IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLEE (RETRIAL)**
v.	Docket No. ARMY 20210389
Private First Class (E-3) **JOHN K. JARLEGO**, United States Army, Appellant	Tried at Fort Leavenworth, Kansas on 18 January 2024, 23 February 2024, and 14–15 May 2024, by a general court-martial convened by Commander, United States Army Combined Arms Center and Fort Leavenworth, Colonel J. Harper Cook, Military Judge, presiding.

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

Assignments of Error

I. WHETHER THIS COURT ERRED BY AUTHORIZING A REHEARING WITHOUT FIRST DETERMINING WHETHER THE RECORD WAS LEGALLY AND FACTUALLY SUFFICIENT?

II. WHETHER THE MILITARY JUDGE ERRED BY NOT SUPPRESSING APPELLANT'S STATEMENT?

Statement of the Case

On 15 May 2024, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of rape of a child and one specification of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice, 10 U.S.C. § 920b [UCMJ]. (R. at 750;

Statement of Trial Results [STR]). The military judge sentenced appellant to reduction to the grade of E-1, confinement for forty-two months, and a dishonorable discharge. (R. at 795; STR). The military judge credited appellant with 809 days of confinement credit. (R. at 795; STR). The convening authority waived automatic forfeitures. (Action). On 12 June 2024, the military judge entered judgment. (Judgment).

Statement of Facts

In June 2019, twenty-year-old appellant exchanged sexually explicit Snapchat messages with eleven-year-old [redacted]. (R. at 620; Pros. 11, 13–18, 19 at 33:57–34:00). These messages included plans to have sex in the mountains in El Paso, Texas. (R. at 661; Pros Ex. 15, 18 at 5–7). In subsequent messages between them, she texted him, "U were my second fuck" and "how was my pussy," while he texted her, "I like the way u were moaning too" and "Next time I'll cum in ur face?" (Pros. Ex. 18 at 3–4).

Law enforcement obtained copies of these messages from the victim and appellant's phones. (R. at 638, 640–41, 648–50, 713; Pros. Ex. 16–17). The victim's Snapchat user account and display names were [redacted] and [redacted] respectively. (R. at 639–40, 666; Pros. Ex. 18). Appellant's user account and display names were "jjarlego" and "JustAsoldjerBoy," respectively. (R. at 623, 634, 650, 666, 674–75, 710–13; Pros. Ex. 18).

In a video and audio recorded interview with the Criminal Investigation Division (CID),[1] appellant waived his Article 31(b), UCMJ, rights. (R. at 660–62; Pros. Ex. 19 at 00:00–07:01). After Special Agent (SA) JD showed appellant a photo of [redacted], appellant confirmed he had sex with her at McKelligon Canyon. (R. at 664; Pros Ex. 19 at 09:34–10:40, 13:43–13:47, 23:31–23:38). He told SA JD that he met her online, confirmed his user account name "jjarlego," believed she was sixteen years old, arranged the meet-up, and took her to the Canyon where he penetrated her vulva and mouth with his penis. (Pros. Ex. 16 at 2, 17 at 2; 19 at 13:19–13:47, 14:41–14:56, 20:54–24:36).

Additional facts are incorporated below.

Assignment of Error I

WHETHER THIS COURT ERRED BY AUTHORIZING A REHEARING WITHOUT FIRST DETERMINING WHETHER THE RECORD WAS LEGALLY AND FACTUALLY SUFFICIENT?

Additional Facts

On 29 June 2021, a military judge, sitting as a general-court martial, convicted and sentenced appellant for the two specifications of rape of a child and

[1] Paragraph I.E.c of this court's current Citation Guide (8th ed. 2019) refers to the agency as Criminal Investigation Command. However, effective 17 September 2021, the agency was officially re-designated as Criminal Investigation Division: https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN35906-AGO_2022-09-000-WEB-1.pdf.

one specification of sexual abuse of a child. (App. Ex. LXX, p. 3). He entered judgment on 22 November 2021. (App. Ex. LXX, p. 1).

On 11 September 2023, this court set aside the findings and sentence and ordered a rehearing. *United States v. Jarlego*, ARMY 20210389, 2023 CCA LEXIS 388 (Army Ct. Crim. App. 11 Sep. 2023) (mem op.). (App. Ex. LXXI). Appellant did not challenge this order by moving for reconsideration or petitioning the Court of Appeals for the Armed Forces. On rehearing, when the military judge asked defense counsel whether counsel had any challenges to the jurisdiction of the rehearing, defense counsel replied, "No, Your Honor." (R. at 537).

Standard of Review

Questions of statutory interpretation are reviewed de novo. *See United States v. Atchak*, 75 M.J. 193 (C.A.A.F. 2016).

Law and Argument

Article 66(f), UCMJ, grants this court discretion to order a rehearing in three circumstances: (i) if the court sets aside the findings, except when prohibited by Article 44, UCMJ, (ii) if the court sets aside the sentence, or (iii) if the court determines additional proceedings are warranted insofar as it may be necessary to address a substantial issue, subject to certain limitations. UCMJ art. 66(f); *see also* UCMJ art. 63. Article 44, UCMJ, provides, in relevant part:

> (a) No person may, without his consent, be tried a second time for the same offense.

> (b) No proceeding in which an accused has been found guilty by a court-martial upon any charge or specification is a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed.

In this case, this court held the military judge erred under the Confrontation Clause of the Sixth Amendment of the United States Constitution, resulting in prejudice to appellant. *Jarlego*, ARMY 20210389, 2023 CCA LEXIS, at *6 ("[O]n the facts of this case it is virtually impossible to show the erroneous admission was harmless."). In finding legal error that materially prejudiced the substantial rights of the accused, the court set aside the findings and sentence and ordered remand. *Jarlego*, ARMY 20210389, 2023 CCA LEXIS, at *6; *see generally* UCMJ art. 59(a). Article 44, UCMJ, did not prohibit a rehearing because the findings of guilty had not become final. Moreover, appellant through counsel consented to the rehearing. (R. at 537). As the first and second Article 66(f), UCMJ, circumstances were met, this court had the discretion to order a rehearing.

Moreover, the cases upon which appellant relies on are misplaced. (Appellant's Br. 5) (citing *United States v. Cooper*, 80 M.J. 664 (N-M. Ct. Crim. App. 2020); *United States v. Conley*, 78 M.J. 747 (Army Ct. Crim. App. 2019); *Hoffler v. Bezio*, 736 F.3d 144 (2d Cir. 2013). First, *Hoffler v. Bezio* is not binding on this court, and it discusses a general rule in federal courts, not the powers statutorily conferred under Article 66(f), UCMJ. 736 F.3d at 162. Second, *Conley*,

in part, cited to a previous version of Article 66, UCMJ, and explained, "As a general practice, we reach the issue of whether the findings and sentence 'should be approved' only after we first determine that the findings and sentence are *correct in law and fact*." 78 M.J. at 751 n.5 (emphasis added). Contrary to appellant's proposition, this does not require the court to consider legal and factual *sufficiency* first. In fact, the Navy-Marine Court of Criminal Appeals (CCA) in *Cooper* stated, "[T]he best practice for a service court of criminal appeals is to simply not comment on the legal and factual sufficiency of findings in a case where a remand is ordered." 80 M.J. at 677. In this case, the court did exactly that. *Jarlego*, ARMY 20210389, 2023 CCA LEXIS. Accordingly, the court should reject appellant's argument and find it properly ordered a rehearing.

Assignment of Error II

WHETHER THE MILITARY JUDGE ERRED BY NOT SUPPRESSING APPELLANT'S STATEMENT?

Additional Facts

On 15 February 2024, defense filed a motion to suppress appellant's statement to CID. (App. Ex. LXXIX, LXXIX-A). The government filed its response on 21 February 2024. (App. Ex. LXXXI). The parties litigated the motion on 23 February 2024. (R. at 560–74). At issue was whether appellant's post-rights warning waiver and statements were knowingly and voluntarily made.

(R. at 568–69). Counsel argued whether CID used unlawful deception so that appellant's waiver was invalid. (R. at 568–73). Defense also submitted for the court's consideration that appellant was born in the Philippines and Tagalog was his principal language. (R. at 541, 554–55; App. Ex. LXXXVII, p. 2).

The military judge denied defense's motion in a written ruling, finding valid waiver. (App. Ex. LXXXVII, pp. 3–8). He found the agent told appellant he was suspected, not accused, of Rape of a Child, because of "what's been presented to us by . . . the girl," read each of the rights aloud from the DA 3881, and the agent sought to prevent an *Edwards* violation.[2] (App. Ex. LXXXVII, pp. 6–7). He further found that the agent obtained appellant's decision regarding waiver by asking if he wanted a lawyer at the time, was willing to discuss the offense and make a statement without talking to a lawyer and without having a lawyer present with him, and to sign the DA 3881 if he agreed to talk to the agent that day. (App. Ex. LXXXVII, p. 8). The military judge attributed instances of appellant's confusion and to the form of the agent's question. (App. Ex. LXXXVII, p. 7).

[2] Although the military judge did not provide the full citation in his written decision, it is reasonable to infer that an "*Edwards* violation" referred to *Edwards v. Arizona*, 451 U.S. 477 (1981), which would have required the agent to cease interrogation if appellant had invoked his right to counsel.

Standard of Review

Courts review a military judge's decision to suppress evidence for an abuse of discretion. *United States v. Flanner*, __ M.J. ___, 2024 CAAF LEXIS 578, *11 (C.A.A.F. 2024) (citing *United States v. Mott*, 72 M.J. 319, 329 (C.A.A.F. 2013)). Courts review de novo any legal conclusions supporting the suppression ruling. *Id.* (citing *United States v. Chatfield*, 67 M.J. 432, 437 (C.A.A.F. 2009).

Law

"A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *Id*. (citation omitted). Said another way, a military judge abuses his discretion when: (1) he predicates his ruling on findings of fact that are not supported by the evidence of record; (2) he uses incorrect legal principles; or (3) he applies correct legal principles to the facts in a way that is clearly unreasonable. *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010).

A person subject to the UCMJ may not interrogate or request any statement from an accused or a person suspected of an offense without first: informing the accused or suspect of the nature of the accusation; advising the accused or suspect that the accused or suspect has the right to remain silent; and advising the accused

or suspect that any statement made may be used as evidence against the accused or suspect in a trial by court-martial. M.R.E. 305(c). However, a person may waive these rights and make a statement if the waiver is made freely, knowingly, and intelligently. M.R.E. 305(e)(1). A servicemember's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish the accused in fact knowingly and voluntarily waived his right to counsel. *Mott*, 72 M.J. at 321.

> Voluntariness of consent and knowing waiver are two distinct and discrete inquiries. Thus, in addition to showing that the waiver was voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception, the government must also demonstrate that the servicemember understood his right to counsel and intelligently and knowingly relinquished it.

Id. The accused or suspect must affirmatively acknowledge that he or she understands the rights involved, affirmatively decline the right to counsel, and affirmatively consent to making a statement. M.R.E. 305(e)(1).

B. Prejudice.

A finding or a sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused. UCMJ art. 59(a). For non-constitutional errors, the court applies the test under *United States v. Kohlbek* by weighing: "(1) the strength of the [g]overnment'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." 78 M.J. 326 (C.A.A.F. 2016). For constitutional errors, the error must be harmless beyond a reasonable doubt. *See United States v. Evans*, 75 M.J. 302, 305 (C.A.A.F. 2016).

Argument

A. The military judge did not abuse his discretion.

Appellant contests the voluntariness of his waiver, asserting that the interviewing agent used deceit and misleading statements during and before the rights warning and waiver process. (Appellant's Br. 12–14). However, the evidence supported the military judge's finding that appellant freely waived his Article 31(b), UCMJ, rights. (App Ex. LXXXVII, p.10).

First, the military judge considered all the relevant facts. He found appellant orally and in writing waived his rights, acknowledged that he understood the rights involved, affirmatively declined the right to counsel, and affirmatively consented to make a statement. (App. Ex. LXXXVII, p. 10). In finding so, the military judge accurately transcribed the rights warning in its entirety, citing the associated timestamps. (App. Ex. LXXXVII, pp. 5–8). He found these warnings included the agent's repeated reinforcement of appellant's rights such as appellant's right not to continue with the interview. (App. Ex. LXXXVII, pp. 7, 11). He also found the agent explained the difference between the word "accused" and "suspected" and

made it clear appellant was suspected of "Rape of a Child." (App. Ex. LXXXVII, pp. 5–8, 11) ("There was no bait and switch afoot here.").

Second, the military judge considered the correct legal principles, including Article 31(b), UCMJ, warnings and waiver, as well as voluntariness of an accused's statement. He recited, in relevant part,

> After being advised of the [Article 31(b)] rights, a suspect may waive the rights. The waiver must be made "freely, knowingly, and intelligently." M.R.E. 305(e)(1). In order to prove a valid waiver, the Government must show by a preponderance of the evidence that (1) the relinquishment of the rights was voluntary; and (2) the accused had full awareness of the nature of the rights being abandoned and the consequences of the decision to abandon them.

(App. Ex. LXXXVII, p. 9) (citing *Moran v. Burbine*, 475, U.S. 412, 421 (1986)). With respect to voluntariness, he recalled the inquiry involved an assessment of the totality of the circumstances, including the characteristics of the accused and details of the interrogation. (App. Ex. LXXXVII, p. 9) (citing M.R.E. 304(a)(1)(A), (f)(7)); *United States v. Bubonics*, 45 M.J. 93 (C.A.A.F. 1996); *Schneckloth v. Bustamonte*, 412 U.S. 218 226 (1973); and *United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005) (citing *United States v. Ellis*, 57 M.J. 375, 379 (C.A.A.F. 2002)).

Third, the military judge correctly applied the principles to the facts. He considered evidence of deception and trickery, the conversational context and conduct of the CID interview and, critically, the absence of deceptive tactics

regarding the rights themselves. (App. Ex. LXXXVII, p. 11). He methodically considered each parties' arguments and characterizations of the evidence with respect to deception and trickery, including defense's assertions that the agent's statements suggested minimization, apparent befriendment, the "truth will set you free fallacy," and absence of a cleansing statement prior to the rights advisal. (App. Ex. LXXXVII, p. 10–11).

Nevertheless, he found the rights warning and waiver process cured concerns over deception and trickery that might have existed before the warnings.[3] (App. Ex. LXXXVII, p. 11). He determined appellant was not tricked into thinking this was a casual conversation, the agent's comments about the nature of the suspected offense were consistent with other comments he made during the pre-warning phrase about the origins of the allegations, the agent took time to verify appellant understood each right before proceeding, and the agent reinforced the idea that the waiver was personal to the accused and remained personal to the accused for the duration of the interview. (App. Ex. LXXXVII, p. 11).

The military judge also accounted for appellant's personal characteristics. (App. Ex. LXXXVII, pp. 11–12). The evidence before the military judge was that

[3] *See also* App. Ex. LXXXVII at 12 n.24–25 (considering the tactics the agent employed after appellant waived his rights) (citing *United States v. Davis*, 6 M.J. 874 (1979) (citing *United States v. McKay*, 26 M.J. 307 (1958)); *United States v. Jones*, 34 M.J. 899 (C.M.R. 1992) (citing *Illinois v. Perkins*, 496 U.S. 292 (1990); *Miller v. Fenton*, 796 F.2d 598 (3d Cir. 1986)).

appellant was an almost twenty-one-year-old private first class from the Philippines.[4] (App. Ex. LXXXVII, p. 2, 11; App. Ex. LXXIX, p. 2). He found appellant understood his rights despite not being a native English speaker:

> [A]t the time of his interview with CID, the accused understood and spoke English without difficulty. He understood the agent's questions in English and responded to them without hesitation in English. At times when he was confused, he asked cogent follow-up questions for clarification. Although confusion on the accused's part was infrequent, it was most pronounced during a back-and-forth about *Edwards* protections—not about the core rights of Article 31(b) themselves. And SA [JD] took his time to rephrase that set of compound questions until the accused clearly understood them. In the end, the Government has shown that the accused intelligently understood his rights before he freely and knowingly waived them.

(App. Ex. LXXXVII, pp. 7, 10–11). He further noted appellant was a high school graduate with a GT score that was slightly above average, attended one year of trade school and earned a pre-apprentice certification before joining the military, and had been in the military for over a year. (App. Ex. LXXXVII, p. 11). He reasonably concluded that appellant had the capacity to understand his rights and actually understood them. (App. Ex. LXXXVII, p. 11).

[4] In his brief, appellant incorrectly states that he was a nineteen-year-old private from Thailand. (Appellant's Brief at 14).

As the military judge's ruling relied upon correct legal principles, applied those principles to the facts in a way that was reasonable, and considered all important facts, the court should find he did not abuse his discretion.

B. To the extent this court finds error, it was harmless with respect to Specifications 1 and 3 of The Charge.

As a threshold matter, if this court finds the military judge abused his discretion, the error was not harmless with respect to Specification 2 of The Charge because appellant's admissions were the principal evidence of this act. (Pros. Ex. 19 at 24:18–24:54).

However, such error was harmless under the *Kohlbek* non-constitutional error test with respect to Specifications 1 and 3 of The Charge. *See* 78 M.J. 326. To the extent this court considers appellant was in custody when he waived his rights so the Fifth Amendment also applied, the government still prevails because the error was harmless beyond a reasonable doubt.[5] *See Evans*, 75 M.J. at 305.

First, the government's case was strong. The evidence of appellant's guilt included (i) messages between appellant and the victim, (ii) photos of the victim, (iii) the victim's birth certificate, and (iv) the testimonies of Detective AZ, SA JD, and SA EP. (Pros. Ex. 11–19). The messages from "JustAsoldjerBoy," "I like the

[5] While the military judge did not make an explicit finding as to whether appellant was in custody, the "Principles of Law" section demonstrates he considered whether Fifth Amendment protections applied. (App. Ex. LXXXVII, p. 8).

way u were moaning too" and "Next time I'll cum in ur face?" was direct evidence of Specification 3 of The Charge. (Pros. Ex. 18 at 4). The messages from [redacted]/[redacted] "U were my second fuck" and "how was my pussy," in combination with the messages from "JustAsoldjerBoy" were circumstantial evidence of Specification 1 of The Charge. (R. at 650; Pros. Ex. 18 at 3–4). In turn, proof that appellant and the victim sent those messages were: (i) Detective AZ and SA EP's testimonies linking appellant to "jjarlego" and "JustAsoldjerBoy." (R. at 650, 666, 674–75, 710–13); (ii) Detective AZ's testimony linking the victim to [redacted] and [redacted] (R. at 639–40); and (iii) Detective AZ's testimony, photos of the victim, and the victim's self-authenticating birth certificate proving her identity and that she was eleven years old. (R. at 621, Pros. Ex. 11–12, 14).

Second, the defense's case was weak. Defense's theory was that the government could not prove the identity of the victim, nor that appellant sent the messages. They did so by eliciting through cross-examination that (i) the testifying agents did not speak with the victim, and (ii) law enforcement merely found the messages on the victim and appellant's phones, not their sender. (R. at 651, 707, 720–21).[6]

[6] However, with the admission of the CID interview, defense was able to further argue that appellant believed the victim was sixteen years old and did not know her name. (R. at 662–63; Pros. Ex. 19 at 17:20–19:32, 24:49–25:07).

Third, appellant's admissions were of good quality, but not material. Although those admissions offered direct evidence of Specifications 1 and 3 of The Charge. However, the agents' testimonies and the messages alone were sufficient to prove Specifications 1 and 3 of The Charge beyond a reasonable doubt.

Thus, the greater weight of the *Kohlbek* factors weigh in favor of the government and the court should find any error harmless with respect to Specifications 1 and 3 of The Charge.

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and sentence.

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CERTIFICATE OF SERVICE, U.S. v. JARLEGO (20210389)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on the 9th day of December, 2024.

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