IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Specialist (E-4) **ROY A. WORDLAW,** United States Army, Appellant	**BRIEF ON BEHALF OF APPELLEE** Docket No. ARMY 20230235 Tried at Fort Wheeler Army Airfield, Hawaii, on 1 December 2022, 24 February 2023, and 24–27 April 2023, before a general court-martial convened by Commander, 25th Infantry Division, Lieutenant Colonel Michael Korte, Military Judge, presiding.

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

Assignment of Error I[1]

[WHETHER] DEFENSE COUNSEL WERE INEFFECTIVE FOR NOT INTRODUCING EXTENSIVE EVIDENCE OF PRIOR CONSENSUAL SEXUAL ACTIVITY[.]

Assignment of Error II

[WHETHER] DEFENSE COUNSEL WERE INEFFECTIVE FOR FAILING TO OBTAIN EXPERT ASSISTANCE[.]

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

Assignment of Error III

[WHETHER] THE GOVERNMENT ENGAGED IN PROSECUTORIAL MISCONDUCT BY MISLEADING THE COURT AND BY CONDUCTING AN IMPROPER CLOSING ARGUMENT[.]

Assignment of Error IV

[WHETHER] THE MILITARY JUDGE ABUSED HIS DISCRETION IN ALLOWING EVIDENCE PURSUANT TO MILITARY RULE OF EVIDENCE 404(B)[.]

Assignment of Error V

[WHETHER THERE WAS POST-TRIAL DELAY AND, IF SO, WHETHER] THE DELAYED POST-TRIAL PROCESSING OF THIS CASE MERITS RELIEF WHERE THE CASE WAS NOT REFERRED TO THIS COURT UNTIL 251 DAYS AFTER SENTENCING[.]

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Statement of the Case

On 27 April 2023, a panel consisting of officer and enlisted members, sitting as a general court-martial, convicted appellant, contrary to his pleas, of two specifications of sexual assault,[2] and one specification of assault consummated by battery in violation of Articles 120 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 928 (2019) [UCMJ]. (R. at 632; Statement of Trial Results [STR]). On 27 April 2023, the military judge sentenced appellant to a dishonorable discharge and confinement for ten years.[3] (R. at 672; STR). On 1 June 2023, the convening authority took no action on the findings or sentence. (Action). On 2 June 2023, the military judge entered judgment. (Judgment).

Statement of Facts

Appellant and Ms. [redacted] were in an intimate relationship for approximately six months before appellant sexually assaulted Ms. [redacted] on 18 July 2020. (R. at 241–42, 262). Ms. [redacted] and appellant met on Tinder while Ms. [redacted] was going through a divorce from her husband with whom she had a child. (R. at 241, 331).

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[2] Appellant was acquitted of one of the three specifications of sexual assault (Specification 1 of Charge I). (R. at 632).

[3] Appellant was specifically sentenced as follows: "To forfeit all pay and allowances; To be confined as follows, with all sentences to confinement to be served concurrently with each other: For Specification 2 of Charge I, Sexual Assault: 3 years; For Specification 3 of Charge I, Sexual Assault: 10 years; For The Specification of Charge II, Assault Consummated by Battery: 6 months; and To be dishonorably discharged from the service." (R. at 672).

Ms. [redacted] and appellant started a dating relationship in January 2020. (R. at 241–24, 321). They spent a lot of time together and went on a couple of trips to Waikiki as well. (R. at 262). Ms. [redacted] described the relationship as "very unhealthy." (R. at 242). She described appellant as controlling and manipulative. (R. at 264–65). Despite this unhealthy relationship, Ms. [redacted] loved appellant and wanted a serious relationship with him. [4] (R. at 242, 262).

1. Threats and "sexting."

In early July 2020, appellant went to a field exercise and was gone for approximately two weeks. (R. at 242–43). Prior to leaving for the exercise, appellant told Ms. [redacted] that if she "decided to have a sexual relationship with somebody else, [appellant was] going to kill the both of [them]."[5] (R. at 243). Ms. [redacted] continued her tumultuous relationship with appellant while he was away on his field exercise. (R. at 243). Specifically, on 17 July 2020, the day before the sexual assault, Ms. [redacted] and appellant discussed their plan to have sex when appellant returned from the field. (R. at 244; Pros. Ex. 1 and 2).

[4] Trial defense counsel's theory of the case was that Ms. [redacted]'s strong desire to be in a relationship with appellant was the motive for her false allegation. (R. at 216). The prosecution's theory was that appellant used Ms. [redacted]'s emotions to manipulate and control her, ultimately culminating in the sexual assault on 18 July 2020. (R. at 48–49, 585–86).

[5] This statement was the basis of the Military Rules of Evidence [MRE] 404(b) motion and hearing. (R. at 13–48).

In those messages, both parties expressed their clear desire to have sex with one another upon appellant's return on 18 July 2020. (Pros. Ex. 1 and 2). However, Ms. [redacted] was adamant that she did not want to have anal sex in the car—"Easy babe [laughing emoji] I'm down with [f***ing] hard but easy on the ass lol[.]" (Pros. Ex. 1, p. 1). Ms. [redacted] expressly told appellant five separate times in these messages that she did not want to engage in anal sex in the car. (Pros. Ex. 2, p. 2, 3, 4, 5) (E.g., "Omg babe. You know no ass in the car."). Despite Ms. [redacted]'s repeated denials to engage in anal sex in the car or on the beach, appellant persisted by demanding anal sex, threatening to end the relationship, and accusing Ms. [redacted] of being unfaithful. (Pros. Ex. 2, p. 2, 3, 4, 5) (E.g., "[F****] that. I'm putting it in your ass in the car. End of discussion."). Ms. [redacted] ultimately relented stating—"I'm not even trying to fight[.] Well do but I'll lead it as last time[.]" and "Stop. You have all of me. Now stop[.]" (Pros. Ex. 2, p. 7).

2. The party and the physical assault.

The following day, on 18 July 2020, Ms. [redacted] went to a birthday party at her friend's house Staff Sergeant [SSG] AA. (R. at 223). Ms. [redacted] did not tell appellant she was going to the party because appellant was "controlling" and "would never let [her] go." (R. at 250, 265). At the party, Ms. [redacted] drank too much alcohol, felt unwell, and vomited. (R. at 224–25). Staff Sergeant AA, after finding Ms. [redacted] in this state, called appellant to come and get her. (R. at 225).

Staff Sergeant AA assumed appellant was taking Ms. [redacted] home based on the fact that she was vomiting and not feeling well. (R. at 226–27).

Appellant got a ride to SSG AA's home in order to use Ms. [redacted]'s car to drive her home, but he did not drive her home. (R. at 252). Instead, appellant drove Ms. [redacted]'s car to Dillingham Beach—a spot they frequently went to together. (R. at 274). Ms. [redacted] did not remember the drive over to the beach. (R. at 252). The next thing she remembered was being parked at the beach, crying with her hands in front of her face, and appellant repeatedly hitting her in her face while calling her "slut and whore." (R. at 252).

3. The sexual assault.

Ms. [redacted] then recalls being in the back seat with appellant, where she was laying on her back when appellant penetrated her vulva and removed her contraceptive (a NuvaRing). (R. at 253). Ms. [redacted] was still crying and covering her face with her hands while this was occurring. (R. at 254). Appellant then proceeded to penetrate Ms. [redacted]'s vulva with his penis. (R. at 254). Ms. [redacted] did not want or consent to this act in this moment. (R. at 254–55). Appellant then penetrated Ms. [redacted]'s anus with his penis while her stomach and hips were pressed against the floor. (R. at 255). Ms. [redacted] felt pain in her anus and on her hip where it was being pressed into the floor. (R. at 255). While this was occurring, Ms. [redacted]

was crying, telling appellant, "It hurts," and told him it was "very wrong." (R. at 256).

4. Appellant discards Ms. [redacted] at his barracks.

The next thing Ms. [redacted] remembered was being at the Schofield Gate. (R. at 256). Ms. [redacted] was surprised because she thought appellant was going to take her home. (R. at 256). However, instead of dropping Ms. [redacted] off at her home, he instead drove himself to his barracks and left her alone in her vehicle. (R. at 256). At this point, Ms. [redacted] realized her phone was missing. (R. at 257). Ms. [redacted] felt confused and shocked. (R. at 257). Ms. [redacted], presumably still intoxicated, had to drive herself home. (R. at 257). When she arrived home, she went on her computer to try and contact appellant about her missing phone. (R. at 257). By the time Ms. [redacted] got home, appellant had already blocked her on social media, so she contacted him via a friend's Facebook account. (R. at 257). Appellant told Ms. [redacted] that he did not know where her phone was and to leave him alone. (R. at 257).

5. The aftermath.

The next day, Ms. [redacted] felt "hungover," "confused," and "numb." (R. at 257). At some point she went back out to her car and found vomit on the passenger seat—it was salmon and arugula, the meal she had the night before. (R. at 258). After these events, Ms. [redacted] reached back out to appellant and two of her close friends: Mr. CM and Ms. VG. (R. at 258). Ms. [redacted] (using her old phone)

reached out to appellant because she wanted answers. (R. at 258–59). Ms. [redacted] confronted appellant about what occurred the night before, but appellant was quiet and "didn't want nothing to do with [her]." (R. at 259).

6. The SAFE.

On Monday, 20 July 2020 at 0245 hours, Ms. [redacted] went to the hospital and had a sexual assault forensic examination [SAFE]. (R. at 260). Dr. KH was the treating physician. (R. at 447). Dr. KH described Ms. [redacted] as "very apprehensive, sad[,]" appearing "fearful" and "teary eyed" as she relayed her narrative. (R. at 447). The narrative Ms. [redacted] told Dr. KH largely corroborated her in-court testimony, to include appellant slapped both sides of her face and sexually assaulted her with his fingers and penis in her vagina and anus. (R. at 450). Dr. KH corroborated this account with physical findings, to include discoloration on both sides of her cheeks,[6] and lacerations on the lips of the vulva and around the anus.[7] (R. at 450, 465–66). Dr. KH specifically stated that the discoloration on her cheeks was not "just being flushed" but rather a yellow discoloration indicative of bruising. (R. at 451). Dr. KH also noted that the photos, although accurate,

[6] Dr. KH also noted that she failed to annotate bruising under Ms. [redacted]'s eye in her report that was clearly captured in the photos taken of Ms. [redacted]. (R. at 459).
[7] These injuries were pronounced enough that Dr. KH initially saw them with the naked eye and only used the T-Blue dye to confirm her suspicion. (R. at 466–67).

deemphasized the discoloration that she saw in-person and that in-person the discoloration was more pronounced. (R. at 457).

Dr. KH noted tenderness on Ms. [redacted]'s hip where Ms. [redacted] recalled being compressed against the floor when appellant was penetrating her anus. (R. at 460–61). Dr. KH stated that regular bowel movements, toilet paper, or the gentle insertion of the penis into the vulva or anus would not likely cause the lacerations to Ms. [redacted]'s vulva and anus.[8]

7. The outcries.

Ms. [redacted] spoke to her friend Ms. VG the day after the sexual assault.[9] (R. at 382). Ms. VG described her as "very devastated," "[t]raumatized," and "numb." (R. at 382).[10] Ms. VG, in response to a panel member's question, relayed that appellant and Ms. [redacted] had engaged in "really rough sex" and "anal sex" in the past. (R. at 389).

Ms. [redacted] also spoke to her friend, Mr. CM, the day after the sexual assault. (R. at 391). Mr. CM recalled that Ms. [redacted] was "hesitant," "distraught," and "very

[8] Dr. KH explained that to cause the lacerations around the anus you would have to have "really punched" to cause the "breakage of the skin." (R. at 471).
[9] Neither Ms. [redacted] nor Ms. VG are native English speakers, and their first language is German. (R. at 239, 388).
[10] On cross-examination, Ms. VG recalled that Ms. [redacted] described appellant punching and strangling her in the vehicle. (R. at 386).

questionable and emotional" during their conversation. (R. at 392).[11] Mr. CM described Ms. [redacted] as a truthful person. (R. at 407).

The day after the sexual assault, SSG AA checked up on Ms. [redacted]. (R. at 227). During a conversation over Facebook Messenger, Ms. [redacted] told SSG AA that she believed her phone was stolen, money was missing, and that appellant had sexually assaulted her. (R. at 227–28). Staff Sergeant AA described Ms. [redacted] as "disturbed and distraught." (R. at 228).

Appellant reached out to Ms. [redacted] one day after her SAFE on 21 July 2020 and asked her a series of questions that Ms. [redacted] interpreted as appellant "trying to see what [she] remembered." (R. at 260).

Additional facts are incorporated below.

Assignment of Error I

[WHETHER] DEFENSE COUNSEL WERE INEFFECTIVE FOR NOT INTRODUCING EXTENSIVE EVIDENCE OF PRIOR CONSENSUAL SEXUAL ACTIVITY[.]

Assignment of Error II

[WHETHER] DEFENSE COUNSEL WERE INEFFECTIVE FOR FAILING TO OBTAIN EXPERT ASSISTANCE[.]

[11] On cross-examination, Mr. CM stated he told Ms. [redacted] to control her emotions and go to the police in order to preserve evidence. (R. at 399–400).

Standard of Review

This court reviews allegations of ineffective assistance of counsel de novo. *United States v. Furth*, 81 M.J. 114, 117 (C.A.A.F. 2021).

Law

Military courts evaluate ineffective assistance claims using the Supreme Court's framework from *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* "Under *Strickland*, an appellant bears the burden of demonstrating that (a) defense counsel's performance was deficient, and (b) this deficient performance was prejudicial." *Id.* (quoting *Strickland*, 466 U.S. at 687).

"With respect to the first prong of this test, courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) (quoting *Strickland*, 466 U.S. at 689, 694). This presumption can be rebutted by "showing specific errors that were unreasonable under prevailing professional norms." *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001) (citations omitted). "An appellant must establish a factual foundation for a claim of ineffectiveness; second-guessing, sweeping generalizations, and hindsight will not suffice." *Id.* (citations omitted). In assessing counsel's performance, "we do not measure deficiency based on the success of a trial defense counsel's strategy, but instead examine whether counsel made an objectively reasonable

choice in strategy from the available alternatives." *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015) (citing *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001)) (quotations omitted).

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–91. "In considering whether an investigation was thorough, '[w]e address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Akbar*, 74 M.J. at 379–80 (quoting *Burger v. Kemp*, 483 U.S. 776, 794 (1987)).

"[A]s to the second prong, a challenger must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." *Captain*, 75 M.J. at 103. A reasonable probability is one "sufficient to undermine confidence in the outcome." *Strickland*, 466 M.J. at 694. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

Argument

"If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Captain*, 75 M.J. at 103. Adhering to the Court of Appeals for the Armed Forces [CAAF] guidance, this brief will presume that trial defense counsels' alleged failure to file a motion under Military Rules of Evidence [M.R.E.] 412 was deficient. However, even assuming such a deficiency, appellant cannot meet his burden to prove a substantial impact on the proceeding. This is because most of what appellant alleges his counsel failed to notice or admit at trial was, in fact, admitted *and* because there is not a reasonable probability that if trial defense counsel had noticed that which was not admitted that they would have prevailed. Additionally, trial defense counsels' decision not to seek expert assistance to pursue a theory that Ms. [redacted] consented to sexual assaults while she was having a fragmentary blackout had no impact on the result. This case was not about whether Ms. [redacted] was capable of consenting, but rather whether she fabricated the assaults out of scorned love or whether appellant did in fact physically and sexually assault her.

1. Appellant's assertions.

Appellant asserts that his trial counsel were ineffective for failing to notice and admit the following facts: 1) appellant and Ms. [redacted] previously had sex; 2) appellant and Ms. [redacted] previously had anal sex; 3) appellant and Ms. [redacted] frequently

engaged in consensual sexual acts at or near the same place where the sexual assault occurred; 4) appellant's and Ms. [redacted]'s entire text message exchange between 16 July 2020 and 18 July 2020; and 5) Ms. [redacted] planned to have sex with appellant on 18 July 2020. (Appellant's Br. 21). Separately, appellant also asserts that his counsel were deficient for failing to seek expert assistance to prove a theory that Ms. [redacted] may have consented while having a fragmentary blackout. (Appellant's Br. 40).

2. Evidence of a sexual relationship, prior anal intercourse, and a plan for consensual intercourse on the night of the assault was admitted at appellant's trial (points one, two, and five).

There was no prejudice because the evidence referenced in points one, two, and five was before the panel. [12] The fact that appellant and Ms. [redacted] were engaged in a prior "intimate" or sexual dating relationship was admitted.[13] (R. at 241, 262, 389). Defense counsel also plainly stated as much in opening statements: "as you've heard and as you will hear, they're both very open about their sexual relationship." (R. at 217). Defense reiterated this point in their closing argument:

[12] Appellate defense counsel's assertions that "[t]he panel did not know that appellant and [redacted] ever had sex" is a gross mischaracterization of the evidence admitted at trial. (Appellant's Br. 24). The panel was repeatedly made aware of the intimate relationship, both directly and through inuendo. (R. at 217, 243, 262, 268, 269, 327–28, 389, 547, 597; Pros. Ex. 1 and 2).

[13] An "intimate" relationship is synonymous with a sexual relationship. *See United States v. Alston*, 75 M.J. 875, 879–80 (Army Ct. Crim. App. 2016) (holding that the military judge did not err by excluding evidence of a "sexual (i.e., intimate)" relationship).

"Ms. [redacted] says that [appellant] had all of her, where she said that they would be doing everything they talked about. This was not a surprise to Ms. [redacted]. This was not new to her. Remember, that they met on Tinder, they had been in an intimate relationship for almost 6 months." (R. at 597). Trial defense counsel argued although appellant's spermatozoa was found on a towel in Ms. [redacted]'s car, "that could have been there for months." (R. at 602).

Even if the panel was unable to glean that the intimate, six-month, dating relationship, which started on Tinder, between two adults, was sexual, there were abundant references and inuendo throughout the record that made it clear that the relationship was sexual prior to the assault. (R. at 217, 243, 262, 268, 269, 327–28, 389, 547; Pros. Ex. 1 and 2).

The panel was also specifically made aware that Ms. [redacted] and appellant engaged in consensual *anal* sex previously. (Pros. Ex. 2, p. 6). In no uncertain terms, Ms. [redacted], after appellant's unrelenting demands for anal sex, stated: "Well do but I'll lead it *as last time*." (Pros. Ex. 2, p. 6) (emphasis added). It is hard to imagine that the panel was not acutely aware that the couple previously engaged in a similar consensual encounter.[14]

[14] Even if the nature of the intimate relationship was not clear to the panel or the military judge at the beginning of trial (R. at 316, 340–41 (sealed)), it was certainly clear once all of the evidence was introduced, arguments were made, and the panel deliberated. (Pros. Ex. 1 and 2; R. at 597, 602).

Additionally, the messages that were admitted clearly demonstrate that Ms. [redacted] agreed and planned to engage in consensual sexual activities upon appellant's return from the field exercise. (Pros. Ex. 1 and 2). Moreover, the admitted text messages showed Ms. [redacted]'s agreement, albeit reluctantly, to engage in *consensual* anal intercourse on the night of the sexual assault.[15] (Pros. Ex. 2, p. 6). The panel convicted appellant with full knowledge of this evidence. (R. at 632).

This begs the question, where is the prejudicial impact that appellant alleges? (Appellant's Br. 21). The record of trial clearly does not support points one, two, and five from Appellant's Brief. Rather, appellant seeks to cast doubt on the fundamental fairness of his trial for his defense counsel's alleged failure to attempt to admit exactly what M.R.E. 412 was designed to exclude—intimate, embarrassing, and degrading details about prior sexual encounters and behaviors of the victim. (Appellant's Br. 32) (arguing that the omission of evidence of "copious" amounts of prior consensual sexual encounters resulted in a fundamentally unfair trial).

3. Additional intimate text messages and details of prior consensual sexual acts were inadmissible.

The details of prior consensual encounters and behavior are not relevant and would not have been admitted under M.R.E. 412. The CAAF, in *United States v.*

[15] Clearly, both sides agreed that this fact was so intertwined with the sexual assault that it could not and need not be excluded under MRE 412.

Ellerbrock and *United States v. Gaddis*, laid a groundwork for practitioners and military judges to follow when seeking and admitting evidence of sexual behavior and predisposition. *United States v. Ellerbrock*, 70 M.J. 314, 318–19 (C.A.A.F. 2011); *United States v. Gaddis*, 70 M.J. 248, 252–53 (C.A.A.F. 2011). The tactical decision to refrain from attempting to admit certain evidence that clearly fell within the prohibitions of M.R.E. 412 could not have resulted in a fundamentally unfair trial. *United States v. Cueto*, 82 M.J. 323, 329 (C.A.A.F. 2022) ("An attorney's decision to forego taking actions that likely would be futile is not deficient.").

The express purpose of M.R.E. 412 is to "shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to [sexual offense prosecutions]." *Gaddis*, 70 M.J. at 252 (citations and quotations omitted). "Under M.R.E. 412, a rule of exclusion, evidence offered to prove that any alleged victim engaged in other sexual behavior is not admissible in any proceeding involving an alleged sexual offense except as provided [under this rule]." *Gaddis*, 70 M.J. 251–52. One of the exceptions to this prohibition is evidence that is constitutionally required. *Id.* at 252. However, even this right "is not without limitation." *Id.*

The determination on whether evidence is constitutionally required "demands the ordinary contextual inquiry and balancing of countervailing

interests, e.g., probative value and . . . harassment, prejudice, confusion of the issues . . . or evidence that is repetitive or only marginally relevant." *Id.* "The evidence must also be material, which is a multifactored test looking at the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to that issue." *Ellerbrock*, 70 M.J. at 318.

For appellant to prevail on his claim, not only must he show that his counsel were ineffective, but he must also show a reasonable probability that 1) any such motion would have been granted *and* that 2) had it been granted it would have been outcome determinative. *Captain*, 75 M.J. at 103. Appellant's argument fails on all fronts.

A. The motion would not have been granted.

Appellant argues that his counsel's alleged failure to introduce additional evidence regarding the details and amount of times appellant and Ms. [redacted] engaged in consensual sexual activities resulted in a fundamentally unfair trial. (Appellant's Br. 24–32). Neither the additional text messages nor the details of the prior sexual encounters were admissible. Specifically, the minimal (if any) probative value was substantially outweighed by the danger to harass, degrade, and embarrass the victim. Additionally, the evidence was "repetitive" and, at best, "only marginally relevant." *Ellerbrock*, 70 M.J. at 318.

In *United States v. Alston*, this court effectively distilled the CAAF's findings in *Ellerbrock* when analyzing the admissibility of potential M.R.E. 412 evidence. 75 M.J. at 881–82. This court specifically found that "*Ellerbrock* does not stand for the principle that the mere existence of an ongoing sexual relationship alone is sufficient to pierce the prohibitions of [M.R.E.] 412." *Id.* at 881. This would certainly apply to admitting more than the existence of a sexual relationship, but, as appellant suggests, the graphic details of such a relationship. (Appellant's Br. 24–27, 32) (stating that appellant was biased by not admitting evidence of victim's "sexual appetite" and the fact that the appellant and victim had "copious" amounts of sexual encounters prior to the sexual assault).

Appellant, relies upon *United States v. Ellerbrock* to support this point. (Appellant's Br. 22). In *Ellerbrock*, the CAAF found that the military judge abused his discretion when he excluded evidence of a victim's prior extramarital affair. 70 M.J. at 319. The appellant in *Ellerbrock* claimed that this deprived him of his ability to present his theory of the case—that the alleged victim's marriage would not have tolerated a second affair and therefore she fabricated the sexual assault in order to save her marriage. *Id.* The CAAF found it problematic that "absolutely no evidence of [the alleged victim's] prior marital affair was admitted." *Id.* at 320. This stunted appellant's cross examination of the alleged

victim and prevented the appellant's presentation of his theory of the case. *Id.* That is inapposite to what occurred here.

Here, evidence of a prior sexual relationship, prior consensual anal intercourse, and a prior plan to engage in consensual intercourse was all before the factfinder. (Pros. Ex. 1 and 2; R. at 262, 268, 328). Any attempt to admit additional details of these previous sexual encounters certainly would have been denied under M.R.E. 412 and 403. Ultimately, the determination is case-specific, but "the CAAF makes clear, the defense in *Ellerbrock* laid an extensive evidentiary foundation to demonstrate that *this* victim, *in this* case, had a motive to fabricate the assault and that motive was material to the defense's case." 75 M.J. at 881–82. As trial defense counsel outlines in his memorandum, there was no such basis to admit such evidence. (Def. App. Ex. B). Appellant has also failed to lay out such an evidentiary foundation here on appeal. Appellant's arguments for admission are, at best, cumulative with the evidence that was already admitted, and at worst an attempt to smuggle in evidence that is clearly prohibited under M.R.E. 412. (Appellant's Br. 24–27).

For example, appellant alleges that the panel was unaware that Ms. [redacted] and appellant "routinely" engaged in consensual activities in the same or similar location to the one where the sexual assault occurred. (Appellant's Br. 25). Additionally, that "[a]t most, the panel knew that the beach near Dillingham

Airfield was a spot appellant and [redacted] 'had been to multiple times.'" (Appellant's Br. 25). These conclusions are erroneous.

First, defense counsel, in their opening statement, clearly stated that appellant and Ms. [redacted] were going to the same location that they had previously gone to in order to have sex. (R. at 217–18). "They had been talking about meeting up and having sex. . . . So, they talked about meeting up. How they frequently did, where basically, Ms. [redacted] would use her car. The two of them would go to Mokule'ia Beach, near Dillingham Air Field, and they would camp there or sleep together on the beach in her car." (R. at 218). Trial defense counsel presented this evidence and argued it. (R. at 217–18, 262, 268, 328, 597; Pros. Ex. 1 and 2). More specific details relating to these events would only serve to embarrass and degrade the victim for prior consensual activities under completely different circumstances than what occurred on the date of the sexual assault. Trial defense counsel wholly recognized this distinction. (Def. App. Ex. B) ("The Government would have pointed to the distinction between the previous anal sex in rooms, which the AV was okay with, and the anal sex in the car, which the AV expressed no desire to do in text messages before the act.").

Appellant also alleges that if the panel knew about the text messages the couple had sent each other on 16 July 2020, then the result would have been different. (Appellant's Br. 26–27). However, appellant failed to establish that

there was a reasonable probability that those text messages were relevant or would establish any fact that could not be readily discerned from the messages that were already admitted. (Pros. Ex. 1 and 2). In other words, not only were the additional messages prohibited under M.R.E. 412, but they were otherwise irrelevant and cumulative under M.R.E. 403. Appellant fails to establish that his trial defense counsel's understanding of M.R.E. 412 was incorrect, and that any attempt to admit the *additional* graphic text messages would have been successful. *See Alston*, 75 M.J. at 882 (finding the evidentiary foundation of the existence of a victim's sexual relationship "wanting" and therefore properly excluded).

Relying on *Ellerbrock*, appellant argues that the introduction of additional evidence of other sexual acts and behavior was constitutionally required.[16] (Appellant's Br. 22). However, unlike *Ellerbrock*, where the panel was unaware of the nature of the victim's relationship, the panel was fully aware of the nature of

[16] Appellant also suggests that trial defense counsel were deficient for failing to attempt to introduce the remainder of text messages under the rule of completeness. (Appellant's Br. 27). This argument is without merit. Not only was most of the content of the messages prohibited under M.R.E. 412, but it also was from two days prior to the sexual assault and cumulative with the messages that were admitted one day prior to the sexual assault. Additionally, the messages contained references to accusations that were prejudicial to appellant, such as admissions that appellant had previously recorded prior intimate encounters without Ms. [redacted]'s consent and allegations that he was jealous and controlling. (Def. App. Ex. E, pp. 10, 13; Def. Ex. A for ID, p. 4). Any attempt to introduce additional details of the sexual relationship likely would have opened the door to this highly prejudicial evidence.

appellant's and Ms. [redacted]'s relationship. (R. at 262, 268, 328; Pros. Ex. 1 and 2). Trial defense counsel could and did make the exact arguments that appellant claims were absent from his trial. (R. at 217–18, 597, 602–03; Appellant's Br. 21).

Appellant's claim about what the panel knew is misleading. Rather, the panel knew the following: 1) Ms. [redacted] and appellant were in a six-month, intimate dating relationship (R. at 241, 262, 331); 2) Ms. [redacted] and appellant had previously engaged in consensual sexual activities, to include consensual anal sex (Pros. Ex. 2, p. 6; R. at 262); 3) the couple planned to meet up and engage in consensual sexual intercourse upon appellant's return from the field exercise (R. at 328; Pros. Ex. 1 and 2); and 4) Ms. [redacted] was equally eager to engage in consensual sexual activities with appellant—just not anal sex in the car. (Pros. Ex. 1 and 2).

Ultimately, appellant's claim of alleged prejudice hinges on the panel not knowing intimate, degrading, and embarrassing details about appellant's and Ms. [redacted]'s *prior* sexual encounters. This is a far cry from what appellant alleges his counsel failed to admit into evidence in his brief. (Appellant's Br. 21, 24, 25, 28). Appellant seeks to find his counsel ineffective for refraining from attempting to introduce cumulative evidence that M.R.E. 412 was explicitly created to exclude. *Gaddis*, 70 M.J. 251–52 (citations omitted).

B. The absence of the evidence was not prejudicial.

Even assuming arguendo that the additional text messages and details of prior sexual encounters or behavior would have been admitted, the absence of such evidence did not have a material impact on any substantial right of appellant.[17] Appellant received an instruction and argued mistake of fact based on the following evidence admitted at trial: a prior consensual relationship, explicit text messages, and a preconceived plan to engage in consensual relations. (R. at 571–72, 597). Appellant's ability to cross-examine Ms. [redacted] was not infringed. Appellant extensively cross-examined Ms. [redacted] about her love and desire to be with appellant before and even after the physical and sexual assault; her plan to meet up with and have consensual sex with appellant; and her inconsistent statements or omissions to friends and investigators. (R. at 262, 269, 273). Appellant presented the factfinder with his theory of the case. (R. at 597).

Ultimately, this was not a case where appellant was deprived of introducing a relevant theory or admitting relevant evidence. *See Ellerbrock*, 75 M.J. at 881–82. Rather, substantial physical evidence, multiple outcries, and a credible victim

[17] Additionally, some of the messages and prior sexual encounters contained highly prejudicial facts for appellant. (Def. Ex. A for Identification [ID], pp. 3–4). It is probable that had defense attempted to elicit additional details about prior sexual encounters, then that would have opened the door to potential M.R.E. 413 evidence that was otherwise unnoticed and inadmissible at the time of trial. (Def. Ex. A for ID, pp. 3–4) (describing appellant committing prior nonconsensual sexual acts). *See supra* n.16.

testimony proved beyond a reasonable doubt that appellant physically and sexually assaulted Ms. [redacted].

4. The government's case was strong.

Despite appellant's claim, this case did not hinge on the admission of additional graphic details regarding the sexual relationship of appellant and Ms. [redacted]. (Appellant's Br. 25–27). The issue the panel had to decide was whether Ms. [redacted] truthfully reported a physical and sexual assault or whether she fabricated the assault out of scorned love. These were the competing theories that the counsel for each party put forth. (R. at 585, 597). These were the only two theories that the evidence substantially supported that either side presented .

The panel clearly found Ms. [redacted]'s account credible and rejected appellant's theory of the case. (R. at 632). Text messages and independent testimony supported Ms. [redacted]'s account. (Pros. Ex. 1 and 2; R. at 222–234, 380–409). The text messages on 17 July 2020, established that Ms. [redacted] was eager and willing to engage in certain consensual sexual acts with appellant. (Pros. Ex. 1 and 2) ("It's going to some explosive feelings when our bodies hit [laughing, drooling, heart emojis]"). She did not deny this. (R. at 328). However, Ms. [redacted] drew clear lines and boundaries regarding anal intercourse in the car.[18] (Pros. Ex. 1 and 2).

[18] This was a fact that would have been further established had trial defense counsel attempted to admit additional text messages of prior consensual sexual activity between Ms. [redacted] and appellant. (Def. App. Ex. B).

Ms. [redacted]: Omg babe. You know no ass in the car.
Appellant: [F***] that. I'm putting it in your ass in the car. End of discussion.
Ms. [redacted]: Nope[.] Don't talk to me like that.
Appellant: Then we're doing it on the beach!
Ms. [redacted]: No Stop!
...
Appellant: Give me what I ask for. You say you want all of me but why I can't get all of you?
Ms. [redacted]: What are you talking about?? Do you [] respect me at all
Appellant: Are we doing it or no?
Ms. [redacted]: I don't feel comfortable doing it in the car because I want to wash off[.] You're [f******] disrespectful. Like I don't want all of this[.]

Appellant's intent to take what he wanted regardless of Ms. [redacted]'s express wishes was also made apparent from the text messages. (Pros. Ex. 1, p. 2; Pros. Ex. 2, p. 2). Ms. [redacted] confronted appellant and outcried to three separate friends within twenty-four hours of the physical and sexual assault. (R. at 222–234, 380–409). Ms. [redacted] consented to a SAFE within approximately forty-eight hours of the assaults. (R. at 447–78). The SAFE produced evidence of injuries consistent with physical and sexual abuse. (R. at 447–78; Pros. Ex. 5, 11, 12).

The circumstances surrounding the sexual assault were dissimilar to any alleged prior consensual encounter. (Def. App. Ex. A). Ms. [redacted] was drunk, she had just vomited, and was feeling unwell. (R. at 224). Appellant was angry at Ms. [redacted] because she went to a party without his knowledge. (R. at 250, 252). His anger manifested itself in him striking Ms. [redacted] repeatedly in the face prior to the sexual assault. (R. at 252). The panel found that the totality of this evidence

overcame any alleged reasonable mistake of fact based on a prior plan or consensual sexual activity. (R. at 572, 632). Based on all of this, there is not a reasonable probability that knowing details about additional prior consensual sexual encounters would have changed the outcome of this trial.

5. Defense counsel's alleged failure to obtain expert assistance did not result in a fundamentally unfair trial.

Appellant asserts his trial defense counsel were "ineffective for not seeking an expert witness to discuss alcohol's impact on memory formation and how one may consent to sex while in a blackout state." (Appellant's Br. 40).

In *United States v. Weiser*, the Coast Guard Court of Criminal Appeals [CCA] analyzed an identical issue. In *Weiser*, the appellant alleged that his counsel "'failed to obtain necessary expert assistance to confront [the victim's] claim of intoxication,' and that expert testimony 'would have been crucial in attacking [the victim's] credibility.'" 80 M.J. 635, 643 (C.G. Ct. Crim. App. 2020). The CCA disagreed finding that "this was a bodily harm case, not incapacity due to impairment by alcohol." *Id.* at 644. The prosecution disavowed that "[the victim] was too drunk to consent and instead pursued a theory that a combination of the effects of alcohol, fatigue, and other circumstances proved an actual lack of consent." *Id.* That is precisely what occurred here.

Neither party pursued a theory that Ms. [redacted] was too drunk to consent or that she may have consented when she was experiencing a fragmentary blackout.

Rather, defense suggested that she never actually consumed enough alcohol to experience a blackout and fabricated the assaults to exact revenge against appellant. (R. at 216, 271, 285, 520, 597–602; Def. Ex. H). Although this was not a successful theory, it was the only one that the evidence reasonably supported. It defies common sense that Ms. [redacted] would remember being struck in the face by an enraged man, and shortly thereafter consent during a fragmentary blackout. This was not a credible theory or one that any reasonable panel member would have accepted. The failure to pursue such a theory could not have amounted to a fundamentally unfair trial. Just as in *Weiser*, "[t]he effects of alcohol, particularly on memory, remained an issue, but, contrary to Appellant's assertion, this case was about whether [the victim] actually consented, not about alcohol." 80 M.J. at 644. In sum, appellant has not and cannot show that his counsels' decision not to further pursue expert assistance had any impact on the outcome of the trial.[19]

Assignment of Error III

[WHETHER] THE GOVERNMENT ENGAGED IN PROSECUTORIAL MISCONDUCT BY MISLEADING THE COURT AND BY CONDUCTING AN IMPROPER CLOSING ARGUMENT[.]

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[19] If this court "finds that allegations of ineffective assistance and the record contain evidence which, if unrebutted, would overcome the presumption of competence" then the government would respectfully request that this court order "a response from trial defense counsel in order to properly evaluate the allegations" in accordance with *United States v. Melson*, 66 M.J. 346, 350−51 (C.A.A.F. 2008).

Additional Facts

Appellant references three arguments from the government's closing statements, one argument from rebuttal, and two arguments from sentencing as prosecutorial misconduct. (Appellant's Br. 44–47). The government's closing argument was thirteen pages (R. at 583–96), the rebuttal was three pages (R. at 604–07), and the sentencing argument was five pages (R. at 662–66), totaling twenty-one pages. The trial lasted four days and the panel deliberated over the course of two days for approximately three- and one-half hours. (R. at 612, 616–17, 620, 631). Appellant also alleges that the government mischaracterized the prior nature of the sexual relationship between appellant and the victim as abusive. (Appellant's Br. 43–44).[20]

1. Government counsel's closing statements.

A. Argument regarding defense's cross exam.

Government counsel acknowledged Ms. [redacted]'s gaps in her memory, but argued that they were insignificant, stating:

[20] This argument is without merit and addressed in this footnote. Ms. [redacted] had described prior intimate relations with appellant as abusive and nonconsensual. (Def. Ex. A for ID, p. 3–4). The government fully acknowledged that there was a prior consensual intimate relationship as well, but also acknowledged that aspects of it were nonconsensual and abusive. (R. at 340–41 (sealed)). This was a fair characterization of Ms. [redacted]'s description of the intimate relationship with appellant. (Def. Ex. A for ID, p. 3–4); *see also supra* n.17–18.

> Now sure, there are things that she can't remember specifically, and the defense tried to get her on those things. In fact, I'm not really sure what the defense was trying to do. You saw my objections. Nobody knew what was really going on that cross-examination. It didn't make sense. Oh, 'Well, wait, Ms. [redacted], you told this investigator 3 years ago that you only had two cocktails, and in fact, you testified on cross-examination that you had three cocktails?' Really, that's the inconsistencies that we're dealing with 3-years later?
>
> 'You told this agent you were strangled.' No. That's not what she said, and she showed you. He grabbed her by the neck. It's entirely plausible based off of what she described happened in that car. The controlling, manipulative nature of the accused in this relationship. There's no deliberate lies, there was no Johnnie Cochran moment in here where the mic was dropped when Ms. [redacted] was on the stand.

(R. at 589–90).

B. Argument regarding Ms. [redacted]'s demeanor.

Government counsel argued Ms. [redacted]'s demeanor and visceral reaction on the stand was indicative of her credibility.

> You saw her visceral reaction, the internal pain that this has caused her taking the stand. She didn't sob through her entire testimony. It was a dark internal pain that she struggled as she is now in front of the man that penetrated her without her consent. The humiliation, the degradation in a public environment. She did her best to keep it together. She was forthright with you when she couldn't remember things.

(R. at 588).

C. Argument regarding Ms. [redacted]'s statements to friends.

Government counsel referred to Ms. [redacted]'s account of the sexual assault that she provided Ms. VG and Mr. CM. "They told you what she said. It generally lines up to what she testified to in this court-martial." (R. at 592).

During Ms. VG's direct exam, she stated that Ms. [redacted] reached out to her the day after the sexual assault and told her what happened. (R. at 381). Ms. VG described Ms. [redacted]'s demeanor on direct but provided specific details during cross examination. (R. at 382). On cross-examination, defense counsel drew out both consistent and inconsistent statements, to include: 1) appellant anally penetrated Ms. [redacted], 2) punched her in the face, 3) Ms. [redacted] was unable to defend herself, 4) appellant strangled Ms. [redacted], and 5) when Ms. [redacted] realized what happened she became angry. (R. at 386).

During Mr. CM's direct exam, he also described Ms. [redacted] reaching out within twenty-four hours of the assault and her demeanor when she told him what happened. (R. at 391–92). During cross-examination, defense counsel, once again, drew out both consistent and inconsistent statements between the two accounts, to include: 1) appellant started slapping Ms. [redacted] on the way to the beach and also hit her during the sexual assault, 2) nonconsensual sexual intercourse occurred, 3) appellant ripped her dress during the assault, 4) appellant forced her to perform oral sex on him, 5) appellant sodomized Ms. [redacted], and 6) appellant ejaculated in Ms. [redacted]'s mouth. (R. at 395–96).

2. Rebuttal argument regarding defense's theme—*The Morning Bride*.

In defense counsel's closing statements, they attacked the government's case and the trial process generally while arguing their theory of the case, stating:

> They have held us into this courtroom for 3 days, posted armed Soldiers at the doors to this courthouse, and flown in witnesses from around the world, but the government over promised an opening and did not deliver in the end.

(R. at 596).

Defense also built upon a theme from their opening statement, analogizing Ms. [redacted]'s motive to fabricate to a fictional play, *The Morning Bride*. (R. at 216). Defense counsel began his opening statement with a quote from the play: "Heaven has no rage like love to hatred turn, nor Hell a fury like a woman scorned." (R. at 216).

Defense counsel began both his opening and ended his closing argument with the theme and the verbiage from this quote.

> It begins with Ms. [redacted], whose emotions, whose hurt, whose anger may be real, but real because she was scorned, because her love was rejected, her happiness turned to fury. . . . [T]he picture that we end up with on this pad is one of a woman who has been scorn. Whose love has been rejected. Whose happiness turned to fury, turned against [appellant] who took what she wanted away.

(R. at 596, 603–04). In response to this argument, the government counsel, during rebuttal, referred to this theme as a "fantasy" and a "shiny object."

> "So government over promised in opening is what the defense is alleging. Well, ladies and Gentlemen, what they just sold you was a fantasy. Let's discuss briefly what they are so delicately trying to avoid, what happened in that car. You notice . . . the defense's opening [], the defense counsel, didn't even discuss it. Pulled up at the beach. Next thing you know, he dropped her off at the gate. Nothing about what happened that night.
>
> In the closing, there was a vague reference to sex – well, first of all, this is a sexual assault. It wasn't sex. And then we just move on. We want

> to move on. Don't want to talk about it. Don't want to talk about what happened 18 July. You know why they don't wanna talk about it? Because they can't get away from it. They can't get away from what their client did to Ms. [redacted] that evening. So what do they do? They try to put up the shiny object. Don't go in that deliberation room and talk about what Ms. [redacted] said happened. Let's focus on all these other things. Let's focus on the shiny object, the scorned love, Romeo and Juliet. I think that the defense described it as, 'Love, rejection, and fury' that 3 years later caused her to come into this courtroom and caused her to testify against the accused? Come on. Ladies and Gentlemen, that is a fantasy. And they want you to focus on anything that they can aside from what happened in the front seat and the backseat of that car.

(R. at 604–05).

3. Government counsel's sentencing argument and comments on appellant's demeanor and lack of apology.

During sentencing, the government counsel referenced appellant's demeanor and failure to apologize to Ms. [redacted]. (R. at 666). The military judge *sua sponte* interrupted trial counsel each time, mid-sentence, and informed him he would not consider that argument. (R. at 666).

Standard of Review

This court "review[s] prosecutorial misconduct and improper argument de novo." *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018). "If proper objection is made, [this court] review[s] for prejudicial error." *Id.* When no objection is made, the appellant has forfeited his right to appeal, and this court will review for plain error. *Id.* "The burden of proof under plain error review is on the appellant." *Id.*

"Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Id.* at 401 (quoting *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)).

Law

Prosecutorial misconduct occurs when trial counsel "overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *United States v. Hornback*, 73 M.J. 155, 159–60 (C.A.A.F. 2014) (quoting *Berger v. United States*, 295 U.S. 78, 84 (1935)). "Prosecutorial misconduct can be generally defined as 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. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (citing *Berger*, 295 U.S. at 88).

"The presence of prosecutorial misconduct does not necessarily mandate dismissal of charges or a rehearing." *Hornback*, 73 M.J. at 159. "It is not the number of legal norms violated but the impact of those violations on the trial which determines the appropriate remedy for prosecutorial misconduct." *Meek*, 44 M.J. at 6. In determining whether prejudice resulted from prosecutorial misconduct, this court will "look at the cumulative impact of any prosecutorial

misconduct on the accused's substantial rights and the fairness and integrity of his trial." *Fletcher*, 62 M.J. at 184 (quoting *Meek*, 44 M.J. at 5).

The CAAF has identified "the best approach" to the prejudice inquiry as requiring the balancing of three factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Id*. "In other words, prosecutorial misconduct by a trial counsel will require reversal when the trial counsel's comments, taken as a whole, were so damaging that [this court] cannot be confident that the members convicted the appellant on the basis of the evidence alone." *Id*.

Often times, courts "need only address the third element of plain error because, even assuming error, [the court finds] no evidence that the trial counsel's arguments resulted in material prejudice to any of Appellant's substantial rights." *Hornback*, 73 M.J. at 160. Although the CAAF has made no determinations regarding how much weight to give each factor, it has often "found that the third factor so overwhelmingly favored the government it was sufficient to establish lack of prejudice.[21]

[21] *See e.g.*, *United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013); *Hornback*, 73 M.J. at 161; *United States v. Sewell*, 76 M.J. 14, 19 (C.A.A.F. 2017); *United States v. Pabelona*, 76 M.J. 9, 12 (C.A.A.F. 2017); *Andrews*, 77 M.J. at 403; *United States v. Vorhees*, 79 M.J. 5, 13 (C.A.A.F. 2019); *United States v. Witt*, 83 M.J. 282, 285 (C.A.A.F. 2023); *but see Fletcher*, 62 M.J. at 185 (holding that where "trial counsel's 'excess zeal was so egregious that it tainted the conviction,"

Argument

Government counsel's arguments during closing statements and rebuttal were not improper. When viewed in context of the trial and the arguments presented, they were proper commentary on the evidence and proper rebuttal to the arguments put forth by trial defense counsel. Even if aspects of the government counsel's statements were improper, the error was not plain and obvious, and certainly did not materially prejudicial a substantial right of appellant. Some of the Government counsel's statements during sentencing were potentially improper, but the military judge who sentenced appellant immediately remediated it.

1. Government counsel's closing arguments were not improper.

In *Fletcher*, the CAAF listed a multitude of ways that the government trial counsel committed misconduct in his closing arguments, to include interjecting personal beliefs, vouching, disparaging defense counsel, disparaging the accused, and introducing facts not in evidence. 62 M.J. at 180–83. In that case, counsel personally vouched for the reliability of evidence, while repeatedly attacking and disparaging defense counsel. *Id.* The comments went beyond the effectiveness of defense counsel's arguments or cross-examination, but rather focused on defense counsel's style and demeanor contrasting it with her own. *Id.* at 181–82

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because it was not "slight or confined to a single instance, but . . . pronounced and persistent," and "so inflammatory and damaging" that it required reversal).

("[Defense Counsel]'s the one that could have scared a witness and freaked them out. . . . Well, ask yourselves, do I scare you?").[22] In *Fletcher*, although the CAAF ultimately found that the culmination of trial counsel's repeated violations and weak evidence presented at trial warranted reversal, it did not find that all the comments constituted plain error. *Id.* at 185.

For example, the government counsel inappropriately commented on the accused's credibility and the believability of his theory of the case. *Id.* at 182–83 (referring to the accused as a liar, who was "utterly unbelievable" with "zero credibility"). However, defense counsel did not object to this line of argument and although the court found these comments to be improper, these comments "did not rise to the level of plain error." *Id.* at 183. Similar to *Fletcher*, here, the government counsel's statements in closing even if they were improper, did not rise to plain error.

2. Argument regarding defense counsel's theme and cross examination.

Appellant alleges that government counsel "disparaged" defense counsel by commenting on aspects of the cross-examination and their theme and theory of the case. (Appellant's Br. 44–45). However, when viewed in context of the entire argument, government counsel's statements were in regard to the efficacy of

[22] In *Fletcher*, defense counsel repeatedly objected to a variety of government counsel's remarks (though not all), resulting in the military judge sustaining the objections. *Id.*

defense counsel's cross-examination and were in direct response to defense counsel's theme—a quote from a fictional play. (R. at 589–90). These comments, when viewed in context, were not improper.

If this court were to carve out a portion of the argument, such as "[n]obody knew what was really going on that cross-examination[,]" one could argue that such a statement is potentially improper. However, that is not the test and an analysis that the Supreme Court and the CAAF has expressly warned against. *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000) ("If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation.") (quoting *Dunlop v. United States*, 165 U.S. 486, 498 (1897)). Such a comment, in isolation, may cross the line from commenting on the evidence or theory into improper comment on counsel's style. *See Voorhees*, 79 M.J. at 10. However, the next two sentences of government counsel's argument provide context—"you told this investigator 3 years ago that you only had two cocktails, and in fact . . . you had three. Really, that's the inconsistencies that we're dealing with 3-years later." (R. at 589). Ultimately, government counsel highlighted that the inconsistencies defense drew out were minor and should not be given undue

weight considering the passage of time. This was a fair comment on the evidence and not improper.

Even if this comment was improper, it was not plain and obvious. "[I]t is improper to 'surgically carve' out a portion of the argument with no regard to its context." *Baer*, 53 M.J. at 238. "To turn a criminal appeal into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution." *Id.* (quoting *Johnson v. United States*, 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring)).

Similarly, during the government's rebuttal argument, counsel repeatedly asked the panel not to be distracted by defense's theme and theory of the case—a quote from a play regarding a woman's scorn. (R. at 603–05). Government counsel's reference to the theme as a "fantasy" or "shiny object" viewed in isolation, perhaps would seem an improper commentary on defense counsel's style rather than the evidence. *See Fletcher*, 62 M.J. at 182 (holding that the prosecutor's repeated disparaging remarks about defense counsel when combined with her other improper remarks constituted plain error).

However, once again, when viewed in the context of the entire court-martial, these comments were not improper. Government counsel did not refer to the defense's entire case or appellant's testimony as a "fantasy", but rather the theme comparing Ms. [redacted]'s motives to an actual fictional play. "Let's focus on the shiny

object, the scorned love, Romeo and Juliet . . . that is a fantasy." (R. at 604–05). In *Baer*, the CAAF provided the following framework: "the argument by a trial counsel must be viewed within the context of the entire court-martial. The focus of our inquiry should not be on words in isolation, but on the argument as 'viewed in context.'" *Baer*, 53 M.J. at 238 (quoting *United States v. Young*, 470 U.S. 1, 16 (1985)).

Here, the context is important. Defense counsel drew upon an actual fictional piece of work (e.g., a fantasy) in order to emphasize his theme and theory of the case. The words of the quote are compelling, and the theme is clearly one that resonates with many people hundreds of years later. Government counsel's caution to the panel not to be distracted by such a theme, but rather to focus on the facts of the case, was proper rebuttal argument and a fair rebuttal to the argument advanced by the defense. (R. at 604–05). In sum, even if this court were to find that any of those comments in isolation were improper, as stated in *Fletcher*, when viewed in their proper context they do not rise to the level of plain error. 62 M.J. at 183.

3. Argument regarding Ms. [redacted]'s demeanor and statements to friends.

Appellant next argues that government counsel's comments regarding the difficulty a victim of sexual assault faces testifying publicly in front of her assaulter constituted an improper comment on appellant's constitutional rights.

(Appellant's Br. 46). First, commenting on the difficulties of testifying in a public environment is not commenting on an accused's right to stand trial—any such argument is a false equivalence. Second, and analogous to this case, "[r]egardless of whether the defendant testifies, there are instances when the nontestimonial acts of the defendant may be admitted." *United States v. Cook*, 48 M.J. 64, 66 (C.A.A.F. 1998); *e.g.*, *People v. Williams*, 42 Mich. App. 278, 280–81 (1st Dist. Ct. App. 1972).

In *Cook*, the CAAF found that the prosecutor commenting on the accused yawning during testimony about his daughter's death did not constitute plain error. 48 M.J. at 65, 67. Here, the prosecutor's comment was directed at the *victim's* testimony and demeanor rather than appellant's, merely referencing appellant's presence. Arguably, this comment was far more attenuated from any constitutional right than that of the appellant's in *Cook*. *Id.*

It is also proper for counsel to comment on "matters of common knowledge within the community." *Fletcher*, 62 M.J. at 183. "[A]sking the members to consider the fear and pain of the victim" is permissible. *Baer*, 53 M.J. at 238. Commenting on the difficulties of testifying publicly, and in front of one's assaulter, to provide context to an emotional and visceral response of a victim is also within the common purview and therefore proper.

In *United States v. Baer*, government counsel asked the members "to imagine the victim's fear, pain, terror and anguish" to the immediate objection of trial defense counsel. *Id.* at 237–38. The CAAF found this impermissible in that it potentially asked the panel members to walk in the shoes of the victim. *Id.* However, despite the military judge's error in overruling the defense objection, the CAAF found the error harmless where the "argument as a whole was not calculated to improperly inflame the members' passions or possible prejudices." *Id.* at 238. Importantly, the CAAF found that although "a trial counsel who is not adequately mindful . . . may find himself . . . wandering dangerously into the realm of impermissible argument[,]" ultimately "the argument itself viewed in its entire context" was not improper—even if the statements in isolation were. *Id.* at 238–39. Here, just as the CAAF contemplated in *Baer*, the comments when viewed in the proper context were not improper, and even if they were, they certainly did not rise to the level of plain error.

Appellant further alleges government counsel "backdoored" evidence of prior consistent statements. (Appellant's Br. 46). This allegation is without merit. Government counsel did not offer any *statements* of Ms. [redacted], but rather stated that what they told the panel generally lined up with what Ms. [redacted] testified to. (R. at 592). Despite appellant's allegations, each witness did in fact detail certain corroborative statements of Ms. [redacted] that were elicited on cross-examination. (R. at

386, 395–96). Although defense counsel elicited some inconsistencies, he also inevitably elicited certain consistent statements. (R. at 386, 395–96). In other words, consistent statements were elicited without objection and properly admitted as evidence. Therefore, the underlying point by trial counsel was supported by evidence in the record and not improper. *See United States v. Bodoh*, 78 M.J. 231, 238 (C.A.A.F. 2019) (finding that although "[t]rial counsel's reference to the SHARP program" and "training" of the panel members was improper, the underlying point was "fully supported by evidence in the record" and had no reasonable probability of impacting the outcome).

4. There was no actual impact to appellant's substantial rights.

Assuming arguendo that there was error and that it was plain and obvious, there was no material prejudice to a substantial right of appellant. When balancing the three factors in *Fletcher*, appellant cannot meet his burden to establish prejudicial error. 62 M.J. at 184 (quoting *Meek*, 44 M.J. at 5).

A. The severity of the misconduct.

Indicators of severity include the number of instances of misconduct compared to the overall length of the argument; whether the misconduct was limited; the length of the trial; and whether counsel abided by any rulings from the military judge. *Fletcher*, 62 M.J. at 184–85. Here, even if all of appellant's

allegations constituted improper argument, they were scarce and minor in comparison to the length of counsel's argument and the length of the trial. *Id.*

In *Fletcher*, there were "several dozen examples of improper argument" over twenty-one pages of argument, with repeated sustained objections. 62 M.J. at 184–85. Here, there are only five alleged improper arguments over twenty-one pages of transcript. The trial lasted two days longer than the trial in *Fletcher* and although the panel deliberated for approximately the same number of hours, this panel paused and deliberated over the course of two days, asked questions, and requested additional evidence. (R. at 612, 616–17, 620, 631). The panel's involved, deliberate, and attentive behavior shows no undue influence from any alleged improper argument.

B. The measures adopted to cure the misconduct.

Neither defense counsel, nor the military judge, objected or attempted to cure any alleged improper argument on the merits. The fact that defense counsel did not object to any of the alleged improper arguments is indicative of the "fleeting and vague" nature of the statements. *Bodoh*, 78 M.J. at 238. Additionally, "[m]ilitary judges are presumed to know the law and to follow it absent clear evidence to the contrary." *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007). "As part of this presumption we further presume that the military judge is able to distinguish between proper and improper sentencing arguments."

Id. The military judge similarly did not interject during closing or rebuttal, which further suggests that any alleged error was not plain or obvious and had little impact on any of the parties who heard it. At sentencing, the military judge did immediately interject, interrupting counsel mid-sentence, and dispelling any notion of prejudice. (R. at 666); *Fletcher*, 62 M.J. at 185.

C. The weight of the evidence supporting the conviction.

As described in the first two assignments of error, the government's case was strong. *Supra*, AE I and II, pt. 4. The testimonial and physical evidence, immediate outcry, and circumstantial evidence supporting the convictions coupled with the lack of severity of the comments when taken as a whole clearly demonstrate that appellant has not met his burden.

Assignment of Error IV

[WHETHER] THE MILITARY JUDGE ABUSED HIS DISCRETION IN ALLOWING EVIDENCE PURSUANT TO MILITARY RULE OF EVIDENCE 404(B)[.]

Additional Facts

The government provided appellant with notice that they intended to admit evidence that he threatened to kill Ms. [redacted] if she cheated on him. (App. Ex. II). The government's theory was that this threat demonstrated a plan to "control and dominate [Ms. [redacted]'s] actions." (App. Ex. VII, p. 6). This threat to kill her if she cheated was especially relevant considering his motive for striking her was linked

to his paranoid suspicions that she in fact did cheat on him. (App. Ex. VII, p. 6). Specifically, the fact that he was calling her a "slut and whore," while striking her in the face immediately prior to the sexual assault, linked the prior threat to the charged assault and sexual assault. (App. Ex. VII, p. 6). Appellant's express threat or plan to cause Ms. [redacted] physical harm, followed by the act of causing her physical harm, showed that he had the same or similar state of mind during both the threat and the assaults. (App. Ex. VII, p. 6–7).

The defense's theory at trial was that the threat was an isolated incident and unrelated to the alleged crimes. (App. Ex. VI, p. 5). Additionally, that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. (App. Ex. VI, p. 7). Both on appeal, and at trial, the defense focused on other evidence that tended to contradict the veracity of the statements, such as Ms. [redacted]'s reluctant resignation to appellant's demands. (App. Ex. VI, p. 7; Appellant's Br. 60–61).

The military judge, in a detailed eight-page written ruling, found that the evidence was permissible under M.R.E. 404(b). (App. Ex. VIII). The military judge's conclusions found that "the alleged threat was made approximately one week before the charged [] sexual assault." (App. Ex. VIII, p. 5). Appellant had "repeatedly thought/expressed to [Ms. [redacted]] the thought [that] she was cheating on him." (App. Ex. VIII, p. 5). "According to [Ms. [redacted]], this suspicion and jealousy

manifested itself in the alleged threat, and again while they were in the car together right before the charged offenses." (App. Ex. VIII, p. 5). "Here, the purpose of the proposed testimony is to demonstrate a jealous Accused who sought to control/dominate [Ms. [redacted]] (i.e., prevent her from establishing or maintaining another intimate relationship), an alleged plan to control accomplished by placing [Ms. [redacted]] in fear before he left for his training event." (App. Ex. VIII, p. 5).

Analyzing the evidence under each prong of the *Reynolds* factors, the military judge found: the evidence "*reasonably* tends to prove that the Accused made the threatening comment to [Ms. [redacted]] (though this was not documented or corroborated). [29 M.J. 105, 109 (1989).] Though the Defense does not concede the threat was made (and is free to explore the validity of this alleged threat at trial through attacks on [Ms. [redacted]'s] motives, bias, and actions), the evidence is sufficiently demonstrated." (App. Ex. VIII, p. 5).

The evidence was "probative of a material issue other than character." (App. Ex. VIII, p. 5). The same alleged jealousy . . . presented itself as a driving motivation for the charged sexual assaults against [Ms. [redacted]]." (App. Ex. VIII, p. 5). "Critical to the outcome of this case is the relationship between [the parties.]" (App. Ex. VIII, p. 5).

Further, the military judge found that "[t]he probative value is not substantially outweighed by the danger of unfair prejudice. The relationship

between the parties is essential. The testimony in this act would be brief, and not a distraction to the fact-finder." (App. Ex. VIII, p. 5). Lastly, the military judge properly instructed the panel regarding the appropriate use of the evidence. (R. at 579–80).

Standard of Review

"Where a military judge conducts a proper weighing under [M.R.E.] 403 and articulates the reasons for admitting the evidence, we will reverse only for a clear abuse of discretion." *United States v. Browning*, 54 M.J. 1, 7 (C.A.A.F. 2000).

Law

Military Rules of Evidence 404(b) "is a rule of inclusion rather than exclusion." *Id*. at 6. "It permits admission of relevant evidence of other crimes or acts unless the evidence tends to prove only criminal disposition." *Id.* (quoting *United States v. Simon*, 767 F.2d 524, 526 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985)).

In *United States v. Reynolds*, the CAAF adopted a three-pronged test for admissibility of "other acts" evidence under M.R.E. 404(b). 29 M.J. 105, 109 (1989). First, such evidence must "reasonably support a finding by the court members that appellant committed prior crimes, wrongs, or acts[.]" *Id.* Second, such evidence must make a fact of consequence more or less probable. *Id.* Third, its "probative value" must not be "substantially outweighed by the danger of unfair

prejudice[.]" *Id.* The standard of proof for the first prong is "quite low." *United States v. Dorsey*, 38 M.J. 244, 246 (CMA 1993). "The Government need only show that a trier of fact could reasonably conclude that [an appellant] did commit the act sought to be introduced." *United States v. Jones*, 32 M.J. 155, 157 (CMA 1991) (citing *Huddleston v. United States*, 485 U.S. 681 (1988)).

Argument

The military judge did not clearly abuse his discretion when he found that the evidence was admissible. The military judge received briefs, reviewed evidence, and heard argument prior to writing his detailed ruling. (App. Ex. VI–VIII; R. 13–86). The military judge relied on appropriate law, and appellant cites no erroneous conclusions of fact or law to the contrary. (Appellant's. Br. 60–62). Rather, appellant's argument simply states that the military judge got it wrong, on all three prongs, and reiterates most of the arguments that defense counsel made at trial. (App. Ex. VI; Appellant's. Br. 60–62). Even if a member of this court believes that they themselves would have excluded the evidence, that is not the standard. "To reverse for an abuse of discretion involves far more than a difference in . . . opinion. . . . The challenged action must . . . be found to be arbitrary, fanciful, clearly unreasonable, or clearly erroneous in order to be invalidated on appeal." *United States v. Hyppolite*, 79 M.J. 161, 166 (C.A.A.F. 2019) (alterations in original).

In *United States v. Jenkins*, this court analyzed a similar issue. 48 M.J. 594, 600 (Army Ct. Crim App. 1998). "Plan is a commonality of purpose that links otherwise disparate criminal acts as stages in the execution of a singular scheme." *Id.* "Uncharged and charged acts are part of a common or continuing plan when they are mutually dependent or interlocking steps toward the accomplishment of the same final goal." *Id.* (citing *Ali v. United States*, 520 A.2d 306, 311–12 (D.C. 1987)). "It is the interconnectivity of the acts inspired by a singular purpose, similar to common motive, that manifests a plan." *Id.* Here, citing *Jenkins*, that is exactly what the military judge found. (App. Ex. VIII, p. 4–5). The threat, made one week prior to the crimes, coupled with the appellant's express statements, while committing the assault and sexual assault, showed a singular purpose and manifestation of a plan.

Appellant seeks to reframe the issue as an isolated incident insufficient to establish a plan. (Appellant's Br. 60). Although "[a] succession of similar acts standing alone does not, however, establish the existence of a plan[,]" there is no requirement that a certain number of acts be accomplished prior to establishing evidence of a plan. *Jenkins*, 48 M.J. at 600. In other words, an accused can demonstrate a plan to effectuate a crime in a single statement or over the course of a series of acts or statements.

"[T]here is [also] no requirement for the separate acts to be similar when offered to establish a common plan." *Id.* "For example, an uncharged larceny of an automobile, that is subsequently used as a getaway vehicle in a charged kidnapping or robbery, may be separate acts in the same drama and thus probative of a larger plan." *Id.* Here, although the acts of threatening physical violence and manifesting physical violence *are* similar, the same logic applies. Additionally, this theory—"a plan to 'control and dominate [Ms. [redacted]'s] actions'" is not attenuated or unique, but rather prevalent in cases involving violence towards intimate partners. *See id.* ("Appellant's plan was to dominate and subjugate his spouse by fear, humiliation, and verbal or physical assaults."). Appellant expressed an intent to do a criminal act similar to the one he ultimately committed one week later. This express plan to inflict physical harm was relevant to the harm he ultimately inflicted (seemingly as punishment for Ms. [redacted]'s alleged infidelity). The military judge certainly did not *clearly abuse his discretion* in finding this to be so.

Assignment of Error V

[WHETHER THERE WAS POST-TRIAL DELAY AND, IF SO, WHETHER] THE DELAYED POST-TRIAL PROCESSING OF THIS CASE MERITS RELIEF WHERE THE CASE WAS NOT REFERRED TO THIS COURT UNTIL 251 DAYS AFTER SENTENCING[.]

Additional Facts

For purposes of this assignment of error, the government adopts the facts from Appellant's Brief. (Appellant's Br. 63). The government offers the following additional facts: The record of trial is 1,772 pages long. The trial transcript is 673 pages long. The appropriate personnel mailed the record of trial to this court on 20 December 2023, 237 days after appellant was sentenced. (Chronology; Memorandum for Record, Explanation of Post-Trial Delay [MFR]).

Standard of Review

This court conducts a de novo review of claims of unreasonable post-trial delay. *United States v. Winfield*, 83, M.J. 662, 666 (Army Ct. Crim. App. 2023).

Law

There are two distinct analyses in addressing claims of post-trial delay: determining whether appellant suffered a due process violation under the Constitution, and determining sentence appropriateness under Article 66(d), UCMJ. *United States v. Simon*, 64 M.J. 205, 207 (C.A.A.F. 2006).

1. Fifth Amendment Procedural Due Process.

Servicemembers convicted at courts-martial have a due process right under the Fifth Amendment to post-trial processing without unreasonable delay. *Diaz v. JAG of the Navy*, 59 M.J. 34, 38 (C.A.A.F. 2003). In order to analyze post-trial delays and due process, appellate courts analyze four factors: "(1) the length of the

delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *United States v. Moreno*, 63, M.J. 129, 135 (C.A.A.F 2006).[23] The four *Barker* factors must be balanced, and "no single factor [is] required to find that post-trial delay constitutes a due process violation." *United States v. Toohey*, 63 M.J. 353, 361 (*Toohey II*) (C.A.A.F. 2006) (quoting *Moreno*, 63 M.J. at 136) (citing *Barker*, 407 U.S. at 533).[24] The *Barker* analysis, however, is not required if this court determines that any due process violation is harmless beyond a reasonable doubt. *United States v. Finch*, 64 M.J. 118, 125 (C.A.A.F. 2006).

In situations where an appellant is unable to show they have suffered prejudice, the court will find a due process violation only when, "in balancing the other three factors, [the post-trial] delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey*, 63 M.J. at 362. If the court finds a due process violation, the burden shifts to the government to prove the constitutional error was harmless beyond a reasonable doubt. *United States v. Ashby*, 68 M.J. 108, 125 (C.A.A.F.

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[23] Additionally, CCAs will also further examine prejudice in light of three primary sub-factors: (1) prevention of oppressive incarceration; (2) minimization of appellant's anxiety and concern while awaiting the outcome of the appeal; and (3) limiting the possibility of impairment of the grounds for appeal and defense at a possible rehearing. *Moreno*, 63 M.J. at 139–40.

2009) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). In determining whether a due process error was harmless beyond a reasonable doubt, the court analyzes the case for prejudice. *Id*. This analysis is "separate and distinct from the consideration of prejudice as one of the four *Barker* factors." *Id.* Under this review, the court considers "the totality of the circumstances" based on the "entire record." *Id.* The court "will not presume prejudice from the length of the delay alone," but instead requires "evidence of prejudice in the record." *Id.*

2. Sentence appropriateness.

Absent a due process violation, this court next considers whether relief for excessive post-trial delay is warranted based on the CCA's sentence appropriateness authority under Article 66(d)(1), UCMJ. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Additionally, pursuant to Article 66(d)(2), UCMJ, a CCA "may provide appropriate relief if the accused demonstrates . . . excessive delay in the processing of the court-martial after the judgment was entered into the record." Because Article 66(d)(2), UCMJ, does not define "excessive delay," "in considering whether a delay is excessive this court will broadly focus on the totality of the circumstances surrounding the post-trial processing timeline for each case, balancing the interplay between factors such as chronology, complexity, and unavailability, as well as the unit's memorialized justifications for any delay."

Winfield, 83 M.J. at 666. Even if there is excessive delay, "Article 66(d)(2) dictates [that this court] 'may provide appropriate relief' and leaves the determination as to whether relief is provided, and what type of relief is appropriate, to [this court's] discretion." *Id*.

Argument

The government did not violate appellant's due process rights because there was no facially unreasonable delay and there was no prejudice. Considering the totality of the circumstances in this case, appellant does not deserve relief under a sentence appropriateness analysis because appellant did not suffer prejudice, his sentence is appropriate, and there is no harm to correct. Furthermore, appellant has not demonstrated error or excessive delay under Article 66(d)(2), UCMJ. Therefore, this court should affirm the findings and sentence as adjudged.

1. The totality of the *Barker* factors weigh in favor of the government.

A. Length of delay

Here, the processing timeline was not unreasonable considering the length of the transcript and amount of time it took to provide the certified transcript to this court for referral. (Chronology; Post-Trial Matters).

B. Reason for delay

The government provided a reason for the post-trial processing timeline. (MFR). The government cites another jurisdiction requiring assistance and

providing that assistance despite suffering their own shortages. (MFR). Although "general reliance on . . . manpower constraints will not constitute reasonable grounds for delay[,]" assisting another jurisdiction arguably falls in the category of "high demands placed upon military personnel[.]" *Winfield*, 83 M.J. at 667.

C. Right to timely appeal

Appellant did not assert any right to timely review and appeal; therefore, this factor weighs in favor of the government.

D. Prejudice

Appellant does not assert any particularized prejudice based on the delay. Appellant has also failed to show that the delay was so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system" and overcome the absence of prejudice. *Toohey*, 63 M.J. at 362. As such, the "difficult and sensitive balancing process" of the facts of this case show that appellant did not suffer a due process violation. *Barker*, 407 U.S. at 533. Even in cases where a court has found a due process violation, courts have found the due process violation to be harmless beyond a reasonable doubt in the absence of *Barker* prejudice. *See United States v. Bush*, 68 M.J. 96, 104 (C.A.A.F. 2009) (holding that seven-year post-trial delay due process violation was harmless beyond a reasonable doubt); *see also United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008) (holding that appellant did not suffer detriment to his legal

position in his appeal as a result of an almost seven-year delay between adjournment and completion of appellate review). For those reasons, the *Barker* factors, in their totality, weigh in favor of the government.

2. No other relief is appropriate or warranted.

Additionally, pursuant to Article 66(d)(2), UCMJ, no relief is otherwise appropriate or warranted based on the nature of the crime and the punishment received. Appellant was convicted for physically assaulting, and then sexually assaulting Ms. [redacted]. (R. at 632). Ms. [redacted] was drunk and pleading with appellant during the assault. (R. at 252–55). Appellant was Ms. [redacted]'s boyfriend, and she loved and trusted him. (R. at 256). In spite of this, after the physical and sexual assault, appellant discarded Ms. [redacted], leaving her to drive herself home from his barracks after he drove himself home first. (R. at 256). Appellant received ten years of confinement and a dishonorable discharge for this offense. (R. at 672). Even assuming excessive delay, no relief is appropriate or warranted in this case.

Conclusion

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

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CERTIFICATE OF SERVICE, U.S. v. WORDLAW (20230235)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] ***@mail.mil*** on the 10th day of September, 2024.

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