IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.	Docket No. ARMY 20220427
Sergeant First Class (E-7) **BRIAN J. DIVINE** United States Army, Appellant	Tried at Fort Hood,[1] Texas, on 24 May, 27 June, and 24 August 2022, before a military judge sitting as a general court-martial convened by the Commander, III Corps, Colonel Maureen A. Kohn, Military Judge, presiding.

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

[1] At the time of trial the installation was still named Fort Hood. On 9 May 2023, Fort Hood officially changed its name to Fort Cavazos.

Assignments of Error[2]

I.

WHETHER THE TRIAL COUNSEL VIOLATED R.C.M. 701(A)(6) BY WILLFULLY FAILING TO QUESTION AND SUBSEQUENTLY FAILING TO SEEK AND PROVIDE EVIDENCE OF PFC [redacted] UNLAWFUL INAPPROPRIATE RELATIONSHIP WITH SGT JK.

II.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE DENIED SFC DIVINE'S REQUEST FOR AN EXPERT CONSULTANT IN THE FIELD OF DIGITAL FORENSIC EXAMINATION (DFE).

III.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION WHERE SHE ACCEPTED SFC DIVINE'S PLEA OF GUILTY DESPITE THE PRESENCE OF EVIDENCE AND STATEMENTS INCONSISTENT WITH THE PLEA.

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[2] The government has reviewed appellant's assignments of error raised pursuant to *United States v. 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.

Table of Contents

Table of Contents iii

Table of Authorities v

Statement of the Case 1

Statement of Facts 1

Assingment of Error I: WHETHER THE TRIAL COUNSEL VIOLATED R.C.M. 701(A)(6) BY WILLFULLY FAILING TO QUESTION AND SUBSEQUENTLY FAILING TO SEEK AND PROVIDE EVIDENCE OF PFC [redacted] UNLAWFUL INAPPROPRIATE RELATIONSHIP WITH SGT JK. 4

Additional Facts 4

Standard of Review 8

Law 8

Argument 11

A. There was not a R.C.M. 701(a)(6) violation. 11

B. Even if there was a R.C.M. 701(a)(6) violation appellant has failed to demonstrate prejudice. 14

Assingment of Error II: WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE DENIED SFC DIVINE'S REQUEST FOR AN EXPERT CONSULTANT IN THE FIELD OF DIGITAL FORENSIC EXAMINATION (DFE). 17

Additional Facts 18

Standard of Review 19

Law 20

Argument 21

A. Appellant waived the issue by entering into an unconditional guilty plea... 22

B. Appellant failed to show a reasonable probability that Mr. PE would be of assistance.....23

C. Appellant failed to show a reasonable probability that denial of Mr. PE would result in a fundamentally unfair trial.....26

D. Any error was harmless beyond a reasonable doubt.....28

Assingment of Error III: WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION WHERE SHE ACCEPTED SFC DIVINE'S PLEA OF GUILTY DESPITE THE PRESENCE OF EVIDENCE AND STATEMENTS INCONSISTENT WITH THE PLEA.....29

Standard of Review.....29

Law.....29

Argument.....31

A. Appellant's stipulation waived a mistake of fact defense 31

B. The military judge did not abuse her discretion in accepting appellant's guilty plea to sexually harassing PFC [redacted].....32

C. The military judge did not abuse her discretion in accepting appellant's guilty plea to fraternizing with SPC [redacted]. 37

D. The military judge did not abuse her discretion in determining appellant made repeated offensive comments to SPC [redacted]. 40

Conclusion 42

Table of Authorities

Supreme Court of the United States
Brady v. Maryland, 373 U.S. 83 (1963) 8, 9, 12, 13
Menna v. New York, 423 U.S. 61 (1975) 15, 21

U.S. Court of Appeals for the Armed Forces
United States v. Argo, 46 M.J. 454 (C.A.A.F. 1997) 11
United States v. Bradley, 68 M.J. 279 (C.A.A.F. 2010) 21, 22
United States v. Bresnahan, 62 M.J. 137 (C.A.A.F. 2005) 25
United States v. Campbell, 68 M.J. 217 (C.A.A.F. 2009) 22, 36
United States v. Care, 18 C.M.A. 535 (1969) 29, 41
United States v. Carr, 65 M.J. 39 (C.A.A.F. 2007) 29, 33, 36
United States v. Carson, 57 M.J. 410 (C.A.A.F. 2002) 36
United States v. Coleman, 72 M.J. 184 (C.A.A.F. 2013) ..... passim.
United States v. Davenport, 9 M.J. 364 (CMA 1980) 30
United States v. English, 79 M.J. 116, 120 (C.A.A.F. 2019) 39
United States v. Freeman, 65 M.J. 451 (C.A.A.F. 2008) 20
United States v. Frost, 79 M.J. 104 (C.A.A.F. 2019) 14, 15
United States v. Fuller, 54 M.J. 107 (C.A.A.F. 2001) 36
United States v. Garries, 22 M.J. 288 (C.M.A. 1986) 20
United States v. Gladue, 67 M.J. 311 (C.A.A.F. 2009) 32, 36
United States v. Gonzalez, 39 M.J. 459 (C.A.A.F. 1994) 21, 22
United States v. Goodman, 70 M.J. 396 (C.A.A.F. 2011) ..... passim.
United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982) ii
United States v. Gunkle. 55 M.J. 26 (C.A.A.F. 2001) 20, 21, 23
United States v. Harrow, 65 M.J. 190 (C.A.A.F. 2007).....10
United States v. Hart, 29 M.J. 407 (C.A.A.F. 1990) 10
Unites States v. Hinojosa, 33 M.J. 353 (C.M.A. 1991) 22
United States v. Inabinette, 66 M.J. 320 (C.A.A.F. 2008) 29, 30
United States v. Jones, 34 M.J. 270 (C.A.A.F. 1992) ..... passim.
United States v. Jones, 69 M.J. 294 (C.A.A.F. 2011) 21, 22
United States v. Kaiser, 58 M.J. 146 (C.A.A.F. 2003) 28
United States v. Kerr, 51 M.J. 401 (C.A.A.F. 1999) 10, 11
United States v. Kinsley, 24 M.J. 855 (A.C.M.R. 1987) 26
United States v. Kohlbek, 78 M.J. 326 (C.A.A.F. 2019) ..... passim.
United States v. Kreutzer, 61 M.J. 293 (C.A.A.F. 2005).....28
United States v. Langston, 53 M.J. 335 (C.A.A.F. 2000) 40, 41

United States v. Lee, 64 M.J. 213 (C.A.A.F. 2006) 26, 27
United States v. Lewis, 65 M.J. 85 (C.A.A.F. 2007) 35
United States v. Lloyd, 69 M.J. 95 (C.A.A.F. 2010) 19, 25
United States v. Lucas, 5 M.J. 167 (C.M.A. 1978) 12
United States v. Lundy, 63 M.J. 299 (C.A.A.F. 2006) 21, 22
United States v. Mahoney, 58 M.J. 346 (C.A.A.F. 2003).....9
United States v. McElhaney, 54 M.J. 120 (C.A.A.F. 2000) 20
United States v. Medina, 66 M.J. 21 (C.A.A.F. 2008) 29
United States v. Meeks, 44 M.J. 1 (C.A.A.F. 1996) 11
United States v. Miller, 66 M.J. 306 (C.A.A.F. 2008) 19, 20, 22, 28
United States v. Mizgala, 61 M.J. 122 (C.A.A.F. 2005) 22
United States v. Moratalla, 82 M.J. 1 (C.A.A.F. 2021) 30
United States v. Murphy, 74 M.J. 302 (C.A.A.F. 2015) 30
United States v. Negron, 60 M.J. 136 (C.A.A.F. 2004) 41
United States v. Penister, 25 M.J. 148 (C.M.A. 1987) 38
United States v. Redlinski, 58 M.J. 117 (C.A.A.F. 2003) 29, 33
United States v. Reed, 41 M.J. 449 (C.A.A.F. 1995) 16
United States v. Roberts, 59 M.J. 323 (C.A.A.F. 2004).....8, 10
United States v. Robinson, 39 M.J. 88 (C.M.A. 1994) 20, 24
United States v. Schweitzer, 68 M.J. 133 (C.A.A.F. 2009) ..... passim.
United States v. Short, 50 M.J. 370 (C.A.A.F. 1999) 25, 26
United States v. Smauley, 42 M.J. 449 (C.A.A.F. 1995) 30
United States v. Stellato, 74 M.J. 473 (C.A.A.F. 2015) .....passsim.
United States v. Travers, 25 M.J. 61 (C.M.A. 1987) 20
United States v. Winckelmann, 73 M.J. 11 (C.A.A.F. 2013) 38

Service Courts of Criminal Appeals

Unites States v. Axelson, 65 M.J. 501 (Army Ct. Crim. App. 2007) 34
United States v. Birdsong, ARMY 20140887, 2016 CCA LEXIS 434 (Army Ct. Crim. App. 08 Jul. 2016) 38
United States v. Ellis, 77 M.J. 671 (Army Ct. Crim. App. 2018)..... 8, 10, 14
United States v. Long, ARMY 20150160, 2023 CCA LEXIS 217 (Army Ct. Crim App. 28 April 2023) 21
United States v Lorance, ARMY 20130679, 2017 CCA LEXIS 429 (Army Ct. Crim. App. 27 Jun. 2017) 9
United States v. Marin, ARMY 20210375, 2023 CCA LEXIS 464 (Army Ct. Crim. App. 30 Oct. 2023).....8
United States v. Robinson, ARMY 20150088, 2017 CCA LEXIS 93 (Army. Ct. Crim. App. 06 Feb. 2017) 20
United States v. Shorts, 76 M.J. 523 (Army Ct. Crim. App. 2017) 9, 12

United States v. Tinsley, 81 M.J. 836 (Army. Ct. Crim. App. 2021) 20
United States v. Upton, ARMY 20220044, 2022 CCA LEXIS 724 (Army Ct. Crim App. 13 Dec. 2022) 37
United States v. Williams, 75 M.J. 663 (Army Ct. Crim. App. 2016) 35

U.S. Federal Courts

Moore v. Kemp, 809 F.2d 709 (11th Cir. 1987) 20
United States v. Beers, 189 F.3d 1297 (10th Cir. 1999).....9

Uniform Code of Military Justice

Article 45, UCMJ; 10 U.S.C. § 845..... 29, 30
Article 46, UCMJ; 10 U.S.C. § 846.....8
Article 92, UCMJ; 10 U.S.C. § 892.....1, 31
Article 93, UCMJ; 10 U.S.C. § 893..... passim.

Military Rules and Regulations

Army Reg. 600-20, Army Command Policy (24 July 2020) ..... passim.
Military Rule of Evidence 413 7
Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook (25 Oct. 2023) 36
Rules for Court Marial 701 ..... passim.
Rules for Court Marial 702.....8
Rules for Court Marial 703.....8
Rules for Court Marial 910..... 21, 29

Statement of the Case

On 24 August 2022, a military judge, sitting as a general court-martial, convicted appellant, in accordance with his pleas, of four specifications of a violation of Article 92, Uniform Code of Military Justice (UCMJ) for wrongfully engaging in a prohibited relationship with a junior enlisted soldier, and three specifications of a violation of Article 93, UCMJ for maltreatment, 10 U.S.C. §§ 892, 893.[3] (Statement of Trial Results (STR); R. at 182–84). That same day, pursuant to the terms of the plea agreement, the military judge sentenced appellant to a bad-conduct discharge (BCD). (STR; R. at 259; App. Ex. XVI). On 9 September 2022, the convening authority took no action on the findings or sentence. (Action). On 13 September 2022, the military judge entered judgment. (Judgement). This court docketed appellant's case on 26 January 2023.

Statement of Facts

Appellant was a platoon sergeant assigned to Headquarters and Headquarters Company, 11th Field Hospital, 9th Hospital Center, 1st Medical Brigade, Fort Hood (now Fort Cavasos), Texas. (Pros. Ex. 38). During this time one of appellant's soldiers, Specialist (SPC) [redacted], asked for help with physical training (PT). (R. at 115, 153). Between September 2019 and February 2020, appellant

[3] In accordance with the plea agreement Charge III alleging abusive sexual contact was dismissed pending appellate review of the remaining charges. (App. Ex. XVI).

agreed to work out with her at the gym prior to unit PT. (R. at 115). During one session, while SPC [redacted] was squatting, appellant commented that the exercise made "her butt look good." (R. at 115). On another occasion SPC [redacted] expressed a lack of desire to get out of bed for extra PT. (R. at 116; Pros. Ex. 38). Appellant responded by texting SPC [redacted] "if you keep talking about your bed I'm joining." (Pros. Ex. 38). After that text message SPC [redacted] stopped working out with appellant. (Pros. Ex 17 for identification (ID)).

Between March 2020 and October 2020, appellant engaged in a relationship with Private First Class (PFC) [redacted], another soldier in his platoon, which spanned a temporary duty (TDY) trip to New York and continued upon their return to Texas. (R. at 123–24, 135, 144). The two exchanged text messages "pretty much daily" at times. (R. at 139). Their conversations "definitely crossed over the line into the friendship" and eventually included some comments that "were flirtatious in nature" from appellant. (R. at 126–27). This included telling PFC [redacted] she was attractive, that he wanted to take her to Las Vegas, and sending her a suggestive text message about getting a hotel room. (R. at 131–33, 136, 139, 148; Pros. Ex. 38). Appellant also hugged PFC [redacted] while they were alone in his office on repeated occasions. (R. at 162). Finally, appellant told PFC [redacted] that seeing her at work drove him "crazy" and he "could hardly keep [his] hands off her." (R. at 159; Pros. Ex. 38).

In October 2020 PFC [redacted] reported appellant's actions and comments through a third party. (Pros. Ex. 17). During the course of the investigation SPC [redacted] was also interviewed by law enforcement and reported appellant's comments to her. (Pros. Ex. 17). Charges against appellant were preferred on 2 February 2022 and referred to a general court-martial on 6 May 2022. (Charge Sheet). Appellant entered a plea agreement with the convening authority (GCMCA) on 17 August 2022 in which he offered to plead guilty to engaging in an inappropriate relationship with both PFC [redacted] and SPC [redacted] and maltreating them both through sexual harassment.[4] (App. Ex. XVI). Pursuant to that plea agreement, appellant would receive no confinement but would be discharged from service with a BCD. (App. Ex. XVI). All other lawful punishments were available. (App. Ex. XVI). As part of the plea agreement appellant also entered into a stipulation of fact. (App. Ex. XVI; Pros. Ex. 38). After a providence inquiry, the military judge accepted appellant's pleas on 24 August 2022 and sentenced him to the agreed upon BCD that same day. (R. at 182; 259)

[4] Pursuant to the plea agreement exceptions were made to four specifications. (App. Ex. XVI). The words "sending [PFC [redacted] a video of himself masturbating, sending her explicit images of himself, asking her to send him pictures of herself" were excepted from Charge I, Specification 2. "Kissing [PFC [redacted]]" was excepted from Charge I, Specification 3. (App. Ex. XVI). Likewise, "sending her a video of himself masturbating, sending her explicit images of himself, asking her to send him pictures of herself" was excepted from Charge II, Specification 2. Finally, "kissing her" was excepted from Charge II, Specification 3.

Assignment of Error I

WHETHER THE TRIAL COUNSEL VIOLATED R.C.M. 701(A)(6) BY WILLFULLY FAILING TO QUESTION AND SUBSEQUENTLY FAILING TO SEEK AND PROVIDE EVIDENCE OF PFC [redacted]'S UNLAWFUL INAPPROPRIATE RELATIONSHIP WITH SGT JK.

Additional Facts

On 29 November 2021 members of the prosecution team, including the Special Victim Prosecutor (SVP), Lieutenant Colonel (LTC) CS, met with PFC [redacted]. (Pros. Ex. 20 for ID). The contents of that meeting were memorialized by Staff Sergeant (SSG) AV, the special Victim Prosecutor Non-Commissioned Officer (SVPNCO), in a memorandum for record (MFR) dated 2 December 2021.[5] (Pros. Ex. 20 for ID). In response to comments made by appellant in a pretext text message exchange, PFC [redacted]'s relationship with Sergeant (SGT) JK was discussed.[6] (Pros. Ex. 20 for ID, pp. 6–7). At that time the SVP explained, "the government did not want to ask about the relationship between [PFC [redacted]] and SGT [JK] at that time, but wanted [PFC [redacted]] to understand that aspects of that would be brought up if this case went forward to court-martial." (Pros. Ex. 20 for ID, pp. 6–7). This

[5] In the memoranda PFC [redacted] is referred to as SGT [redacted] to reflect the rank she held at the time of the interview and her new married last name. (Pros. Ex. 20 for ID, Pros. Ex 21 for ID).

[6] Although married to each other at the time of this conversation, PFC [redacted] and SGT JK were married to other people at the time of appellant's crimes.

memorandum was included in the preferral evidence packet and used at the Article 32, UCMJ Preliminary Hearing. (Memorandum from Trial Counsel for CPT [CS], Preliminary Hearing Officer Subject: Government Notice of Documentary Evidence for Preliminary Hearing (11 February 2022.))

On 31 January 2022 members of the prosecution team met with PFC [redacted] again. (Pros. Ex. 21 for ID). The contents of that meeting were memorialized by PFC BH, a government paralegal, in an MFR dated 1 February 2022. (Pros. Ex. 21 for ID). Private First Class [redacted]'s relationship with SGT JK was discussed more deeply during this meeting. (Pros. Ex. 21 for ID, para. c, d, e, f, g). At that time PFC [redacted] disclosed that she and SGT JK "were investigated by their commander, [LTC M], via a commander's inquiry for an improper relationship." (Pros. Ex. 21 for ID, para. e). She further explained that although she and SGT JK were supposed receive a brief on the outcome of the investigation that never occurred. (Pros. Ex. 21 for ID, para. e). Private First Class [redacted] explained that no action was taken against her or SGT JK. (Pros. Ex. 21 for ID, para. e). In response to this, LTC CS warned that the defense may "go after" PFC [redacted] due to this inappropriate relationship. (Pros. Ex. 21 for ID, para. f). After PFC [redacted] expressed fear of losing rank, LTC CS explained that decision would be in the hands of her command, but he would "recommend against any punitive action being taken, because this was only brought to light based upon the reported sexual offenses" and clarified "this

was only his position and what his recommendation would be." (Pros. Ex. 21 for ID, para. f).

During that meeting the SVP also allowed PFC [redacted] to review Snapchat conversations between herself and SGT JK. (Pros. Ex. 21 for ID). These messages had been produced by CID in the course of their investigation. (Pros. Ex. 21 for ID). The messages indicated that PFC [redacted] and SGT JK were in a relationship that constituted misconduct at the time they were sent, specifically "a relationship between a junior enlisted Soldier and an NCO." (Pros. Ex. 21 for ID).

Appellant made his only discovery request on 14 April 2022.[7] (Discovery Request). Included in that request were requests for "[a]ny and all information and records relating to any criminal history, convictions, non-judicial punishments, or arrests of any party, witness, and/or person with knowledge of relevant facts named in discovery information provided by or to you before trial," "[a]ny evidence, known or which through the exercise of reasonable diligence should be known to the trial counsel, which may negate the guilt of the accused, reduce the degree of guilt of the accused, or reduce the punishment," and "[c]opies of any administrative or other non-criminal investigations related, directly or

[7] Appellant did submit an additional "Discovery Request" to the government on 26 May 2022. (App. Ex. IV-A). This request seems to be a request for production of witnesses and not a discovery request. (App. Ex. IV-A). None of the witness proffers mention the investigation at question. (App. Ex. IV-A).

indirectly, to this case . . . for example . . . commander's inquiries." (Discovery Request, paras. d, e, s). Members of the prosecution team interviewed Captain (CPT) CH who stated that she gave a sworn statement about disrespect, but "never heard about an investigation." (Pros. Ex. 22 for ID). On 11 July 2022 the prosecution team had a telephonic interview with CPT JG to discuss any possible investigations into [redacted]. (Pros. Ex. 23). Captain JG stated that PFC [redacted] was given an Article 15 for disrespect and was "brought up in a fraternization investigation against [PFC [redacted]'s] roommate" but did not mention any fraternization or adultery investigation into PFC [redacted] and SGT JK. (Pros. Ex. 23 for ID). Captain JG confirmed that CPT CH had been one of the officers disrespected by PFC [redacted]. (Pros. Ex. 23 for ID).

Appellant was arraigned on 24 May 2022 and requested to defer motions at that time. (R. at 9). Appellant subsequently submitted four motions to the court, none of which were a motion to compel discovery.[8] (App. Ex. II; App. Ex. IV; App. Ex. VI; App. Ex. VIII).

[8] Appellant motioned the court to compel expert assistance, for the production of witnesses, to exclude evidence under Mil. R. Evid. 413, and for appropriate relief for unreasonable multiplication of charges and multiplicity. (App. Ex. II, App. Ex. IV, App. Ex. VI, App. Ex. VIII).

Standard of Review

Violations of discovery disclosure requirements that do not rise to the level of a violation of *Brady v. Maryland* or prosecutorial misconduct are tested for material prejudice. *United States v. Ellis*, 77 M.J. 671, 677–79 (Army Ct. Crim. App. 2018). "Where an appellant demonstrates that the Government failed to disclose discoverable evidence in response to a specific request or as a result of prosecutorial misconduct, the appellant will be entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt." *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004).

Law

"Article 46, UCMJ, as implemented by [Rule for Courts-Martial (R.C.M.)] 701–703, affords a military accused the right to obtain favorable evidence and provides 'greater statutory discovery rights to an accused than does his constitutional right to due process.'" *United States v. Marin*, ARMY 20210375, 2023 CCA LEXIS 464 (Army Ct. Crim. App. 30 Oct. 2023) (mem op.) at *10 (citing; *United States v. Coleman*, 72 M.J. 184, 187 (C.A.A.F. 2013)). R.C.M. 701(a)(6) states: "Trial counsel shall, as soon as practicable*, disclose to the defense the existence of* evidence known to trial counsel which reasonably tends to— (A) Negate the guilt of the accused of an offense charged; (B) Reduce the degree of guilt of the accused of an offense charged; (C) Reduce the punishment; or (D)

Adversely affect the credibility of any prosecution witness or evidence." R.C.M. 701(a)(6) (emphasis added). "R.C.M. 701(a)(6) is based on *Brady v. Maryland* and its progeny, which in turn, is derived from the Due Process Clause of the Fifth Amendment." *United States v Lorance,* ARMY 20130679, 2017 CCA LEXIS 429 (Army Ct. Crim. App. 27 Jun. 2017) (mem. op.) (discussing generally *Brady v. Maryland*, 373 U.S. 83 (1963)). "The trial counsel must reveal information that it had in its possession or knowledge—whether actual or constructive." *United States v. Stellato*, 74 M.J. 473, 487 (C.A.A.F. 2015) (quoting *United States v. Beers*, 189 F.3d 1297, 1304 (10th Cir. 1999). "In general, the courts . . . require a search of a trial counsel's own files, the investigative files of federal law enforcement, and—if the facts demonstrate they are in the constructive control of the trial counsel—state law enforcement and other agencies." *Stellato*, 74 M.J. at 486. "A trial counsel must search his or her own file, and the files of related criminal and administrative investigations. However, we require a trial counsel only exercise due diligence." *United States v. Shorts*, 76 M.J. 523, 532 (Army Ct. Crim. App. 2017) (citing *United States v. Simmons*, 38 M.J 276 (C.A.A.F. 1993)); *United States v. Mahoney*, 58 M.J. 346 (C.A.A.F. 2003).

In *Coleman*, the C.A.A.F. established "two categories of disclosure error: (1) cases in which the defense either did not make a discovery request or made only a general request for discovery"; and (2) cases in which the defense made a specific

request for the undisclosed information. 72 M.J. at 187 (citing *Roberts*, 59 M.J. at 326–327. "For cases in the first category, [the courts] apply the harmless error standard. *Id.* (citing *United States v. Hart*, 29 M.J. 407, 410 (C.A.A.F. 1990). "Where an appellant demonstrates that the Government failed to disclose discoverable evidence in response to a specific request or as a result of prosecutorial misconduct, the appellant will be entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt." *Roberts*, 59 M.J. at 327. In *United States v. Ellis* this court established a three part test to determine if a request is specific:

> First, the request must, on its face or by clear implication, identify the specific file, document or evidence in question. Second, unless the request concerns evidence in the possession of the trial counsel, the request must reasonably identify the location of the evidence or its custodian. Third, the specific request should include a statement of the expected materiality of the evidence to preparation of the defense's case unless the relevance is plain.

77 M.J. 671, 681 (Army Cr. Crim. App. 2018) (interpreting *Hart,* 29 M.J. at 410). "Applying nonconstitutional harmless error analysis, [the courts] conduct a de novo review to determine whether the error had a substantial influence on the . . . verdict in the context of the entire case." *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007). In determining that impact, 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)).

Prosecutorial misconduct is "action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Argo*, 46 M.J. 454, 457 (C.A.A.F. 1997). If there is prosecutorial misconduct, "relief is merited only if that misconduct actually impacted on a substantial right of an accused (i.e., resulted in prejudice)." *United States v. Meeks*, 44 M.J. 1, 5 (C.A.A.F. 1996). "If it did, then the reviewing court still considers the trial record as a whole to determine whether such a right's violation was harmless under all the facts of a particular case." *Id.*

Argument

A. There was not a R.C.M. 701(a)(6) violation.

The government disclosed PFC [redacted]'s belief a commander's inquiry was done into her relationship with SGT JK's and the existence of Snapchat messages between the two in the form of PFC BH's 1 February 2021 MFR.[9] (Pros. Ex. 21). That is sufficient to satisfy the requirements of R.C.M. 701(a)(6). *Stellato*, 74 M.J.

[9] Appellant seemingly does not claim the government violated R.C.M. 701(a)(6) with respect to PFC [redacted] and SGT JK's relationship. (Appellant's Br. 13–20). Appellant likewise does not claim that the government failed to disclose the 1 February 2021 MFR. (Appellant's Br. 13–20; Pros. Ex. 21).

at 487 (where the court noted the requirement to "*reveal* information that it had in its possession or knowledge") (emphasis added); *Brady*, 373 U.S. 83. Furthermore, it is clear from the interviews with CPT JG and CPT CH that the government exercised the required due diligence in attempting to determine if a commander's inquiry did occur.[10] (Pros. Ex. 22 for ID, Pros. Ex. 23 for ID); *Shorts*, 76 M.J. at 532. Importantly, appellant made no effort to obtain the production of the investigation or Snapchat messages beyond his general discovery request, and therefore there is no R.C.M. 701(a)(6) violation. *See United States v. Lucas*, 5 M.J. 167, 167 (C.M.A. 1978) ("there is no *Brady* violation when the accused or his counsel knows before trial about the allegedly exculpatory information and makes no effort to obtain its production"). Simply put, the government met its requirements to disclose the evidence and appellant failed, or chose, to act upon that disclosure.

Stellato is instructive in this case, but not for the reasons asserted by appellant, as it shows how the government did not violate their discovery obligations. (Appellant's Br. 15, 19). The trial counsel in *Stellato* could not merely be "considered lazy" as appellant claims, rather he was "willfully ignorant" and refused to disclose the existence of exculpatory evidence. *Stellato*, 74 M.J. at

[10] It is apparent from the interview of CPT JG that a commander's inquiry into fraternization and/or adultery did not occur. (Pros. Ex. 23 for ID).

487–488; (Appellant's Br. 19). As discussed, in present case the government disclosed the existence of both the investigation and Snapchat messages. (Pros. Ex. 21). The trial counsel in *Stellato* refused to discuss the contents of the box with the government witness over the course of many months preferring to wait until "the week before trial [to talk] with her." 74 M.J. at 478. Conversely, the SVP here confronted PFC [redacted] with the evidence well in advance of trial and memorialized that confrontation for disclosure to appellant. (Pros. Ex. 20, Pros. Ex. 21). When he SVP was informed about the investigation he took reasonable steps to determine if that investigation existed. (Pros. Ex. 23). In *Stellato,* the trial counsel actively attempted to avoid searching for the banana evidence – claiming it had been lost – only to be ordered to conduct a search by the judge which located the evidence. 74 M.J. at 478–79. Finally, trial counsel in *Stellato* violated the duty to permit inspection of evidence within military control while here the entire file was available to appellant at CID. *Id.*, at 485; (R. at 58–59). A comparison of the government's non-compliance in *Stellato* with this case clearly shows the government here was compliant with the requirements of *Brady* and R.C.M. 701(a)(6). (Appellant's Br. 15, 19).

The government took the required steps to notify appellant of the existence of this evidence. Appellant now asks the court to enforce a higher standard than R.C.M. 701(a)(6) and *Stellato* require, that evidence be *produced* without request.

R.C.M. 701(a)(6); *Stellato*, 74 M.J. at 487. This court should reject that request and determine no discovery violation occurred.

B. Even if there was a R.C.M. 701(a)(6) violation appellant has failed to demonstrate prejudice.

Appellant's general discovery request and therefore a harmless error test should be applied to any potential violation. *Coleman,* 72 M.J. at 187. By applying the standard of *Frost* and employing the *Kolbeck* factors this court will determine that any error had no impact, let alone a substantial impact, on the findings. *United States v. Frost*, 79 M.J. 104, 104 (C.A.A.F. 2019); *Kolbeck*, 78 M.J. at 334. As such, no relief is warranted.

1. Appellant made a general discovery request.

Appellant's discovery request fails all three prongs of the *Ellis* test. 77 M.J. at 681; (Discovery Request).[11] First, while the request asks for any commander's inquiries "related, directly or indirectly, to this case," that does not identify any specific file, document, or evidence, nor did appellant request copies of communications between PFC [redacted] and SGT JK, or any other third party. (Discovery Request). Second, appellant makes no mention of the location of the evidence or its custodian in the request. (Discovery Request). Finally, the

[11] While the *Ellis* test is making a determination under R.C.M. 701(a)(2) and appellant has only made a claim under R.C.M. 701(a)(6) the analysis is nonetheless useful in determining what degree of harmlessness must be shown if error occurred. 77 M.J. at 681.

materiality of the evidence is not contained within the request. (Discovery Request). Therefore, it is evident that appellant made one general discovery request in this case. As such, if this court deems any error in disclosure occurred it should apply the harmless error standard and find any such error to be harmless. *Coleman,* 72 M.J. at 187.

2. Any error in disclosure was harmless.

Any failure to disclose evidence did not have a substantial influence on the findings in light of appellant's guilty plea and the evidence against him. *Frost*, 79 M.J. at 104. When weighing the *Kohlbek* factors, it is clear that the error had no impact on the findings. 78 M.J. at 334. Most determinatively, appellant plead guilty. *See United States v. Schweitzer*, 68 M.J. 133, 136 (C.A.A.F. 2009) ("A counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case.") (quoting *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975)).

Even without appellant's plea, had the case gone to trial, the *Kohlbek* factors still indicate any error was harmless. First, the government's case was strong. The government would have had the credible testimony of two junior enlisted victims, a third party eyewitness account to appellant "try to kiss" PFC [redacted], and most importantly appellant's own words via text and snapchat

messaging.[12] (BS 000354–000355, BS 000366–000367; Pros. Exs. 4 for ID, 5 for ID, 6 for ID, 7 for ID, 8 for ID, 9 for ID, 10 for ID, 11 for ID, 28 for ID, Pros. Ex. 38; R. at 62– 96;). Meanwhile, appellant's case was limited to a weak motive to fabricate and character evidence, both limited only to PFC [redacted].[13] (Appellant's Br. 16–17).

The quality and materiality of evidence were very low as well. Both the commander's inquiry and Snapchat messages could not have provided defense with any evidence not already disclosed through the two MFRs. (Pros. Ex. 20 for ID, Pros. Ex. 21 for ID). Appellant claims that this evidence would have allowed him to potentially impeach PFC [redacted] and show a motive to fabricate. (Appellant's Br. 16–17). However, he would have only been allowed to impeach had PFC [redacted] denied the relationship or the investigation which, given her wiliness to discuss both with the government, seems unlikely.[14] (Pros. Ex. 20 for ID, Pros. Ex. 21 for

[12] Further, not only would both victims likely have testified to the conduct to which appellant pled guilty, but also to the conduct charged but dismissed by the government via exceptions in exchange for appellant's plea. (Charge Sheet; App. Ex. XVI).

[13] Appellant asserts on appeal that PFC [redacted] had a motive to fabricate allegations against him because a third party "threatened to report [SGT] [redacted]'s relationship with SGT JK . . . prompted reporting allegations against [appellant]." (Appellant's Br. 16). He also asserts that PFC [redacted] may have fabricated the non-consensual nature of appellant's conduct to protect her relationship with SGT JK. (Appellant's Br. 17). These motives are unpersuasive and do not even address the allegations made by SPC [redacted].

[14] Appellant also claims that the Snapchat messages may have provided evidence that PFC [redacted] and SGT JK the "discussed their scheme to disclose [appellant's]

ID). Additionally, even if PFC [redacted] denied the relationship or the investigation, she could have been impeached with testimony of SSG AV or PFC BH, rendering the Snapchat messages and investigation unnecessary. (Pros. Ex. 20 for ID, Pros. Ex. 21 for ID).

Ultimately, an analysis under *Kohlbek* shows that any discovery violation did not have a substantial impact on the findings in this case. 78 M.J. at 334. The majority of appellant's claim of prejudice comes from his potential cross-examination of one of the two victims – a right he expressly gave up in pleading guilty – which could have been accomplished without the evidence he failed to request. (R. at 108). As appellant has not, and cannot, show prejudice for the alleged discovery violation, no relief is warranted. *Coleman*, 72 M.J. at 187.

Assignment of Error II

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE DENIED SFC DIVINE'S REQUEST FOR AN EXPERT CONSULTANT IN THE FIELD OF DIGITAL FORENSIC EXAMINATION (DFE).

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actions to avoid any repercussions that could result from SPC ALP reporting PFC [redacted]'s and SGT JK's unlawful and inappropriate relationship." (Appellant's Br. 18–19.) There is no indication such a scheme, let alone messages of that scheme, existed and appellant's argument is mere speculation. *See United States v. Reed,* 41 M.J. 449 (C.A.A.F. 1995).

Additional Facts

Appellant requested the appointment of an expert consultant, Mr. PE, on 22 February 2022. (App. Ex. II – A). Mr. PE is an expert in digital forensic examinations requested to analyze the two phones collected as well as review the government's own forensic examinations. (App. Ex. II – A). The GCMCA disapproved the request on 2 March 2022. (App. Ex. II – B). On 8 June 2022 appellant motioned the court to compel expert assistance in the form of Mr. PE. (App. Ex. II). The government responded to that motion on 10 June 2022 and asked the military judge to deny appellant's motion. (App. Ex. III).

An Article 39(a) UCMJ hearing was held on 27 June 2022 for the presentation of evidence and argument on the motion to compel and other matters. (R. at 12, 20–62). Appellant called two CID agents and Mr. PE as witnesses. (R. at 21, 37, 43). Special Agent (SA) [redacted] testified that the extraction done could "potentially" show deleted data. (R. at 24). He also testified to the type extraction done and what he did and did not look for in the phones. (R. at 27–28, 33). Special Agent [redacted] testified that he reviewed the reports after SA [redacted] did the extractions. (R. at 38–39). He clarified that the Snapchat messages came from Snapchat corporate and not the phone reviewed. (R. at 39). Special Agent [redacted] conceded that he did not request any higher level of assistance but also noted that appellant would have received CID assistance in reviewing files had he requested

it. (R. at 40). Finally, Mr. PE testified to his background, the reports, the absence of raw data, and how his firm could access the "full file system" including such things as deleted files, videos, call logs, messages, photos, emails, and location histories. (R. at 43–51).

The government called SA [redacted] who testified that the extraction report created could be reviewed and understood by laypersons. (R. at 53). He also noted that the report was available for appellant's review. (R. at 53). Importantly, SA [redacted] explained that if data had been extracted it could be viewed in other formats. (R. at 54–55). The military judge heard argument from both appellant and the government. (R. at 55–62). In his argument, defense counsel explained he needed an expert "to review all the data" and stated "I don't necessarily know I am going to find something" before arguing confidentiality prevented him from explaining in greater detail.[15] (R. at 55–58). In a written ruling the military judge denied defense's motion to compel on 25 July 2022. (App. Ex. XI).

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

[15] Appellant's counsel offered to submit an ex-parte filing to demonstrate "the number of things that I need my expert to look for and to do." (R. at 57)

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 *Miller*, 46 M.J. at 65; *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). That is, an accused "must show the trial court that there exists a reasonable probability *both* that an expert would be of assistance to the defense *and* that denial of expert assistance would result in a fundamentally unfair trial." *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994) (quoting *Moore v. Kemp*, 809 F.2d 709, 712 (11th Cir. 1987)) (emphasis added). 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?" *United States v. Gunkle*. 55 M.J. 26, 32 (C.A.A.F. 2001); *United States v. Gonzalez*, 39 M.J. 459, 461 (C.A.A.F. 1994).

By agreeing to plead guilty, appellant "foregoes his or her constitutional rights . . . in exchange for a reduction in sentence or other benefit." *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006). An unconditional guilty plea "which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made." *United States v. Jones*, 69 M.J. 294, 299 (C.A.A.F. 2011) (citing R.C.M. 910(j)); *see also United States v. Long,* ARMY 20150160, 2023 CCA LEXIS 217 (Army Ct. Crim App. 28 April 2023) at *13 (mem. op.) ("An unconditional plea of guilty waives all nonjurisdictional defects at earlier stages of the proceedings.") (citations omitted). "A counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." *Schweitzer*, 68 M.J. at 136 (C.A.A.F. 2009) (quoting *Menna* 423 U.S. at 62 n.2). "An unconditional plea of guilty waives all non-jurisdictional defects at earlier stages of the proceedings." *United States v. Bradley*, 68 M.J. 279, 281 (C.A.A.F. 2010).

Argument

By entering into an unconditional guilty plea, appellant waived the issue of the denial of expert assistance. *Jones*, 69 M.J. at 299; *Bradley*, 68 M.J. at 281. If not waived, the military judge did not abuse her discretion when she denied appellant's motion to compel Mr. PE, because appellant failed to demonstrate that Mr. PE's assistance was necessary. There were at least two separate bases for the military judge's ruling, and each was well within the "range of choices reasonably arising from the applicable facts and the law." *Miller*, 66 M.J. at 307.

A. Appellant waived the issue by entering into an unconditional guilty plea.

When appellant entered into an unconditional plea agreement and subsequently plead guilty he waived the issue of his motion to compel expert assistance.[16] (App. Ex. XVI). This was not merely an example of an appellant failing to recognize a fleeting opportunity, but rather a knowing relinquishment of his constitutional rights in order to receive a benefit, in this case plea agreement

[16] *See Jones*, 69 M.J. at 296 (an unconditional guilty plea waived of appellate review of the denial of discovery requests); *Bradley*, 68 M.J. at 282 (an unconditional guilty plea waived appellate review of a denial of a motion to disqualify government counsel); *United States v. Campbell,* 68 M.J. 217 (C.A.A.F. 2009) (an unconditional guilty plea waived multiplicity issues); *Unites States v. Hinojosa*, 33 M.J. 353 (C.M.A. 1991) (an unconditional guilty plea waived the right to assert on appeal a failure to suppress appellant's statement to CID); *c.f. United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005) (holding "a litigated speedy trial motion under Article 10 is not waived by a subsequent unconditional guilty plea.")

that removed the most serious offense, excepted the most heinous language from the offenses he did plead guilty to, and limited the available sentence. *Lundy*, 63 M.J. at 301; (Charge Sheet; App. Ex. XVI). Importantly, appellant knew of the denial of his motion when he bargained and entered into this agreement. *Schweitzer*, 68 M.J. at 137. However, even if this court agrees with appellant that the issue was not waived, the military judge still did not abuse her discretion.

B. Appellant failed to show a reasonable probability that Mr. PE would be of assistance.

In denying appellant's motion to compel Mr. PE, the military judge cited the correct test for the "assistance" prong of the necessity analysis. (App. Ex. XI); *Gonzalez*, 39 M.J. at 461. Thus, the military judge's decision was not influenced by an erroneous view of the law. 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. XI, pp. 5–6). This decision was well within a range of reasonable choices based on the facts before her. *Gunkle*, 55 M.J. at 31 (C.A.A.F. 2001) (holding that the accused has the burden to establish an expert would be of assistance).

In his motion to compel, appellant argued that Mr. PE was necessary as "[t]he Defense counsel in this case do not have the requisite education and

experience required to conduct an independent examination any digital evidence at issue." (App. Ex. II, pp. 3–4). Appellant further concluded that Mr. PE could provide assistance in "view[ing] any government's forensic examination of both cell phones and educate the defense on any discrepancies *that may be found*," independently analyze the phones and inform counsel, "listen to any government expert(s)" that may be called at trial, and aid in development of trial strategy. (App. Ex. II, p. 3) (emphasis added). Appellant's counsel cited their lack of background in digital forensic examination, the risk of providing ineffective assistance, and argued Mr. PE's expertise "cannot be adequately substituted for the defense's 'best efforts' over the course of the next several months or weeks prior to trial." (App. Ex. II, p. 3). In its response, the government noted that they did not intend to request any witness be recognized as an expert. (App. Ex. III, pp. 5–7).

At the Article 39(a) session to litigate the motion counsel admitted to being able to read and understand the reports and understand the call logs, and could review the evidence at CID. (R. at 55–57). He further admitted "I don't necessarily know I am going to find something." (R. at 56).[17] He then suggested that he could not use CID's resources because of confidentiality issues before

[17] Appellant incorrectly argued at the motions hearing that the standard was "will the expert provide the needed assistance or is it a possibility that the expert will provide the assistance?" (R. at 60). The correct standard is the higher "reasonable probability" described in *Robinson*. 39 M.J. at 89.

refusing to elaborate on what exactly he would be searching the phones for.[18] (R. at 57). In short, appellant's counsel could not, or would not, specify the actual assistance, if any, Mr. PE could provide. (R. at 55–57). The military judge was therefore correct in determining "[appellant] speculates that there could be deleted text messages or information both beneficial and adverse to its case" and "[appellant] did not proffer any evidence on what it believed would find on the phones." (App. Ex. XI, p. 5).[19] She was further correct in determining that since the government did not intend to call an expert witness, the argument that a defense expert would assist in preparation of cross-examination is unpersuasive. (App. Ex. XI, p. 5). Importantly, defense failed to demonstrate their efforts to educate themselves or interview the government expert, which the military judge correctly noted. *See United States v. Short*, 50 M.J. 370 (C.A.A.F. 1999).

At most, appellant provided the military judge a "mere possibility" Mr. PE would be of assistance. This is far from the "precise explanations" required to show necessity. *Lloyd*, 69 M.J. at 99; *United States v. Bresnahan*, 62 M.J. 137,

[18] Counsel stated "I don't want to say it in open court, what I'm looking for, because I don't want [the government] to hear it" before suggesting an ex parte filing of "the number of things that I need my expert to look for and to do." (R. at 57).

[19] Appellant now claims that Pros. Ex. 20 for ID established that text messages were deleted. (Appellant's Br. 20-21). Regardless of whether that fact is established, appellant did not submit Pros. Ex. 20 for ID as evidence, either with his motion or at the Article 39(a) hearing.

143 (C.A.A.F. 2005) ("necessity requires more than the mere possibility of assistance from a requested expert") (internal quotations and alterations omitted). Appellant asked the military judge to compel expert assistance to engage in the proverbial "fishing expedition" without any degree of certainty that assistance would be necessary or even fruitful. *See United States v. Kinsley*, 24 M.J. 855, 855 (A.C.M.R. 1987) ("A court need not provide for investigative services for a mere fishing expedition.") (citations omitted). Further, appellant made no effort "to gather evidence to lay a foundation for . . . necessity" through interviewing the CID agent or self-education. *Short*, 50 M.J. at 370. Accordingly, the military judge did not abuse her discretion by denying the motion to compel.

C. Appellant failed to show a reasonable probability that denial of Mr. PE 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 found "there is not a reasonable probability that, absent expert assistance, a fundamentally unfair trial would result." (App. Ex. XVI, p. 6). The military judge correctly determined that the digital forensic examination was not a linchpin of the government's case. (App. Ex. XVI, p. 6).

Appellant's reliance on *United States v. Lee* cuts against his own argument. (Appellant's Br. 25, 29). 64 M.J. 213 (C.A.A.F. 2006). Unlike in present case,

Lee was a complex case regarding child pornography which hinged on expert testimony that the images on Lee's computer were of real children and not digitally created. The government expert witness was to testify to a "scientific discipline" used to determine whether the photos were of real children that "was novel, evolving, and varied from lab to lab." *Id.* at 217. This fact was "a critical element of [the government's] burden of proof" at trial which was shown only through the novel and evolving "scientific analysis and expert testimony." *Id.* The *Lee* court determined "where the Government has found it necessary to grant itself an expert and present expert forensic analysis often involving novel or complex scientific disciplines, fundamental fairness compels . . . that an accused is not disadvantaged by a lack of resources and denied necessary expert assistance." *Id.* at 218.

The present case is dissimilar to *Lee*. First, the evidence in question was not novel, complex, or evolving – rather it was simple printout and reports of text message and Snapchat conversations that appellant's counsel admitted he could read and understand.[20] (R. at 55–57). Second, as the military judge noted, the government did not even intend to call an expert witness. (App. Ex. XI, p. 6). Finally, unlike *Lee* the digital evidence is not the "critical element" of the

[20] Appellant now claims, for the first time, that discrepancies between the Snapchat usernames and Yahoo! emails could have created a viable alibi defense. (Appellant's Br. 26–27). That evidence was not before the military judge and thus not considered by her in making her ruling.

government's proof. 4 M.J. at 218. A comparison of this case to *Lee* shows how the denial of expert assistance would not result in appellant receiving a fundamentally unfair trial.

The military judge's finding that it was not reasonably likely that denial of Mr. PE would result in a fundamentally unfair trial, alone, was sufficient to deny appellant's motion to compel. *Robinson*, 39 M.J. at 89. Because the military judge applied the correct law and her conclusions were reasonable, she did not abuse her discretion, and appellant's argument fails. *Miller*, 66 M.J. at 307.

D. Any error was harmless beyond a reasonable doubt.

Even if this court finds that the military judge erred in denying Mr. PE as an expert consultant and the error implicates appellant's due process rights, the error was harmless beyond a reasonable doubt. For the same reasons discussed *supra*, appellant suffered no prejudice from Mr. PE's absence. The facts prove beyond a reasonable doubt that, even with Mr. PE's assistance, appellant would have been convicted—even if he had not entered into his guilty plea. 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

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION WHERE SHE ACCEPTED SFC DIVINE'S PLEA OF GUILTY DESPITE THE PRESENCE OF EVIDENCE AND STATEMENTS INCONSISTENT WITH THE PLEA.

Standard of Review

A military judge's acceptance of an accused's guilty plea is reviewed for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

Law

A military judge shall not accept a guilty plea without conducting an inquiry to establish an adequate factual basis to support the plea. R.C.M. 910(e); UCMJ Art. 45; *Inabinette,* 66 M.J. at 322. The military judge must ensure that an accused understands the facts that support his guilty plea and must be satisfied that the accused understands how the law applies to those facts, and that he is, in fact, guilty. *See United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008) (citing *United States v. Care*, 18 C.M.A. 535, 538–39 (1969)).

"In reviewing the providence of Appellant's guilty pleas, we consider his colloquy with the military judge, as well as any inferences that may reasonably be drawn from it." *United States v. Carr*, 65 M.J. 39, 41 (C.A.A.F. 2007). Military appellate courts consider the entire record when determining providence of a plea. *United States v. Redlinski*, 58 M.J. 117, 119 (C.A.A.F. 2003). When reviewing

whether a substantial inconsistency was presented, the appellate court "considers the 'full context' of the plea inquiry, including [a]ppellant's stipulation of fact." *United States v. Goodman*, 70 M.J. 396, 399 (C.A.A.F. 2011) (quoting *United States v. Smauley*, 42 M.J. 449, 452 (C.A.A.F. 1995)).

A guilty plea will not be disturbed unless the appellant demonstrates there is a substantial basis in law or fact for questioning the plea. *United States v. Murphy*, 74 M.J. 302, 305 (C.A.A.F. 2015) (citing *Inabinette*, 66 M.J. at 322). The three critical requirements for a provident plea are: "[a]ppellant admitted the facts necessary to establish the charges; he expressed a belief in his own guilt; and there were no inconsistencies between the facts and the pleas." *United States v. Jones*, 34 M.J. 270, 272 (C.A.A.F. 1992) (citing *United States v. Davenport*, 9 M.J. 364, 366–67 (CMA 1980)). "Even if a guilty plea is later determined to be improvident, a reviewing court may grant relief only if it finds that the military judge's error in accepting the plea 'materially prejudice[d] the substantial rights of the accused.'" *United States v. Moratalla*, 82 M.J. 1, 4 (C.A.A.F. 2021) (citing Article 45(c), UCMJ).

The elements of Article 93, UCMJ are "(1) that a certain person was subject to the orders of the accused; and (2) that the accused was cruel toward, or oppressed, or maltreated that person." Article 93(b), UCMJ. "Sexual harassment

may constitute this offense" which is defined as "deliberate and repeated offensive comments or gestures of a sexual nature." Article 93(c)(2), UCMJ.

The elements of Article 92, UCMJ for failure to obey a lawful general order or regulation are "(a) that there was in effect a certain lawful general order or regulation; (b) that the accused had a duty to obey it; and (c) that the accused violated or failed to obey the order or regulation. Article 92(b)(1), UCMJ. Army Regulation (AR) 600-20 para 4-14(b) prohibits all relationships between NCOs and junior enlisted soldiers, commonly referred to as fraternization, when they: "Compromise, or appear to compromise, the integrity of supervisory authority or the chain of command, [c]ause actual or perceived partiality or unfairness, [or] [a]re, or are perceived to be, exploitative or coercive in nature. Army Reg. 600-20, Army Command Policy, ch. 4 (24 July 2020) [AR 600-20].

Argument

A. Appellant's stipulation waived a mistake of fact defense.

Pursuant to his plea agreement, in which he drastically reduced his punitive exposure, appellant agreed to enter into a stipulation of fact. (App. Ex. XVI). In the stipulation of fact appellant agreed:

> [Appellant] has no legal excuse or justification for his actions […] He knew what he did was wrong and voluntarily chose to engage in the wrongful conduct. [Appellant] acknowledges and accepts that all of the misconduct he is pleading guilty to was wrongful without any legal justification or excuse.

(Pros. Ex. 38, para 29). Appellant now claims that he has a reasonable mistake of fact as to consent defense, thus negating the *mens rea* of the Article 93 violation. (Appellant's Br. 35–42). However, in accordance with paragraph 29 of the stipulation of fact, that defense has been disclaimed and waived. (Pros. Ex. 38, para 29). *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) ("waiver is the intentional relinquishment or abandonment of a known right that leaves no error to correct on appeal.") *See United States v. Robinson,* ARMY 20150088, 2017 CCA LEXIS 93 (Army. Ct. Crim. App. 06 Feb. 2017) (mem. op.) at *fn 3 (when an accused signs a document expressly agreeing to waive an issue, with the express advice of counsel (who also signed the stipulation), that fact would certainly be relevant in determining whether the accused had knowingly waived an issue.) (parenthetical in original).

B. The military judge did not abuse her discretion in accepting appellant's guilty plea to sexually harassing PFC [redacted].

Appellant asks this court to determine whether the military judge abused her discretion based largely on evidence not before her. (Appellant's Br. 37–38, 40–41).[21] These repeated references to information or statements in prosecution

[21] This includes Pros. Ex. 5 for ID (text messages between appellant and PFC [redacted]), Pros. Ex. 6 for ID additional (text messages between appellant and PFC [redacted], Pros. Ex. 10 for ID (photos of Snapchat conversations between appellant and PFC [redacted]); Pros. Ex. 11 for ID (photos of the pretext messages between appellant and PFC [redacted]); Pros Ex. 12 for ID (CID notes memorializing pretext conversation between

exhibits marked for identification have no bearing on the military judge's acceptance of appellant's plea, as they are not contained in the colloquy, stipulation of fact, or even the record of trial. *See Carr*, 65 M.J. at 41; *Redlinski*, 58 M.J. at 119; *Goodman*, 70 M.J. at 399; (Appellants Br. 37–38, 40–41). Rather, this court should look at what was properly before the military judge in her colloquy with appellant and the stipulation of fact as well as reasonable inferences drawn therefrom. *Carr*, 65 M.J. at 41; *Redlinski*, 58 M.J. at 119; *Goodman*, 70 M.J. at 399.

1. Appellant sexually harassed PFC [redacted] in New York.

During his colloquy, and in accordance with the stipulation of fact, appellant admitted that while in New York he sent PFC [redacted] text messages that were "in a personal nature" that could have come off as flirtatious including telling her she was attractive and wanting to take her to Las Vegas. (R. at 125–26, 132–33; Pros. Ex. 38). He further admitted while in New York he stated something like "seeing PFC [redacted] at work drove him crazy because he could hardly keep his hands off her" which was "unwarranted and completely unnecessary" and could be perceived as "flirtatious and sexual nature [sic]."[22] (R. at 159; Pros. Ex 38, p. 13). Appellant

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appellant and PFC [redacted]) and Pros. Ex. 16 for ID (WhatsApp conversation between appellant and PFC [redacted]).

[22] Appellant now claims that there is "no record" of these statements. (Appellant's Br. 39). Appellant's statements at trial are sufficient evidence to prove the statements. *Schweitzer*, 68 M.J. at 136.

admitted to making "deliberate and repeated offensive comments of a sexual nature" towards PFC [redacted]. AR 600-20, para. 7-7; *Jones*, 34 M.J. at 272.

When the military judge raised the issue of possible reciprocation from PFC [redacted], appellant disclaimed any, saying "due to my position and with her rank, [she possibly felt] forced into reacting."[23] (R. at 160). There are no inconsistences in that colloquy or in the stipulation of fact that would require the military judge to reject appellant's plea. *Jones*, 34 M.J. at 272; *see also Unites States v. Axelson*, 65 M.J. 501, 517 (Army Ct. Crim. App. 2007) ("the military judge was under no obligation to explore other potential defenses . . . not raised during the plea inquiry or on the merits"). In fact, appellant's claim on appeal that the sexual comments were invited is directly contradicted by his concession that they were "unwarranted and completely unnecessary."[24] (Appellant's Br. 39; R. at 159; Pros. Ex 38). It is

[23] Throughout his argument regarding the two sexual harassment specifications of PFC [redacted], appellant makes no distinction between answers to the separate colloquies for Specifications 2, 3, and 4 of Charge I. (Appellant's Br. 35–43). The military judge uses earlier answers from the colloquies to Charge I and its specifications to form the basis for some instances of sexual harassment, such as the Las Vegas comment. (R. at 158). However, appellant's assertion that he did not believe his relationship with PFC [redacted] in Texas was "exploitive" or "corrosive" is relevant to consent for sexual harassment in New York is illogical and unpersuasive. (Appellant's Br. 39–40).

[24] Appellant includes the definition from AR 600-20, para. 7-7 which states sexual harassment is "the unwelcome sexual advances, requests for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature." (Appellant's Br. 36). Appellant argues that "unwelcome" modifies all the acts in that clause, rather than just "sexual advances." A plain reading of the statute suggests "unwelcome" modifies "sexual advances" while "offensive" modifies

clear that the military judge did not abuse her discretion in accepting appellant's guilty plea to Charge II, Specification 2.

2. Appellant sexually harassed PFC [redacted] in Texas.

When appellant returned to Texas he continued to make sexual comments and advances towards PFC [redacted]. (R. at 133–48, 161–64). Although appellant described most of the harassment in the colloquy for Charge I Specifications 3 and 4, he did admit the acts applied to the sexual harassment charge. (R. at 163). Appellant admitted to sending PFC [redacted] a message indicating he was going to get a hotel room which included a "winky-face emoji." (R. at 139; Pros. Ex. 38 pp. 7–8). During his colloquy appellant admitted that could have been perceived as an invitation to join him and "something sexual in nature." (R. at 139). Private First Class [redacted] did not respond to that message. (Pros. Ex. 38, p. 8). Appellant explained that he repeatedly "kind of mention[ed] the whole 'if we were single' or 'if I was single' kind of thing, that she would definitely be what--one of the ones that I'd pursue or somebody that I would pursue." (R. at 148). In the same vein, appellant readily admitted that his invitation for PFC [redacted] to join his family for

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"comments or gestures of a sexual nature." (Appellant's Br. 36). *United States v. Williams*, 75 M.J. 663, 666 (Army Ct. Crim. App. 2016) (citing *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007) (the "plain and unambiguous meaning" will control unless is it ambiguous or leads to an absurd result." Regardless, appellant was charged with a violation of Article 93, UCMJ which does not include "unwelcome." (Charge Sheet). However, even if "unwanted" modifies the whole clause, the analysis does not change.

Thanksgiving could have been "perceived as sexual nature [sic]." (R. at 148). Finally, appellant admitted to hugging PFC [redacted] in his office after emotional conversations.[25] (R. at 163). Again, appellant admitted to making "deliberate and repeated offensive comments or gestures of a sexual nature" towards PFC [redacted]. AR 600-20, para. 7-7; *Jones*, 34 M.J. at 272.

There was nothing in the record to suggest that PFC [redacted] viewed these advances and actions as welcomed—in fact, the record suggests explicitly that she was uncomfortable. (Pros. Ex. 38, p. 8). *See also* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook para. 3a-17-1. (25 Oct. 2023) ("the fact that [the victim] may have consented (or acquiesced), does not alone prove that he/she was not maltreated, but it is one factor to consider in determining whether the accused maltreated [the victim]."") (referencing *United States v. Carson*, 57 M.J. 410 (C.A.A.F. 2002); *United States v. Fuller*, 54 M.J. 107 (C.A.A.F. 2001). Likewise, there are no inconsistences in that colloquy or in the stipulation of fact that would require the military judge to reject appellant's plea.

[25] While the military judge did acknowledge that appellant may have asked for permission to hug PFC [redacted], he did so alone with her in his office while the door was locked and the blinds were closed. (R. at 162; Pros. Ex. 38, p. 13). The only reasonable inference that can be drawn from those facts is that PFC [redacted] was pressured into acquiescing to the hug. *See Carr*, 65 M.J. at 41. However, even if the hugs were truly consensual, the remaining acts of harassment are enough for appellant to be provident.

See Jones, 34 M.J. at 272. Accordingly, the military judge did not abuse her discretion in accepting appellant's plea to Charge II Specification 3.

C. The military judge did not abuse her discretion in accepting appellant's guilty plea to fraternizing with SPC [redacted].

Appellant clearly demonstrated how his relationship with SPC [redacted], perhaps in the guise of professionalism, was inappropriate. (R. at 118–20). Appellant made two sexual advances towards SPC [redacted], who was "his soldier." (R. at 115, 118).[26] First, while ostensibly helping SPC [redacted] in the gym for physical training, appellant told his soldier, "squats made her butt look good." (R. at 115–16, 118). On a different occasion appellant made a comment that he would join SPC [redacted] in her bed if she did not get up and go to the gym. (R. at 116). While appellant claimed this was for motivation, the actual message sent, "if you keep talking about your bed I'm joining," clearly indicates a sexual desire rather than a professional one. (R. at 116; Pros. Ex. 38, p. 3). Simply put, appellant is attempting to downplay his own actions by labeling them "motivation" and the

[26] Appellant appears to make an argument that Charge I, Specification 1 and Charge II, Specification 1 are unreasonably multiplied. (Appellant's Br. 44). Appellant affirmatively waived this issue by both pleading guilty and by intentionally abandoning the issue by withdrawing his motion for appropriate relief prior to that plea. (R. at 104). *Campbell*, 68 M.J. 217; *Gladue*, 67 M.J. at 313. *C.f. United States v. Upton*, ARMY 20220044, 2022 CCA LEXIS 724 (Army Ct. Crim App. 13 Dec. 2022) at *6 (sum. disp.) (holding C.A.A.F. "has carved out a narrow exception that a guilty plea does not waive 'facially duplicitous' specifications.")

military judge did not abuse her discretion by seeing past that. *See Goodman,* 70 at 400 ("[o]ne aspect of human beings is that we rationalize our behavior and, although sometimes the rationalization is 'inconsistent with the plea,' more often than not it is an effort by the accused to justify his misbehavior.") (quoting *United States v. Penister*, 25 M.J. 148, 153 (C.M.A. 1987) (Cox, J., concurring)).

Appellant relies on a narrow definition of relationship to mean a relationship involving dating and engaging "in social activities outside of the workplace" and the fact that his actions were unrequited to argue the military judge abused her discretion.[27] (Appellant's Br. 43). However, as AR 600-20 para 4-14 illustrates, an inappropriate relationship between an NCO and junior enlisted soldier can take many forms. Importantly, *all relationships*, including professional relationships are prohibited if they meet the criteria of AR 600-20 para 4-14(b). The comments appellant made to SPC [redacted], verbal and via text, would have implied partiality or

[27] If this court determines that SPC [redacted]'s lack of reciprocation means that a prohibited relationship did not occur, appellant would still be provident to the lesser-included offense of attempting to disobey AR 600-20, a violation of Article 80, UCMJ. *See United States v. Birdsong*, ARMY 20140887, 2016 CCA LEXIS 434 (Army Ct. Crim. App. 08 Jul. 2016) (sum. disp.) (where the act of "making sexual advances towards a junior officer within his chain of responsibility," which were rebuffed, did not constitute a "relationship" for the purposes of AR 600-20, but did constitute an attempt for such a relationship). As this court did in *Birdsong*, it could affirm the lesser included offense and reassess the sentence under *United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013). *Birdsong*, 2016 CCA LEXIS at *7. Given the terms of the plea agreement, a *Winckelmann* analysis should lead this court to approve the sentence as adjudged. 73 M.J. at 15–16; (App. Ex. XVI).

unfairness through favoritism in violation of AR 600-20 para 4-14(b)(2). (R. at 118–19). These advances, which SPC [redacted] "could have taken as . . . flirtatious" and "therefore implying that another type of relationship was what I desired" would have certainly compromised, or at least appear to compromise, the integrity the chain of command. (R. at 115, 119); AR 600-20 para 4-14(b)(1).

Appellant's explanation of his position as platoon sergeant and SPC [redacted]'s role under him, the connection to physical training, and "the rank difference" allowed for the military judge to use the "full context" of the charge, the stipulation, and appellant's colloquy to determine the relationship was coercive and appeared to involve the use of grade or position for personal gain.[28] (R. at 115–19); *Goodman,* 70 M.J. at 399. Even though appellant stated he did not believe that disparity in rank could make create a perception of exploitation, this rationalization falls short in the face of the entire context of appellant's comments.[29] *Id.* at 400. That context, along with the entire colloquy and

[28] Appellant describes his interactions with SPC [redacted] at the gym as essentially remedial PT from an NCO attempting to assist his Soldier who specifically requested help. (Appellant's Br. 44). Had that been the extent of the interaction, he would be right that "is a completely acceptable professional interaction between a senior NCO and his Soldier." It does not mean appellant could use his position as platoon sergeant to make sexual advances on a subordinate.

[29] Should this court find the military judge abused her discretion for one clause of the specification it may "may narrow the scope of an appellant's conviction to that conduct it deems legally and factually sufficient." *United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019).

stipulation of fact, shows that the military judge did not abuse her discretion in accepting appellant's plea of guilty to Charge I, Specification 1.

D. The military judge did not abuse her discretion in determining appellant made repeated offensive comments to SPC [redacted].

As discussed *supra* pp. 37-40, appellant made two sexual advances towards SPC [redacted]. Contrary to appellant's claim now, both comments were clearly sexual in nature. [30] (Appellant's Br. 47). When discussing both comments, appellant described them as "flirtatious" and "implying that another type of relationship was what [he] desired." (R. at 119). He later confirmed that both the comments could be perceived by SPC [redacted] as sexual in nature. (R. at 154). As discussed *supra*, while appellant continues to claim the text message about joining her in bed was "to try and motivate her and get of out the gym [sic]," this is clearly an attempt to rationalize a sexual advance. (R. at 115–16; Appellant's Br. 47); *Goodman,* 70 M.J. at 400. The military judge did not abuse her discretion in determining that appellant's testimony at trial that both comments were sexual in nature when that testimony is the strongest proof under the law. *United States v. Langston*, 53 M.J. 335, 337 (C.A.A.F. 2000) ("appellant was put under oath and his responses were

[30] Appellant apparently concedes that the buttocks comment was a deliberate offensive comment of a sexual nature but contests that the bed comment was sexual. (Appellant's Br. 47).

judicial admissions, the strongest form of proof in our legal system.") (internal citations omitted).

Similarly, appellant attempts to negate his own colloquy and the stipulation of fact to say that SPC [redacted] experienced no mental harm or suffering from his actions. (Appellant's Br. 48). Again, appellant asks this court to ignore *Langston*'s holding and determine that his own testimony on the matter, and the facts contained within the stipulation, are non-determinative to the issue of harm. *Langston*, 53 M.J. at 337.[31] Appellant agreed, both in the stipulation and during the *Care* inquiry, that SPC [redacted] suffered harm from his comments. (Pros. Ex. 38; R. at 154). He explicitly told the military judge "I realize now that I essentially caused harm and mental harm and trauma to her with those statements." (R. at 154). There can be no stronger proof of mental harm and suffering than that statement. *Langston*, 53 M.J. at 337.

Appellant's after-the-fact claim that his own testimony was insufficient does not rise to the level of a "substantial basis in law and fact for questioning the guilty plea." *United States v. Negron*, 60 M.J. 136, 141 (C.A.A.F. 2004). The military judge did not abuse her discretion in determining appellant admitted the facts

[31] Appellant relies heavily on evidence not before the military judge to conlcude that SPC [redacted] was not affected by his sexual comments. (Appellant's Br. 48–49). Even if this court considers that evidence, it is clear that SPC [redacted] stopped working out with appellant after the second comment thus indicating mental harm or suffering. (Pros Ex. 17 for ID)

necessary to establish the charges, that he expressed a belief in his own guilt, and that there were no inconsistencies between the facts and the pleas. *Jones*, 34 M.J. at 272. This court should reject appellant's attempt to negotiate a favorable agreement, plead guilty, receive the benefit of the deal, and then question the accuracy his own admissions on appeal.

Conclusion

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

[redacted]

PATRICK S. BARR
CPT, JA
Appellate Attorney, Government
Appellate Division

[redacted]

KALIN P. SCHLUETER
MAJ, JA
Branch Chief, Government
Appellate Division

[redacted]

CHRISTOPHER B. BURGESS
COL, JA
Chief, Government Appellate
Division

Certificate of Filing and Service

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] on the 5th day of January, 2024.

[redacted]
Paralegal Specialist
Government Appellate Division

APPENDIX

United States v. Marin

United States Army Court of Criminal Appeals

October 30, 2023, Decided

ARMY 20210375

Reporter
2023 CCA LEXIS 464 *; 2023 WL 7271145

UNITED STATES, Appellee v. Staff Sergeant JONATHAN MARIN, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, Fort Carson. John M. Bergen, Military Judge. Steven C. Henricks, Military Judge (DuBay). Colonel Pia Rogers, Staff Judge Advocate.

Counsel: For Appellant: Captain Tumentugs D. Armstrong, JA; William E. Cassara, Esquire (on brief and reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline J. DeGaine, JA; Major Kalin P. Schlueter, JA; Major Jaclyn G. Hagner, JA (on brief).

Judges: Before WALKER, EWING[1], and PARKER, Appellate Military Judges. Senior Judge WALKER and Judge EWING concur.

Opinion by: PARKER

Opinion

MEMORANDUM OPINION

PARKER, Judge:

Appellant raises four assignments of error, two of which warrant discussion but no relief. We find the government violated appellant's rights under Rule for Courts-Martial (R.C.M.) 914 and R.C.M. 701 (a)(6), but that appellant has failed to demonstrate he suffered prejudice as a result of the violations.

BACKGROUND

[1] Judge EWING decided this case while on active duty.

Appellant and the victim, Private First Class (PFC) [TEXT REDACTED BY THE COURT] met while deployed together to Erbil Air Base, Iraq in 2019. Appellant was a senior mechanic with a Ranger Tab and a Noncommissioned Officer (NCO) to the victim. The victim needed mentorship to train for an upcoming spur ride. Appellant assisted her with her training and provided her professional development advice on her career [*2] progression. On or about 11 July 2019, the victim and appellant were at a cafe on the base socializing with other soldiers. Prior to heading to the cafe, appellant had stored the victim's weapon in the male housing tent on her behalf. When the victim got up to leave the cafe, appellant accompanied her so he could retrieve her weapon.

While the two were walking to the male tent, appellant grabbed the victim's wrist and tried to kiss her, and she tried to pull away from him. The victim testified that appellant would not let go of her wrist and began pulling her toward an empty bus that was parked nearby. She testified that she was scared, that appellant's actions were abrupt, and that he opened the driver side door of the bus and cornered her in the door. The victim testified she didn't know if she should scream or run, but that she had nowhere to go while he cornered her in the bus door. She testified she climbed up into the bus, faced the front of the bus and appellant walked toward her down the aisle of the bus as she walked backwards, not knowing what to do. Appellant then pushed her down onto the seats, and when the victim tried to sit up, he pushed her down again. She testified [*3] that when he pushed her back down, she gave up and shut down, that her shorts came off, and that appellant penetrated her vagina with his penis. Appellant ejaculated on the victim and she used her shorts to clean herself. She then got off the bus, telling appellant she wanted her weapon, and began crying. Appellant retrieved her weapon, and the victim immediately left and went to talk to her Sexual Harassment/Assault Response and Prevention (SHARP) representative. Distraught, the victim also called her mother and told her, "mommy, a sergeant just pulled me on a bus and raped me."

The victim also reported what happened to her platoon leader, First Lieutenant (1LT) [TEXT REDACTED BY THE COURT] As part of the investigation, 1LT [TEXT REDACTED BY THE COURT] was interviewed by the trial counsel for appellant's court-martial, Captain (CPT) [TEXT REDACTED BY THE COURT] and the unit paralegal, Sergeant (SGT) [TEXT REDACTED BY THE COURT] The interview was recorded on the unit's handheld recording device. The recorded interview of 1LT [TEXT REDACTED BY THE COURT] was not disclosed to, or turned over to, defense counsel.

Appellant was tried before an officer panel at a general court-martial located at Fort Carson, Colorado. Contrary to his pleas, appellant was convicted of one specification of rape and one specification [*4] of sexual assault (charged in the alternative),[2] in violation

[2] The finding for Specification 2 of the Charge, as incorporated into the Judgment of the Court, is amended to reflect a response of "Dismissed."

of Article 120, Uniform Code of Military Justice, 10 U.S.C. §§ 920 [UCMJ]. Appellant was sentenced by a military judge to a dishonorable discharge and confinement for twelve years.

On appeal, appellant alleged the government violated his rights under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and R.C.M. 701(a)(2)(A), in that they did not disclose 1LT [TEXT REDACTED BY THE COURT] recorded interview to defense counsel. Appellant contended that the interview was material and reasonably tended to adversely affect the credibility of the victim, making such disclosure required. Appellant also alleged the government violated his rights under *Jencks v. United States*, 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103, 75 Ohio Law Abs. 465 (1957), and R.C.M. 914 and 701(a)(6), in that they did not disclose 1LT LM's recorded interview with the trial counsel, denying appellant his right to proper confrontation of the victim. On 22 May 2022, this court ordered a hearing pursuant *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967), to establish facts relevant to whether these violations occurred. On 15 September 2022, the military judge issued his *DuBay* hearing findings of fact and conclusions of law. The military judge found the government did not violate its obligations under *Brady v. Maryland* or R.C.M. 701(a)(2)(A), but did find the government violated R.C.M. 701(a)(6) and R.C.M. 914.

LAW AND DISCUSSION

A. Dubay Hearing

We review a military judge's findings of fact at *DuBay* hearings under a clearly erroneous standard [*5] and the conclusions of law de novo. *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997).

In the *DuBay* order, we instructed the military judge to determine, *inter alia*, "[w]hat, if any, negative information did 1LT [[TEXT REDACTED BY THE COURT]] provide during the interview about the victim." After hearing testimony and reviewing the documentary evidence, the military judge identified four general areas of possible negative information that 1LT [TEXT REDACTED BY THE COURT] may have discussed during the interview, to include statements related to PFCH [TEXT REDACTED BY THE COURT]'s poor duty performance, sexual promiscuity, poor character, and a specific reference to PFC [TEXT REDACTED BY THE COURT] as "shady."

After hearing witness testimony concerning the substance of 1LT [TEXT REDACTED BY THE COURT]'s interview, as a preliminary matter, the military judge found that "1LT [[TEXT REDACTED BY THE COURT]] possesse[d] the best memory of what occurred

during her interview about the victim and accept[ed] her testimony as factual." In evaluating the testimony of the three witnesses present for the interview, the military judge reasoned that CPT [TEXT REDACTED BY THE COURT] and SGT [TEXT REDACTED BY THE COURT] only recalled the interview in general terms, whereas 1LT [TEXT REDACTED BY THE COURT] remembered the specifics of the interview and testified persuasively. Moreover, the military judge found 1LT [TEXT REDACTED BY THE COURT]'s testimony consistent, and not contradictory in any material or significant [*6] way, with the notes SGT [TEXT REDACTED BY THE COURT] prepared contemporaneously with the recorded interview.

Relying upon 1LT [TEXT REDACTED BY THE COURT]'s testimony, the military judge found that 1LT [TEXT REDACTED BY THE COURT] spoke about PFC [TEXT REDACTED BY THE COURT]'s poor duty performance during her recorded interview but did so to highlight that she believed the sexual assault was what caused the decline in PFC [TEXT REDACTED BY THE COURT]'s duty performance. The military judge also found, consistent with 1LT [TEXT REDACTED BY THE COURT]'s testimony, that 1LT [TEXT REDACTED BY THE COURT] did not make any statements during the recorded interview about PFC [TEXT REDACTED BY THE COURT]'s sexual promiscuity or poor character and did not refer to PFC [TEXT REDACTED BY THE COURT] as "shady."

We find that military judge's findings of fact are reasonable and supported by the record. Because the military judge's findings of fact were not clearly erroneous, we rely on these facts in addressing appellant's assignments of error.

B. Brady v. Maryland

The Due Process Clause of the Fifth Amendment requires the prosecution to disclose evidence that is material and favorable to the defense. *Brady*, 373 U.S. at 87. This requirement exists whether there is a general request or no request at all. *United States v. Agurs*, 427 U.S. 97, 107, 96 S. Ct. 2392, 49 L. Ed. 2d 342, (1976). "Evidence is favorable if it is exculpatory, substantive evidence or evidence capable of impeaching the government's case." *United States v. Behenna*, 71 M.J. 228, 238 (C.A.A.F. 2012) (internal citations omitted). Evidence is material when there is [*7] a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *Id.* (internal quotation marks and citations omitted). Under due process discovery and disclosure requirements, the Supreme Court has "rejected any . . . distinction between impeachment evidence and exculpatory evidence." *United States v. Eshalomi*, 23 M.J. 12, 23 (C.M.A. 1986) (*quoting United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)). Once a *Brady* violation is established, courts need not test for

harmlessness. *Behenna*, 71 M.J. at 238 (*citing Kyles v. Whitley*, 514 U.S. 419, 435-36, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)).

As highlighted by the military judge's findings of fact, the government recorded, and failed to disclose, their pretrial interview with 1LT [TEXT REDACTED BY THE COURT], the victim's supervisor. The undisclosed interview was alleged to include evidence that was arguably favorable to the defense, specifically, the victim's poor duty performance, sexual promiscuity, poor character opinion, and that the victim was 'shady.' At trial, the defense argued that appellant and PFC [TEXT REDACTED BY THE COURT] had a consensual sexual encounter and PFC [TEXT REDACTED BY THE COURT] fabricated the rape allegation because she sought to redeploy from Iraq early. During the interview, 1LT [TEXT REDACTED BY THE COURT] discussed PFC [TEXT REDACTED BY THE COURT]'s poor duty performance while serving in Iraq, but only to highlight that she believed the sexual assault caused PFC [TEXT REDACTED BY THE COURT]'s poor duty performance. [*8] Arguably, evidence of PFC [TEXT REDACTED BY THE COURT]'s poor duty performance could be favorable to the defense as circumstantial evidence that PFC [TEXT REDACTED BY THE COURT] exhibited a desire to redeploy early from Iraq.

However, even assuming this evidence was favorable to defense, the recording of 1LT [TEXT REDACTED BY THE COURT]'s interview was not material. Stated differently, had the evidence of the interview been disclosed, the defense has failed to show a reasonable probability that the result of the proceeding would have been different. First, although 1LT [TEXT REDACTED BY THE COURT] discussed PFC [TEXT REDACTED BY THE COURT]'s poor duty performance, it was only within the context of 1LT [TEXT REDACTED BY THE COURT]'s opinion that the rape was the catalyst for any deterioration of duty performance. Notably, prior to the rape, 1LT had a high opinion of the victim's duty performance and at no time did she hold a poor opinion of the victim's character.

Second, the government provided two statements from 1LT [TEXT REDACTED BY THE COURT] — a sworn statement executed several days after the rape and a character statement supporting the victim that was drafted in April 2020. In both documents, 1LT [TEXT REDACTED BY THE COURT] praised the victim's duty performance prior to the rape. Specifically, in the character statement, signed approximately nine months after the rape, 1LT [TEXT REDACTED BY THE COURT] [*9] provided illustrative examples of the victim's deteriorating duty performance following the rape and opined that the changes in her demeanor and performance were "a direct result of trauma." The military judge properly found both of these prior statements were consistent with the content of her recorded interview. As to whether 1LT [TEXT REDACTED BY THE COURT]'s interview included evidence of sexual promiscuity, 1LT [TEXT REDACTED BY THE

COURT] testified [TEXT REDACTED BY THE COURT] provided no such information. She testified that although she was asked by CPT [TEXT REDACTED BY THE COURT] about this topic, she declined to answer stating a person can be sexually assaulted despite other consensual sexual activity. Lastly, 1LT [TEXT REDACTED BY THE COURT] testified that she never held a poor opinion of the victim's character and never described her as 'shady.' She summarized that to the extent anything negative was construed from her interview, it was her intent to highlight the negative effect the rape had on the victim.

Tellingly, after the government provided evidence of the victim's poor duty performance in discovery, the defense elected not to cross-examine 1LT [TEXT REDACTED BY THE COURT] on this topic. That strategic decision was understandable as the evidence of deterioration of duty performance directly following the rape was arguably [*10] more beneficial to the government than the defense as it would have provided potential evidence of the impact of the rape on the victim.

The recorded interview, which was substantively equivalent to information in 1LT [TEXT REDACTED BY THE COURT]'s two prior statements the government had disclosed to the defense, was not material because there was not a reasonable likelihood of a different result concerning the findings or sentence had the government disclosed the interview.

C.R.C.M. Discovery Violations

Article 46, UCMJ, as implemented by R.C.M. 701-703, affords a military accused the right to obtain favorable evidence and provides "greater statutory discovery rights to an accused than does his constitutional right to due process." *United States v. Coleman*, 72 M.J. 184, 187 (C.A.A.F.2013). Disclosures are governed by R.C.M. 701, "which sets forth specific requirements with respect to 'evidence favorable to the defense' . . ." *United States v. Williams*, 50 M.J. 436, 440 (C.A.A.F. 1999). The Court of Appeals for the Armed Forces (CAAF) has recognized "two categories of disclosure error." *Coleman*, 72 M.J. at 187. This court applies the harmless error standard in "cases in which the defense either did not make a discovery request or made only a general request for discovery." *Id.; United States v. Hart*, 29 M.J. 407, 410 (C.M.A. 1990); *see Behenna*, 71 M.J. 228 at 238. An error is not harmless if it materially prejudiced an appellant's substantial rights. *United States v. Stone*, 40 M.J. 420, 422 (C.M.A 1994); UCMJ art. 59(a). The heightened, [*11] constitutional harmless beyond a reasonable doubt standard applies in "cases in which the defense made a specific request for the undisclosed information." *Coleman*, 72 M.J. at 187; *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004); *Hart*, 29 M.J. at 410. Such a failure to disclose a specific request "'is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial.'" *United States v. Claxton*, 76 M.J.

356, 359 (C.A.A.F. 2017) (citing *Roberts*, 59 M.J. at 327 (C.A.A.F. 2004)(quoting *Coleman*, 72 M.J. at 187)).

D. R.C.M. 701(a)(2)(A)

R.C.M. 701(a)(2)(A) provides that, upon defense request, "[t]he Government shall permit the defense to inspect any books, papers, documents, data, photographs, tangible objects, buildings, or places, or copies of portions of these items, if the item is within the possession, custody, or control of military authorities, and . . . *relevant* to defense preparation. . . ." (emphasis added). The Miliary Justice Act of 2016 amended R.C.M. 701 (a)(2)(A) to broaden the scope of discovery, requiring disclosure of items that are "relevant" rather than "material" to defense preparation of a case. *See* MCM 2019, A15-9.

Prior to this expansion of R.C.M. 701 (a)(2)(A), this court recognized the prior version of the rule "incorporate[d] a constitutional 'materiality' requirement similar to *Brady." United States v. Shorts, 76 M.J. 523, 531 (Army Ct. Crim. App. 2017).* Because the new version of the rule only requires the disclosure of "relevant" evidence, a *Brady-type* analysis may no longer be applicable. For reasons set [*12] forth herein, we need not address this issue in our opinion.

Military Rule of Evidence 401 defines what is relevant in an expansive fashion, stating, "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Conversely, evidence is only irrelevant when it has no tendency to prove any fact of consequence.

The updated R.C.M. 701 (a)(2)(A) still requires a request from the defense. In this case, the R.C.M. 701(a)(2)(A) defense request was a general request that included one specific request for an updated Criminal Investigation Division case activity summary and sought evidence "*material* to defense preparation of the defense." (Emphasis added). In other words, the discovery request mirrored the prior version of the rule and sought a narrower set of discovery instead of the more expansive set of discovery that would be *relevant* to defense preparation of the defense as permitted under the rule.

Given the unique facts of this case, the military judge properly found the government did not violate R.C.M. 701(a)(2)(A). Because the rule requires a request from the defense, and the request in this case sought evidence that was "material" [*13] rather than "relevant" to the defense case, the military judge's application of *Shorts* was appropriate. As noted above, the recorded interview was not material. Consequently, it was not within the scope of the evidence the defense requested and the failure of the government to disclose the recorded interview in response to this request was not in violation of R.C.M. 701 (a)(2)(A).

Because we find no discovery violation, we need not decide whether a violation of a general request under the new version of R.C.M. 701(a)(2)(A) would be tested under a *Brady-type* analysis as described in *Shorts* or would be subject to a harmless error analysis. That said, even if the defense request would have sought "relevant" evidence resulting in a violation of the rule, the outcome would have been the same under either framework. There was neither a reasonable likelihood of a different result concerning the findings or sentence had the government disclosed the interview nor did the government's failure to disclose the evidence materially prejudice appellant's substantial rights.

E. Conceded Discovery Violations

The military judge found, and appellee does not challenge, that the government's failure to disclose 1LT [TEXT REDACTED BY THE COURT]'s interview violated R.C.M. 701(a)(6), and R.C.M. 914. We agree. The [*14] question is whether these violations prejudiced appellant.

1. R.C.M. 701(a)(6)

Neither appellant nor appellee directly addressed the appropriate analysis for the conceded R.C.M. 701(a)(6) violation or whether appellant is entitled relief based upon this discovery violation. We find appellant was not prejudiced by this violation.

As opposed to R.C.M. 701(a)(2)(A), which requires the defense to affirmatively make a request for evidence, R.C.M 701(a)(6) mandates that the government provide to the defense all information "known to trial counsel" which "reasonably tends to negate or reduce the degree of guilt or reduce punishment" however it "does not create an obligation to get information of which the trial counsel is unaware." *Shorts*, 76 M.J. at 530-31. Moreover, there is no explicit requirement for "materiality." *Id.* at 531.

Notwithstanding the lack of "materiality" requirement in the rule, in *Williams*, the CAAF held that R.C.M. 701(a)(6) implements the Supreme Court's decision in *Brady*. *Williams*, 50 M.J. at 440. Consequently, the CAAF reasoned that if a R.C.M. 701 (a)(6) violation occurs, "the test for prejudicial error is whether there is a reasonable probability of a different result had the suppressed evidence been disclosed to the defense." *Id.* (internal citation and quotations omitted).

Because the cited test for prejudicial error is akin to a [*15] *Brady* materiality analysis, based upon the rationale set forth in our preceding materiality analysis, appellant was not prejudiced by the government's R.C.M. 701(a)(6) violation.

2. Jencks Act and R.C.M. 914

The Jencks Act requires, upon motion by the defendant, a trial court to order the government to disclose prior "statement[s]" of its witnesses that are "relate[d] to the subject matter" of their testimony after each witness testifies on direct examination. 18 U.S.C. § 3500(b). R.C.M. 914 "tracks the language of the Jencks Act, but it also includes disclosure of prior statements by defense witnesses other than the accused." *United States v. Muwwakkil*, 74 M.J. 187, 190 (C.A.A.F. 2015). "Given the similarities in language and purpose between R.C.M. 914 and the Jencks Act," the CAAF concluded "that our Jencks Act case law and that of the Supreme Court informs our analysis of R.C.M. 914 issues." *Id.* at 191.

At the trial level, R.C.M. 914(e) provides the military judge with two remedies for the government's failure to deliver the qualifying statement: (1) "order that the testimony of the witness be disregarded by the trier of fact" or (2) "declare a mistrial if required in the interest of justice." When a R.C.M 914(e) violation is found on appeal, an appellate court's prejudice analysis "depends on whether the defect amounts to a constitutional error or a nonconstitutional error." *United States v. Clark*, 79 M.J. 449, 454 (C.A.A.F. 2020) (internal citations [*16] omitted).

In *Clark*, the CAAF recognized that a R.C.M. 914 violation generally will not rise to the level of a constitutional error. *Id.* In this case, because 1LT [TEXT REDACTED BY THE COURT] testified and was subject to cross-examination, appellant was not denied his constitutional right to confront the witness against him. *See United States v. Sigrah*, 82 M.J. 463, 467 (C.A.A.F. 2022) (holding the constitutional right to confront a witness is not implicated when a witness testifies and is subject to cross examination). For nonconstitutional errors, "the test for prejudice is whether the error had a substantial influence on the findings." *United States v. Kohlbek*, 78 M.J. 326, 335 (C.A.A.F. 2019) (citation omitted) (internal quotation marks omitted). "In conducting the prejudice analysis, this 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." *Id.* (internal quotation marks and citations omitted).

Because the defense did not contest that appellant engaged in sexual intercourse with SPC [TEXT REDACTED BY THE COURT] and the government presented DNA evidence establishing appellant's semen was present on SPC [TEXT REDACTED BY THE COURT]'s shorts, appellant's conviction hinged on whether the panel found the encounter to be consensual. Similar to *Kohlbek*, the government's [*17] case was strong. *Kohlbek*, 78 M.J. at 334. Specialist [TEXT REDACTED BY THE COURT] provided detailed testimony describing how appellant restrained her by the wrist, forced her into the bus, and engaged in sexual intercourse while she repeatedly told him "no" and that she "didn't want

to." Within minutes of the attack, SPC [TEXT REDACTED BY THE COURT] sought out SGT [TEXT REDACTED BY THE COURT] to obtain information on reporting the assault. Sergeant [TEXT REDACTED BY THE COURT] testified SPC [TEXT REDACTED BY THE COURT] was in distress, crying, and "in a panic," and told SGT [TEXT REDACTED BY THE COURT] that she told someone to stop, but they wouldn't or didn't. Approximately 30 minutes following the assault, SPC [TEXT REDACTED BY THE COURT] called her mom "hysterically crying" and was initially unable to communicate. After several minutes, her mother calmed her down and SPC [TEXT REDACTED BY THE COURT] explained, "Mommy, a sergeant just pulled me on a bus and raped me." Specialist [TEXT REDACTED BY THE COURT]'s actions, demeanor, and nearly contemporaneous reports of the incident provided evidence of the rape.

Moreover, even if the military judge excluded 1LT [TEXT REDACTED BY THE COURT]'s testimony, an appropriate remedy under R.C.M. 914, the direct evidence the government presented to establish the elements of the rape would be unchanged and remain strong. First, 1LT [TEXT REDACTED BY THE COURT]'s testimony did not touch on the facts or circumstances of the rape. Rather, 1LT [TEXT REDACTED BY THE COURT]'s direct testimony [*18] was limited to rebuttal evidence focused on PFC [TEXT REDACTED BY THE COURT]'s desire to remain in Iraq following the assault. This testimony, along with PFC [TEXT REDACTED BY THE COURT]'s own testimony that she wanted to complete the deployment, was designed to undercut the defense theory that PFC [TEXT REDACTED BY THE COURT] fabricated the rape so that she could redeploy early. Without 1LT [TEXT REDACTED BY THE COURT]'s testimony, the panel would have still received evidence directly from PFC [TEXT REDACTED BY THE COURT] undermining this defense theory. More importantly, if 1LT [TEXT REDACTED BY THE COURT]'s testimony was stricken, the remaining evidence would still establish the elements of the offense.

Appellant's defense was not strong and rested on the premise that PFC [TEXT REDACTED BY THE COURT] could not be believed. The defense presented witnesses that testified about PFC [TEXT REDACTED BY THE COURT]'s reputation for untruthfulness and highlighted PFC [TEXT REDACTED BY THE COURT]'s contradictory statements. As the government noted during closing argument, several of the reputation witnesses did not have extensive interactions with PFC [TEXT REDACTED BY THE COURT] and the alleged contradictory statements were explainable.

First Lieutenant [TEXT REDACTED BY THE COURT]'s testimony rebutting the alleged motive to fabricate was not material as it did not negate or otherwise disprove the remaining evidence supporting appellant's conviction. Similarly, the quality [*19] of the evidence was low as the testimony did not speak to any element of the offense.

In conducting the *Kohlbek* prejudice analysis, this court may also consider whether the defense had access to the same information as contained in the undisclosed evidence to further support a finding of no prejudice. *Sigrah*, 82 M.J. at 467-68 (*citing Rosenberg v. United States*, 360 U.S. 367, 371, 79 S. Ct. 1231, 3 L. Ed. 2d 1304 (1959); *Clark*, 79 M.J. at 455).

As the military judge reasonably found, the only undisclosed negative evidence 1LT [TEXT REDACTED BY THE COURT] provided during the recorded interview was that PFC [TEXT REDACTED BY THE COURT]'s duty performance deteriorated following the rape. As previously noted, the defense had access to substantially the same evidence because the government provided the defense a character statement that 1LT [TEXT REDACTED BY THE COURT] drafted for PFC [TEXT REDACTED BY THE COURT] that was consistent with the undisclosed evidence. Although armed with this information, the defense elected not to cross-examine 1LT [TEXT REDACTED BY THE COURT] on PFC's [TEXT REDACTED BY THE COURT]'s poor duty performance following the assault and it is unlikely the defense would have taken a different approach had the government produced the undisclosed recorded interview.

Appellant was not prejudiced as a result of the R.C.M. 914 violation as the government's failure to disclose 1LT [TEXT REDACTED BY THE COURT]'s recorded interview did not have a substantial influence on the findings.

CONCLUSION

On consideration [*20] of the entire record, the finding of guilty and the sentence are AFFIRMED.

Senior Judge WALKER and Judge EWING concur.

United States v. Lorance

United States Army Court of Criminal Appeals

June 27, 2017, Decided

ARMY 20130679

Reporter
2017 CCA LEXIS 429 *

UNITED STATES, Appellee v. First Lieutenant CLINT A. LORANCE, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion denied by United States v. Lorance, 77 M.J. 130, 2017 CAAF LEXIS 1131 (C.A.A.F., Dec. 12, 2017)

Review denied by United States v. Lorance, 77 M.J. 136, 2017 CAAF LEXIS 1165 (C.A.A.F., Dec. 19, 2017)

Writ of habeas corpus dismissed, Without prejudice, Motion denied by Lorance v. Commandant, United States Disciplinary Barracks, 2019 U.S. Dist. LEXIS 194827 (D. Kan., Nov. 8, 2019)

Writ of habeas corpus dismissed, Motion granted by Lorance v. Commandant, United States Disciplinary Barracks, 2020 U.S. Dist. LEXIS 12339 (D. Kan., Jan. 24, 2020)

Prior History: [*1] Headquarters, Fort Bragg. Kirsten V. Brunson, Military Judge, Colonel John N. Ohlweiler, Staff Judge Advocate (pretrial and recommendation), Lieutenant Colonel Dean L. Whitford, Staff Judge Advocate (addendum).

Counsel: For Appellant: Lieutenant Colonel Jonathan F. Potter, JA; Captain Payum Doroodian, JA; John N. Maher, Esq.; John D. Carr, Esq. (on brief); Captain Scott Martin, JA; John N. Maher, Esq.; John D. Carr, Esq. (on reply brief); Lieutenant Colonel Jonathan F. Potter, JA; John N. Maher, Esq.; John D. Carr, Esq. (Petition for New Trial); Lieutenant Colonel Jonathan F. Potter, JA; Captain Payum Doroodian, JA; John N. Maher, Esq.; John D. Carr, Esq. (reply brief on Petition for New Trial).

For Appellee: Colonel Mark H. Sydenham, JA; Lieutenant Colonel A.G. Courie III, JA; Captain Samuel E. Landes, JA (on brief);[1] Colonel Mark H. Sydenham, JA; Lieutenant Colonel A.G. Courie III, JA; Captain Samuel E. Landes, JA (on reply brief); Colonel Mark

[1] The government's brief in response to appellant's assignment of errors, as well as appellant's reply brief, were revised and resubmitted to this court.

H. Sydenham, JA; Major Daniel D. Derner, JA; Captain Samuel E. Landes, JA (brief and reply brief in response to Petition for New Trial).

Judges: Before TOZZI, HERRING, and BURTON, Appellate Military Judges. Senior Judge TOZZI and Judge BURTON concur.

Opinion by: HERRING

Opinion

MEMORANDUM [*2] OPINION AND ACTION ON PETITION FOR NEW TRIAL

HERRING, Judge:

An officer panel sitting as a general court-martial convicted appellant, contrary to his pleas, of attempted murder, murder, wrongfully communicating a threat, reckless endangerment, soliciting a false statement, and obstructing justice in violation of Articles 80, 118, and 134 Uniform Code of Military Justice, 10 U.S.C. §§ 880, 918, 934 (2012) [hereinafter UCMJ]. The panel sentenced appellant to a dismissal, confinement for twenty years, and forfeiture of all pay and allowances. The convening authority approved only nineteen years confinement but otherwise approved the sentence as adjudged.

We review this case under Article 66, UCMJ. Appellant assigns six errors, only two of which—alleging discovery violations and ineffective assistance of counsel—merit discussion, but no relief. We have considered matters personally asserted by appellant under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982); and find that they lack merit.

BACKGROUND

In 2012, appellant and members of 4th Brigade Combat Team (BCT), 82nd Airborne Division were deployed to Afghanistan. During this time, the Chairman of the Joint Chiefs of Staff's Standing Rules of Engagement (SROE) were in effect. The SROE permitted soldiers to [*3] use force in defense of themselves or others upon the commission of a hostile act or the demonstration of imminent hostile intent. There were no declared hostile forces, and thus no authority to engage any person upon sight.

In June 2012, First Platoon of the BCT was situated at an outpost named Strong Point Payenzai, located near the village of Sarenzai in the Zharay district of Kandahar province. First Platoon had recently lost their platoon leader to injury from an improvised explosive device (IED), and had suffered other casualties in the months prior. Appellant, who had

spent the deployment as the squadron liaison officer (LNO) at the brigade tactical operations center (TOC), was assigned to take over as the platoon leader.

On 30 June 2012, appellant, in his new role, was leading the platoon back to Strong Point Payenzai from the Troop TOC at Strong Point Ghariban. As they approached the Entry Control Point (ECP), appellant encountered an Afghan villager with a young child. The villager was asking to move some concertina wire on the road leading to Strong Point Payenzai that was impeding his ability to work on his farm. Appellant told the villager that if he touched the concertina [*4] wire, he and his family would be killed. Appellant conveyed the seriousness of his message by pulling back the charging handle of his weapon and pointing the weapon at the young child. Appellant ended the encounter by instructing the villager to come to his shura, a meeting, and to bring twenty people.

The next day, appellant ordered two of his soldiers to go up into one of the towers and shoot harassing fire in the general direction of villagers. Appellant told the soldiers he was doing this in order to provoke the villagers' attendance at the upcoming shura. Hearing the shots, the Troop TOC radioed Strong Point Payenzai for a report. Appellant instructed a noncommissioned officer to respond by falsely reporting the Strong Point was receiving fire.

On 2 July 2012, a mission brief was held for the platoon and their accompanying Afghanistan National Army (ANA) element before they left to go on a patrol. In this briefing, it was announced that motorcycles were now authorized to be engaged on sight, although the testimony was somewhat inconsistent with at least one soldier recalling this coming from the ANA while others identified appellant as the source of this new information. Appellant [*5] had posted a sign in the platoon headquarters prior to the patrol stating that no motorcycles would be permitted in the area of operations. As the platoon, with the ANA element in the lead, moved out they encountered a number of villagers near the ECP complaining about the shots from the day prior. Appellant told the villagers that they could discuss it at the upcoming shura. Appellant told the villagers to leave and then began counting down from five. The platoon began its patrol.

Not long into the patrol, Private First Class (PFC) Skelton, the Company Intelligence Support Team (COIST) member attached to the platoon headquarters element, called out to appellant that he observed a motorcycle with three passengers. PFC Skelton did not report any hostile actions, but simply that he spotted a motorcycle with three passengers in his field of view. Appellant did not ask whether the motorcycle passengers were presenting any threat. Appellant ordered PFC Skelton to engage the motorcycle. PFC Skelton complied and fired his weapon, but missed. At trial, PFC Skelton testified that he would not have fired upon the motorcycle or its passengers on his own, because "there was no reason to shoot at [*6] that moment in time that presented a clear, definitive hostile intent and hostile act."

Apparently in response to the impact of PFC Skelton's rounds, the motorcycle stopped, the male passengers dismounted and began walking in the direction of the ANA unit. The ANA soldiers did not open fire, but rather gesticulated to the men, who then headed back to their motorcycle. As the three men returned to the motorcycle, appellant, over his portable radio, ordered the platoon's gun truck to engage the men. Private E-2 (PV2) Shiloh, the gunner on the 240 machine gun in the gun truck that had overwatch of the patrol, had continuous observation of the victims from after the first set of shots by PFC Skelton. Upon receiving appellant's order, Private Shiloh fired his weapon, killing two of the riders and wounding the third. The third victim ran away into the village. Prior to the engagement, the victims had no observable weapons or radios, and were not displaying any hostility toward U.S. or Afghan forces. According to PV2 Shiloh, the only reason he engaged the men was because he was ordered to do so by appellant. Following the engagement, the two deceased victims were on the ground, and the motorcycle [*7] was standing up, kickstand still down. Upon learning that the motorcycle was still standing, Appellant ordered PV2 Shiloh to engage and disable the motorcycle. PV2 Shiloh refused this order, noting that a young boy was nearby.

Shortly after this engagement, helicopter support came on station. The aircraft crew received a request to locate the third motorcycle rider last seen running into the village. While on station, the pilot took aerial photographs of the two deceased victims and the motorcycle. Sergeant First Class (SFC) Ayres, the platoon sergeant, linked up with appellant to find out what happened, as he had heard the shots moments before. Appellant told SFC Ayres that the aircraft had spotted the men on the motorcycle with weapons before his troops engaged.

Appellant ordered two soldiers, PFC Wingo and PFC Leon, to conduct a Battle Damage Assessment (BDA) of the deceased victims. BDAs normally entailed taking photographs, obtaining biometric data, and testing for any explosive residue on the bodies. Private First Class Skelton was the soldier trained and equipped to conduct a BDA and was also responsible for briefing the TOC afterwards. Even though PFC Skelton was standing right [*8] next to appellant, appellant had PFC Wingo and PFC Leon conduct the BDA, neither of whom had the training or equipment to properly perform the task. When PFC Skelton reminded appellant that he was supposed to do the BDA, appellant told PFC Skelton not to because he wouldn't like what he saw.

After the two soldiers conducted a cursory inspection of the victims, appellant told the gathered villagers to take the bodies. The soldiers did not find any weapons, explosives or communications gear on the bodies. Appellant then told the radio transmission operator (RTO) to report over the radio that a BDA could not be done because the bodies were removed before the platoon could get to them. When the RTO did not make this report,

appellant took over the radio and made this report to Captain (CPT) Swanson, the Troop Commander.

After the mission, and back at Strong Point Payenzai, appellant told PFC Skelton not to include the BDA information in his upcoming brief to the TOC. Private First Class Skelton went to the TOC at Strong Point Ghariban to deliver his intelligence brief on the patrol. Upon arriving, he informed the COIST platoon leader that he needed to speak with CPT Swanson. PFC Skelton [*9] told CPT Swanson what happened on the patrol and that he believed they may have civilian casualties. Shortly thereafter, appellant was relieved of his duties pending an investigation into the events.

LAW AND ANALYSIS

A. Discovery Violations

"Article 46, UCMJ, provides the trial counsel, defense counsel, and the court-martial with 'equal opportunity to obtain witnesses and other evidence in accordance with' the rules prescribed by the President." *United States v. Stellato*, 74 M.J. 473, 481 (C.A.A.F. 2015) (quoting Article UCMJ art. 46). The Rules for Courts-Martial elucidate the trial counsel's unique obligations in furtherance of Article 46's mandate. In this case, the two pertinent provisions are: that the "trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to negate...or reduce" the guilt or punishment of the accused; and that the trial counsel shall permit the defense to inspect certain items "which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense." Rule for Courts-Martial [hereinafter R.C.M.] 701(a)(6), R.C.M. 701(a)(2)(A). The former provision requires no triggering action on behalf of the defense, while [*10] the later provision requires a request from the defense to trigger the trial counsel's obligation, for "[w]ithout the request, a trial counsel might be uncertain in many cases as to the extent of the duty to obtain matters not in the trial counsel's immediate possession." R.C.M. 701 analysis at A21-34. As we have stated before, the distinction between the two provisions is significant, because "whether the trial counsel exercised reasonable diligence in response to the request will depend on the specificity of the request." *United States v. Shorts*, 76 M.J. 523, 530 (Army Ct. Crim. App. 24 Jan. 2017).

R.C.M. 701(a)(6) is based on *Brady v. Maryland* and its progeny, which in turn, is derived from the Due Process Clause of the Fifth Amendment. *See generally Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). *Brady* requires the prosecution to disclose evidence that is material and favorable to the defense. *Id.* at 87. This is an affirmative duty to disclose and requires no triggering action by the defense. *Strickler v.*

Greene, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (citing *United States v. Agurs*, 427 U.S. 97, 107, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976)). Evidence is said to be material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433-434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). The "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police" has long been a recognized duty of [*11] trial counsel. *Id.* at 437. In order to have a "true *Brady* violation ". . . the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler*, 527 U.S. at 281-82. Courts have a responsibility to consider the impact of undisclosed evidence dynamically, in light of the rest of the trial record. *United States v. Pettiford*, 627 F.3d 1223, 1229, 393 U.S. App. D.C. 283 (D.C. Cir. 2010) (citing *Agurs*, 427 U.S. at 112). "Once a *Brady* violation is established, courts need not test for harmlessness." *United States v. Behenna*, 71 M.J. 228, 238 (C.A.A.F. 2012) (citing *Kyles*, 514 U.S. at 435-36).

With the above framework in mind, we now work through appellant's contention that the government violated its discovery obligations. Appellant asserts that the discovery request from detailed counsel was a specific request for information and not just a general request. Appellant's own brief here on appeal, as well as the actions of appellant pre-trial belie that assertion.

There is nothing in the record that supports any inference that the defense was unsatisfied with the government's response to its discovery request, such as a motion to compel. Nor is there anything that supports a finding that the defense contemplated a search of specific intelligence [*12] databases. Rather, the language of the discovery request reflects the typical boilerplate request for discovery, although it included the language "deceased persons." We therefore treat this as a general request for discovery and find that the exercise of reasonable diligence in response to this request did not include searching intelligence databases. While we have long held that the rules of military discovery are generous, we decline to now require trial counsel to seek out and search into the abyss of the intelligence community for the potential existence of unspecified information.

In addressing *Brady*, we first consider whether the information presented by appellant regarding the identities and associations of the victims was favorable to appellant. Even assuming we accept appellant's information concerning the victims as true,[2] we come to three conclusions.

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[2] This court strains to accept the information presented in the video presentation (Def. App. Ex. K) at face value given that many asserted facts contained therein are not supported by trial testimony and, in fact, are directly contradicted by trial testimony. We specifically point to the purported signs that restricted motorcycles from the area. While there was testimony that such a sign was posted by appellant in the unit

First, with respect to the two deceased victims, the older victim, identified by witnesses at trial as the village elder, knew someone who was linked to hostile action against U.S. forces. The younger victim was biometrically linked to an IED incident that occurred prior to 2 July 2012. Second, the surviving victim was allegedly [*13] involved in hostile action against U.S. forces *after* he was wounded and his two compatriots were killed by U.S. forces on 2 July 2012. Third, and perhaps most importantly, appellant was not aware of any of this information at the time he ordered his soldiers to engage.

The testimony of PFC Skelton, who first observed the motorcycle, paints a clear picture of what happened. He identified the motorcycle and three passengers, and reported that information to appellant. PFC Skelton did not report any hostile actions. Appellant did not ask whether the motorcycle passengers were presenting any threat; he simply ordered PFC Skelton to engage. PFC Skelton testified that he would not have fired upon the motorcycle or its passengers on his own, because "there was no reason to shoot at that moment in time that presented a clear, definitive hostile intent and hostile act."

The testimony of PV2 Shiloh, the 240 gunner, supports that these men posed no discernable harm. The motorcycle was parked and the three men were returning to the motorcycle at the direction of the ANA element at the time he opened fire. According to PV2 Shiloh, he engaged the three men based solely on the order from the appellant. [*14]

In considering any nondisclosure dynamically, as we are required to do, the evidence presented by the government on the murders and attempted murder was overwhelming. Appellant had no indications that the victims posed any threat at the time he ordered the shootings. Assuming arguendo, that the information was found and turned over to appellant before trial, we can see no scenario for the admissibility of such evidence during the trial. As stated previously, the negative information about the surviving victim was derived from actions he took after his two compatriots were shot and killed on appellant's orders. The actions of the surviving victim after the shootings would have no relevance on what appellant knew at the time he ordered the shootings. In fact, it is the more likely scenario that the government would have been able to capitalize on this aggravating evidence in presentencing by demonstrating why the SROE exist, and the direct impact on U.S. forces when the local population believe they are being indiscriminately killed. The same is true for the deceased victims. That the village elder knew someone associated with a hostile act cannot be used to infer that he posed a threat [*15] at that date and time. Similarly, if the other deceased victim was "linked" to a hostile act on a prior date, that is

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TOC, there was no testimony that any signs were posted in the area of Route Chilliwack, where the shootings occurred. The exhibit also asserts that air assets were on station before the shooting of the three men. The trial testimony of the pilot of the aircraft and the soldiers on the ground all have the aircraft arriving on scene after the engagement at the center of this trial. Appellant's video presentation was more an attempt at persuasive argument rather than a helpful presentation of data and link analysis of information obtained from intelligence databases.

not sufficient to bring him in to the category of individuals that can be lawfully targeted under the SROE.

The rules of discovery "are themselves grounded on the fundamental concept of relevance." *United States v. Graner*, 69 M.J. 104, 107 (C.A.A.F. 2010). "None but facts having rational probative value are admissible." (quoting 1 John Henry Wigmore, *Evidence in Trials at Common Law* 655 (Peter Tillers rev. 1983)). The aforementioned information simply has no tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Military Rules of Evidence [hereinafter Mil. R. Evid.] 401. This is particularly true in this incident as the appellant had no knowledge of this information at the time he made the decision to engage.

Since we do not find that the discovered information was favorable to appellant, we need not address the nondisclosure or prejudice prongs. Consistent with our holding in *Shorts*, "to comply with *Brady*, a trial counsel must search his or her own file, and the files of related criminal and *administrative investigations*. However, [*16] consistent with our superior court's interpretation of the issue, we require a trial counsel only exercise due diligence." 76 M.J. at 532 (citing *United States v. Simmons*, 38 M.J. 276 (C.A.A.F. 1993)). Here, we find trial counsel exercised the diligence due under *Brady* and as required under defense counsel's discovery request.

B. Ineffective Assistance of Counsel

To prevail on an ineffective assistance of counsel claim, which we review de novo, an appellant must show: that counsel's performance fell below an objective standard of reasonableness; and that "counsel's deficient performance gives rise to a 'reasonable probability' that the result of the proceeding would have been different without counsel's unprofessional errors." *United States v. Akbar*, 74 M.J. 364, 371 (C.A.A.F. 2015) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). We are also mindful that in evaluating the first *Strickland* prong, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. As to our evaluation of the second *Strickland* prong, we must determine whether, absent counsel's errors, there is a reasonable probability the factfinder would have had a reasonable doubt as to appellant's guilt. *Id.* at 695.

> A court need not determine whether counsel's performance was deficient before examining the prejudice suffered [*17] by the defense as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack

> of sufficient prejudice, which we expect will often be so, that course should be followed.

Id. at 697.

Even though appellant primarily focuses his claim against civilian defense counsel, for purposes of ineffective assistance of counsel claims, "the performance of defense counsel is measured by the combined efforts of the defense team as a whole." *United States v. McConnell*, 55 M.J. 479, 481 (C.A.A.F. 2001) (citing *United States v. Boone*, 42 M.J. 308, 313 (C.A.A.F. 1995)). Therefore, we consider appellant's claims in light of the defense team's performance as a unit. We also consider every claim by appellant balanced against the complete record before us, including the "experience, and abilities of trial defense counsel; the pretrial proceedings; the investigative efforts of the defense team; the selection of the court members; the trial strategy; the performance of counsel during the trial; the sentencing case; and the posttrial proceedings." *United States v. Murphy*, 50 M.J. 4, 8 (C.A.A.F. 1998).

The record reflects that appellant was fully advised of his rights, the evidence against him, and that he substantively communicated with his defense team regularly. [*18] He was routinely consulted for his opinion on trial strategy, and was intimately involved with the decision making of his defense team. The trial strategy adopted by the defense, with the endorsement of appellant, was that these were combat related shootings and not orders to murder. To that end, the defense team competently pursued this theory at every stage of the proceedings. The defense team worked to portray the appellant as a "by the book" officer trying to bring discipline back to a unit that had gotten lax under its prior platoon leader. They also attempted to explain his actions as those of an aggressive young officer trying to protect his men from further harm. The defense questioned numerous government witnesses to expound on the frequent use of motorcycles by hostile elements in this area of operations. Given the overwhelming evidence against appellant, it is difficult to conceive of any other viable defense.[3]

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[3] Appellant's affidavit asserts civilian defense counsel was persistently unprepared, did not keep in contact with appellant before trial, and did not consult with appellant on, amongst other things, evidence, the pros and cons of offering a plea, the relative strength of the government's evidence, overall strategy and presentencing. This affidavit makes no mention of the efforts of appellant's military defense counsel. Civilian defense counsel and appellant's military defense counsel submitted affidavits painting a much different picture and, read together, show a defense team that kept appellant involved in each stage of his court-martial, both before and after trial. One area of agreement concerns the overall defense theme that this was a combat case, not a murder case. Under the circumstances of this case, we see no need to order a fact-finding hearing pursuant to *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967). First, even if we accept appellant's claims at face value, he has failed to show how he was prejudiced by the stated deficiencies of his defense counsel. The government presented overwhelming evidence of appellant's guilt and appellant has not shown how a different approach by defense counsel during preparation for or at trial would have resulted in a different outcome. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). Second, appellant's focus on the performance of his civilian defense counsel to the exclusion of the efforts of his detailed defense counsel ignores our examination of the overall efforts of the defense team. In this respect, appellant's affidavit is conclusory as to his defense team's supposed ineffectiveness in that it doesn't address the many contributions and efforts of his military defense counsel in the overall effort at trial. *Id.*

Even had the defense team located biometric evidence pertaining to the victims, and it was somehow introduced into evidence, there is no reasonable probability that the result of the proceeding would have been different. On the contrary, had this evidence been [*19] presented at trial, it is likely the panel members would have considered it an aggravating factor. The fact that the surviving victim was linked to hostile action against U.S. forces only *after* his compatriots were killed illustrates that appellant's actions directly resulted in a significant adverse impact on the mission of the command. This is also supported by detailed defense counsel's affidavit when he discussed his rationale for being unable to make a site visit. That is, after the village elder was killed in this incident, the area became so kinetic that U.S. forces withdrew from there altogether.

CONCLUSION

The Petition for a New Trial is DENIED.[4] The findings of guilty and the sentence are AFFIRMED.

Senior Judge TOZZI and Judge BURTON concur.

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[4] We note this court granted appellant's request for expedited consideration of his petition for a new trial on 13 November 2015. The basis for this petition was the same information that forms the basis for the appellant's discovery assignment of error. The parties continued to submit filings on this issue and we did not receive the last filing, appellant's revised reply brief, until 21 November 2016. Thus the delay in addressing appellant's petition for a new trial.

United States v. Robinson

United States Army Court of Criminal Appeals

February 6, 2017, Decided

ARMY 20150088

Reporter
2017 CCA LEXIS 93 *

UNITED STATES, Appellee v. Private E-2 COREY J. ROBINSON, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by United States v. Robinson, 2017 CAAF LEXIS 614 (C.A.A.F., June 12, 2017)

Prior History: [*1] Headquarters, Joint Readiness Training Center and Fort Polk. Wade N. Faulkner, Military Judge (arraignment), Randall L. Fluke, Military Judge (trial), Colonel Jan E. Aldykiewicz, Staff Judge Advocate.

Counsel: For Appellant: Major Brian J. Sullivan, JA (argued); Lieutenant Colonel Charles D. Lozano, JA; Major Andres Vazquez, Jr., JA; Major Brian J. Sullivan, JA (on brief).

For Appellee: Captain Austin L. Fenwick, JA (argued); Colonel Mark H. Sydenham, JA; Major Michael E. Korte, JA; Captain Austin L. Fenwick, JA (on brief).

Judges: Before MULLIGAN, FEBBO, and WOLFE, Appellate Military Judges. Senior Judge MULLIGAN and Judge FEBBO concur.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION

WOLFE, Judge:

This appeal raises an interesting issue regarding attempts. The question, restated, is what is/are the proper charge(s) when an accused attempts to steal several items during one transaction but is successful in only stealing some of them? May the government charge appellant with both the completed thefts and the attempted thefts? If the accused is convicted of the actual thefts, can convictions for the attempted theft of the remaining items stand? These are good questions, but ones that we ultimately do not answer because

we find appellant [*2] waived the issue when he pleaded guilty to all charges and specifications.[1]

BACKGROUND

At a general court-martial, appellant plead guilty to repeatedly—and fraudulently—using other persons' identity and credit cards to steal high-value items from the Army and Air Force Exchange Service (AAFES) online retail website. The identities he used were of current, former, or retired service members. Appellant arranged for the items to be shipped to two co-conspirators. In total, appellant stole $64,771.95. Most of the items appellant stole were not recovered.

On twenty-three different days, appellant placed orders with the online AAFES exchange. Those orders were converted into eighteen specifications of attempted larceny and eleven specifications of larceny.[2] When AAFES delivered the ordered goods, appellant was charged with the larceny of the goods contained in the order. When AAFES (for whatever reason) did not ship the order, appellant was charged with the attempted larceny of the goods contained in the order. When AAFES shipped only a portion of appellant's fraudulent order, appellant was charged with the larceny of the goods actually shipped, and the attempted larceny of the goods that were [*3] not shipped.

On appeal, appellant is concerned with the third category: the six instances where appellant was charged with both attempted larceny and larceny for what he claims was a single fraudulent order. One example illustrates the point.On 28 December 2013, appellant went to the AAFES website and used a fraudulently obtained credit card to place an order for two iPad Minis, one purse, one Kindle, and two Macbooks. However, AAFES did not actually ship the iPad Minis. Appellant does not dispute that he stole the two Macbooks, the purse, or the Kindle. Nor does appellant dispute that he attempted to steal the two iPads Minis. The issue, as appellant sees it, is that he cannot be convicted of both an attempt and a completed larceny for what was one transaction.

Appellant cites two alternative theories as to why he is entitled to relief. First, appellant argues a unit of prosecution issue that when a larceny of several articles is committed at substantially the same time and place, it is a single larceny. *See Manual for Courts-Martial, United States,* (2012 ed.) [hereinafter *MCM*], pt. IV, ¶ 46c(1)(h)(ii); *United States*

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[1] We considered several assigments of error personally asserted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find they lack merit.

[2] Appellant also pleaded guilty to one specification of conspiracy to commit larceny in violation of Article 81, UCMJ, and ten specifications of a violation of 18 U.S.C. §1028 (fraud in connection with the possession and use of identity documents) charged under Article 134, UCMJ. Appellant also assigns as error that some of these specifications were unreasonably multiplied with other specifications. For reasons discussed below, we find appellant waived any error by pleading guilty to these offenses.

v. Miller, No. 99-0990, 53 M.J. 128, 2000 CAAF LEXIS 207 (24 February 2000). Second, appellant argues an accused cannot be "convicted both [*4] of a substantive crime and of an attempt to commit that same crime, when a single continuous transaction was involved." *United States v. Hyska*, 29 M.J. 122, 125 (1989).

For either or both reasons, appellant argues we must dismiss the attempt specifications as multiplicious. Additionally, appellant notes that the resulting charges, in each instance, doubled the maximum sentence he faced. Appellant asks us to consider that had AAFES shipped both the iPads and Macbooks appellant would face only a single larceny specification. When the iPads were not shipped, the harm caused by appellant's offense was *less*, but he faced twice as many specifications and twice the maximum sentence.

In response, the government argues that to dismiss the attempt specifications as appellant requests would be to dismiss separate and distinct conduct of which appellant is clearly guilty. Using the one example discussed above, were we to dismiss the attempted larceny of the three iPads, appellant would no longer be held criminally responsible for that conduct. In other words, appellant's attempted theft of the three iPads did not merge into the completed larceny because the iPads were never, in fact, stolen. The government argues that it may properly hold appellant [*5] accountable for both his attempted theft of three iPads and his actual theft of two Macbooks.

LAW AND DISCUSSION

We do not directly address the merits of appellant's assigned error as we determine he waived the issue by his guilty plea.

An unconditional guilty plea generally "waives all defects which are neither jurisdictional nor a deprivation of due process of law." *United States v. Schweitzer*, 68 M.J. 133, 136 (C.A.A.F. 2009) (citing *United States v. Rehorn*, 9 U.S.C.M.A.487, 488-89, 26 C.M.R. 267, 268-69 (1958)). Challenges to offenses that "could be seen as 'facially duplicative,' that is, factually the same" are not waived. *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997) (citing *United States v. Oatney*, 45 M.J. 185 (C.A.A.F. 1996).

A. Were the Specifications Facially Duplicative?

As an initial matter, the offenses are not "facially duplicative." Each attempted and completed larceny involved different goods and were not, therefore, factually the same. *See United States v. Ramsey*, 52 M.J. 322, 324 (C.A.A.F. 2000) ("In light of our holding that the specifications are not 'facially duplicative,' we need not reach the second granted issue, because the multiplicity issue was waived.").

Accordingly, *if* appellant's guilty plea constituted waiver, then he has waived any error regarding whether the offenses were multiplicious or unreasonably multiplied.

B. Did Appellant's Guilty Plea Waive the Issues of Multiplicity and Unreasonable Multiplication of Charges?

The brief for the government [*6] appears to agree that appellant did not waive the issues of multiplicity and unreasonable multiplication of charges (UMC). As we disagree and reject the government's concession, we address the issue at some length.

It should be tautological that an appellant cannot simultaneously enter an unconditional guilty plea to a specification *and* argue that the specification should be dismissed on legal grounds by the military judge. It is inconsistent to claim that one is guilty of an offense while also arguing that the offense should be dismissed because it is legally impermissible to be convicted of the offense.

On 10 February 2015, appellant entered an unconditional guilty plea to all charges and specifications. After conducting an inquiry pursuant to *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969), the military judge inquired about the maximum punishment. Both parties agreed that the maximum punishment included 207 years and six months confinement. The military judge then asked the defense counsel whether he believed any of the offenses had been unreasonably multiplied.[3] The defense counsel initially stated that the offenses should be merged for purposes of sentencing, but that "we don't feel as if we're in a position to be successful [*7] in our argument." The military judge ordered a recess. After the recess, the defense made a general objection that the charges were unreasonably multiplied. Counsel's entire argument was as follows:

> [W]e would argue that these offenses, they- -they arise out of a common conspiracy theme- -common conspiracy in which the accused has pled guilty to masterminding the conspiracy in order to profit and obtain Military Star Card information in order to steal items from AAFES. And we would argue that over the course of a period of time, this was a common plan or scheme, Your Honor.

It is unclear to us what exactly was meant by this argument; but we see two possible interpretations. The more plausible understanding is the defense counsel was arguing the

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[3] In the stipulation of fact both parties had agreed that the accused agreed to waive the issue of unreasonable multiplication of charges. The military judge rejected that part of the stipulation because he determined it was a "*sub rosa* . . . extraneous" term that should have been incorporated into the pretrial agreement. We first note, as the term was incorporated into a stipulation of fact presented to the military judge, it was not secret or "*sub rosa.*" We do, however, agree with the military judge that an agreement to waive an issue is not, strictly speaking, a "fact" to be contained in a stipulation of fact. But, when an accused signs a document expressly agreeing to waive an issue, with the express advice of counsel (who also signed the stipulation), that fact would certainly be relevant in determining whether the accused had knowingly waived an issue. However, under the law of the case doctrine, any waiver provision contained in the stipulation was excepted out by the military judge and therefore has little or no bearing on the issue of waiver. *See United States v. Morris*, 49 M.J. 227, 230 (C.A.A.F. 1998).

conspiracy offense was unreasonably multiplied with the remaining offenses. If so, we would disagree. *See Pinkerton v. United States*, 328 U.S. 640, 643, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946) (A defendant may be convicted of conspiracy and the substantive offense); *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001). Alternatively, appellant may have been arguing that some or all offenses were unreasonably multiplied with some or all of the other offenses. If so, the "general objection"(which failed to articulate the basis for relief) did not preserve the issue. [*8] *See United States v. Payne*, 73 M.J. 19, 24 (C.A.A.F. 2014). Thus, even if this plea was not an unconditional guilty plea, we would not see this as preserved error.

In any event, the military judge denied the motion. Prior to announcing findings, the military judge asked appellant several questions to ensure he still wanted to plead guilty. Appellant clearly indicated he wanted to go forward with his guilty plea. The military judge found appellant guilty of all offenses.

When the military judge rejected appellant's unreasonable multiplication motion, appellant faced several options. First, appellant could have withdrawn his guilty plea and pleaded not guilty. Second, appellant could have withdrawn his guilty plea and entered a conditional guilty plea, thereby preserving the issue for appeal. Finally, appellant could continue with his unconditional guilty plea. The first two options would have been a material breach of appellant's pretrial agreement (with the potential for unknown consequences), while the third option preserved the protections contained in the pretrial agreement. Appellant went with the third option.

A guilty plea "is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered [*9] without a trial . . . ." *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). "Litigants should not be permitted to keep some of their objections in their hip pockets and to disclose them only to the appellate tribunal . . . ." *Hunter v. United States*, 606 A.2d 139, 144 (D.C. 1992). Provided the specifications were not facially duplicative, by continuing with his guilty plea appellant waived the issue of whether the charges were multiplicious or unreasonably multiplied. *Schweitzer*, 68 M.J. at 136.

C. Should this Court Notice the Waived Issue?

In *Quiroz*, our superior court made clear that courts of criminal appeals are "well within [their] authority to determine the circumstances, *if any*, under which [they] would apply waiver or forfeiture" to issues of unreasonable multiplication of charges. 55 M.J. at 338 (emphasis added). That is, while we have "awesome, plenary, de novo power" to recognize waived and forfeited issues, such recognition is not required and is certainly not always wise. *Id.* (citation and internal quotation marks omitted); *see also United States v. Chin*, 75

M.J. 220, 223 (C.A.A.F. 2016)("[T]he CCAs are required to assess the entire record to determine whether to leave an accused's waiver intact, or to correct the error").

Here, we do not exercise our discretion to notice the waived issue for two independent reasons.

First, appellant's argument that the charges are multiplicious [*10] and/or unreasonably multiplied relies on a factual interpretation of the record which was never fully developed at trial. It is critical to appellant's argument that the theft and the attempted theft were all part of one online transaction. While this is *a* possible interpretation of the record, it is not the only one.[4]

For example, consider the theft and attempted theft that occurred on 28 December 2013. Appellant stipulated to the offense as follows:

> On 28 December 2013, the Accused placed orders from AAFES for two iPadA Minis, valued at $898, and one purse, one Kindle, and 2 Macbooks, valued at $2502. The Macbooks were shipped to [DJ] at [address omitted] and the purse and Kindle were shipped to himself at [address omitted]. The two iPads, to be shipped to himself, were cancelled by AAFES. The orders were billed . . . and to Military Star Cards [16 digit card #], [16 digit card #], and [16 digit card #] belonging to CPT [BM], MSG [IC], and SFC (Ret.) [CC], fraudulently obtained by the accused.

That is, appellant placed "orders" (note the plural) for six items, to be shipped to two different locations, using three different credit cards from three different individuals. While it is possible [*11] that this was completed as part of a single transaction, it is also possible that the thefts and attempted thefts were part of separate transactions, to be shipped to different addresses, using different credit cards.[5]

As our superior court has stated "[w]e cannot lose sight that this is a guilty plea case" and that "a guilty plea case is less likely to have developed facts."*United States v. Barton*, 60 M.J. 62, 65 (C.A.A.F. 2004) (citation and internal quotation omitted). This concern is all the more so when the issue in question was never adequately litigated at trial. Had this been a contested case, or had appellant adequately raised the issue at trial, it is likely that the facts would have been developed one way or the other.

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[4] If anything, the stipulation of fact leads one to the opposite of appellant's argument. Appellant's stipulation of fact repeatedly states he placed "29orders." Appellant was charged with eighteen attempted larcenies and eleven larcenies (18+11=29).

[5] Of the six pairs of specifications where appellant was charged with having committed a larceny and attempted larceny on the same day, only one (23 October 2013) involves the use of a single credit card and where the items were shipped to a single address. However, even in that case it is unclear whether it was the result of a single transaction or multiple transactions. *See United States v. Broce*, 488 U.S. 563, 570, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989).

Secondly, and separately, we note that appellant negotiated a pretrial agreement that reduced his potential confinement from 2490 months to seventy-two months (approximately a ninety-seven percent reduction in his punitive exposure). In other words, appellant received a substantial benefit from pleading guilty as he did.[6] In reviewing the entire record, we are not persuaded to notice the waived issue and address it on its merits.

CONCLUSION

The findings and sentence are AFFIRMED.

Senior Judge MULLIGAN and Judge FEBBO [*12] concur.

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[6] That the convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for sixty-four months, and reduction to the grade of E-1 does not alter our reasoning. Appellant received the benefit of the "insurance policy" provided by the pretrial agreement that ensured his confinement would not exceed a certain amount.

United States v. John T. Long

United States Army Court of Criminal Appeals

April 28, 2023, Decided

ARMY 20150160

Reporter
2023 CCA LEXIS 217 *; 2023 WL 3455033

UNITED STATES, Appellee v. Master Sergeant JOHN T. LONG, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, U.S. Special Operations Command (trial). Headquarters, U.S. Army Combined Arms Center and Fort Leavenworth (rehearing). Deidra J. Fleming and Christopher T. Fredrikson, Military Judges (trial). Tyesha L. Smith, Military Judge (rehearing). Lieutenant Colonel Charles L. Pritchard, Jr., Acting Staff Judge Advocate. Colonel Robert L. Manley III, Staff Judge Advocate (rehearing).

United States v. Long, 2018 CCA LEXIS 512, 2018 WL 5623640 (A.C.C.A., Oct. 26, 2018)

Counsel: For Appellant: Major Mitchell D. Herniak, JA; Captain Tumentugs D. Armstrong, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Mitchell D. Herniak, JA; Captain Tumentugs D. Armstrong (on brief on specified issues).

For Appellee: Major Kalin P. Schlueter, JA (on brief); Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline J. DeGaine, JA; Captain Cynthia A. Hunter, JA (on brief on specified issues).

Judges: Before BROOKHART, PENLAND, and MORRIS, Appellate Military Judges. Senior Judge BROOKHART and Judge PENLAND concur.

Opinion by: MORRIS

Opinion

MEMORANDUM OPINION ON FURTHER REVIEW

MORRIS, Judge:

At a rehearing, a military judge sitting as a general court-martial found appellant guilty, pursuant to his pleas, of three specifications of abusive sexual contact with a child. The [*2] military judge sentenced appellant to 12 years of confinement, reduction to E-1, and a dishonorable discharge. A pretrial agreement had no impact on the sentence. The convening authority denied appellant's request to reduce the sentence of confinement to 8 years and took no action on the findings or sentence.

PROCEDURAL HISTORY

In December 2015, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of three specifications of abusive sexual contact of a child, two specifications of indecent liberties with a child, rape of a child, sodomy upon a child under twelve years of age, assault consummated by a battery upon a child under sixteen years of age, two specifications of indecent acts with a child, child endangerment, and sexual abuse of a child in violation of Articles 120, 125, 128, and 134, Uniform Code of Military Justice [UCMJ]; 10 U.S.C. §§ 920, 925, 928, 934 (2006) and Article 120b, UCMJ; 10 U.S.C. § 920b (2006 & Supp. V 2012). The military judge sentenced appellant to sixty years of confinement, reduction to the grade of E-1, and a dishonorable discharge. The convening authority approved the findings and sentence as adjudged.

In his first appeal to this court, appellant argued that the military judge had improperly allowed the government to use evidence that he had committed charged [*3] sexual offenses to prove that he had a propensity to commit other charged sexual offenses. *United States v. Long*, ARMY 20150160, 2018 CCA LEXIS 512, at *2 (Army Ct. Crim. App. 26 Oct. 2018) (mem. op.). The government conceded that this was *Hills* error, and further conceded that the error was not harmless beyond a reasonable doubt with respect to nine specifications of sexual offenses. *Long*, 2018 CCA LEXIS 512, at *13-14. This court dismissed two of the specifications and set aside the guilty findings on the other seven. *Id.* at *33-34. However, regarding the specification of rape of a child (Specification 8 of Charge II), this court affirmed the finding because it determined that the *Hills* error was harmless beyond a reasonable doubt. *Id.* This court also affirmed the findings of guilt with respect to the specifications of child endangerment (Specification 5 of Charge I) and the specification of assault consummated by a battery (the Specification of Charge IV). *Id.* at *33. The sentence was set aside and returned to the convening authority for further action. This court provided the convening authority three options: (1) order a rehearing on the specifications for which it had set aside guilty findings and not dismissed; (2) order a rehearing on the sentence alone; or, (3) "reassess the sentence affirming no more than [*4] a dishonorable discharge, confinement for forty years, and reduction to E-1." *Id.* at *34. Appellant petitioned the Court of Appeals for the Armed Forces (CAAF) for grant of review of the decision of this court, but the CAAF determined that "given the possibility of

a rehearing, the petition is not ripe for review at this time." *United States v. Long*, 79 M.J. 99 (C.A.A.F. 2019).

In the convening authority's action, dated 12 February 2020, he determined that holding a rehearing would be impracticable on the two indecent acts specifications, three sexual contact specifications, one lewd act specification, and one sodomy upon a child specification that were set aside by this court and dismissed those specifications without prejudice. Accordingly, the convening authority approved only so much of the sentence as provided for confinement for forty years, reduction to the grade of E-1, and a dishonorable discharge. *United States v. Long*, ARMY 20150160, 2020 CCA LEXIS 368, at *4 (Army Ct. Crim. App. 21 Oct. 2020) (summ. disp.).

Appellant again appealed to this court. This court reaffirmed the findings that appellant was guilty of the specifications for rape of a child, child endangerment, and assault consummated by a battery. *Long*, 2020 CCA LEXIS 368 at *7. Additionally, this court recognized that its prior ruling instructing the convening authority that he could reassess [*5] the sentence within a specified limit violated a recent CAAF ruling in *United States v. Gonzalez*, 79 M.J. 466 (C.A.A.F. 2020). Accordingly, this court reassessed the sentence de novo. *Long*, 2020 CCA LEXIS 368 at *6-8. The reassessment produced the same result: A dishonorable discharge, confinement for forty years, and reduction to the grade of E-1. *Id.* at *8.

In the Summer of 2021, the CAAF affirmed in part and reversed in part the judgment of this court. *United States v. Long*, 81 M.J. 362, 371 (C.A.A.F. 2021). The CAAF affirmed the findings as to Charge I and Specification 5 of Charge I for child endangerment and Charge IV and the Specification of Charge IV for assault consummated by a battery. *Long*, 81 M.J. at 371. As to Specification 8 of Charge II, the remaining Article 120 offense for rape of a child, our superior court found that while non-propensity evidence was legally and factually sufficient to establish all of the elements of the offense, they also needed to test whether the previous *Hills* error, "materially prejudiced the substantial rights of appellant." *Id.* at 370. Because appellant failed to preserve the error by objection, our Superior Court first tested for plain error. After Government concession under *Hills* and *Hukill*, that "the use of propensity evidence from charged offenses to prove other charged offenses constitutes 'clear or obvious' error, [*6] the CAAF then tested for material prejudice using the 'harmlessness beyond a reasonable doubt' standard. *Id. (citing United States v. Tovarchavez*, 78 M.J. 458,460 (C.A.A.F. 2019) (internal quotations omitted) (citations omitted). Unable to find that there was "no reasonable possibility that the error might have contributed to the conviction," the CAAF then set aside the findings as to Charge II and Specification 8 of Charge II for rape of a child and the sentence. *Id.* at 371. The CAAF instructed "[t]he record is returned to the Judge Advocate General of the Army.

A rehearing on Charge II and Specification 8 of Charge II is authorized. A rehearing on the sentence is also authorized." *Id.*

On 2 December 2021, in his Article 34, UCMJ, advice, the Staff Judge Advocate (SJA) properly advised the Convening Authority (CA) about the trial and appellate history of appellant's case, including the rehearing authorized for the one remaining set aside Article 120 violation and the sentence rehearing. This advice also included CAAF's affirmance of the convictions for child endangerment and assault consummated by a battery. The SJA recommended the CA:

> refer five specifications of Article 120 violations, for 1) penetrating with his penis the vulva of [CV1], a child who had not attained the age of 12 years old [*7] [formerly Specification 8 of charge II]; 2) touching the breasts of [CV2], a child who had attained the age of 12 years but had not attained the age of 16 years; 3) touching the breasts of [CV3], [a child] who had attained the age of 12 years, but had not attained the age of 16 years; 4) touching the breasts of [CV3] and touching with his penis the leg of [CV3], a child who had attained the age of 12 years, but had not attained the age of 16 years; 5) touching the breasts of [CV3] and touching with his penis the lower back of [CV3], a child who had not attained the age of 16 years, to trial by General Court-Martial, convened by General Court-Martial Convening Order Number 1, this headquarters, dated 16 September 2021.

The SJA did not recommend the CA order a sentence rehearing for the CAAF affirmed convictions of child endangerment or assault consummated by a battery. The CA did not order a sentence rehearing. Without re-preferral of the four Article 120 specifications that the prior convening authority had dismissed without prejudice on 12 February 2020, the convening authority referred five Article 120 specifications, originally preferred on 15 October 2013, to a general court-martial. This new referral [*8] was reflected on a flapped charged sheet.

On 7 January 2022, appellant offered to plead guilty by exceptions and substitutions to Specification 1 of The Charge (referring to Charge I on the Charge Sheet) for rape of a child, excepting the language "'sexual act to wit: penetrate the vulva of [CV1] substitute therefore the words 'sexual contact, to wit: touching the genitalia of [CV1] through her clothing' except the words 'penis,' substitute therefore the words 'body." Appellant offered to plead guilty to Specifications 2 and 3 of The Charge, one sexual contact specification each for sexual contact with CV2 and CV3. Appellant pleaded not guilty to Specifications 4 and 5 of The Charge, one additional sexual contact and a lewd act, both perpetrated against CV3. In exchange, the CA agreed to disapprove any confinement in excess of 12 years.

Paragraph 1 of appellant's offer to plea stated that he "personally examined the Charges and their Specifications preferred against [him] on 15 October 2013 . . . as well as the supporting evidence produced and disclosed by the Government in my first court-martial, and the full record of trial and supporting documents ordering this hearing . . .." Appellant's [*9] pretrial agreement did not include any language concerning the affirmed convictions for child endangerment and assault consummated by a battery. Appellant also complied with a term in his pretrial agreement to enter into a stipulation of fact establishing the elements of the offenses to which he was offering to plead guilty. In addition to covering the offenses for which appellant was pleading guilty, his stipulation of fact included a paragraph outlining, in detail, the convictions affirmed by both this court and the CAAF for child endangerment and assault consummated by a battery. Further, the paragraph specifically stated that the affirmed convictions should be considered during sentencing. The military judge properly advised appellant that if she admitted the stipulation of fact, that it would be used to determine an appropriate sentence.

After the defense counsel entered appellant's pleas on the record, the military judge informed appellant that Specification 1 of The Charge for rape of a child was different from the offense of abusive sexual contact with a child for which he had offered to plead guilty. The military judge explained that his counsel had entered a plea of guilty [*10] on his behalf to an offense that had not been preferred or referred. She then asked appellant if he was specifically forfeiting and waiving his right to have any offense pending against him at trial properly preferred and referred. Appellant affirmatively stated he was forfeiting that right. Specifications 2 through 5 of The Charge contained the exact same wording as the original charge sheet. Unlike Specification 1, the military judge did not ask appellant if he was specifically forfeiting or waiving his right to have Specifications 2 through 5 of The Charge properly preferred or referred.

Prior to accepting appellant's plea of guilty, the government and military judge confirmed on the record that the maximum punishment authorized by law based on appellant's guilty plea was reduction to the grade of E-1, total forfeiture of all pay and allowances, confinement for 45 years, and a dishonorable discharge. The military judge then explained to appellant that based on the appellate history, she could not adjudge confinement greater than 40 years, reduction to E-1, and a dishonorable discharge.

During his presentencing argument, government counsel referred to the affirmed convictions stating, [*11] "and those affirmed convictions, this Court, as you well know, should sentence him on. And the maximum punishment for those two affirmed convictions alone is seven years." Neither the military judge nor defense counsel addressed the affirmed convictions, or the government's argument, on the record.

On 25 November 2022, appellant requested this court consider matters pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). This court then specified two issues: 1)

whether the government's failure to re-prefer Specifications 2, 3, 4, and 5 was an error and if so, if any remedy is required; and, 2) whether there is an adjudged sentence for appellant's affirmed convictions for child endangerment and assault consummated by a battery.

LAW AND DISCUSSION

A. Proper Referral

"Jurisdiction is the power of a court to try and determine a case and to render a valid judgment. Jurisdiction is a legal question which we review de novo." *United States v. Nealy*, 71 M.J. 73, 75 (C.A.A.F. 2012) (citing *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006) (quotation marks omitted); *see also United States v. Alexander*, 61 M.J. 266, 269 (C.A.A.F. 2005). Under R.C.M. 201(b) a court-martial has jurisdiction when: 1) it is convened by an official empowered to convene it; 2) it is composed in accordance with the rules with respect to number and qualifications of its personnel; 3) each charge is referred by competent authority; 4) the [*12] accused is subject to court-martial jurisdiction; and 5) the offense is subject to court-martial jurisdiction. Rule for Courts Martial 601(a) defines "[r]eferral" as "the order of a convening authority that charges against an accused will be tried by a specified court-martial."

An improper referral is not a jurisdictional defect. *United States v. Blaylock*, 15 M.J. 190, 192-93 (C.M.A. 1983). Although the order for referral is a jurisdictional prerequisite, the form of the order is not jurisdictional. *United States v. Wilkins*, 29 M.J. 421, 424 (C.M.A. 1990). An accused may, "waive the swearing to the charges against him, as long as it was clear what charges were to be considered by court-martial." *Id.; see also* R.C.M. 603(d). The purpose of charges and specifications is to provide notice to an accused as to the matters against which he must defend and to protect him against double jeopardy. *Id.* The convening authority's entry into the pretrial agreement was the functional equivalent of an order by the convening authority that the charges be referred to the court-martial for trial. *Id.* Rule for Courts-Martial 905(b)(2) requires objections "based on defects in the charges and specifications" to be raised before the guilty plea is entered. *United States v. Hardy*, 77 M.J. 438, 440 (C.A.A.F. 2018) "An unconditional plea of guilty waives all nonjurisdictional defects at earlier stages of the proceedings." *Hardy*, 77 M.J. at 442 (citing *United States v. Lee*, 73 M.J. 166, 167 (C.A.A.F. 2014)). Even though the [*13] practice followed was irregular, any such irregularity was waived by appellant. *Wilkins*, 29 M.J. at 425. Even if we were to apply forfeiture, it was not clear error to apply the constructive referral doctrine in light of the pretrial agreement.

Finally, even if we were to find error, it is procedural and not jurisdictional in nature in which case we would test for material prejudice. "A jurisdictional defect goes to the underlying authority of a court to hear a case . . . [h]owever, where an error is procedural rather than jurisdictional in nature, we test for material prejudice to a substantial right to determine whether relief is warranted." *United States v. Ballan*, 71 M.J. 28, 32 (quoting *United States v. Alexander*, 61 M.J. 266, 269 (C.A.A.F. 2005) ((citing Article 59(a), UCMJ; *United States v. Morgan*, 57 M.J. 119, 122 (C.A.A.F. 2002)).

Appellant alleges and the government concedes that four of the five specifications to which he pleaded guilty at the rehearing of his case were previously dismissed without prejudice by the CA and were not re-preferred before being referred to the rehearing. The issues in this case are not jurisdictional, because appellant was "subject to the Uniform Code; the offenses charged were prohibited by the code; the convening authority was a person empowered by Article 22 of the Code, 10 U.S.C. § 822 to convene a general court-martial; and the court personnel were appointed pursuant to Articles 25-27 of the Code, 10 U.S.C. § 825-27 [*14] ." *Blaylock*, 15 M.J. at 192. The only issue is whether the referral of dismissed specifications was proper. We answer in the affirmative.

While referral generally follows the CA's receipt of preferred charges, our superior court in *Wilkins* held that the accused could "waive the swearing of charges against him, as long as it is clear what charges were to be considered by the court-martial." *Wilkins*, 29 M.J. at 424. The purpose of charges and specifications is to provide notice to an accused as to the matters against which he must defend and to protect him against double jeopardy. *Wilkins*, 29 M.J. 421, 424 (C.M.A. 1990). Procedurally in this case, appellant was abundantly aware of what charges were being considered at the rehearing, because they were the exact charges for which he was found guilty at his original trial and for which he was entering a plea of guilty.

Appellant, on the advice of counsel, offered to plead guilty to the dismissed specifications. Paragraph 1 of his pretrial agreement specifically stated that he "personally examined the Charges and their Specifications preferred against [him] on 15 October 2013. . .." Thus, he cannot and does not allege that he did not have notice of the charges. Appellant, in his brief, has expressed "a clear intent to waive [*15] formal preferral and proceed with a functional preferral."

The pretrial agreement also cures any defects in the referral of this case. Even in cases with unpreferred and unreferred charges, both this court and our superior court have consistently found "the convening authority's entry into the pretrial agreement was the 'functional equivalent' of a referral order and that it satisfied R.C.M. 201(b)(3)." *Ballan*, 71 M.J. at 31 (citing *Wilkins*, 29 M.J. at 424). Here, the dismissed charges were not preferred anew, but the CA referred these charges to the court-martial upon the Article 34, UCMJ, advice of his SJA. The preferred method for resolving this potential issue was addressed

by this court in *United States v. Vega*, where "a proactive military judge" informed the accused on the record that "he was pleading to an unpreferred and unreferred offense" and asked questions to determine whether he was "specifically forfeiting and waiving [his] right" to have the charges preferred and referred. ARMY 20180467, 2019 CCA LEXIS 109, *4 (Army Ct. Crim. App. 8 March 2019) (summ. disp). The military judge was similarly proactive in this case as to Specification 1 of The Charge. Both appellant and appellee agree that appellant's forfeiture and waiver of the irregular preferral in Specification 1 should be extended to the entire charge sheet.

[*16] We need not agree with the parties' position to resolve the issue. Objections based on defects in referral (other than jurisdictional defects) must be raised before a plea is entered. *United States v. Shakur*, 77 M.J. 758, 761 (Army Ct. Crim. App. 2018); *see also* R.C.M. 905(b)(1). Appellant did not raise the issue of improper referral of charges at trial. The failure to raise such an objection means the objection is waived. R.C.M. 905(e); *United States v. Corcoran*, 40 M.J. 478, 484 (C.M.A 1994). ("Nonjurisdictional defects in the preferral, forwarding, and referral process are waived if not raised prior to entry of pleas."). Even if we found appellant forfeited the issue, under a plain error analysis, it was not plain error to accept appellant's plea to the dismissed specifications in light of the clear language in the pretrial agreement. Regardless, appellant would not be entitled to any relief because the error did not materially prejudice a substantial right. *Ballan*, 71 M.J. at 32; *United States v. Goings*, 72 M.J. 202 (C.A.A.F. 2013) (citing *United States v. Sweeney*, 20 M.J. 296, 304 (C.A.A.F. 2011). By offering to plead guilty, appellant limited his maximum confinement from 40 years to 12 years.

B. Constructive Decision

Appellant and appellee claim that under the prevailing unitary sentencing scheme, the military judge sentenced appellant for his previously affirmed convictions for child endangerment and assault consummated by a battery. While we agree the military judge may have properly *considered* those affirmed convictions when deciding on an appropriate sentence for the specifications appellant had just pled guilty to, we disagree that appellant was sentenced *for* those offenses. The SJA never recommended, and the CA never ordered a sentence rehearing for the affirmed convictions. "A resentencing hearing is a 'trial' in the sense that it is a 'formal judicial examination of evidence and determination of legal claims in an adversary proceeding.'" *United States v. Stanton*, 80 M.J. 415, 420 (C.A.A.F. 2021) (citing Black's Law Dictionary 1812 (11th ed. 2019) (entry for trial)). Here, other than inclusion in the stipulation of fact where matters in [*17] aggravation are often included and a brief mention of the affirmed offenses in the government counsel's argument, the evidence supporting those convictions was not judicially examined.

Under R.C.M. 705(d)(2), in a pretrial agreement, terms, conditions, and promises between the parties shall be written." R.C.M. 705(d)(2); *Stanton*, 80 M.J. at 419. Yet, the pretrial agreement was silent as to the inclusion of the affirmed convictions. In addition, neither the government counsel, nor military judge included the affirmed convictions in their respective maximum sentence calculations. Despite the appellate history's limitation to a maximum of 40 years confinement, both the government and military judge calculated the maximum sentence to confinement to be 45 years. If the affirmed convictions were included in the calculation, the maximum sentence to confinement would have been 52 years. At most, the government included the affirmed convictions in the stipulation of fact and argued for their use as aggravation evidence under R.C.M. 1001(a)(1)(A)(iii)-(iv). Given the affirmed convictions were properly before the court as aggravation evidence, we assume they were considered in arriving at an appropriate sentence for the offenses adjudicated at the rehearing.

The CAAF remand gave [*18] the CA the option to order a sentence rehearing but did not mandate that a sentence rehearing be conducted. Perhaps inadvertently, the CA did not order a sentence rehearing. Nevertheless, appellant claims, and appellee concurs, that the 12-year cap on the sentence to confinement that appellant bargained for was meant to incorporate all known offenses at the time. This interpretation is consistent with our assumption that the affirmed convictions were considered by the military judge in aggravation, not improperly subject to sentencing specific to those offenses in the absence of an order to conduct a rehearing on sentence for those offenses. As a result, we find that the CA constructively decided not to conduct a sentence rehearing for the affirmed convictions of child endangerment and assault consummated by a battery. Therefore, there is no sentence for us to review or affirm for those convictions.

CONCLUSION

Upon consideration of the entire record, the findings of guilty and sentence are AFFIRMED.[*]

Senior Judge BROOKHART and Judge PENLAND concur.

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[*] We have also given full and fair consideration to the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit.

United States v. Upton

United States Army Court of Criminal Appeals

December 13, 2022, Decided

ARMY 20220044

Reporter
2022 CCA LEXIS 724 *; 2022 WL 17684886

UNITED STATES, Appellee v. Private First Class STEPHEN M. UPTON, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, U.S. Army Medical Research and Development Command and Fort Detrick. Mary Catherine Vergona, Military Judge. Colonel Brian P. Adams, Staff Judge Advocate.

Counsel: For Appellant: Major Bryan A. Osterhage, JA; Captain Carol K. Rim, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Jonathan F. Potter, Esquire; Captain Carol K. Rim, JA (on brief on specified issue).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline J. DeGaine, JA; Major Kalin P. Schlueter, JA; Captain R. Tristan C. De Vega, JA (on brief on specified issue).

Judges: Before FLEMING, DENNEY,[1] and HAYES, Appellate Military Judges. Judge DENNEY and Judge HAYES concur.

Opinion by: FLEMING

Opinion

SUMMARY DISPOSITION

FLEMING, Senior Judge:

Appellant's guilty plea to a specification of possessing child pornography with an intent to distribute and a separate specification of distributing the identical child pornography, at the same locations and dates, was factually inseparable and "facially duplicative," requiring the dismissal of Specification 2 of The Charge. We address the remedy in our decretal paragraph.

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[1] Judge DENNEY decided this case while on active duty.

BACKGROUND

Appellant entered into a plea agreement with the convening authority to [*2] plead guilty to three specifications involving child pornography in exchange for the military judge limiting appellant's sentence to, in relevant part, confinement within a range between twelve and twenty-four months. Subsequently, appellant pleaded guilty to viewing child pornography (Specification 1 of The Charge); possession of child pornography with intent to distribute (Specification 2 of The Charge); and distribution of child pornography (Specification 3 of The Charge) in violation of Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934 [UCMJ].

The military judge sentenced appellant to a bad conduct discharge, confinement for twenty-one months, and reduction to Private E-1. As to the confinement, the military judge's segmented sentence was: six months for Specification 1; six months for Specification 2; and nine months for Specification 3; all sentences were to run consecutively. The convening authority approved the findings and sentence as adjudged.

LAW AND DISCUSSION

Whether appellant has waived an issue is a question of law that this court reviews de novo. *United States v. Givens*, 82 M.J. 211, 215 (C.A.A.F. 2022) (citing *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017)). "[T]he general principle of criminal law [is] that an unconditional plea of guilty waives all nonjurisdictional defects." *United States v. Hardy*, 77 M.J. 438, 442 (C.A.A.F. 2018) (citations omitted). Our superior court, [*3] however, "[t]o be sure, . . . [has] recognized some exceptions to this general principle about the effect of a guilty plea." *Id.* (citing *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F 2004)) (holding a guilty plea does not waive a [constitutional] multiplicity issue when the offenses are 'facially duplicative.'"). "Whether two offenses are facially duplicative is a question of law we review de novo." *Pauling*, 60 M.J. at 94. Offenses are "facially duplicative" if factually the same as "determined by reviewing the language of the specifications and facts apparent on the face of the record." *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000) (citations omitted).

First, we turn to the language of the relevant specifications. Specification 2 (Wrongful Possession with Intent to Distribute Child Pornography) states appellant did:

> [A]t or near Fort Gordon, Georgia, Tiffin, Ohio, and Fort Detrick, Maryland on divers occasions between on or about 7 November 2019 and on or about 11 May 2021 knowingly and wrongfully possess child pornography, to wit: one or more videos and images of minors, or what appears to be minors, engaging in sexually explicit conduct

> with intent to distribute the said child pornography, and that said conduct was of a nature to bring discredit upon the armed forces.

Specification 3 (Wrongful Distribution [*4] of Child Pornography) states appellant did:

> [A]t or near Fort Gordon, Georgia, Tiffin, Ohio, and Fort Detrick, Maryland on divers occasions between on or about 7 November 2019 and on or about 11 May 2021 knowingly and wrongfully distribute child pornography, to wit: one or more videos and images of minors, or what appears to be minors, engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed forces.

As charged, Specifications 2 and 3 are identical, aside from the language "possess with the intent to distribute" and "distribute." The language of both specifications fails to clarify which pornographic child videos or images appellant possessed or distributed. The stipulation of fact and appellant's providence inquiry colloquy with the military judge established, however, that the underlying pornographic child videos and images charged for both specifications were identical.

Most importantly, the stipulation of fact and providence inquiry colloquy established appellant employed a system, a single Dropbox folder, which required his possession of the same underlying pornographic child videos and images that he distributed. Appellant could [*5] not distribute child pornography through his single Dropbox without first possessing the same files of child pornography. No other means were established anywhere in the record by which appellant could have distributed the same child pornographic videos and images without first possessing the same child pornographic videos and images. No varying dates or locations in the stipulation of fact or during providence inquiry were provided to adequately distinguish between any act of possessing or distributing the pornographic child videos or images.

After our close review of the language of the two specifications, the stipulation of fact, and appellant's providence inquiry colloquy with the military judge, we find in this case that the two charged offenses are predicated on the same criminal conduct and factually inseparable. Our realistic comparison of the two specifications established Specification 2, as pleaded and proven, was "facially duplicative" of Specification 3. *See Pauling*, 60 M.J. at 94 (holding two offenses are not "facially duplicative" if each "requires proof of a fact which the other does not" the assessment of which "involves a realistic comparison of the two offenses to determine whether one [*6] is rationally derivative of the other."). Having found the two specifications "facially duplicative" it would be plain error not to dismiss one of them. *Heryford*, 52 M.J. at 266-677; *United States v. Lloyd*, 46 M.J. 19 (C.A.A.F. 1997) (holding constitutionally multiplicitous offenses are reviewed under the doctrine of plain error.)

Despite our determination, the government argues appellant "affirmatively waived" our plain error review of this issue when his counsel stated the defense had no motions in response to the military judge's advisement that any motions to dismiss or for appropriate relief were to be made prior to appellant's plea. Our review of *Hardy*, however, guides our analysis that our superior court has carved out a narrow exception that a guilty plea does not waive "facially duplicitous" specifications. *Hardy*, 77 M.J. at 442 (citing *United States v. Pauling*, 60 M.J. at 94).[2]

Both the government and the defense agree, even if Specification 2 is dismissed, that the plea agreement is still binding upon the parties. We concur. Neither the convening authority nor appellant can withdraw from the plea agreement because the contractual conditions negotiated between them regarding withdrawal have not been triggered by our dismissal of Specification 2. *See United States v. Dean*, 67 M.J. 224, 227 (C.A.A.F 2009) (holding the interpretation of a plea agreement is a question of law [*7] this court reviews de novo).

Faced with a plea agreement dictating the confinement limits for each specification combined with a confinement sentence segmented by the military judge for each specification, we are easily able to reassess the sentence and will do so below. *See United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013).

CONCLUSION

On consideration of the entire record, the finding of guilty as to Specification 2 of The Charge is DISMISSED. The finding of guilty as to Specification 1 and Specification 3 of The Charge and The Charge is AFFIRMED. Only so much of the sentence as includes a bad conduct discharge, confinement for fifteen months, and reduction to the grade of E-1 is AFFIRMED.[3]

Judge DENNEY and Judge HAYES concur.

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[2] Although we find pursuant to *Hardy*, that in this situation a narrow exception to waiver still exists, we also pause to note the third "should be approved" prong of Article 66, UCMJ would also "allow us to, in our discretion, treat a waived or forfeited claim as if it had been preserved at trial." *United States v. Conley*, 78 M.J. 747 (Army Ct. Crim. App. 2019).

[3] Our sentence affirms the military judge's segmented sentence of, to run consecutive, six months confinement for Specification 1, and nine months confinement for Specification 3. We find this sentence "appropriate for the offenses of which [appellant] has been convicted." *See United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986).

United States v. Birdsong

United States Army Court of Criminal Appeals

July 8, 2016, Decided

ARMY 20140887

Reporter
2016 CCA LEXIS 434 *

UNITED STATES, Appellee v. Captain JOHN G. BIRDSONG United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by United States v. Birdsong, 75 M.J. 449, 2016 CAAF LEXIS 771 (C.A.A.F., Sept. 21, 2016)

Review granted by, in part United States v. Birdsong, 75 M.J. 488, 2016 CAAF LEXIS 917 (C.A.A.F., Nov. 21, 2016)

Affirmed by, Without opinion by United States v. Birdsong, 2017 CAAF LEXIS 340 (C.A.A.F., May 3, 2017)

Prior History: [*1] Headquarters, 8th Army. Mark A. Bridges, Military Judge, Colonel Craig A. Meredith, Staff Judge Advocate.

Counsel: For Appellant: Colonel Mary J. Bradley, JA; Major Christopher D. Coleman, JA; Captain Jennifer K. Beerman, JA (on brief).

For Appellee: Colonel Mark H. Sydenham, JA; Lieutenant Colonel A.G. Courie III, JA; Lieutenant Colonel Daniel D. Derner, JA; Captain Vincent S. Scalfani, JA (on brief).

Judges: Before CAMPANELLA, HERRING, and PENLAND, Appellate Military Judges. Judge HERRING and Judge PENLAND concur.

Opinion by: CAMPANELLA

Opinion

SUMMARY DISPOSITION

CAMPANELLA, Senior Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of violating a lawful general regulation and one specification of

sexual assault, in violation of Articles 92 and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920 (2012) [hereinafter UCMJ]. The military judge sentenced appellant to a dismissal and thirty months confinement. Pursuant to a pretrial agreement, the convening authority approved only so much of the sentence as provided for a dismissal and twenty-four months confinement.

This case is before us for review pursuant to Article 66, UCMJ. Appellant raises one assignment of [*2] error, which merits discussion and relief.

BACKGROUND

Appellant attended a New Year's Eve party at the Dragon Hill Lodge, a military-run hotel in Korea, where Captain (CPT) KG, First Lieutenant (1LT) JJ, and Sergeant (SGT) JD were also in attendance. Appellant was a company commander; 1LT JJ worked directly for appellant as his S-3.

Anticipating they were going to drink alcohol that evening, the three female soldiers, CPT KG, 1LT JJ, and SGT JD, arranged to spend the night at the hotel. To avoid military police during curfew, appellant invited himself to spend the night in the suite rented by the three soldiers—who, after an evening of drinking, acquiesced to his wishes. At approximately 0200, the four took leave of the party and went to the rented suite.

Captain KG and SGT JD withdrew to the two beds in the suite leaving appellant and 1LT JJ alone on the couch. Appellant began to massage 1LT JJ's shoulders, but 1LT JJ moved to a chair in the room thereby suspending appellant's massage. A short time later, appellant tried again to massage 1LT JJ's shoulders and again, 1LT JJ moved away. She then told appellant she was going to sleep on the couch and there was not room for two on the couch. [*3] Despite her proclamation, appellant got on the couch with 1LT JJ and laid next to her, which she countenanced. While on the couch, appellant rolled on top of 1LT JJ and began rubbing her arms and breasts. First Lieutenant JJ stated she was going to vomit—resulting in appellant getting off the couch and moving onto the floor to sleep. First Lieutenant JJ rolled away from appellant and fell asleep facing the backside of the couch.[*]

Appellant was charged, *inter alia*, with violating a lawful general regulation, specifically Army Reg. 600-20, Army Command Policy, paras. 4-14(b)(1) and 4-14(b)(5)(18 Mar. 2008) (Rapid Action Revision, 20 Sep. 2012) [hereinafter AR 600-20], by wrongfully engaging in a prohibited relationship with 1LT JJ.

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[*] The Article 120, UCMJ, offense relates to appellant's later sexual act with CPT KG.

Paragraphs 4-14(b)(1) and 4-14(b)(5) of AR 600-20 prohibit *relationships* between soldiers of different ranks if they:

> (1) Compromise, or appear to compromise, the integrity of supervisory authority or the chain of command; [or]
> (5) Create an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission.

(emphasis added). [*4]

The stipulation of fact states appellant violated the foregoing provisions of the regulation by "making sexual advances towards a junior officer within his chain of responsibility." During the providence inquiry, appellant admitted he violated AR 600-20 by making sexual advances towards 1LT JJ, his subordinate.

LAW AND DISCUSSION

This court reviews a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Weeks*, 71 M.J. 44, 46 (C.A.A.F. 2012). "The test for an abuse of discretion is whether the record shows a substantial basis in law or fact for questioning the plea." *United States v. Schell*, 72 M.J. 339, 345 (C.A.A.F. 2013). "It is an abuse of discretion for a military judge to accept a guilty plea without an adequate factual basis to support it." *Weeks*, 71 M.J. at 46.

In this case, appellant asserts his rebuffed sexual gestures towards 1LT JJ do not constitute a "relationship" as envisioned by AR 600-20, and the military judge abused his discretion by accepting appellant's guilty plea to violating this regulation because he failed to elicit a sufficient factual basis to establish a relationship. Appellant argues this court should now set aside and dismiss the finding of guilty to this specification.

The government counsel concedes that the facts elicited in this case do not [*5] support appellant engaged in a prohibited relationship. Government counsel, however, argue appellant's conduct and the providence inquiry support a conviction for the lesser-included offense of attempting to disobey AR 600-20, a violation of Article 80, UCMJ. We agree.

A solicitation to engage in a sexual act does not amount to a relationship as envisioned by AR 600-20 when a verbal advance is rejected. *See United States v. Oramas*, ARMY 20051168, 2007 CCA LEXIS 588, at *6-8 (Army Ct. Crim. App. 29 Mar. 2007) (mem. op.). This court has also found a single incident involving a rejected physical advance including touching and kissing also did not rise to the level of a "relationship" as defined by AR 600-20. *United States v. Morgan*, ARMY 20000928, 2004 CCA LEXIS 423, at *6-8 (Army Ct. Crim. App. 20 Feb. 2004) (mem. op.). It is firmly recognized that the "victim's conduct is relevant to whether or not a prohibited relationship was established." 2004 CCA

LEXIS 423, at *7; *see also United States v. Humpherys*, 57 M.J. 83, 93-95 (C.A.A.F. 2002); *United States v. Moorer*, 15 M.J. 520, 522 (A.C.M.R.) (holding that a supply clerk attempted to violate a lawful general order prohibiting specifically enumerated personal relationships when he asked trainee for a date), *rev'd in part on other grounds*, 16 M.J. 451 (C.M.A. 1983). Further, the "clumsy and ineffective courting techniques and flirtatious behavior, alone, do not constitute a 'relationship' as that term is ordinarily defined." *Oramas*, 2007 CCA LEXIS 588, at *8.

Because [*6] 1LT JJ declined appellant's advances, appellant was unable to actually form a relationship with 1LT JJ prohibited by AR 600-20. The providence inquiry, nonetheless, still establishes appellant's criminal intent and liability. Appellant's testimony during the colloquy made clear he intended to engage in a prohibited relationship with 1LT JJ that evening. But for her actions, appellant would have exploited his position and rank to take advantage of 1LT JJ—a junior soldier on his immediate staff. Appellant's actions went beyond mere preparation and included physical advances. It is clear from the record appellant fully intended to enter into a prohibited relationship as envisioned by AR 600-20.

Accordingly, we affirm the lesser-included offense of an attempt to violate a lawful general regulation under Article 80, UCMJ with respect to the Specification of Charge I. *See United States v. Redlinski*, 58 M.J. 117, 119 (C.A.A.F. 2003); UCMJ art. 59.

CONCLUSION

The court affirms only so much of the finding of guilty of the Specification of Charge 1 as finds that appellant:

> did, at or near USAG-Yongsan, ROK, on or about 1 January 2014, attempt to violate a lawful general regulation, to wit: paragraph 4-14(b)(1) and 4-14(b)(5), Army Regulation 600-20, dated [*7] 18 March 2008, (Rapid Action Revision, dated 20 September 2012) by attempting to wrongfully engage in a prohibited relationship with [1LT JJ], which, if successful, would have compromised the integrity of the supervisory authority and created a clear predictable adverse impact on discipline and authority, in violation of Article 80, UCMJ.

The remaining findings of guilty are AFFIRMED.

We are able to reassess the sentence on the basis of the error noted and do so after conducting a thorough analysis of the totality of circumstances presented by appellant's case and in accordance with the principles articulated by our superior court in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013) and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). In evaluating the *Winckelmann* factors, we first find no dramatic change in the penalty landscape that might cause us pause in reassessing appellant's

sentence. *See Manual for Courts-Martial*, United States (2012 ed.), pt. IV, ¶ 4.e. Additionally, appellant was tried and sentenced by a military judge and the nature of the remaining offenses still captures the gravamen of the original offenses and the circumstances surrounding appellant's conduct. Finally, based on our experience, we are familiar with the remaining offenses, so we may reliably determine [*8] what sentence would have been imposed at trial by the military judge. Based on the entire record and appellant's course of conduct, we are confident the military judge would have imposed a sentence of at least that which was approved.

Reassessing the sentence based on the noted error and the remaining findings of guilty, we AFFIRM the sentence as approved. We find this reassessed sentence is not only purged of any error but is also appropriate. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by our decision, are ordered restored.

Judge HERRING and Judge PENLAND concur.
