IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Staff Sergeant (E-6)
JOEL A. CORRINARD,
United States Army,
Appellant

BRIEF ON BEHALF OF APPELLEE

Docket No. ARMY 20220616

Tried at Fort Hood,[1] Texas, on 23 January, 13 June, and 29 November–2 December 2022, before a general court-martial convened by the Commander, 1st Cavalry Division, 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 23, Fort Hood was officially redesignated to Fort Cavazos.

Panel No 2

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Statement of the Case

On 2 December 2022, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of sexual assault and one specification of abusive sexual contact. (R. at 602; Statement of Trial Results [STR]). The same day, the military judge sentenced appellant to seventy-two months confinement and a dishonorable discharge. (R. at 632; STR).

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[2] The government has reviewed appellant's *Grostefon* matters and 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.

[3] This assignment of error consists only of the headnote and this footnote. The Government agrees the Entry of Judgment should be corrected accordingly.

On 12 January 2023, the convening authority took no action, and on 20 January 2023, the military judge entered judgment. (Action; Judgment). This court docketed appellant's case on 7 June 2023. (Referral and Designation of Counsel).

Statement of Facts

A. Appellant's Sexual Assault of [redacted].

[redacted] met appellant while each were staying separately as guests at the Navy Lodge near Joint Base Pearl Harbor-Hickam, Hawaii. (R. at 160, 164). After initially meeting, [redacted] and appellant exchanged phone numbers in case appellant needed assistance as he was new to the island and [redacted] had been on the island already for several months. (R. at 176). Appellant then proceeded to flirtatiously reach out to [redacted] via text message and ask her if she wanted to get together. (R. at 176–81; Pros. Ex. 10, 11). On the night of the incident, while walking her dogs before going to sleep, [redacted] received a text from appellant asking if she wanted some company. (R. at 182). Appellant subsequently joined [redacted] on her dog walk. (R. at 183). After a brief conversation, [redacted] began walking back to her lodging while Appellant turned and walked with her. (R. at 183). When appellant began walking with [redacted], [redacted] assumed appellant was walking back to his room as she had not invited him to hers, but knew he was staying on the same floor of the same build as she was. (R. at 183).

Appellant followed [redacted] into her lodging area, which consisted of one room, continuing to converse with her. (R. at 184). [redacted] sat on one corner of her bed and appellant sat on the opposite corner. (R. at 184). Appellant eventually started asking [redacted] more personal questions. (R. at 185). Appellant became angry and frustrated when [redacted] did not reciprocate. (R. at 186). Appellant then got up to stand in front of [redacted], pushed her flat onto the bed with [redacted] landing on her back, laid on top of [redacted], and forcefully removed [redacted] athletic shorts and underwear. (R. at 186–87). Appellant then forced [redacted] legs apart, exposing her vagina, and began to penetrate her vagina with his finger while telling [redacted] that he was "going to work [her] out." (R. at 187). [redacted] repeatedly said "no," "I don't want it," and "I don't want this" to appellant throughout the incident. (R. at 188). Appellant pulled [redacted] shirt and sports bra above her chest, damaging her sports bra and exposing her breasts. (R. at 188). Appellant then began to touch, kiss, and lick [redacted] breast. (R. at 188). [redacted] pulled away and appellant began kissing her neck. (R. at 188). Appellant then proceeded to penetrate [redacted] vagina with his penis. (R. at 189). During this time, [redacted] was crying because she was in so much pain. (R. at 189).

Appellant then rolled [redacted] over so that she was now on her stomach and again proceeded to penetrate [redacted] vagina with his penis without her consent.

(R. at 189–90). Eventually, [redacted] was able to push appellant off her by pushing up from her mattress, which caused appellant to fall back away from her with him standing close to the doorframe and wall mirror, with his hands impacting the wall mirror. (R. at 191–92). [redacted] momentum caused her to continue in the direction she had pushed, hitting her head against the wall. (R. at 192). [redacted] then began yelling at appellant that he had hurt her and demanded that he leave. (R. at 192). Though appellant initially responded to this with anger and started to lean toward [redacted] as if he was going to walk towards her, he instead left her room. (R. at 192–93). [redacted] called 911 approximately 10 seconds after appellant left. (R. at 193–94).

[redacted] was one of the first responders to arrive at the scene of the incident in response to [redacted] 911 call. (R. at 272). As [redacted] approached the building where [redacted] was staying, appellant approached [redacted] to learn why she was there. (R. at 273). After walking away, appellant reapproached [redacted] spontaneously saying, "I think I know what's going on. I think I'm involved." (R. at 274). Appellant then described to [redacted] what he claimed to be a consensual encounter he had with [redacted] that included him talking to [redacted], that she had invited him to her room where they became physically intimate, that she eventually then told him to stop, and that appellant did stop. (R. at 274).

Nearly two weeks after the incident, appellant went to the Naval Criminal Investigation Service (NCIS), Southwest Field Office where he filed a complaint against [redacted] claiming that [redacted] had sexually assaulted him. (R. at 475).

B. Appellant's Court-Martial.

At trial, a stipulation of expected testimony was read to the panel identifying that [redacted] formerly of Joint Base Peral Harbor-Hickam Criminal Investigation Division (CID) collected DNA and fingerprints from a hand smudge from the wall mirror in [redacted] room pursuant to the investigation of this incident. (R. at 358–59).

The prosecution called a DNA expert witness who testified to the presence of appellant's DNA inside [redacted] vagina and on her nipples. (R. at 305–11). The prosecution also introduced pictures of [redacted] torn sports bra strap and pictures of bruises she received from the incident. (R. at 298–300). The prosecution also called [redacted] Latent Print Examiner Physical Scientist employed at the U.S. Army Criminal Investigation Laboratory (USACIL), who testified the prints collected from the wall mirror were, in fact, those of [redacted]. (R. at 393).

C. The Trial Testimony of [redacted]

In 2014, appellant was deployed to Afghanistan with [redacted] (R. at 247–52). [redacted] testified at appellant's trial, pursuant to Military Rule of Evidence (Mil. R. Evid.) 413, to several instances where appellant sexually harassed and

sexually assaulted her while they were both in Afghanistan. One night, appellant went to [redacted] single-sex dormitory room, a place prohibited to males, stating that he wanted to talk with her. (R. at 252). When [redacted] said she did not want to talk to appellant, appellant forced his way into her room. (R. at 252). While appellant did this, he also grabbed [redacted] around her waist and aggressively forced her back into her room as well. (R. at 252–53). Appellant refused to leave [redacted] room despite her repeatedly telling appellant to do so. (R. at 253). Instead, appellant began forcibly kissing [redacted] on different portions of her face as she moved her face in an attempt to avoid appellant's unwanted kisses. (R. at 254). This encounter only ended when [redacted] was able to force appellant back into the hallway outside her dormitory and close the door on him. (R. at 254).

The next day, [redacted] went to her workspace and discovered appellant had written her a note and put it on her computer. (R. at 255). Appellant's note described things that he would do to her to make her feel nice, such as combing her hair and putting lotion on her skin, things he had said to her when he forcibly entered her dormitory room against her wishes the previous day. (R. at 255). After [redacted] saw the note, appellant arrived and asked to speak to her about the previous night. (R. at 256). She agreed to speak to appellant, and they went to the computer server room. (R. at 257). Appellant then apologized to [redacted] for the previous night and gave several excuses. (R. at 257). When [redacted] turned to leave,

appellant grabbed her and kissed her on her lips without her consent. (R. at 257–58). [redacted] then yelled at appellant and left the room. (R. at 257).

Additional facts are incorporated below.

Assignment of Error II

WHETHER DEFENSE COUNSEL WERE INEFFECTIVE FOR FAILING TO INVESTIGATE THE ALLEGED VICTIM'S MEDICATION HISTORY.

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012). "Even under de novo review, the standard for judging counsel's representation is a most deferential one." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Law

The Sixth Amendment to the United States Constitution guarantees that an accused shall have the assistance of counsel for his defense in all criminal prosecutions. U.S. Const. amend. VI. In 1984, the Supreme Court set out a two-part test—applicable to trials by courts-martial—to determine whether a counsel's performance fell short of this guarantee. *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Scott*, 24 M.J. 186, 187 (C.M.A. 1987). To prevail on an ineffective assistance of counsel claim, appellant must show: (1) that his counsel's performance was so deficient that he was not "functioning as the 'counsel' guaranteed by the Sixth Amendment;" and (2) the deficient performance prejudiced appellant such that he was deprived of a fair trial—one with an "unreliable result." *Strickland*, 466 U.S. at 687, 691.

An attorney is deficient when his representation falls "below an objective standard of reasonableness." *Id*. at 688. Appellate courts do not measure deficiency based on the success of a trial defense counsel's strategy, but instead "whether counsel made an objectively reasonable choice in strategy" from the available alternatives. *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001). Only when an accused can show his counsel's performance diverged from that of "prevailing professional norms" is he able to overcome this presumption. *Id*.; *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001). This is a "heavy" burden, as military defense counsel are "presumed to have performed in a competent, professional manner." *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004); *United States v. Cronic*, 466 U.S. 648, 658 (1984) ("Moreover, because we presume that the lawyer is competent to provide the guiding hand that the defendant needs . . . the burden rests on the accused to demonstrate a constitutional violation."). Counsel has "wide latitude" in tactical decisions, receiving a high level of deference. *Strickland*, 466 U.S. at 689. Accordingly, appellate courts make "every effort . . . to eliminate the distorting effects of hindsight" and to evaluate the counsel's "conduct from counsel's perspective at the time." *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015) (quoting *Strickland*, 466 U.S. at 689).

In analyzing ineffective-assistance claims under *Strickland*, this court asks three questions:

> 1. Are the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsel's actions in the defense of the case?
>
> 2. If they are true, did the level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers?
>
> 3. If ineffective assistance of counsel is found to exist, 'is . . . there . . . a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt?

United States v. McConnell, 55 M.J. 479, 481 (C.A.A.F. 2001) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)). Regarding prejudice, the third question in the *Polk* test comports with the prejudice standard in *Strickland*. *McConnell*, 55 M.J. at 481.

Argument

First, appellant's argument that defense counsel did not adequately investigate the relevance of [redacted] medical history is purely speculative, and doing so would not have supported defense counsel's theory. Second, even if appellant did meet the first part of the Strickland test, counsel did not perform below the level of prevailing professional norms. Third, there was no reasonable probability the case would have turned out differently if defense counsel had investigated [redacted] medical history.

A. Appellant's theory on appeal conflicts with his theory at trial.

Appellant's allegation of ineffective assistance of counsel due to defense counsel failing to investigate and pursue [redacted] medical history does not have merit. (Appellant's Br. 12–13).

The only evidence introduced at trial that [redacted] may have been acting in an unusual manner was from appellant's testimony. (*See generally* R. at 476-94). However, appellant's description of how he and [redacted] met that evening was contradicted by text messages between the two. (Pros. Ex. 10, 11). Appellant's credibility was further damaged by his own contradictory statements to first responders compared to his in-court testimony as to what had happened inside [redacted] room. [redacted]'s handprints on the wall mirror and the presence of appellant's DNA in her vagina and on her nipples further supported [redacted] testimony and undercut appellant's version. Because of this, there was no need to have an expert explain behavior that was not in need of explanation. Defense counsel's theory at trial was that [redacted] had engaged in consensual sexual activity with appellant and then fabricated the incident for the purpose of protecting her marriage. (R. at 239). Advancement of this theory would not have benefited from scrutinizing [redacted] prescribed medications. Defense counsels' theory of the case was that [redacted] engaged in a consensual sexual activity and then made the allegations against appellant to save her marriage. (R. at 239).

Appellant's theory on appeal, however, is that [redacted] initiated the sexual contact and then began behaving erratically. (Appellant's Br. 13, 14).

Additionally, it is purely speculative for appellant to claim that defense counsel had not adequately investigated [redacted] medical history. Appellant concedes that defense counsel inquired into [redacted] medical history. (Appellant's Br. 13). The most rudimentary online research of the medications listed in the 1-page document appellant relies on in support of this argument on appeal would have revealed the potential side effects of each medication. However, relying on these side effects would not have aided appellant at trial as pursuing this would no.t have supported defense's strategy.

Appellant relies on an affidavit of a psychiatrist regarding the potential side effects of some of the medications [redacted] was prescribed. (*See* proposed Appellant's Motion to Attach). However, all information relayed is highly speculative, as acknowledged by the affiant. (*See* proposed Appellant's Motion to Attach, Appendix A at paragraph 5, limitations). The affiant acknowledges significant limitations, primarily that it "lacked an independent medical examination of [redacted], did not include a comprehensive medical history of [redacted], and lacked [redacted] diagnosis and treatment indications for each prescribed medication." (*See* proposed Appellant's Motion to Attach, Appendix A at paragraph 5, limitations). Additionally, "individual responses to medications . . .

may be idiosyncratic and may include unanticipated adverse effects or the absence of such." (*See* proposed Appellant's Motion to Attach, Appendix A at paragraph 5, limitations). Further, speaking to [redacted] cognitive state would be purely theoretical as "genetic, physiological, and psychological differences can markedly influence the extent of cognitive effects experienced." The affiant's opinion is further significantly limited by not even knowing if [redacted] was adhering to any or all of her prescription regime. (*See* proposed Appellant's Motion to Attach, Appendix A at paragraph 5, limitations). Finally, the affiant is unaware of any possible interactions between medications [redacted] may have been on. (*See* proposed Appellant's Motion to Attach, Appendix A at paragraph 5, limitations). The affiant acknowledges:

> Absent a baseline cognitive function assessment and follow-up examination, it is impossible to determine whether any hypothetical cognitive changes could be attributable to medications, underlying health conditions, or external factors. The possibility of undiagnosed conditions with intrinsic cognitive functional implications cannot be ignored.
>
> Non-pharmacological factors such as stress, environment, lifestyle, and diet significantly influence cognitive function but are not reflected in a medication list.
>
> The medication list provided shows only prescriptions within military pharmacy records; additional prescriptions may exist from other healthcare providers, which could exacerbate, mitigate, or independently cause drug-drug interactions or cognitive effects on the individual beyond the scope of our present review.

> In total, *significant data limitations prevent a definitive opinion as to whether prescribed medications reviewed led to the array of possible effects on the individual's cognitions and behaviors*.

(*See* proposed Appellant's Motion to Attach, Appendix A at paragraph 5, limitations). (emphasis added).

Obtaining access to this level of information about [redacted] would have been near impossible, involving an extensive examination of [redacted] entire relevant medical history beyond military medical records to include any records relevant to any civilian providers and likely privileged communications with any psychiatric provider [redacted] may have had. To fully explore the cognitive effects any such prescription cocktail could have had on [redacted] would have required her to voluntarily submit to additional medical evaluation—a request not likely to have been accepted. To receive access to this level of private and privileged information would have been all but impossible. Without this unobtainable level of access and analysis, pursuing a strategy focusing on [redacted] medical history would most likely have been fruitless. *See United States v. Jameson*, 65 M.J. 160, 163–64 (C.A.A.F. 2007) ("[W]hen a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion . . . an appellant must show that there is a reasonable probability that such a motion would have been meritorious.") (quoting *United States v. McConnell*, 56 M.J. 479, 482 (C.A.A.F. 2001) (motion to suppress evidence).

B. Defense counsel competently advanced their theory at trial and diligently attacked the government's case.

Assuming, arguendo, that an expert speaking to [redacted] medical history could have cast any doubt on [redacted] testimony, counsel's performance was not such a departure from professional norms that she was deficient in her duty. Counsel make a myriad of decisions in every trial, the most important of which is what story to tell in the most impactful manner. It is clear from the record that defense counsels' main avenue of attack was to cast doubt on [redacted] version of the incident and her motivation for reporting. Defense counsel got [redacted] to admit that she had confided in a friend that she was having issues with her marriage at the time of the assault. (R. at 239). Defense counsel elicited from [redacted] that he had interviewed individuals lodging near [redacted] room and none heard screaming or yelling at the time of the incident. (R. at 369). Defense counsel secured a stipulation of expected testimony that appellant had alleged [redacted] had sexually assaulted him prior to trial, consistent with appellant's testimony at trial (R. at 474, Pros. Ex. 32), and further extracted testimony from [redacted] regarding appellant's prior consistent allegation of sexual assault by [redacted], over objection by the government. (R. at 535). Defense called the Sexual Assault Nurse Examiner (SANE) who received appellant's allegation to testify that appellant had injuries to his arm, the presence of which tended to support appellant's version of events. (R. at 522). Counsel effectively cross-examined the

government's fingerprint expert to show his inability to date [redacted] fingerprints on her wall mirror. (R. at 407–08). Finally, defense counsel persuasively argued the amount of DNA obtained from [redacted] vagina was relatively small and could be seen as more consistent with a brief insertion, appellant's version, rather than a long vigorous insertion, as alleged by [redacted]. (R. at 580).

To attempt to also promote a theory that [redacted] medication had somehow contributed to a false allegation would have been entirely too speculative, ambiguous, and likely cost defense counsel credibility before the fact finder by advancing multiple competing theories. It is objectively reasonable for a defense counsel to focus on a main point and not bog down an already lengthy examination with details of lesser importance, such as the possibility that some medications [redacted] might have been taking may have impacted [redacted] cognitively, and any effects may have contributed to a false allegation.

C. Even if defense counsel's performance was deficient, there was no prejudice.

Even assuming deficient performance, there was no prejudice. Appellant falls short of showing prejudice from a failure to investigate and introduce corroborating evidence of appellant's testimony. Therefore, this court should not grant appellant any relief. *See United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) (noting "[i]f it is easier to dispose of an ineffectiveness claim on the ground

of lack of sufficient prejudice [then] that course should be followed."); *see also Strickland*, 466 U.S. at 695 (prejudice requires consideration of "the totality of the evidence before the judge or jury."). [redacted] gave lengthy, detailed testimony through direct, cross, and redirect examination. (*See generally* R. at 158–200, 206–246). The government introduced evidence that corroborated [redacted] allegations and contradicted appellant's account, including an immediate outcry from [redacted] consisting of her calling 911 approximately 10 seconds after appellant left [redacted] lodging and a recording of that call (R. at 194, 205); expert testimony regarding appellant's DNA in [redacted] vagina, under her fingernails, and on her nipples (R. at 438, 439–40, 443); expert testimony of [redacted] DNA and handprint on the wall mirror where she impacted it after pushing appellant off her (R. at 403, 441); pictures of [redacted] sports bra with the strap appellant damaged when he forcefully exposed [redacted] breasts (R. at 298; Pros Ex. 31); testimony by a SANE who described red markings along [redacted] back, tenderness, and bruising associated with when appellant forcefully removed [redacted] sports bra (R. at 295; Pros. Ex. 12); and compelling testimony from [redacted] regarding appellant's predatory predisposition, as described by his sexually harassing and assaulting her in 2014 (R. at 247–59).

In contrast, appellant's own statements to first responders shortly after they arrived at the scene of the sexual assault evidence contradicted his testimonial

version of events. (R. at 274). Factual impracticalities revealed through cross-examination of appellant undercut his claims that [redacted] took off her own shorts from the sitting position and that [redacted] somehow took off appellant's shirt while he was standing and she was sitting (R. at 506-09). The factfinder was able to observe the testimony of both [redacted] and appellant and evaluate the credibility of each; in light of the extensive evidence against appellant, the panel clearly determined [redacted] to be credible, and appellant to not be, beyond a reasonable doubt.

What the government's evidence showed, compellingly, was a non-consensual sexual encounter between appellant and [redacted]. Accordingly, appellant has failed to demonstrate a reasonable probability that, absent the alleged error, there would have been a different result.[4] *See United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011); *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991) (citations omitted).

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[4] Affidavits are not necessary in this case. Even if an appellant's claims are supported by an affidavit, a corresponding affidavit from defense counsel is not necessary unless "the allegations and the record contain evidence which, if unrebutted, would overcome the presumption of competence." *United States v. Melson*, 66 M.J. 346, 350 (C.A.A.F. 2008). Here, appellant did not set forth any facts in his brief that, when reviewing the record and the government's response, "would overcome the presumption of competence." *Id*. Consequently, this "court may decide the issue on the basis of the appellate file and record." *Id*. If, however, this Court requires additional facts, the government shall obtain any affidavits, in accordance with *Melson*, as this court may deem necessary.

Assignment of Error III

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION IN ADMITTING MIL. R. EVID. 413 EVIDENCE.

Standard of Review

This court reviews a military judge's decision to admit evidence under Mil. R. Evid. 413 for an abuse of discretion. *United States v. White*, No. ARMY 20190194, 2021 CCA LEXIS 97, at *1 (Army Ct. Crim. App. 26 Feb. 2021) (citing *United States v. Solomon*, 72 M.J. at 179 (C.A.A.F. 2013)(additional citation omitted)). Moreover, when a military judge articulates a properly conducted Mil. R. Evid. 403 balancing test on the record, the "decision will not be overturned absent a clear abuse of discretion." *Solomon*, 72 M.J. at 180 (citing *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). The abuse of discretion standard is deferential, predicating reversal on more than a mere difference of opinion. *See United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015); *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) (citation omitted) ("[T]he abuse of discretion standard of review recognizes that a judge has a wide range of choices and will not be reversed so long as the decision remains within that range.").

Even if this court finds that the military judge erred, appellant is not entitled to relief "unless the error materially prejudices [his] substantial rights." Article 59(a), UCMJ; 10 U.S.C. § 859(a). Thus, "[e]rror not amounting to a constitutional violation will be harmless if the factfinder was not influenced by it, or if the error had only a slight effect on the resolution of the issues of the case." *United States v. Muirhead*, 51 M.J. 94, 97 (C.A.A.F. 1999) (citation omitted). In determining the prejudice from an erroneous admission of evidence, the court weighs: "(1) the strength of the government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (citing *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

Additional Facts Relevant to Assignment of Error

On or about 10–11 July 2014, while deployed to Afghanistan, appellant went to [redacted] living quarters, which were coed barracks with females on one side and males on the other. (R. at 251). Males and females were not allowed to go into a room of the opposite sex. (R. at 250). Appellant told [redacted] that he wanted to go into her room, to which [redacted] responded that she was not going to allow him in. (R. at 252). In response to [redacted] telling appellant "no," appellant stepped into her room and simultaneously grabbed [redacted] by the wrist and aggressively pushed her into her room. (R. at 252–53). Despite [redacted] repeatedly telling appellant to leave her room,

appellant refused and instead grabbed [redacted] and began repeatedly trying to kiss her. (R. at 253). [redacted] responded to this by repeatedly stating, "No, you've got to leave." (R. at 253). Appellant replied with, "You should let me stay," and "I can make you feel good." (R. at 253). [redacted] eventually was able to force appellant out of her room and closed the door on him. (R. at 254).

The next day, [redacted] arrived to her workspace to find a handwritten note from appellant on her desk. (R. at 255). The note indicated how [redacted] missed out on him making her feel good and included pictures of a comb, blue magic hair grease, and other items meant to imply pampering. (R. at 255). As [redacted] went to shred the note, appellant arrived to the same work location and asked to speak to [redacted] privately. (R. at 256). [redacted] agreed because she did not want to discuss what happened the previous night in front of her work colleagues. (R. at 256). [redacted] told multiple people where she was going as the two walked to the computer server room nearby. (R. at 256). Once they arrived in the server room, appellant began apologizing for what occurred the previous night. (R. at 257). [redacted] did not accept his apology nor the excuses he made for his behavior. (R. at 257). As [redacted] turned to leave, appellant grabbed [redacted] and kissed her on her lips without her consent. (R. at 257–58). In response, [redacted] said, "dude, are you serious?" and left the server room. (R. at 258).

Within several days, [redacted] reported the misconduct and U.S. Army CID opened an investigation. (App. Ex. V-C). The investigation determined that the allegation of unwanted kissing against appellant were supported by probable cause. (App. Ex. V-C).

On 12 May 2022, the government provided appellant with notice pursuant to Mil. R. Evid. 413 of its intent to introduce evidence during its case-in-chief, specifically the testimony of [redacted] that appellant had violated Article 120, Uniform Code of Military Justice on or about 10 July 2014 and 11 July 2014. (App. Ex. VIII). On 17 May 2022, appellant filed a motion to exclude this evidence. (App. Ex. IV). On 24 May 2022, the government filed a response to appellant's motion. (App. Ex. V). On 13 June 2022, the military judge conducted an Article 39(a), UCMJ hearing and heard from counsel on the motion. (R. at 11). On 6 July 2022, the military judge ruled to exclude the evidence, focusing on appellant's statement. (App. Ex. XII). On 8 November 2024, the military judge reconsidered and reversed her decision, allowing the evidence to be presented to the factfinder. (App. Ex. XIV).

Law

Military Rule of Evidence 413(a) provides that "[i]n a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be

considered for its bearing on any matter to which it is relevant." *Solomon*, 72 M.J. at 179 . "This court has noted that inherent in [Mil. R. Evid.] 413 is a general presumption in favor of admission." *United States v. Berry*, 61 M.J. at 94–95 (C.A.A.F. 2005).

There are three threshold requirements for admitting evidence of similar offenses in sexual assault cases under Mil. R. Evid. 413: (1) the accused must be charged with an offense of sexual assault; (2) the proffered evidence must be evidence of the accused's commission of another offense of sexual assault; and (3) the evidence must be relevant under Mil. R. Evid. 401 and 402. Id. at 95; *United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2000). For (2), the court must conclude that the members could find, by a preponderance of the evidence, that the offenses occurred. *Wright*, 53 M.J. at 483 (citing *Huddleston v. United States*, 485 U.S. 681, 689–90 (1988)).

Once these three findings are made, the military judge is constitutionally required to also apply a balancing test under Mil. R. Evid. 403. *Solomon*, 72 M.J. at 179–80 (citing *Berry*, 61 M.J. at 95). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Mil. R. Evid. 403. In the Mil. R. Evid. 413 context, "[t]he Rule 403 balancing test

should be applied in light of the strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible[.]" *Wright*, 53 M.J. at 482 (citation and internal quotation marks omitted). Accordingly, in conducting the balancing test, the military judge should consider the following non-exhaustive factors to determine whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice: strength of proof of the prior act (i.e., conviction versus gossip); probative weight of the evidence; potential for less prejudicial evidence; distraction of the factfinder; time needed for proof of the prior conduct; temporal proximity; frequency of the acts; presence or lack of intervening circumstances; and the relationship between the parties. *Id.* When a military judge articulates his properly conducted Mil. R. Evid. 403 balancing test on the record, the decision will not be overturned absent a clear abuse of discretion. *Manns*, 54 M.J. at 166.

Argument

A. Military judge's Mil. R. Evid. 413 findings in support of ruling.

The military judge did not abuse her discretion when she reversed her earlier ruling and admitted the Mil. R. Evid. 413 evidence. In her ruling dated 8 November 2022, the military judge correctly found "[t]he Government charged the Accused with penetrating [redacted] vulva with his penis and finger without her

consent and touching and licking [redacted] breast without her consent, all in violation of Article 120 of the UCMJ." (App. Ex. XIV).

Next, the military judge found "the uncharged conduct the Government seeks to introduce at trial under [Mil. R. Evid.] 413 involves the accused allegedly going to [redacted] room late at night on or about 11 July 2014 while deployed in Afghanistan where he pushed his way into her room and twice attempted to kiss her lips without her consent." (App. Ex. XIV). The military judge correctly found that based on the evidence provided in support of the government's response to the defense' motion, the factfinder could reasonably find that the accused committed a sexual offense as defined by Mil. R. Evid. 413. (App. Ex. XIV). And while the military judge does not state clearly here the burden by which the factfinder could make such a finding, she clearly defined the burden as a preponderance of the evidence earlier in the same ruling under the section titled "Law and Analysis." (App. Ex. XIV).

Last, the military judge found that relevant evidence need only have a tendency to make a fact of consequence more or less probable than it would be without the evidence. (App. Ex. XIV). And because of this relatively low burden to find that evidence is relevant, that the Mil. R. Evid. 413 evidence proffered by the government was relevant. (App. Ex. XIV). The military judge did not abuse

her discretion in making these findings as they are fully supported by the record and there is a lack of any evidence that calls these findings into question.

B. Mil. R. Evid. 403 Balancing Test.

Where evidence passes the Mil. R. Evid. 413 criteria, it must then pass a Mil. R. Evid. 403 balancing test to determine whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice. *Solomon*, 72 M.J. at 177.

1. Strength of the Proof

The first factor, the strength of the proof, i.e., conviction versus gossip, weighs in favor of the government. Here, the evidence supporting what [redacted] would testify to was collected pursuant to a thorough CID investigation that occurred close in time to the misconduct and included her original handwritten statement with a subsequent typed statement which were largely consistent with each other. The evidence also included an admission from appellant that he had kissed her on the cheek in the server room in a manner that did not appear to be with her consent, though he claimed it to have been in a "brotherly manner." [redacted] statement explained in detail the allegations with sufficient facts so that a finder of fact could determine it occurred by a preponderance of the evidence.

The military judge correctly found the strength of the proofs to be high due to it being specific and detailed with no apparent motive to lie being identified.

(App. Ex. XIV). Appellant argues the military judge failed to weigh the lack of a finding of probable cause for appellant kissing [redacted] on the lips without her consent. (Appellant's Br. 20). This argument is unpersuasive as this determination or the lack of it is merely a conclusion by another regarding the same evidence the military judge relied on. Because the military judge had the same evidence on which to make this determination, any other conclusions reached regarding this same evidence are irrelevant.

2. Probative Weight of the Evidence

The military judge concluded the probative weight of the evidence was average as the evidence tended to show appellant pushed his way into [redacted] room, the circumstances surrounding the offense were much less violent. (App. Ex. XIV). The evidence in the instant case demonstrated the appellant entering and remaining in places he was not welcome, attempting to kiss [redacted] without her consent, and then only leaving when his victim aggressively forced him to leave. While [redacted] caused appellant to leave her room by yelling at him to leave and [redacted] caused him to leave by pushing him out the door, both instances involve appellant not leaving of his own accord but because of his victims' efforts. Additionally, the evidence of the instant offense and the offense involve [redacted] both involve unwanted kissing and attempted kissing. That the instant offense is more violent degrades the probative value of the evidence only slightly simply because

appellant engaged in more egregious misconduct in addition to the unwanted kissing, not instead of an unwanted kissing. The military judge correctly found this. Therefore, this factor weighs in favor of the government and the evidence being admissible.

3. Potential for Less Prejudicial Evidence

The military judge correctly found neither side introduced less prejudicial evidence and, based on a review of the record, there was not likely any to exist. As a result, [redacted] testimony would be the only way for evidence of this misconduct to be presented. If the evidence was limited to initial statements, as argued for by appellant (Appellant's Br. 21), he would have been deprived of any opportunity for a meaningful cross-examination. Similarly, if the military judge limited the evidence to the investigative findings, as argued in the alternative by appellant (Appellant's Br. 21), then there would have been confusion for the factfinder due to a lack of context. Therefore, this factor weighs heavily in favor of the government.

4. Distraction of the Factfinder

The military judge correctly determined the evidence of appellant's misconduct against [redacted] would not distract the factfinder and that all necessary instructions and tailored examination would occur. An instruction was provided (R. at 557). If more was required, defense counsel could have requested the

military judge to have given a more specific instruction given or more tailor the examination. No such action was taken nor was it needed. The military judge also correctly found the evidence relating to [redacted] was limited to two instances and that [redacted] was capable of clearly testify to both. To the extent that testimony strayed too far, defense counsel was present to be able to object and limit it as her defense strategy dictated. *Solomon* does not stand for the proposition that an examination must be narrowly tailored or that detailed limiting instructions be given, only that where the evidence risks distracting the factfinder that the military judge make sufficient efforts to prevent this.

5. Time Needed for Proof of the Prior Conduct

Appellant does not comment on the amount of time needed for proof of the prior conduct, but this factor also weighs in favor of the government. The military judge found the time needed to prove the uncharged misconduct was minimal as only two witnesses were needed to testify. (App. Ex. XVI). As such, the risk of a minitrial was practically non-existent. This factor weighs in favor of the government and demonstrates the military judge did not abuse her discretion.

6. Temporal Proximity

The military judge first found that Mil. R. Evid. 413 does not set a time limitation for past sexual offense evidence, that the prior alleged conduct occurred six years prior to the offense at issue, and that the length of time between the two

instances of misconduct was a neutral factor. While the military judge also incorrectly found that [redacted] and appellant were co-workers, she later acknowledged that this finding was not correct. (R. at 29). However, the military judge stood by her other findings regarding temporal proximity due to the fact appellant and [redacted] knew each other prior to the alleged incident. (R. at 29). Because the two incidents were separated in space and time to the degree they were, the military judge correctly found this factor to be neutral.

7. Frequency of the Acts

The military judge found that the frequency of the uncharged misconduct occurred on multiple occasions within a short period of time and that this appears similar to the incident at issue in the present case. (App. Ex. XIV). Appellant argues this finding is not supported by the record and relies on appellant's sexual assault on [redacted] was the only sexual encounter between the two. (Appellant's Br. 24). The military judge's findings are correct as the record clearly demonstrates the multiple unwanted sexual contacts appellant inflicted on his victims as well as that appellant's advances on each only ended after they reported his misconduct. In the case of [redacted] appellant repeatedly kissed [redacted] on her cheeks approximately less than 12 hours after the prior incident where he made unwanted sexual contact on [redacted] These incidents of misconduct only stopped occurring after [redacted] reported the misconduct to a military member seemingly minutes after

returning to her desk after the second assault. (App. Ex. V-B). In the case of [redacted], she reported the incident a mere ten seconds after she was able to get appellant out of her room after being sexually assault. (R. at 194). In this way, the frequency of the incidents are almost identical and weigh heavily in favor of the government.

8. Presence or Lack of Intervening Circumstances

The military judge found there were no intervening circumstances between these offenses. (App. Ex. XIV). While this factor weighs in favor of appellant, this finding demonstrates the military judge satisfied the requirements of *Solomon* by making findings on each of the named non-exhaustive factors.

9. The Relationship Between the Parties

The military judge originally found that both [redacted] and [redacted] knew and worked with appellant. (App. Ex. XIV). The military judge subsequently corrected this finding and concluded [redacted] and [redacted] both knew the appellant prior to each incident of misconduct. (R. at 29). Appellant contends that since most Article 120 offenses involve individuals who know each other prior to the misconduct, this should mean this factor is weak. (Appellant's Br. 24). This argument is not persuasive, in part because appellant fails to cite any authority in support of this assertion. Additionally, there are varying degrees to which people may know each other prior to an incident, including as casual acquaintances, close

or distant family members, or lifelong friends. Because both [redacted] and [redacted] knew appellant through similar interactions, it demonstrates a clear similarity between the incidents of misconduct. Therefore, the military judge correctly concluded this factor weighed in favor of admission and did not abuse her discretion.

The military judge articulated a properly conducted M.R.E. 403 balancing test on the record and so the decision must not be overturned absent a *clear* abuse of discretion, which cannot be demonstrated. *Solomon*, 72 M.J. at 180.

C. Even if the military judge abused her discretion, appellant was not prejudiced by the Mil. R. Evid. 413 evidence.

Assuming, arguendo, the military judge abused her discretion, the appellant was not prejudiced. In determining the prejudice from an erroneous admission of evidence, the court weighs: "(1) the strength of the government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Kohlbek*, 78 M.J. at 334 (citing *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

1. The Strength of the Government's Case

As discussed *supra*, pp. 19-21, the government had an incredibly strong case, to include an immediate outcry from a highly credible victim who gave a very detailed account of what happened both during the initial investigation as well as on the stand. In addition, the government introduced the text messages between

appellant and [redacted] which supported [redacted] version and contradicted appellant's. The government also introduced testimony of appellant's own words shortly after [redacted] outcry to first responders where he describes a contradictory version of what happened than what he later claims occurred, both in an interview with CID as well as during his testimony at trial.

2. The Strength of the Defense Case

In contrast, and as discussed *supra* pp. 21, the strength of appellant's case at trial was very weak. Appellant's testimony was undercut by his own statements to first responders, factual impracticalities were revealed through cross examination of appellant, and appellant failed to mention pivotal portions of what he testified to when he described the incident to first responders immediately after the event and to a SANE nurse two days after the incident. The fact finder was able to observe the testimony of both [redacted] and appellant and evaluate the credibility of each in light of this extensive evidence. Having this opportunity, the factfinder correctly believed [redacted] and not appellant.

3. The Materiality of the Evidence in Question

The court should also find the materiality of the evidence to be limited. Were the fact finder to have not heard testimony from [redacted] the factfinder would still have seen and heard all the other evidence the government presented regarding appellant's assault of [redacted]. In light of the overwhelming strength of the

government's case, suppressing [redacted] testimony would not have had a substantial impact on the outcome of this case.

4. The Quality of the Evidence in Question

Finally, the court must consider the quality of the evidence in question. The evidence was the testimony of a single witness. Though there was some passage of time between the misconduct committed against [redacted] and trial, she testified fully and convincingly, claiming any issues regarding memory, and appellant was able to cross-examine her consistent with defense counsel's trial strategy.

After considering the factors outlined in *Kohlbeck*, evening assuming arguendo the military judge abused her discretion in admitting the M.R.E. 413 evidence, appellant has failed to demonstrate any impact on the fact finder. Accordingly, the military judge did not abuse her discretion to allow the Mil. R. Evid. 413 testimony, or even if she did, appellant was not prejudiced by her ruling.

Conclusion

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

[redacted]
[redacted] JA
Branch Chief, Government
Appellate Division

[redacted]
[redacted] JA
Branch Chief, Government
Appellate Division

[redacted]
[redacted]
[redacted] JA
Chief, Government
Appellate Division

CERTIFICATE OF SERVICE U.S. v. CORRINARD (20220616)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at ***usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@army.mil*** on this 3rd day of June, 2024.

[redacted]
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