

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee

v.

Chief Warrant Officer Two (CW-2)
JONATHAN K. CUNNINGHAM
United States Army,
Appellant

BRIEF ON BEHALF OF APPELLEE

Docket No. ARMY 20220140

Tried at Fort Liberty, North Carolina,
on 9 November 2021 and 22-25 March
2022, before a general court-martial
appointed by the Commander,
Headquarters, Fort Liberty, Colonel G.
Bret Batdorff and Colonel J. Harper
Cook, military judges, presiding.

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

Assignments of Error¹

I.

**WHETHER APPELLANT’S CONVICTIONS ARE
FACTUALLY SUFFICIENT.**

II.

¹ The government has reviewed appellant’s *Grostepon* matters and agrees with the appellate counsel that they do not warrant full briefing as an assignment of error. Furthermore, the government respectfully submits that they lack merit. The government recognizes this court’s authority to elevate *Grostepon* matters deserving of increased attention. *United States v. Grostepon*, 12 M.J. 431, 437 (C.M.A. 1982). Should this court exercise such authority, finding any of appellant’s *Grostepon* matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

**WHETHER THE MILITARY JUDGE ERRED BY
ADMITTING A HEARSAY STATEMENT OF
APPELLANT’S WIFE.**

III.

**WHETHER THE MILITARY JUDGE
IMPROPERLY ALLOWED OPINION TESTIMONY
AS TO THE MEANING OF “SIT AND SPIN.”**

IV.

**WHETHER GOVERNMENT COUNSEL
COMMITTED PROSECUTORIAL MISCONDUCT
BY REPEATEDLY ATTEMPTING TO ADMIT
INADMISSIBLE M.R.E. 404(b) TESTIMONY OVER
SUSTAINED OBJECTIONS.**

Statement of the Case

On 24 March 2022, an officer panel sitting as a general court-martial convicted appellant, Chief Warrant Officer Two (CW2) Jonathan K. Cunningham, contrary to his pleas, of one specification of sexual abuse of a child, one specification of false official statement, and one specification of wrongful interference with an adverse administrative proceeding in violation of Articles 120b, 107, and 131g, Uniform Code of Military Justice, 10 U.S.C. §§ 920b, 907 and 931g [UCMJ]. (R. at 758). On 25 March 2022, the military judge sentenced appellant to be dismissed from the service. (R. at 802). On 19 May 2022, the

convening authority took no action on the findings or sentence. (Action). On 25 May 2022, the military judge entered judgment. (Judgment).

Statement of Facts

Appellant first met SSG [REDACTED] and his family while stationed at Fort Campbell, Kentucky. (R. at 419). Over the course of the next eight years, appellant became a mentor and friend to SSG [REDACTED] and their families also became close. (R. at 419, 421). Staff Sergeant [REDACTED] had several children that were close in age to those of appellant, including a daughter, Miss [REDACTED], who in 2020 was 13 years old, one year younger than appellant's son, Master [REDACTED]. (R. at 417-418, 574).

On June 29, 2020, appellant initiated a conversation with Miss [REDACTED] using Instagram. (Pros. Ex. 3, p. 1). The two had messaged previously on Instagram about innocuous topics such as a sweatshirt appellant had given Miss [REDACTED] and various life events. (Pros. Ex. 2). In this conversation however, the topic rapidly turned to how Miss [REDACTED] looked in a particular photo she had taken in a bathroom. (Pros. Ex. 3, p. 4). Appellant commented, "[t]rying to look all cute in the photos you took" and "[l]et me stop before you rat me out to [SSG [REDACTED]] and [REDACTED]" as well as "I was gonna say something about your pic but I won't." (Pros. Ex. 3., p. 5-6). Appellant commented on the photo Miss [REDACTED] had taken saying, "I see skin" and "I see side leg." (Pros. Ex. 3., p. 11).

The two discussed their relative heights and how appellant was much taller than Miss ■■■; this part of the conversation led to appellant telling Miss ■■■ that “short is good...I’ll explain when you’re older.” (Pros. Ex. 3., p. 14). Appellant and Miss ■■■ went back and forth over nicknames, with Miss ■■■ calling him “skyscraper” and appellant stating “[i]f you call me skyscraper I’ll call you Frodo....I have worse but your ears are too young” and eventually saying “[i]f you keep calling me skyscraper I’m going to find a really bad nickname for you...I’ll start calling you sit and spin.” (Pros. Ex. 3., p. 18, 23).

As the conversation progressed, appellant asked Miss ■■■ about her relationships then, after asking her a few other questions, he asked, “[y]ou already have bodies?” and “[s]o you knew what sit and spin was lmao.” (Pros. Ex. 3., p. 27). Appellant remarked to Miss ■■■ that, “[y]ou are just looking for an excuse to get close to me” and when she said only to make him look stupid, he replied, “[c]ause I know I ain’t ugly.” (Pros. Ex. 3., p. 30-31). After being called a “pantless midget,” Miss ■■■ told appellant to “fuck off” to which he said, “[nah] [h]elicopter sit and spin midget.” (Pros. Ex. 3., p. 31-32). The two then discussed OnlyFans and “dick pics” and appellant promised to not send any “dick pics” to Miss ■■■’s snapchat. (Pros. Ex. 3, p. 36-37). The conversation moved from Instagram to Snapchat, where it soon ended after Miss ■■■ told appellant that he was “being scary” and pointed out he was a thirty-nine-year-old talking with a

thirteen-year-old. (Pros Ex. 4). Miss ■ described Snapchat as a communication platform where messages are deleted after both parties view them, and that on that platform there is more “freedom.” (R. at 300).

A few weeks after the conversation Miss ■ told her father and her stepmother about the messages from appellant’s accounts. (R. at 311, 397-99). As soon as SSG ■ found out about the messages he drove over to appellant’s home to confront him. (R. at 424). Staff Sergeant ■ arrived at the house around midnight, knocked on the door, and asked appellant if he had been sending his daughter inappropriate messages. *Id.* Appellant threw his arms in the air and “shrugged his shoulders” and told SSG ■ “nope” all while not making eye contact. Staff Sergeant ■ found appellant’s body language so bizarre that he asked him the same question again. (R. at 426). Appellant stated that it looked like it was his account, but that he had not sent the messages. (R. at 440).

By the next morning appellant had decided to have his fourteen-year-old son, Master ■, assume responsibility for the messages between appellant and Miss ■. According to appellant and his wife, Master ■ was aware that SSG ■ came to their house in the middle of the night, though he did not hear any of what took place, and the next morning Master ■ allegedly confessed to his parents that he had logged into appellant’s accounts and messaged Miss ■. (R. at 590-93; Pros. Ex. 5). Although they were in the same house, the conversation where

Master [REDACTED] ‘confessed’ to his mother took place entirely over text messages. (R. at 594). When Master [REDACTED] first told the story that he was responsible he did not add that any discussion had taken place over Snapchat. (R. at 595). Master [REDACTED] later added to his story, stating that he had sent Snapchat messages as well, and he wrote a letter to SSG [REDACTED]’s family apologizing. (R. 595-96). At trial Master [REDACTED] testified that he logged in to his father’s Instagram account (he never gave a reason for why this happened), saw a picture of Miss [REDACTED] that he thought was “cute,” and based on this made the decision to chat with her while pretending to be his father. (R. at 576-77, 580, 583).

As part of the investigations into appellant’s misconduct, his unit conducted an administrative investigation. (R. at 459). The investigating officer (IO), CPT [REDACTED] interviewed Appellant and Master [REDACTED]. (R. at 460). Appellant gave a sworn statement claiming that he did not have the sexually charged conversation with Miss [REDACTED] and reiterating that his teenage son had a conversation that he knew nothing about. (R. at 467; Pros. Ex. 10). Master [REDACTED] also gave a sworn statement, in the presence of his father, admitting to logging into appellant’s accounts to send messages to Miss [REDACTED]. (Pros. Ex. 11). As the interview with Master [REDACTED] was finishing, the IO left the interview room to print off a copy of the sworn statement for Master [REDACTED] to review before signing. (R. at 473). As the IO left the interview room, he heard appellant say to Master [REDACTED] that one of his answers was wrong and

he needed to change it. (R. at 474). After appellant's correction, Master [REDACTED] did change a part of his sworn statement, editing when he had first accessed appellant's social media accounts from June 2020 to January 2020. (R. at 474-75; Pros. Ex. 11).

Appellant later gave a statement to Army Criminal Investigation Command (CID) Special Agent (SA) [REDACTED], in which he stated, in part, "I did not text [Miss [REDACTED]]." (Pros. Ex. 14). At trial, the parties later stipulated that appellant's statement to SA [REDACTED] was referring to any communications with Miss [REDACTED] in June 2020, not to the earlier messages sent in February 2020. (R. at 752-753).

Assignment of Error I

WHETHER APPELLANT'S CONVICTIONS ARE FACTUALLY SUFFICIENT.

Standard of Review

Military appellate courts conduct a de novo review of factual sufficiency. *United States v. Bright*, 66 M.J. 359, 363 (C.A.A.F. 2008); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Argument

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, *the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt.*" *United States v. Rosario*, 76 M.J.

114, 117 (C.A.A.F. 2017) (emphasis in original). In conducting this unique appellate role, the court takes “a fresh, impartial look at the evidence,” applying “neither a presumption of innocence nor a presumption of guilt” to “make [its] own independent determination as to whether the evidence constitutes proof of each element beyond a reasonable doubt.” *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Proof beyond a reasonable doubt does not require that the evidence be free from all conflict. *United States v. Trigueros*, 69 M.J. 604, 612 (Army Ct. Crim. App. 2010) (quoting *United States v. Rankin*, 63 M.J. 552, 557 (N. M. Ct. Crim. App. 2006)). “In sum, to sustain appellant’s conviction, [this court] must find that the government has proven all essential elements and, taken together as a whole, the parcels of proof credibly and coherently demonstrate that appellant is guilty beyond a reasonable doubt.” *United States v. Gilchrist*, 61 M.J. 785, 793 (Army Ct. Crim. App. 2005).

The government’s case required the panel to make logical inferences, but that does not mean that the government failed to meet its burden of proof. It was straightforward and relied on the factfinder exercising common sense. Miss [REDACTED] received sexually charged inappropriate messages from appellant’s social media accounts. Those messages were written in such a way that it was clear an adult was writing them, from an account that clearly belonged to appellant. Far from a

single sentence or two, the government produced 38 pages of messages supporting the conclusion that appellant wrote them to Miss ■■■. (Pros. Ex. 3). Appellant repeatedly discussed his age and Miss ■■■'s youth, "[w]ell I'm old, I should stop texting you," "[n]ope and I'm older, so I have heard them all," "I'll explain when you are older," "[y]ou're like 12 now???", "I have worse but your ears are too young," "I thought you have to verify your age for it." (Pros. Ex. 3., p. 14, 16-18, 24, 37).

When Miss ■■■ reported the sexually charged messages to her parents, her father (SSG ■■■ immediately drove to appellant's house in the middle of the night to confront him. Once there, appellant behaved bizarrely while denying the crime, not looking at SSG ■■■ while he gave cursory answers. (R. at 426). Appellant's wife later came out and appeared angry about the messages, saying among other things, "I told you to stop talking to her." (R. at 441). Perhaps most damningly, during an administrative investigation into the misconduct, the investigating officer overheard appellant telling his son, Master ■■■, to change one of the answers he gave (in a way that was more helpful to appellant). (R. at 476).

Appellant correctly points out that "[i]n order for the government to have proven its case beyond a reasonable doubt, it would have had to show not only that appellant was dishonest, but that his son and wife were also dishonest and engaged in a conspiracy." (App. Br. at 13). Appellant did force his son to tell a story on the

stand, but that story was easily shown false with an examination of the government's evidence. The story appellant put forward, through his teenage son, was that Master [REDACTED] had decided for the first time in his life to perfectly imitate his father while speaking with a family friend. According to this story, Master [REDACTED] checked his father's messages to make sure he would sound the same. (R. at 589). Master [REDACTED]'s alleged reason for doing all of this was that he believed Miss [REDACTED] was "cute." (R. at 583).

The messages did not read as though they were written by a teenager, they read like an adult writing to a teenage girl. Appellant referenced a number of topics such as age, his height, and his general life experience in a way that made it clear who was writing those messages. To make it worse, when SSG [REDACTED] confronted appellant his reaction was so strange that SSG [REDACTED] asked him multiple times whether he had been inappropriately messaging his daughter. The entire story that appellant's son was the one who sent the texts was implausible. There was never a motive introduced as to why Master [REDACTED] would have done this, outside of thinking that Miss [REDACTED] was "cute" and allegedly having access to his father's account. Worst of all, appellant made sure he was present at Master [REDACTED]'s interview and then corrected him when he got some of the story wrong.

Appellant sent the text messages to Miss [REDACTED]. He did so in a gross betrayal of rank and friendship. The story he came up with after the fact was obviously just that, a story, and the government proved its case beyond a reasonable doubt.

Assignment of Error II

WHETHER THE MILITARY JUDGE ERRED BY ADMITTING A HEARSAY STATEMENT OF APPELLANT’S WIFE.

Standard of Review

A military judge’s decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Bowen*, 76 M.J. 83, 87 (C.A.A.F. 2017). “An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact.” *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003).

Law and Argument

"As a general rule, hearsay, defined as an out of court statement offered into evidence to prove the truth of the matter asserted, is not admissible in courts-martial." *United States v. Ayala*, 81 M.J. 25, 28 (C.A.A.F. 2021) (citing M.R.E. 801(c) and M.R.E. 802). However, "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused," is admissible as an exception to the general prohibition on hearsay as an excited utterance. M.R.E. 803(2). "The implicit premise [of the exception] is that a

person who reacts to a startling event or condition while under the stress of excitement caused thereby will speak truthfully because of a lack of opportunity to fabricate." *United States v. Jones*, 30 M.J. 127, 129 (C.M.A. 1990) (internal quotation marks omitted).

For hearsay to be admitted as an excited utterance: (1) "the statement must be spontaneous, excited or impulsive rather than the product of reflection and deliberation;" (2) "the event [that prompts the utterance] must be startling;" and (3) "the declarant must be under the stress of excitement caused by the event." *United States v. Arnold*, 25 M.J. 129, 132 (C.M.A. 1987) (internal quotation marks omitted) (citations omitted). "The proponent of the excited utterance has the burden to show by a preponderance of the evidence that each element is met." *United States v. Henry*, 81 M.J. 91, 96 (C.A.A.F. 2021).

As part of the government's case, SSG [REDACTED] testified that when he learned about the messages appellant sent to his daughter, he drove over to appellant's home. (R. at 424). When SSG [REDACTED] arrived and confronted appellant, appellant denied the accusations by shrugging his shoulders and saying "nope" while not making eye contact. (R. at 426). Based on appellant's denial and strange behavior SSG [REDACTED] returned to his home and retrieved Miss [REDACTED]'s phone, then drove back to appellant's residence. (R. at 427). Staff Sergeant [REDACTED] estimated that he spent approximately five minutes at appellant's home the first time, and then returned

within three minutes of leaving. (R. at 427, 440). When he arrived at appellant's home for the second time, SSG [REDACTED] was met by appellant's wife who took Miss [REDACTED]'s phone and began to look through it, causing her to say "[w]hat the fuck is this [appellant]?" (R. at 440). Appellant's wife continued to look through the phone before handing it back to SSG [REDACTED] but before giving it back to him she said, "I told you to stop talking to her." (R. at 441). The time spent at appellant's house the second visit was around six minutes. *Id.* Staff Sergeant [REDACTED] testified that appellant's wife was upset or angry when she made the statements about the phone. (R. at 434).

As a starting point, discovering that your husband of sixteen years was having a sexually charged conversation with a thirteen-year-old is an event that would cause someone to be startled and feel stressed. (R. at 530). The question then is whether the military judge abused his discretion by finding that the statement was spontaneous and made while Mrs. [REDACTED] was still under the stress of the event. The testimony of SSG [REDACTED] was that his confrontation with appellant lasted no more fourteen minutes, including the three minutes it took him to leave and come back. Appellant's wife was not a part of the first conversation between the two men, and so any revelations that took place happened in the three minutes between SSG [REDACTED] leaving and coming back with Miss [REDACTED]'s cell phone. Based on

the words she used, Mrs. [REDACTED] had not seen the messages and so no time at all elapsed between her seeing them and the expressions of displeasure and shock.

Appellant also argues that once the Article 134 offense was dismissed, the panel should have been instructed to disregard the testimony of SSG BJ as it related to the statements of Mrs. [REDACTED]. (App. Br. at 26). However, the government offered those statements under two separate theories of relevance. The first was related to the Article 134 offense, but the second theory of relevance was that those statements showed appellant was the one texting Miss [REDACTED]. (R. at 437).² The military judge's ultimate ruling on the objection was somewhat more nuanced than appellant presented in his brief and was as follows, "I find you have laid a sufficient foundation for an excited utterance...you have shown that those two statements that this witness says that [REDACTED] made in the moment are relevant to facts in issue; and specifically, the terminal element of the 134 charge, at a minimum." (R. at 438). Although not speaking directly to government's secondary theory of relevance, the military judge did not (and should not have) find that the statements were only relevant to the Article 134 offense.

Assignment of Error III

WHETHER THE MILITARY JUDGE IMPROPERLY ALLOWED OPINION TESTIMONY AS TO THE MEANING OF "SIT AND SPIN."

² The issue of identity is central to appellant's defense both at trial and on appeal.

Standard of Review

This court reviews a military judge's admission of lay opinion testimony for an abuse of discretion. *United States v. Norman*, 74 M.J. 144, 149 (C.A.A.F. 2015).

Law and Argument

Lay opinion testimony is only admissible if (1) the opinion is rationally based on the witness's perception; and (2) the opinion is "helpful to either understanding of the testimony of the witness on the stand or to the determination of a fact in issue." *United States v. Byrd*, 60 M.J. 4, 7 (C.A.A.F. 2004); Mil. R. Evid. 701. Such testimony is not objectionable simply because it embraces an ultimate issue to be decided by the trier of fact. Mil. R. Evid. 704. "It is generally held . . . that opinion testimony is not helpful where it does no more than instruct the factfinder as to what result it should reach." *United States v. Littlewood*, 53 M.J. 349, 353 (C.A.A.F. 2000) (citation omitted).

Indecent language "is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must also violate community standards. The word "community" means the standards that are applicable to the military as a whole, and not the accused's unit.

(App. Ex. XXXIX, p. 2).

In a case where the meaning of slang made the difference between innocence or guilt, the government was entitled to present evidence on what the words used during the sexually charged conversation between appellant and Miss ■ meant. Three witnesses, Ms. ■, SSG ■ and SA ■ provided the panel with their opinion as to the meaning of the phrase “helicopter sit and spin” that appellant used in his conversation with Miss ■. Of those three witnesses, defense counsel objected to Ms. ■’s competence to give an opinion of what the phrase meant, stating that “[t]here are things that, that cannot be explained by a competent witness, because there is no competent witness to explain.” (R. at 386). Defense counsel then went on to say, “[a]gain, Your Honor, this is a, a slang term that can mean different things to different people. What she thought it meant when she read it is certainly not all-inclusive....” (R. at 388). Lay opinion testimony is much like expert testimony in an important regard, the panel is not bound by it and is told the responsibility for determining facts and credibility is theirs alone. (App. Ex. XXXIX, p. 8).

Both Ms. ■ and SSG ■ immediately recognized the sexually charged nature of the messages from appellant to their child. (R. at 423-4). The two parents knew what sexual act the phrase “helicopter sit and spin” described, and that was why SSG ■ drove to appellant’s house in the middle of the night to confront him. (R. at 400, 424). Allowing the witnesses to discuss the meaning of

the phrase in question was not error where the opinion was based on their own understanding and helpful to the factfinder.

Despite the defense objection, it appears clear that all parties understood “helicopter sit and spin” or “sit and spin” were sexual references. Master [REDACTED] referred to that specific phrase in the apology letter and text messages appellant forced him to create to take blame for appellant’s own crimes. (Pros. Ex. 5-6). The phrase in question here was among the most overtly sexual parts of the conversation between appellant and Miss [REDACTED], and therefore the reactions to and understanding of that phrase was critical to the panel’s understanding.

As appellant’s defense counsel at trial pointed out, the words used could have potentially meant more than one thing. Appellant argues the same on appeal, that the term was ambiguous. (App. Br. at 14-15). Even one of the panel members asked SA [REDACTED] whether the phrase could mean something non-sexual. (R. at 517). As those previous examples show, the military judge did not err by allowing the government to call lay witnesses to explain the term.

Further, the government had to prove the indecency of the language used, and discussing what the words meant to the community receiving them and the reaction they elicited gives the panel critical insight to the nature of the phrase. If appellant had told Miss [REDACTED] that he wanted to have sex with her, there would be no need to have anyone testify as to what the words meant. In this case, appellant’s

indecent language was couched in less obvious terms which, despite some mutual understanding among the parties, required the government to prove meaning beyond a reasonable doubt.

Assignment of Error IV

WHETHER GOVERNMENT COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY REPEATEDLY ATTEMPTING TO ADMIT INADMISSIBLE M.R.E. 404(b) TESTIMONY OVER SUSTAINED OBJECTIONS.

Standard of Review

Military appellate courts review allegations of prosecutorial misconduct de novo. *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018).

Law and Argument

Trial prosecutorial misconduct is behavior by the prosecuting attorney that oversteps the bounds of propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense. 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. Prosecutors have a duty to refrain from improper methods calculated to produce a wrongful conviction.

Id. at 402. The court presumes “absent contrary indications, that the panel followed the military judge's instructions with regard to the improper testimony and trial counsel's arguments.” *United States v. Short*, 77 M.J. 148, 151 (C.A.A.F.2018) (citing *Sewell*, 76 M.J. at 19) (internal citations omitted). In cases

of prosecutorial misconduct, “relief will be granted if the trial counsel's misconduct actually impacted on a substantial right of an accused (i.e., resulted in prejudice).” *Andrews*, 77 M.J. at 402. The test for prejudice requires 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.” *United States v. Fletcher* 62 M.J. 175, 184 (C.A.A.F. 2005). 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.” *Id.* (quoting *United States v. Meek*, 44 M.J. 1, 15 (C.A.A.F. 1996)).

This court should find that there was no prosecutorial misconduct because (1) the prosecutor’s attempt to elicit a question concerning the phone was not improper 404(b) evidence, and (2) the defense affirmatively waived this issue when counsel stated “no objection” to Prosecution Exhibit 10. (R. at 468). Finally, even if this court finds misconduct by the prosecutor, the defense fails to show prejudice against appellant.

Military Rule of Evidence 404(b) implicates other “bad acts” of an accused, and specifically prohibits the use of those bad acts to show that the accused committed one bad act and so now must have committed another. A threshold requirement then, is that the act itself must be another crime, wrong, or bad act or the rule does not apply. Evidence that law enforcement agents were not able to

examine appellant's phone does not implicate M.R.E. 404(b) absent additional evidence of tampering or obstruction (which was not the evidence trial counsel attempted to introduce) and despite the military judge's ruling was relevant to show consciousness of guilt.

In this case the defense counsel's additional objection (from what started as a relevance objection under M.R.E. 403) triggered the military judge to inquire about M.R.E. 404(b) notice without consideration of whether the act itself fell under that provision. Following defense counsel's objection, the military judge held a muddled conversation between the defense counsel, trial counsel, and military judge where the military judge ultimately excluded the evidence. (R. at 504-7). Contrary to appellant's assertion that the evidence was excluded under M.R.E. 404(b), it appears that the military judge believed the statement should be excluded as hearsay (an issue the military judge brought up through questioning the witness) and never ruled on the earlier bases for objection. *Id.*

Trial counsel asked one question to SA [REDACTED] regarding whether appellant "got rid" of his cell phone. (R. at 504). After the military judge sustained his own objection for hearsay, trial counsel did not bring that up again. The last question the trial counsel asked SA [REDACTED] after the members had proposed questions was "when the accused came in for his interview, did he give you consent to search his phone?" (R. at 518). The military judge sustained an objection from defense

counsel, saying “[t]hat’s sustained again.” (R. at 519). It is unclear why the objection was sustained because no basis was given nor asked for by the military judge. However, this question, though related, is not the same as the trial counsel’s previous question. There is no hearsay component to the question; it did not fall under M.R.E. 404(b), and whether law enforcement had been able to examine the phone is clearly relevant. Based on this careful review of the record of trial, the trial counsel did not repeatedly attempt to elicit objectionable material.

Additionally, defense waived this issue when they affirmatively stated “no objection” to the admission of Pros. Ex. 10. In this exhibit, a part of the command administrative investigation, CPT [REDACTED] asked appellant whether he had his old phone (referring to the one he owned when the conversation took place), and appellant responded “[n]o I didn’t keep my old phone.” (Pros. Ex. 10). The defense affirmatively waived this information, mooted any possible issues of foundation or hearsay regarding that topic.

Finally, there is no prejudice to appellant. The military judge properly instructed the panel to disregard trial counsel’s question concerning the phone. (R. at 511). While one panel member initially seemed to misunderstand the question (R. at 512-513), he eventually agreed to the military judge’s instruction. (R. at 513). Even if this court finds prosecutorial misconduct, the trial counsel’s actions

did not affect the findings—the military judge’s immediate corrective action protected the fairness and integrity of the trial.

Conclusion

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



AUSTIN L. FENWICK
MAJ, JA
Appellate Attorney, Government
Appellate Division

MARC B. SAWYER
MAJ, JA
Branch Chief, Government
Appellate Division



RICHARD E. GORINI
COL, JA
Chief, Government
Appellate Division

CERTIFICATE OF FILING AND SERVICE,
U.S. v. CUNNINGHAM, ARMY 20220140

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

ANGELA R. RIDDICK
Paralegal Specialist
Government Appellate Division