPELLANT'S PREJUDICE WHEN THEY COMMITTED A NUMBER OF SIGNIFICANT ERRORS?

Additional Facts

Appellant did not testify at trial, a decision he told the military judge was his alone. (R. at 837). Appellant now argues that his defense counsel were ineffective by giving incorrect advice on whether he should testify and threatening him when he adamantly insisted on testifying. (Appellant's Br. 22; Appellant's Declaration 2, 4, 6). Further, he argues his counsel were ineffective by failing to object to [redacted] testimony concerning her medical records, as discussed above; failing to introduce documentary evidence; and failing to litigate relevant discovery requests. (Appellant's Br. 20).

Standard of Review

Claims of ineffective assistance of counsel (IAC) are reviewed de novo. *United States v. Cueto*, 82 M.J. 323 (C.A.A.F. 2022).

Law

"In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both: (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J.

360, 361–62 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Under the first *Strickland* prong regarding deficiency, appellant must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. An appellant "must establish a factual foundation for a claim of ineffectiveness; second-guessing, sweeping generalizations, and hindsight will not suffice." *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005). In evaluating performance, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

An appellant may establish prejudice by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. Appellant must show "a reasonable probability that, but for counsel's [deficient performance] the result of the proceedings would have been different." *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) (quoting *Strickland*, 466 U.S. at 694). "[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* (quoting *Strickland*, 466 U.S. at 695). "It is not enough to show that the errors had some conceivable effect on the outcome." *Id.* (citations omitted). When challenging his counsel's deficiency in the

presentation of evidence, appellant's burden of production requires him to demonstrate precisely what the evidence in question would have shown, or the witnesses in question would have said that would support a claim of ineffective assistance. *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997). Appellant must establish both prongs—deficient performance and prejudice—or else his claim fails. *Strickland*, 466 U.S. at 697.

"The right of a criminal accused to testify is not a mere tactical or strategic decision, but is a constitutionally protected right." *United States v. Richardson*, 1998 CCA Lexis 535 at *5–6 (Army Ct. Crim. App. 1998) (mem. op.) (citing *Rock v. Arkansas*, 483 U.S. 44, (1987); *Brooks v. Tennessee*, 406 U.S. 605, (1972) (additional citations omitted). "Defense counsel can, indeed must, advise accused regarding the exercise of that right and can strenuously recommend how that right should be exercised." *Id.* at *6. "The decision to testify," however, "belongs ultimately to the accused." *Id.* (citing *United States v. Belizaire*, 24 M.J. 183, 184–85 (C.M.A. 1987)).

Argument

A. The Defense Counsel were effective.

Courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." United States v. Captain, 75 M.J. 99, 103 (C.A.A.F. 2016) (quoting Strickland, 466 U.S. at 689, 694). This

presumption can be rebutted by "showing specific errors that were unreasonable under prevailing professional norms," which appellant has failed to provide. United States v. McConnell, 55 M.J. 479, 482 (C.A.A.F. 2001) (citations omitted).

1. Appellant's decision not to testify was his alone.

Appellant's primary claim is that his DC gave him incompetent advice on whether he should testify during his court-martial. (Appellant's Br. 19). However, when asked by the military judge, appellant replied that it was his personal decision not to testify. (R. at 837). In appellant's declaration, he alleges several misstatements of the Military Rules of Evidence by his defense counsel, or lack of information regarding his rights. (Appellant's Declaration 5–6). Notably, appellant states, "at no time did [civilian defense counsel] tell me . . . that if I was dissatisfied with his advice and preparation, I could bring this up with the judge or hire other counsel. I believed I was completely stuck and with no options." (Appellant's Declaration 5–6).

An accused's right to testify is his alone, and defense counsel may only advise on that decision. *Belizaire*, 24 M.J. at 185. Interpreting a First Circuit Court of Appeals decision, appellant contends that a waiver of that right is invalid when based on incorrect legal advice. (Appellant's Br. 23 (citing *Garuti v. Roden*, 733 F.3d 18 (1st Cir. 2013)). However, military and federal courts have stopped short of inquiring into that the decision for fear of piercing the attorney-client

privilege. *See Belizaire*, 24 M.J. at 185; *see also United States v. Dewrell*, 52 M.J. 601, 614 (A.F. Ct. Crim App. 1999), *aff'd*, 55 M.J. 131 (C.A.A.F. 2001). ("*Belizaire* is consistent with the prevailing Federal norm that the Court runs the risk of intruding into the confidential attorney-client relationship by inquiring into whether a criminal defendant not taking the witness stand is the result of a knowing waiver, ignorance, or otherwise. . . . Thus, not testifying in one's own behalf is deemed a knowing waiver.")

Nevertheless, appellant did tell the military judge that his decision not to testify was his own (R. at 837), despite his post-trial claim that he felt coerced into this decision by his counsel. (Appellant's Br. 23; Appellant's Declaration 6). Further, he was informed at his arraignment of his rights to counsel, to include detailed military counsel and the right to hire civilian counsel—a right he exercised. (R. at 3). "By now, we believe that most persons—both in the armed services and outside—are aware that they have a right to testify at their trial." *Belizaire*, 24 M.J. at 184. Certainly, this presumption extends to appellant, a trained neurologist. Thus, appellant's claim that he believed he was "stuck and with no options" but to waive his right to testify and continue to be represented by the civilian defense counsel he hired, despite his dissatisfaction, is not supported by the record.

Appellant's failure to testify did not significantly prejudice his case because he failed to show "a reasonable probability that, but for counsel's [deficient performance] the result of the proceedings would have been different." *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) (quoting *Strickland*, 466 U.S. at 694). Appellant's position was that [redacted] was present in the room with appellant and [redacted] while appellant performed medical procedures on her and referred to the medical record notes to support that proposition. (R. at 308). [redacted] testimony—that she was in the exam room alone with appellant—was corroborated by [redacted] testimony that she did not serve as a chaperone at [redacted] appointment, never served as a chaperone during any OMT appointment with appellant, and that she was the only nurse working at the time and only person available to do so. (R. at 336, 338–39).

Finally, appellant himself points out that his counsel advised him not to take the witness stand because "they told me I wouldn't come across well if I testified." (Appellant's Declaration 6). Even if appellant had testified, there is no reason to believe that he would have fared any better at trial. *See United States v. Nicola*, 78 M.J. 223, 227–28 (C.A.A.F. 2019) (trier of fact may disbelieve the accused's testimony and consider his untrue statements as evidence that the opposite is true).[9]

[9] Given his counsels' assessment of appellant's likely poor reception by the panel (Appellant's Declaration 6), as well as the number of alleged victims and sexual

Defense counsel thoroughly cross-examined each government witness and alleged victim in depth and delivered a lengthy closing argument summarizing the evidence as it pertained to [redacted] and every other alleged victim. The outcome is not sufficient reason to "Monday morning quarterback" the decision not to testify. *See Strickland*, 466 U.S. at 689 ("A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight.").

2. Defense Counsel's performance otherwise was not ineffective.

Appellant's remaining claims of ineffective assistance are specious. As discussed in Assignment of Error I, *supra*, there was no error in declining to object to [redacted] testimony because the government did not elicit, nor did [redacted] provide, human lie detector testimony. Alternatively, even if this court finds [redacted] statement to meet the criteria of HLD testimony, there was no prejudice to appellant.

Appellant's decisions not to object to [redacted] testimony regarding her medical records or her unsworn victim impact statement were also not erroneous. Regarding the former, [redacted] testified to a statement made by appellant, a party to the proceedings, that was relevant to the charged offense and not unfairly

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offenses with which appellant was charged, his taking the witness stand could have left appellant in a worse position that the lone conviction adjudged at trial.

prejudicial; as such, it necessarily qualified as a statement by a party opponent and an exclusion to the rule against hearsay under Mil. R. Evid. 801(d)(2). *See United States v. Rivera*, 23 M.J. 89, 97 (C.M.A. 1986).

Regarding the latter, "a victim's unsworn statement may include statements of victim impact, or matters in mitigation, or both." *United States v. Cornelison*, 78 M.J. 739, 745 (Army Ct. Crim App. 2019). [redacted] unsworn statement regarding the questioning of her "credibility, character, and cognitive health" throughout the trial process was proper victim impact testimony of the "social, psychological, or medical impact . . . directly relating to or arising from the offense of which [appellant had] been found guilty." (R. at 938); R.C.M. 1001(c)(2).

The underlying issue regarding the chaperone question was not what the policy was, or who knew of it; it was whether another person was, in fact, in the room at the time appellant sexually assaulted [redacted].[10] To suggest that there was, defense counsel conducted a thorough cross-examination of [redacted] and [redacted] the hospital Deputy Commander of Clinical Services. (R. at 455). Counsel elicited information illustrating that appellant was responsible for training

[10] Nevertheless, counsel did elicit testimony from a different alleged victim that, during that alleged victim's visit with appellant on 26 October 2017—approximately ten months prior to [redacted] visit with appellant at issue here—there were signs posted inside and outside appellant's office that stated chaperones were available to any patient who wanted one. (R. at 351).

other physicians in neurology and that if neurology patients came in, the physicians would accompany him during their appointment. (R. at 460). This was significant information that supported appellant's argument that he was not alone in the examination room with his patients for the panel to consider, contrasted with all other evidence presented at trial to suggest the opposite.

Had appellant admitted the medical record that indicated [redacted] was in the room with appellant and [redacted] (as either a chaperone or as an additional provider), as he argues in his personal declaration, that record merely would have served to bolster [redacted] testimony regarding her review of the record after the fact. Providing the panel with a hard copy of the record to review during deliberations foreseeably could have undercut appellant's closing argument questioning the accuracy of that record. Without the medical record for the panel to review, appellant's counsel were in a better position to argue, at length, that [redacted] and [redacted] memories were fallible and unreliable—to include [redacted] history of TBI, the medication she received for a colonoscopy immediately after the visit with appellant, and the often rushed and delayed nature of completing post-appointment notes. (R. at 873–75, 879, 895, 901–03, 906).[11]

[11] Given that appellant's counsel elicited significant testimony to challenge [redacted] memory at closing, this significantly undercuts appellant's contention that his counsel were ineffective for failing to obtain [redacted] medical records regarding the same. (Appellant's Declaration 10). Nevertheless, appellant then

Finally, appellant questions his counsel's attempts to thoroughly conduct discovery or introduce additional evidence. Specifically, appellant references "the ICE[12] reports, Joint Outpatient Experience Survey reports, and inpatient satisfaction metrics." (Appellant's Declaration 10). However, he again contradicts himself when he states, "the defense counsel had the documents in their case file." (Appellant's Declaration 10). To support a claim of ineffective assistance of counsel, part of the "very high hurdle" that appellant must overcome requires him to demonstrate that his counsel's errors prejudiced him "so seriously as to deprive him of a fair trial, a trial whose result is reliable." *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006) (additional citations omitted). In doing so, appellant bears the burden of showing how the outcome would have been different with the offered evidence or testimony—specificity appellant has failed to provide in his declaration with regards to testimony of other witnesses or documentary evidence not introduced. *Id.* at 244; *Moulton*, 47 M.J. at 229. See also *United States v.*

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contradicts this claim of inadequate discovery by admitting "the defense counsel had the documents in their case files." (Appellant's Declaration 10).

[12] "The Interactive Customer Evaluation (ICE) system is a web-based tool that collects feedback on services provided by various organizations throughout the Department of Defense (DoD). The ICE system allows customers to submit online comment cards to provide feedback to the service providers they have encountered at military installations and related facilities around the world. It is designed to improve customer service by allowing managers to monitor the satisfaction levels of services provided through reports and customer comments." About ICE, https://ice.disa.mil/index.cfm?fa=about_ice&dep=DoD (last visited 5 Jan. 2024).

Dorman, 58 M.J. 295, 298 (C.A.A.F. 2003), holding, "trial defense counsel must, upon request [and consent of the client], provide appellate defense counsel with the case file."

Regardless, appellant then faults his counsel for not impeaching [redacted] statement to law enforcement regarding these supposedly negative reviews from previous patients and requests not to be seen by appellant at future appointments—information that was not otherwise admitted at trial or before the factfinder. (Appellant's Br. 26–27; Appellant's Declaration 9–10; Pros. Ex. 3 for Identification). Confusingly, appellant's contention is apparently that his defense counsel should have brought up the topic of appellant's patient feedback, which would have necessarily required [redacted] to testify regarding her statement to law enforcement that appellant had received numerous complaints and requests not to be seen by him again, solely for the purpose of discrediting [redacted] with reports supposedly to the contrary. Counsels' decision not to introduce or open the door to such derogatory evidence against their client, in a case with four alleged sexual assault victims, was clearly a reasonable decision "under prevailing professional norms." *See United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004).[13]

[13] Should this court elect to examine whether defense counsel was deficient and deem the presumption of competence overcome, the government respectfully requests to "submit a statement or affidavit from . . . defense counsel to rebut the allegations." *United States v. Melson*, 66 M.J. 346, 347 (C.A.A.F. 2008).

B. Even if the defense counsel's performance was deficient, there is not a reasonable probability of a different result with effective assistance.

Defense counsel are "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 689. An error by the defense counsel, even if professionally unreasonable, does not warrant setting aside the judgment if the error had no effect on the judgment. *Id.* at 687.

"A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Accordingly, judicial scrutiny of the defense counsel's performance must be highly deferential. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* The test is not whether the defense counsel did everything possible to pose little or no risk to the client. Instead, the test is whether counsel's conduct falls within the wide range of reasonable professional assistance. *Cueto*, 82 M.J. 323.

A victim's testimony alone, when credible, can be sufficient to sustain a conviction beyond reasonable doubt. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 383 (C.A.A.F. 2006) (the testimony of a single witness may be sufficient to

establish guilt beyond a reasonable doubt so long as the trier of fact finds the witness's testimony sufficiently credible).[14] The panel considered all of the evidence and had every reason to believe [redacted] testimony, which proved every element of the specification, and was also corroborated by the testimony of [redacted]. Even if defense counsel had made different tactical decisions, the outcome would likely have been no better for appellant. Accordingly, this court should deny appellant's claim of ineffective assistance of counsel.

[14] *See also United States v. Coovert*, No. ACM 39848, 2021 CCA LEXIS 355, at *38 (A.F. Ct. Crim. App. 21 Jul. 2021) (mem. op.) ("At trial, [the victim's] testimony alone was sufficient to establish proof of the two elements necessary for the charge."); *United States v. Leach*, No. ACM 39563, 2020 CCA LEXIS 230, at *74 (A.F. Ct. Crim. App. 8 Jul. 2020) (mem. op.) ("[Trial Counsel] further correctly argued [the Victim's] testimony alone could be sufficient to convict Appellant if the members found her credible."); *United States v. Long*, ARMY 20150160, 2018 CCA LEXIS 512, at *19 (Army Ct. Crim. App. 26 Oct. 2018) (reversed on other grounds) (mem. op.) ("The strength of one witness's testimony may, in some cases, be sufficient to sustain a conviction."). *United States v. Ryan*, 21 M.J. 627, 632 (A.C.M.R. 20 Nov. 1985) ([C]onvictions for sexual offenses may be sustained on the basis of the victim's testimony alone . . . if it is not inherently improbable or incredible." (quoting *United States v. Deshotel*, 15 M.J. 787, 790 (A.C.M.R. 1983)).

CONCLUSION

WHEREFORE, the government respectfully requests this honorable court affirm the findings and the sentence.

[redacted]

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CERTIFICATE OF SERVICE, U.S. v. HANSEN (20220162)

I certify that a copy of the foregoing was sent via electronic submission to Mr. Philip D. Cave, civilian appellate defense counsel, at [redacted] and the Defense Appellate Division, at [redacted] on the 10th day of January, 2024.

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