

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

v.

**BRIEF ON BEHALF OF
APPELLANT**

Docket No. ARMY 20220140

Chief Warrant Officer Two (CW2)
JONATHAN K. CUNNINGHAM
United States Army

Appellant

Tried at Fort Bragg,¹ North Carolina,
on 9 November 2021 and 22-25 March
2022, before a general court-martial
appointed by the Commander,
Headquarters, Fort Bragg, 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 Error²

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

**II. 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”**

¹ Fort Bragg, North Carolina was recently redesignated Fort Liberty. For purposes of clarity and to coincide with the record of trial, this brief uses the prior name of Fort Bragg.

² Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant personally requests that this Honorable court consider the matters in the Appendix.

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

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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; Statement of Trial Results (STR))³. The next day, 25 March 2022, the military judge sentenced appellant to be dismissed from the service. (R. at 802; STR).

On 19 May 2022, the convening authority took no action on the findings or sentence. (Convening Authority Action). On 25 May 2022, the military judge entered judgment. (Judgment of the Court). On 20 November 2023, this court docketed appellant's case. (Referral and Designation of Counsel).

Statement of Facts

Appellant first met SSG [REDACTED] around 2012 while both were 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

³ After the presentation of evidence, but prior to closing arguments, the military judge dismissed the specification of indecent language in violation of Article 134, UCMJ (the Specification of Charge II) on preemption grounds. (R. at 528).

families also became close. (R. at 419, 421). SSG [REDACTED] had several children that were close in age to those of appellant, including a son that was roughly the same age as appellant's son, Master [REDACTED] (R. at 574). SSG [REDACTED] also had 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). Miss [REDACTED] lived with her mother in Washington State but visited SSG [REDACTED] in the summers. (R. at 418). Miss [REDACTED] was first introduced to appellant and his family in the summer of 2019, when Miss [REDACTED] first visited her father at his new duty station at Fort Bragg, North Carolina. (R. at 418, 421).

On 22 February 2020, with the encouragement of her stepmother, Ms. [REDACTED] Miss [REDACTED] had a conversation over Instagram with appellant thanking him for a hoodie sweatshirt that appellant had given her as a present during her mid-winter visit with SSG [REDACTED] (R. 272-74, 278, 550-51). The two discussed Miss [REDACTED] visit to an aquarium, and appellant wished Miss [REDACTED] a safe trip back to Washington State. (Pros. Ex. 2, pp. 1-9). Miss [REDACTED] received no further messages from appellant's Instagram account until late June 2020. (R. at 286; Pros Ex. 3, p. 1).

Around January 2020, appellant's son, Master [REDACTED] first logged into appellant's Instagram account. (R. at 577). Master [REDACTED] knew appellant's password because appellant used the same password for all of his online accounts, including

Instagram and Snapchat, and appellant had previously given Master [REDACTED] his password in order to access a video games website they were both using around 2013. (R. at 577-78). Master [REDACTED] was aware that appellant did not use his Instagram or Snapchat accounts very often. (R. at 576-77).

In June 2020, Master [REDACTED] was bored so he decided to use his phone to log in to appellant's Instagram account. (Pros. Ex. 5, p. 1). Once logged into appellant's account, he saw a recently posted picture of Miss [REDACTED] wearing a tie-dye shirt. (R. at 578-80). Master [REDACTED] thought Miss [REDACTED] was "cute," and so after viewing Miss [REDACTED] picture, he decided to use appellant's Instagram account to message Miss [REDACTED] (R. at 576-77, 580, 583). During Master [REDACTED] conversation with Miss [REDACTED] over Instagram, he presented himself as his father, appellant. (R. at 582). During their conversation, Master [REDACTED] made fun of Miss [REDACTED] for being short, calling her "Frodo," before assigning her the name "helicopter sit and spin midget." (R. at 582-83; Pros Ex. 3, pp. 18, 31). The two talked about Miss [REDACTED] relationship history before Miss [REDACTED] sent her Snapchat profile name. (Pros. Ex. 3, pp. 27, 37). Master [REDACTED] promised to not send any "dick picks" to Miss [REDACTED] snapchat. (Pros. Ex. 3, p. 37).

Immediately after receiving Miss [REDACTED] Snapchat profile name, Master [REDACTED] used the same password to log in to appellant's Snapchat account, where he continued to pose as appellant while continuing the conversation with Miss [REDACTED] (R.

at 583-84; Pros Ex. 4). The conversation ended when Miss [REDACTED] messaged that she found the conversation “scary,” at which point Master [REDACTED] ceased all communication with Miss [REDACTED] unadded her from appellant’s Snapchat, and deleted the Instagram messages he had sent her (R. at 585, 587; Pros Ex. 4).

Approximately three weeks later, Miss [REDACTED] flew back to Fort Bragg to visit her father. (R. at 311, 422). She then told her father and stepmother about the messages from appellant’s accounts. (R. at 311, 397-99). Staff Sergeant [REDACTED] confronted appellant with the Instagram messages. (R. at 424). Appellant stated that it was his account, but that he had not sent the messages. (R. at 424, 451). Master [REDACTED] overheard some of the conversation between SSG [REDACTED] and his parents, and the next morning Master [REDACTED] confessed to his parents that he had logged into appellant’s Instagram account and messaged Miss [REDACTED] (R. at 590-93; Pros. Ex. 5). Later that same morning, Master [REDACTED] confessed to Ms. [REDACTED] that he sent the Instagram messages to Miss [REDACTED] (R. at 594).

Master [REDACTED] did not initially admit to sending the Snapchat messages because he “didn’t want to get in any more trouble.” (R. at 595). However, later that same day, Master [REDACTED] admitted to sending the Snapchat messages as well, and he wrote a letter to SSG [REDACTED] family apologizing. (R. 595-96). Master [REDACTED] parents punished him for his actions, restricting his access to his electronic devices for

approximately one month. (R. at 596). Master [REDACTED] friends knew about his punishment. (R. at 596-98).

In the fall of 2020, appellant's battalion commander appointed an Investigating Officer (IO), CPT [REDACTED] to conduct an administrative investigation into whether appellant sent inappropriate messages to Miss [REDACTED] (R. at 459; Pros. Ex. 11).⁴ As part of the investigation, CPT [REDACTED] interviewed appellant and Master [REDACTED] (R. at 460). Appellant gave a sworn statement, denying sending inappropriate messages to Miss [REDACTED] and stating that Master [REDACTED] had confessed to accessing his accounts to communicate with Miss [REDACTED] (R. at 467; Pros. Ex. 10).

Master [REDACTED] also gave a sworn statement, admitting to logging into appellant's accounts to send messages to Miss [REDACTED] (Pros. Ex. 11). After CPT [REDACTED] completed his interview with Master [REDACTED] he had to print out the sworn statement form. The IO went outside the interview room but lingered outside the door, where he heard appellant tell Master [REDACTED] that "one of his answers was wrong, and that he needed to change it." (R. at 474). Master [REDACTED] decided to change his answer because appellant had told him to "be truthful about [his] answers;" at no time did appellant threaten him. (R. at 600, 612, 615). When the IO returned,

⁴ Appellant's command appointed this investigating officer even though Army Criminal Investigation Command had the authority and responsibility for investigating an allegation of sexual abuse of a child. Army Reg. 195-2, Criminal Investigation: Criminal Investigation Activities, Table B-1 (21 July 2020).

Master [REDACTED] changed an answer on his sworn statement, stating that he had first accessed appellant's social media accounts in January 2020, rather than June 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 early messages sent in February 2020. (R. at 752-753).

I. WHETHER APPELLANT'S CONVICTIONS ARE FACTUALLY SUFFICIENT.

Facts Relevant to Assignment of Error

In seeking to prove the identity of the person messaging Miss [REDACTED] the government pointed to the use of capitalizations and punctuation in the messages sent to Miss [REDACTED] in June 2020. The government also admitted unrelated screenshots of conversations between Master [REDACTED] and Ms. [REDACTED] and between Master [REDACTED] and Miss [REDACTED] brother, Master [REDACTED], seeking to contrast the differing style of capitalization and punctuation between these messages and those sent from appellant's accounts to Miss [REDACTED] (R. at 707-08; Pros. Ex. 7, 15). However, during his direct examination, Master [REDACTED] confirmed that he had used capitalizations and punctuation in his messages to Miss [REDACTED] so that his messages would appear more like the style of appellant's. (R. at 588-90). Master [REDACTED] testified that it was not

difficult for him to mimic the messaging style of appellant. (R. at 588-89). Master [REDACTED] also identified several instances where he had “messed up” and not capitalized the beginnings of his messages or used proper punctuation while messaging Miss [REDACTED] (R. at 609, 624-25, 627-29). Although the government argued that statements contained in the messages to Miss [REDACTED] about appellant’s height, age, and medical history indicated appellant had been the person messaging Miss [REDACTED] Master [REDACTED] testified that he was familiar with all of this information. (R. at 588; 705-06).

Evidence that any attempt to access appellant’s Instagram and Snapchat accounts would have resulted in appellant receiving an email or text to confirm the access request was inconclusive. (R. at 517, 588). The government did not call any witness that was an expert on Instagram or Snapchat account access protocols or introduce any evidence of logins from Instagram or Snapchat themselves.

During argument, the government focused on appellant telling Master [REDACTED] that one of his answers was wrong in the sworn statement he gave to CPT [REDACTED] and that he needed to change it. (R. at 473-74, 709). The government also highlighted the hearsay statement of appellant’s wife after looking at the messages sent from appellant’s Instagram, in which she stated, “I told you to stop talking to her.” (R. at 440-41; App. Ex. XLI, p. 58).

In contrast, the defense presented direct evidence from Master [REDACTED] under oath, that he, not appellant, was responsible for sending the inappropriate messages

to Miss [REDACTED] (R. at 580-85). The defense also introduced evidence that 1) Master [REDACTED] gave confessions to his mother, Ms. [REDACTED] and Ms. [REDACTED] (R. at 591-96, Pros. Exs. 5 and 6), that were consistent with his in-court testimony; 2) that both appellant and his mother had encouraged him to tell the truth; and 3) that he had been punished for his actions by his parents, something he told his friends about. (R. at 544-45, 596-98). Master [REDACTED] testimony was also corroborated by his consistent sworn statement to CPT [REDACTED] affirming that he had sent the inappropriate messages to Miss [REDACTED] (Pros. Ex. 11).

Lastly, because appellant's sworn statement to SA [REDACTED] was admitted into evidence, the defense called six senior leaders, COL [REDACTED], LTC [REDACTED], [REDACTED], CW5 [REDACTED], MSG [REDACTED], SFC [REDACTED], and CW4 [REDACTED], who knew appellant well, in diverse settings, and who testified to his honesty. (R. at 639-68). The government offered no evidence to rebut appellant's character for truthfulness; the government presented no rebuttal case at all. (R. at 673).

Standard of Review

Factual sufficiency is reviewed de novo. *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017).

Law

The test for factual sufficiency is, “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. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (emphasis in original). In conducting this unique appellate role, this 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 required element beyond a reasonable doubt.” *Id.*⁵ In fact, this court is empowered to judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the fact finder. *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

Although this court applies neither a presumption of guilt nor a presumption of innocence, “reasonable doubt” means the same thing with respect to this court’s factual sufficiency determination under Article 66(d), UCMJ, as it did at trial. “Beyond a reasonable doubt” means that if “the record leaves [this court] with a

⁵ Because the convictions here are for offenses that allegedly occurred before 1 January 2021, the “old” version of Article 66, UCMJ applies. *United States v. Scott*, 83 M.J. 778, 779 (Army Ct. Crim. 2023) (citing Pub. L. No. 116-283, § 542(b), 134 Stat. 3611-12).

fair and rational hypothesis other than guilt,” the court is required to set aside the conviction for insufficient evidence. *United States v. Whisenhunt*, ARMY 20170274, 2019 CCA Lexis 244, at *6 (Army Ct. Crim. App. 3 Jun. 2019) ([summ. disp.](#)) (reversing cadet’s sexual assault conviction for factual insufficiency because the “record also supported the defense’s scenario that the alleged victim was a willing and active participant”) (citing *United States v. Billings*, 58 M.J. 861, 869 (Army Ct. Crim. App. 2003). Mere suspicion cannot serve as proof to sustain a verdict beyond a reasonable doubt. *See, e.g. United States v. Cage*, 42 M.J. 139, 144 (C.A.A.F. 1995) (“Suspicion, conjecture, and speculation cannot form the basis for fact-finding action.”).

Argument

A. The Government’s Case Amounted to Mere Suspicion

This was a case of insinuation versus solid alibi.⁶ A central issue at trial was the identity of the person using appellant’s accounts to inappropriately message Miss [REDACTED]. The government relied completely on ambiguous, circumstantial evidence in its attempt to prove that appellant was the person who sent the subject messages to Miss [REDACTED] in June 2020. The government produced no direct evidence

⁶ Notably, the Article 32 Preliminary Hearing Officer (PHO), in her report of 24 August 2021, after extensive review of the evidence, found that the evidence did not support a finding of probable cause that appellant had committed the charged offenses. (PHO Report, p. 3) (stating “the Government’s evidence, presented at the preliminary hearing, was tantamount to nothing more but a mere suspicion.”).

that actually put appellant behind the device messaging Miss [REDACTED] in late June 2020—no statements of appellant admitting to sending inappropriate messages to Miss [REDACTED] no meta-data of the subject messages that could have shown what device had been used to send the inappropriate messages to Miss [REDACTED] and not a single witness to testify that they had witnessed appellant sending the inappropriate messages to Miss [REDACTED]⁷

The government’s case relied almost entirely on comparisons of the subject messages to Miss [REDACTED] with supposed exemplars of the writing style of appellant and Master [REDACTED]. However, this flimsy proof was undermined by the testimony of Master [REDACTED] in which he stated that he was familiar with, and attempted to emulate, the writing style of his father when messaging Miss [REDACTED]. The strength of this “comparison evidence” was further undermined by the multiple times that the alleged indicia of identity failed to show what the government was arguing.

Contrary to the government’s theory, there were multiple times where Master [REDACTED] messages to Miss [REDACTED] used the same capitalization and punctuation style as his messages to other individuals. Despite his best efforts, in Master [REDACTED] words, he “messed up” several times by failing to faithfully reproduce messages to Miss [REDACTED] that were in the style of his father’s. None of this evidence introduced by

⁷ The government even failed to produce any direct evidence that appellant was even “at or near” Fort Bragg, North Carolina, at the time the subject messages were sent.

the government was able to prove anything more than a mere possibility that appellant had been the person behind the messages to Miss [REDACTED]

B. The Defense Had a Complete Theory of the Case and a Strong Alibi

In contrast to the government's reliance on circumstantial evidence, the defense presented a complete alibi adduced from the direct evidence of Master [REDACTED] an alibi the government failed to exclude as a fair and reasonable hypothesis of the evidence. Defense established through the sworn testimony of Master [REDACTED] that he was the one who logged into appellant's accounts and messaged Miss [REDACTED]. Master [REDACTED] also described how he learned of appellant's social media accounts passwords, how he had originally accessed the accounts, why he accessed them, and how he was able to reproduce messages that would seem like appellant's.

Defense did not rely on Master [REDACTED] testimony alone. Master [REDACTED] sworn testimony was supported by evidence of his confessions to Ms. [REDACTED] Ms. [REDACTED] his apology letter, and his sworn statement to CPT [REDACTED] all of which were consistent with his in-court testimony. Moreover, the government's admission of appellant's sworn statements to CPT [REDACTED] and to SA [REDACTED] far from undermining Master [REDACTED] testimony, corroborated it. The only evidence of what device had been used to send the messages to Miss [REDACTED] came from the defense—from Master [REDACTED] testimony. The government failed to admit any evidence, through experts or otherwise, of the geolocation of the device accessing

appellant's accounts or access data from Instagram or Snapchat to rebut Master [REDACTED] testimony.

C. All Admissible Character Evidence Supported Appellant's Honesty

The defense called six senior leaders who each gave opinions that appellant was a truthful person based off extensive interaction with him in diverse work settings, and in the case of CW4 [REDACTED], even social settings. The government did not rebut this evidence. In 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. The government presented no evidence of the kind, either of Master [REDACTED] or Ms. [REDACTED] character for untruthfulness, or of any attempts by them to conspire with appellant to fool Miss [REDACTED] family or investigators. In fact, Master [REDACTED] honesty was corroborated even further by the evidence that he had been punished for his actions—not the result one would expect if he was being induced to lie to cover for his parent.

The only character evidence that the government attempted to introduce was evidence that appellant had “got rid” of his phone prior to the start of the investigation into the alleged misconduct.⁸

⁸ The military judge properly excluded this impermissible propensity evidence, but not before it made a considerable impression on the panel. *See infra* AE IV.

D. The Government Failed to Introduce Sufficient Evidence to Prove Specific Intent or Indecency

Evidence of identity was not the only deficiency of proof. The government also did not meet its burden to prove beyond a reasonable doubt the element of specific intent to arouse sexual desire. Nowhere in the long conversation between Master [REDACTED] and Miss [REDACTED] on Instagram and Snapchat did Master [REDACTED] solicit nude photographs, request to meet in person, or describe explicit sexual acts. In fact, the messages included the promise of “no dick pics,” specifically disavowing that the messages sent from appellant’s accounts were intended to gratify sexual desire. The only direct evidence of the intent of the person behind the messages came from defense, from Master [REDACTED] who stated he sent the messages because he thought Miss [REDACTED] was “cute,” but not to gratify his or anyone else’s sexual desire.

Moreover, the government’s evidence on the meaning of “helicopter sit and spin midget” was improper. The government, by relying on generalities, failed to prove what that term meant to its author, let alone what it meant to appellant.⁹ Despite the government’s best effort, the improperly admitted evidence failed to prove beyond a reasonable doubt an indecent meaning of the phrase—Miss [REDACTED] herself testified that she did not know what the term meant, and SA [REDACTED]

⁹ See *infra* AE III.

insinuated that it was a term that could mean different things in different contexts.¹⁰ (R. at 310, 517).

D. The Government Bolstered Its Case With Incompetent Evidence

The government bolstered its case with inadmissible evidence and prosecutorial misconduct which biased the panel against appellant.¹¹ Without this inadmissible evidence and the improper actions of government counsel, the government's case would have been exceptionally weak, utterly incapable of disproving appellant's strong alibi defense. Therefore, after weighing the evidence, this court cannot be convinced of appellant's guilt beyond a reasonable doubt and should therefore set aside the findings of guilty and dismiss with prejudice all charges and their specifications as well as the sentence.

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

Facts Relevant to Assignment of Error

At trial, the government called SSG [REDACTED] who testified to his confrontation with appellant about the messages sent to Miss [REDACTED] (R. at 424). Staff Sergeant [REDACTED] testified to going to appellant's house and asking him if he had

¹⁰ For instance, a "Sit 'N Spin" is a classic toy for toddlers that allows the user to literally "sit and spin."

<https://www.businessinsider.com/guides/parenting/playskool-sit-n-spin-review>

¹¹ See *infra* AEs II-IV.

been having inappropriate conversations with Miss [REDACTED] (R. at 426). After appellant denied the allegation, SSG [REDACTED] went back to his home to grab Miss [REDACTED] phone. (R. at 427). SSG [REDACTED] testified that when he returned minutes later with Miss [REDACTED] phone, Ms. [REDACTED] appellant's wife, grabbed Miss [REDACTED] phone and asked, "[w]hat the hell is this?" (R. at 427). Staff Sergeant [REDACTED] began to testify to the next thing Ms. [REDACTED] said but before he could, defense objected. (R. at 427).

The military judge asked if the government was attempting to elicit hearsay, to which the trial counsel responded, "I believe that the statement will either not be hearsay or be [Military Rule of Evidence] 803(2)." (R. at 428). The government then attempted to lay a foundation for an excited utterance by reiterating that it was Miss [REDACTED] phone that SSG [REDACTED] had handed Ms. [REDACTED] and that it included the messages from appellant's Instagram account. (R. at 428-29). Staff Sergeant [REDACTED] testified that "she looked angry" and "sounded pretty angry as well." (R. at 429).

The trial counsel then stated that there was now "sufficient foundation," to which the military judge disagreed, responding "there's one more foundational element that I'll have to receive outside the member's presence." (R. at 429). After the panel departed, the trial counsel elicited the following from SSG [REDACTED] about what Ms. [REDACTED] said: "[s]he said, 'what the fuck is this, Jonathan?' . .

. . [and] [a]fter she went to hand—before she handed me the phone back, she said, ‘I told you to stop talking to her.’” (R. at 430).

Defense maintained its hearsay objection because of lack of foundation and then voir dired SSG [REDACTED]

CDC: [I]n the sworn statement [for the subject administrative investigation], you stated that “when I got there, [Ms. [REDACTED] came outside and took the phone from me to look at it. [Ms. [REDACTED] then said, “what the fuck is this,” correct?

WIT: Yes.

CDC: While looking at [appellant]. [Appellant] said that it, it is his account, but that it’s not him writing it. Do you recall that?

WIT: Yes.

CDC: Also, then you said, [Ms. [REDACTED] then said to [appellant], “I told you to stop talking to her,” correct?

WIT: Yes.

CDC: And then you also said that after [Ms. [REDACTED] read all of the—all of it, she gave me the phone back and walked to the house.

WIT: Yes.

CDC: So, so you don’t know what—how, how far she read other than to see that there was—that she had seen a, a test message between what you believe to be [appellant] and [Miss [REDACTED] correct?

WIT: Yes.

. . . .

CDC: You don’t know anything other than [Ms. [REDACTED] had the phone and saw the first set of text messages between [Miss [REDACTED] and who you believe to be [appellant], correct”

WIT: Yes.

CDC: And also you don't know—at that time, you had no idea what [Ms. ██████████] thought at all, did you? You couldn't.

WIT: No, I just, just from how she was answering, it just sound—she sounded upset.

(R. at 431-432).

The military judge then gave a preliminary analysis of the foundation. He found that Ms. ██████████ was confronted with reading the phone; that event was startling, as evidenced by her being angry and upset in the moment; she had personal knowledge of the event; she made a statement about the event; and she had to have made the statement while she was in the state of nervous excitement.

(R. at 433).

The military judge then asked SSG ██████████ whether there was “any kind of break in time, between the time she read these text messages and the time she made the statements “what the fuck is this, Jonathan?” and “I’ve told you to stop talking to her.” (R. at 434.) SSG ██████████ answered “she said, ‘what the fuck is this, Jonathan?’ [W]hen she took a couple of seconds, when she was looking though the messages.” (R. at 434). As to Ms. ██████████ emotional state, SSG ██████████ testified that “it wasn’t softly. But it, to me, it sounded like she was upset how she said it.” (R. at 434). SSG ██████████ then agreed with the military

judge that Ms. [REDACTED] then continued reading before handing the phone back to SSG [REDACTED] and saying, “I told you to stop talking to her.” (R. at 434).

Defense then objected to the relevance of the subject statement. (R. at 436). The government argued that it went to the service discrediting element of the indecent language specification, and that it was also relevant to show that appellant was in fact messaging Miss [REDACTED] (R. at 437). Defense then objected under Military Rule of Evidence (Mil. R. Evid.) 403, arguing that it was ambiguous because SSG [REDACTED] had no way of knowing the context in which the statement had first been uttered to appellant. (R. at 437).

Defense counsel then renewed his objection of hearsay and Mil. R. Evid. 403. (R. at 438). The military judge overruled both objections, finding that the government had laid a sufficient foundation for an excited utterance and that the statements were relevant to facts at issue, specifically the terminal element of the indecent language specification. (R. 438). Lastly, the military judge stated that he had considered Mil. R. Evid. 403 and found that the probative value was “not substantially outweighed by the standards in the 403.” (R. at 438). When the panel returned, SSG [REDACTED] testified to the statements made by Ms. [REDACTED] (R. at 440-41).

After the government rested, defense moved to dismiss the specification of indecent language in violation of Article 134, UCMJ, on preemption grounds. (R.

at 528). The government did not object, and the military judge granted the motion. (R. at 528). The military judge did not reconsider his earlier ruling on the relevance of Ms. [REDACTED] hearsay statements, nor did he give the panel an instruction to disregard the testimony, only that the panel disregard the dismissed charge and its specification on the flyer. (R. at 529).

During the government's closing, the trial counsel highlighted the testimony of SSG [REDACTED] arguing to the panel: "she looked through the messages and said 'What the hell? What the fuck is this? I told you to stop messaging her.'" (R. at 710). The civilian defense counsel objected, citing "incorrect from the evidence." (R. at 710). The military judge overruled the objection, reminding the panel that it is their "memory of the facts that controls." (R. at 711).

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

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence

in determining the action.” Mil. R. Evid. 401. The hearsay rule is a general rule of exclusion. *See* Mil. R. Evid. 802. An excited utterance is an exception to this rule of exclusion. Mil. R. Evid. 803(2). To determine whether a statement qualifies as an excited utterance, The Court of Appeals for the Armed Forces [CAAF] adopted a three-part test. *Donaldson*, 58 M.J. at 482. For a statement to qualify, the following must be true: “(1) the statement relates to a startling event; (2) the declarant makes the statement while under the stress of excitement caused by the startling event; and (3) the statement is ‘spontaneous, excited or impulsive rather than the product of reflection and deliberation.’” *Id.* (quoting *United States v. Feltham*, 58 M.J. 470, 474 (C.A.A.F. 2003)). Relevant to the second prong of this inquiry are "the physical and mental condition of the declarant" and "the lapse of time between the startling event and the statement." *Id.* at 483.

“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) (citing *Bourjaily v. United States*, 483 U.S. 171, 175, (1987) (explaining that though a court determines admissibility of evidence, the Supreme Court has "traditionally required that these matters be established by a preponderance of proof"))).

This court weighs the prejudice from erroneous evidentiary rulings by evaluating: “(1) the strength of the Government ‘s case, (2) the strength of the

defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.” *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F.1999).

Argument

The military judge erred by admitting Ms. [REDACTED] hearsay statement as an excited utterance because none of the *Donaldson* factors were met.

A. The Statement Did Not Relate to a Startling Event

The government failed to meet its burden to show by a preponderance of the evidence that Ms. [REDACTED] statement was related to an actual startling event. The record suggests only that Ms. [REDACTED] saw *some* messages sent from appellant’s Instagram account to Miss [REDACTED]. The record does not support that Ms. [REDACTED] saw any *particular* messages, just messages generally. Staff Sergeant [REDACTED] admitted that he didn’t “know anything other than [Ms. [REDACTED] had the phone and saw the first set of text messages between [Miss [REDACTED] and who [he believed] to be [appellant].” (R. at 432). SSG [REDACTED] also admitted that he had no real idea what Ms. [REDACTED] was thinking as she made the statement except that she sounded upset or angry. Never did SSG [REDACTED] state that Ms. [REDACTED] yelled at appellant, cried, started shaking, was unresponsive, looked sick, or did anything else that could cause a reasonable observer to conclude that she was responding to a “startling” event.

The prototypical startling event under case law is that which occurred in *Donaldson*—a minor victim made the excited utterance at issue shortly after being sexually assaulted and being told that if she told anyone she and her family would be killed. 58 M.J. at 479. The uncontrovertibly shocking nature of that event was further supported by the testimony that the minor victim at the time of the hearsay statement was “hysterical,” screaming, and physically resisting being touched. In such a case, it is clear what the startling event in question actually is, and it is logical to see how such an event would naturally lead to a state of shock or excitement. Such facts are not present in the instant case. Absent unambiguous evidence establishing the existence of an actually shocking event, this court cannot be certain of the statement’s reliability. It is this presumption of reliability that the excited utterance exception is based upon.

What is clear in this case is that the military judge assumed that Ms. [REDACTED] saw some arguably inappropriate messages. But the more the defense counsel voir dired SSG [REDACTED] the less certain it became that there was a predicate startling event, far less certain than the preponderance of the evidence standard the government had to meet under *Henry*. 81 M.J. at 96.

B. Ms. [REDACTED] Was Not Under the Stress of Excitement

Staff Sergeant [REDACTED] used two words to describe Ms. [REDACTED] deportment around the time she made the subject statement—angry and upset.

Never did SSG [REDACTED] describe Ms. [REDACTED] as hysterical, out-of-control, furious, enraged, distraught. The thin description painted by SSG [REDACTED] does not lead to a conclusion, by a preponderance of the evidence, that Ms. [REDACTED] was under the stress of excitement.

Moreover, the government failed to put on the record any description of Ms. [REDACTED] demeanor. Beyond Ms. [REDACTED] grabbing Miss [REDACTED] phone and looking at it, there is a lack of any description of her appearance or actions to help illuminate her state of mind. In fact, SSG [REDACTED] admitted that he had “no idea what [Ms. [REDACTED]] thought at all. [SSG [REDACTED]] couldn’t.” (R. at 432).

C. The Statement Was Not Spontaneous, Excited, or Impulsive

Although Ms. [REDACTED] statement was not in response to an inquiry, that does not prove that it was spontaneous, excited, or impulsive. Ms. [REDACTED] took several moments to look at Miss [REDACTED] phone after SSG [REDACTED] gave it to her. She then uttered the question: “what the fuck is this?” before reviewing the phone a few more moments. Her eventual hearsay statement was preceded by the appellant’s explanation that “it was his account but not him writing it.”

A clearer case of spontaneity or impulsiveness would have been presented if Ms. [REDACTED] had immediately made her statement as soon as she saw the subject messages, but that is not the case; instead, she saw the messages, asked a

question, listened to appellant's response, reviewed the messages again, and then made the subject statement. There is nothing in this sequence of events to support a finding that Ms. [REDACTED] statement was spontaneous, excited, or impulsive.

D. After the Dismissal of the Specification of Charge II, Ms. [REDACTED] Statement Was No Longer Relevant

The military judge ruled that Ms. [REDACTED] hearsay statement was relevant to show that appellant's messages to Miss [REDACTED] were service discrediting, citing the terminal element of the specification of indecent language in violation of Article 134, UCMJ. The military judge ruled that the probative value of the statement was also not substantially outweighed by the dangers enumerated under Mil. R. Evid. 403. This was error, an error made plain after the dismissal of the Article 134 specification.¹² Absent that specification and its terminal element, the statement no longer had any probative value and essentially became inadmissible bad character evidence.

E. Appellant was Prejudiced by the Admitted Statement

The strength and weakness of the parties' cases is addressed fully in AE I. In short, the government's case was weak, consisting of circumstantial evidence,

¹² See *United States v. OlahPrado*, ARMY 20220200, 2024 CCA LEXIS 170, *30 (Army. Ct. Crim. App. 2024) ([mem. op.](#)) (citing *United States v. Driskill*, 2024 CAAF LEXIS 126, *6 ([C.A.A.F. 2023](#)) (holding that it is plain error to "consider evidence pertaining exclusively to a dismissed specification in determining the findings and sentence for the remaining offenses.")).

while the defense’s case contained a complete alibi. The materiality of this evidence was high as shown by the government’s use of it in closing argument, and the relative lack of any other evidence that put appellant behind the device messaging Miss [REDACTED] in June 2020. Lastly, the quality of this evidence was high as it came from appellant’s own wife, presumably from private communications between them.

Under these facts, the military judge should have crafted an instruction for the panel directing them to disregard any evidence that was relevant only to the dismissed charge, with particular reference to the hearsay statement at issue. Because the military judge admitted this evidence and then failed to take appropriate remedial measures, appellant was prejudiced. Reversal of the findings and sentence of all charges and their specifications is warranted.

III. WHETHER THE MILITARY JUDGE ALLOWED IMPROPER OPINION TESTIMONY AS TO THE MEANING OF “HELICOPTER SIT AND SPIN”

Facts Relevant to Assignment of Error

During an Article 39(a) session outside the presence of the panel, in the middle of the government’s direct examination of Ms. [REDACTED] the military judge asked the trial counsel what else he intended to elicit during the remainder of his examination. (R. at 385). The trial counsel answered that he intended to ask Ms. [REDACTED] what “helicopter sit and spin” means. (R. at 385). The civilian defense

counsel responded that “sit and spin” is a “slang term that can have different meanings to different people.” (R. at 385). The military judge agreed, stating that he “wasn’t sure what that means either,” before suggesting the fact finder was “waiting for the government to explain [the meaning of the phrase].” (R. at 385). The civilian defense counsel then argued that Ms. [REDACTED] lacked the competence to render a definition. (R. at 386). When the military judge asked the trial counsel whether Ms. [REDACTED] was competent to give a definition, the trial counsel responded “I believe she’ll be able to say she is familiar with the term[,] [i]t’s not a scientific or technical term.” (R. at 386).

The military judge called Ms. [REDACTED] back onto the witness stand to allow the trial counsel to ask about the meaning of the phrase. (R. at 386). Ms. [REDACTED] stated that she recalled seeing the term “helicopter sit and spin” in the messages from appellant’s Instagram and that she was familiar with that term. (R. at 386). Ms. [REDACTED] then stated that to her “it means that it’s a sexual position to where a man is lying down on the floor or a bed, and the woman is on top of him riding him, spinning around.” (R. 387).

The civilian defense counsel then cross-examined Ms. [REDACTED] asking whether she had known what the term meant at the time she read it on Miss [REDACTED] phone or whether she learned of it at some later time. (R. at 387). She replied that she “knew what it meant” when she originally read it. (R. at 387). Ms. [REDACTED]

denied providing the government with a “web search page from Urban Language Dictionary.” (R. at 387). Civilian defense counsel then argued that what Ms. [REDACTED] “thought it meant when she read it is certainly not all-inclusive” and she is “no more capable of saying what it meant than any member is from their own experience.” (R. at 388-89).

The military judge overruled the civilian defense counsel’s “competence objection,” offering no analysis, but stating that Ms. [REDACTED] “can’t offer an expert opinion [. . .] can’t filter it through Urban Dictionary [or] through hearsay. That’s what she just said that she knew what it meant.” (R. at 389). After the panel returned, Ms. [REDACTED] gave her definition of the phrase “helicopter sit and spin.” (R. at 399-400).

Later, trial counsel asked the same question of SSG [REDACTED] Miss [REDACTED] father, to which he gave the definition: “[i]t’s typically you have a female that’s very small and light, would sit on the male genitalia and you would spin her.” (R. 424).

Lastly, the government called SA [REDACTED] who had acted as an investigator on appellant’s case. SA [REDACTED] testified that the phrase was slang and that one of his duties was to “interact and review slang terms” and interpret their meaning. (R. at 497). As to the meaning of “sit and spin,” SA [REDACTED] testified that “the way I interpret in the context of the text messages of what I interpreted, the term to mean

was when a woman spins around a man's penis 360 degrees." (R. at 497). As to the meaning of "helicopter sit and spin," SA [REDACTED] testified that "[i]n the context of the text messages, the way I interpreted that to mean, was the height differential between himself and the victim." (R. at 497).

Later, a panel member asked SA [REDACTED] "can 'helicopter sit and spin' be interpreted in any other way than sexual?" (R. at 517). Before SA [REDACTED] could respond, the military judge told SA [REDACTED] that he had to testify to his personal knowledge. (R. at 517). SA [REDACTED] then answered that, "the way I interpreted that comment was in the context of the messages that I read. That's why I interpreted it the way that I did." (R. at 517).

Standard of Review

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Bowen*, 76 M.J. at 87. This court must reverse for an abuse of discretion when "the military judge's findings of fact are clearly erroneous or . . . his decision is influenced by an erroneous view of the law." *United States v. Byrd*, 60 M.J. 4, 5 (C.A.A.F. 2004) (citing *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995)). "[W]here the military judge placed on the record his analysis, deference is clearly warranted." *United States v. Finch*, 79 M.J. 389, 397 (C.A.A.F. 2020) (quotation omitted). However, where "the military judge fails to place his findings and analysis on the record, less deference will be accorded." *Id.*

“The appellate court evaluates prejudice from an erroneous evidentiary ruling by weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.” *United States v. Lopez*, 76 M.J. 151, 156 (C.A.A.F. 2017).

Law

“Lay opinion testimony is only admissible if (1) the opinion is rationally based on the witness's perception; and (2) the opinion is helpful either to an understanding of the testimony of the witness on the stand or to the determination of a fact in issue. *Id* (citing *Byrd*, 60 M.J. at 7)) (internal citation omitted). “The general rule in federal civilian courts is that ‘lay witnesses are normally not permitted to testify about their subjective interpretations or conclusions as to what has been said.’” *Byrd*, 60 M.J. at 7 (citing *United States v. Cox*, 633 F.2d 871, 875 (9th Cir. 1980)). “Where terms are capable of being understood by the layman, and where the jury is capable of interpreting the language or slang involved, lay witness opinion testimony is improper, as is the lay witness's conclusion or interpretation of the conversation.” *Id.* at 8 (citing *State v. Webb*, 243 Mont. 368, 792 P.2d 1097, 1100 (Mont. 1990)).

“In order to allow lay opinion testimony interpreting a facially coherent conversation . . . the government [has] to establish a foundation that [calls] into

question the apparent coherence of the conversation so that it no longer [seems] clear, coherent, or legitimate.” *Id.* at 8. However, even if the government has established a foundation of ambiguity or incoherence in the communication, “[f]or a lay opinion interpreting another person's meaning to be admissible, the proponent must establish that the witness has *some special basis* for determining the speaker's true meaning.” *Id.* (emphasis added). “Once that foundation is laid, the witness “may clarify conversations that are abbreviated, composed of unfinished sentences and punctuated with ambiguous references to events that were clear *only to the conversation participants[.]*” *Id.* (citing *United States v. Sneed*, 34 F.3d 1570, 1581 (10th Cir. 1994)) (emphasis added).

Argument

It is apparent that neither the government nor the military judge understood the factors that must be met to allow lay testimony on the meaning of communications. Under CAAF’s standard in *Byrd*, neither Ms. [REDACTED] SSG [REDACTED] nor SA [REDACTED] were qualified to testify to their interpretations of the phrase “helicopter sit and spin.”

A. The Government Failed to Establish a Foundation That “Helicopter Sit and Spin” is an Ambiguous Phrase

Ironically, the testimony of the three government witnesses at issue supports the proposition that the phrase *was not* ambiguous. First, Ms. [REDACTED] and SSG [REDACTED] stated they knew what the term meant when they first saw it, without any

hesitation. Second, SA [REDACTED] said he could interpret the meaning from the context of the messages—usurping the role of the fact finder.

Although the military judge offered no real analysis of his ruling to allow the opinion testimony, he did seem at the last unpersuaded by the civilian defense counsel’s assertions that the phrase was a “slang term that can have different meanings to different people.” By the military judge misapplying the law related to this threshold question, failing to require a showing of ambiguity from the proponent of this opinion testimony, the military judge erred.

B. The Government Failed to establish a Sufficient Foundation that the Three Witnesses Were Competent to Define the Phrase

In *Byrd*, the CAAF held that “[f]or a lay opinion interpreting another person's meaning to be admissible, the proponent must establish that the witness has some *special basis* for determining the speaker's true meaning.” *Byrd*, 60 M.J. at 8 (emphasis added). The government failed to lay a sufficient foundation as to Ms. [REDACTED] SSG [REDACTED] or SA [REDACTED] special basis for knowing what the phrase “helicopter sit and spin” meant when it was sent to Miss [REDACTED]. In fact, the government and the military judge seem to have been under the mistaken presumption that the foundation is the same as for a general lay opinion, that the witness has “personal knowledge of the matter.” Mil. R. Evid. 602. The case law requires more.

In *Byrd*, the CAAF held that opinion testimony of the appellant’s wife about the meaning of key phrases in his writing was inadmissible because the government failed to demonstrate that the witness had “some basis for knowing appellant’s intended meaning.” 60 M.J. at 7. In the instant case, the government failed to provide a foundation of particular knowledge—evidence that the three witnesses at issue had a “special basis” for understanding the *author’s* meaning. In other words, for such opinion testimony to be proper, the government would have had to provide a foundation for how each individual witness would know what “helicopter sit and spin” meant to the writer of that message. The government would have to adduce evidence that each witness had 1) observed the declarant use that phrase previously, and 2) had, at that time, obtained a sufficient basis to know the declarant’s particular intended meaning.

Instead, trial counsel led Ms. [REDACTED] through a general foundation as to whether she knew what the term meant. Although the government established that her understanding of the meaning did not come from some source like Urban Dictionary, the government failed to establish that she had any idea what the term actually meant when used by appellant, Master [REDACTED] or any other potential writer of the message. This lack of particularity in the government foundation violated the principles established in *Byrd*. If a wife of an appellant lacks the necessary

understanding of particularized meaning, then a spouse of a friend of the alleged speaker fails the test even more.

The government also failed to lay a sufficient foundation before it asked the same question of SSG [REDACTED]. Later, when the government did provide some form of foundation before asking SA [REDACTED] to define the phrase, they did so by attempting to give a veneer of expertise to his opinion, with questions like “now, in your duties as a special agent do you frequently interact or review slang terms?” and “is your job to interpret what those terms mean?” (R. at 497). The government’s questions were likely an attempt to establish a foundation of pseudo-expertise for SA [REDACTED] opinion and improperly add weight to his characterization. However, in doing so, the government failed again to show any particularized basis for SA [REDACTED] knowledge of what that phrase means when appellant or anyone else used it. Without a showing of particularized knowledge of appellant’s meaning behind the phrase, the military judge erred by allowing the definition testimony.

C. The Admission of the Three Definitions Materially Prejudiced Appellant

The strength of the government and defense’s cases are addressed in full in AE I. In short, the government’s case was weak, consisting of vague circumstantial evidence in the face of a very strong defense case, a full alibi from witnesses

whose credibility was uncontested by any direct evidence. These two factors weigh in favor of appellant.

Regarding materiality, there were essentially two central contestable elements in this case. The first was over identity of the person messaging Ms. [REDACTED]. The second was whether “helicopter sit and spin” was an indecent communication. As seen in a panel member’s question, the meaning of the phrase “helicopter sit and spin” was not so clear as to exclude all reasonable doubt as to whether it was an indecent communication. (App. Ex. XVI).

Without the testimony of Ms. [REDACTED] SSG [REDACTED] and SA [REDACTED] as to the phrase’s meaning, it is unlikely that the government would have been able to marshal *any* evidence to show that it was an indecent communication. The government would have been left with only its argument—the panel left to decide what it meant in the context of the other messages. Instead, the three government witnesses usurped the role of the fact finder by impermissibly granting the phrase an indecent meaning, without any proper foundation to do so. This factor weighs in favor of appellant.

Lastly, the quality of the evidence was strong, particularly as the government took pains to paint Ms. [REDACTED] and SSG [REDACTED] as close friends of appellant and attempted to establish a foundation of expertise for the opinion of SA [REDACTED]. This gave greater weight to their opinions. It was likewise, the only evidence the

panel heard as to the phrase's meaning. This factor, likewise, weighs in favor of appellant. These errors materially prejudiced appellant, necessitating the one remedy appropriate, reversal.

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

Facts Relevant to Assignment of Error

During its case-in-chief, the government called SA [REDACTED] of Fort Bragg CID. (R. at 493). Towards the end of SA [REDACTED] testimony, the assistant trial counsel asked him whether appellant had “gotten rid of” anything besides his social media. (R. at 503-04). SA [REDACTED] answered “[y]es sir. He also got rid of his phone.” (R. at 504). The assistant trial counsel then asked, “and what other evidence is there that he got rid of his phone?” to which SA [REDACTED] responded “[i]n the 15-6 documents.” (R. at 504).

At this point the assistant defense counsel objected on relevance, and the military judge excused the panel members for an Article 39(a) session. (R. at 504). The assistant trial counsel argued that the line of questioning was relevant to prove “consciousness of guilt.” (R. at 504). The assistant defense counsel then added an additional objection, Mil. R. Evid. 404(b). (R. at 504). When asked if the government had given proper notice of their intent to use this evidence under Mil.

R. Evid. 404(b), the assistant trial counsel stated “[w]e gave 404(b) notice as far as his statements” (R. at 506). The military judge then questioned SA [REDACTED] on how he knew that appellant had “got rid of his phone,” to which SA [REDACTED] responded, “[i]t was stated in the 15-6.” (R. at 507). The military judge then sustained the objection on the basis of hearsay, lack of personal knowledge, and 404(b). (R. at 507).

The military judge then asked the assistant trial counsel if there were any other questions that he anticipated could draw objections from defense, and the assistant trial counsel stated that it was his intent to ask SA [REDACTED] to “characterize pieces of the video” in order to tell the “fact-finder why he continued the investigation.” (R. at 508-09). The military judge ruled the assistant trial counsel’s proposed line of questioning improper, stating “that’s the job of the fact-finder.” (R. at 509).

The military judge then called back the members and instructed them to disregard the call of the question and response of SA [REDACTED] about “the accused and his phone.” (R. at 511). The military judge asked “[w]ill all members disregard the call of that question and any answer the witness began to give?” (R. at 511). All panel members gave an affirmative response. (R. at 512).

But then one member, LTC [REDACTED], interrupted, stating “I was starting to write a question for the witness.” (R. at 512). The military judge stated “we’re

not done with the witness,” before admonishing the panel again that they must disregard the question about appellant’s phone. (R. at 512). All the panel members answered that they would follow the instruction except for LTC [REDACTED], who the military judge noted “you’re looking a little confused. Do you need me to clarify that further?” (R. at 512). LTC [REDACTED] responded that he “still want[ed] to ask a question about the phone, sir? Am I allowed to ask a—.” (R. at 512-13). The military judge interjected, reminding LTC [REDACTED] that they were still in the trial counsel’s examination of SA [REDACTED] before noting “once again, all the members except for you, [LTC [REDACTED]], said they understand my instruction. So let me just tell you directly. That question that was asked right before I asked you to step out, I have sustained an objection. That means that it is not properly before as [sic] evidence. You must disregard that the question was even asked or that the witness even began to answer the question. Will you follow that instruction, sir?” (R. at 513). LTC [REDACTED] finally responded that he would follow the instruction. (R. at 513).

After the trial counsel completed his examination of SA [REDACTED] the defense did not cross-examine the witness. (R. at 515). At that point, LTC [REDACTED] submitted a panel member question, asking: “When you say he got rid of his phone did he specify what he meant? Did he destroy or sell the phone?” (App. Ex. XV).

Defense counsel objected to the question and the military judge stated he could not ask the question. (R. at 517-18).

On re-direct, trial counsel asked one final question: “[W]hen the accused came in for his interview, did he give you consent to search his phone.” (R. at 518). Defense counsel immediately objected, which was “sustained again” by the military judge before he ordered the members to disregard it. (R. at 518-19). Throughout the trial, LTC [REDACTED] only submitted two questions for witnesses; both concerned appellant’s phone. (App. Ex. XIII; App. Ex. XV).

Standard of Review

Questions of prosecutorial misconduct are reviewed de novo. *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018) (citing *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017)). Where proper objection is entered at trial, the court reviews prosecutorial misconduct for prejudicial error. *Id* (citing *United States v. Fletcher* 62 M.J. 175, 179 (C.A.A.F. 2005)).

Law

“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, 10-11 (C.A.A.F. 1996). Prosecutorial misconduct at trial is behavior by the prosecuting attorney that "oversteps the

bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *Sewell*, 76 M.J. at 18 (citing *Fletcher*, 62 M.J. at 178 (C.A.A.F. 2005)). Repeated violations of rules of evidence can constitute prosecutorial misconduct—for instance, trial counsel repeatedly eliciting improper testimony. See *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014).

Among the dangers inherent in the panel receiving improper evidence is the specter of panel bias. “Actual bias is personal bias which will not yield to the military judge's instructions and the evidence presented at trial.” *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012). Actual bias can be shown through the substance of questions asked by a panel member during trial. *Id.* at 89 (finding that a panel member’s “question demonstrated that he had not kept an open mind until the close of evidence and was therefore unable to follow the military judge's instructions.”). 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.” *Fletcher*, 62 M.J. at 184.

Argument

A. Trial Counsel’s Attempt to Admit Mil. R. Evid. 404(b) Evidence Was Improper

Government counsel’s initial question to SA [REDACTED] had one purpose—to paint appellant as untruthful, uncooperative, and as a person with a general criminal character. Despite the assistant trial counsel’s protestations, the government did not give notice of the government’s intent to offer Mil. R. Evid. 404(b) evidence; notice intended, in part, to give defense the opportunity to move the court to exclude the evidence before the fact-finder hears it. Moreover, as the military judge rightfully found, the foundation for SA [REDACTED] knowledge for this evidence was hearsay, in the form of an Army Regulation 15-6 investigation. With all the evidentiary issues surrounding the question, the assistant trial counsel should have known that the question was improper; by trying to sneak the evidence in, trial counsel overstepped the bounds of “propriety and fairness.” *Meek*, 44 M.J. at 10-11.

The government had an appropriate avenue to seek to admit this evidence. First, the government should have given defense notice under Mil. R. Evid. 404(b). Second, the government should have called a witness with personal knowledge of

the facts at issue. The fact that the government failed to follow these basic steps is a clear departure from the norms of trial advocacy.

B. Trial Counsel's Question Unfairly Influenced the Panel

The biggest issue confronting the panel was the identity of the person behind the messages to Miss [REDACTED]. The panel members must have understandably been looking for evidence of a “smoking gun” that would make the identity of this person obvious. When it became clear that the government’s case was one built on a foundation of conjecture, it is logical to assume the members may have been frustrated. One panel member was apparently more frustrated than the rest.

The inflammatory nature of the evidence at issue, why the trials counsel’s attempt to smuggle in the testimony in front of the fact finder was so improper, is clearly demonstrated by the persistence of LTC [REDACTED]. Lieutenant Colonel [REDACTED] interest in appellant’s phone was clear earlier in the government’s case, when he asked a panel member question of CPT [REDACTED] a question that the government may have taken note of.¹³ Regardless, throughout the trial, all the members, including LTC [REDACTED], repeatedly stated that they would have no trouble following the military judge’s instructions on a variety of issues—the

¹³ Lieutenant Colonel [REDACTED] asked whether appellant or Master [REDACTED] had used appellant’s phone to access appellant’s social media accounts. (App. Ex. XIII).

burden of proof, presumption of innocence, and a variety of sustained objections—all but one.

The colloquy between the military judge and LTC [REDACTED] reveals a striking departure by LTC [REDACTED] from what had been until then his routine deference to the military judge. LTC [REDACTED] first statement to the military judge, that he was “starting to write a question,” revealed how the inadmissible evidence had piqued his interest. LTC [REDACTED] refusal to state he would disregard the question and answer and then his insistence that he “still want[ed] to ask a question about the phone,” revealed to whose benefit his piqued interest inured. LTC [REDACTED] made this last statement after he had just heard the military judge state *twice* that the members were to disregard the question and SA [REDACTED] answer. The military judge noted, “all the members except for you . . . said they understand my instruction.” Finally, on the military judge’s third attempt, LTC [REDACTED] relented and stated he would follow the instruction to disregard the question and answer.

This dialogue is a rare insight into the mind of a panel member upon receiving inadmissible character evidence. But despite how the assistant trial counsel’s efforts had already tainted at least one panel member against appellant, the assistant trial counsel was still not done.

C. The Trial Counsel's Persistence in Seeking to Admit Evidence of Appellant's Phone Further Inflamed the Panel Against Him

Undeterred by the military judge's repeated admonishments that evidence of appellant's phone was inadmissible, LTC [REDACTED] finally was able to submit his question, the same one he had verbally jousting with the military judge about. Unsurprisingly, the government did not object to the question, despite its clear inadmissibility. The military judge did not ask the question.

After the military judge stated that he would be unable to ask the question because of the rules of evidence, trial counsel said he had a "brief[]" redirect. The trial counsel asked only one question. The trial counsel asked SA [REDACTED] about appellant's phone, the exact same subject matter twice ruled inadmissible. The trial counsel formulated this question after having just seen LTC [REDACTED] question.

With this question, it's reasonable to assume that the assistant trial counsel was seeking to engage in a dialogue of sorts with the panel, and particularly LTC [REDACTED]—a dialogue intended to present the government as the party on the side of truth, openness, the party that would scratch that logical, though impermissible, itch that onerous rules had thus far impeded. As the Supreme Court stated nearly 100 years ago, it is the duty of trial counsel to "refrain from improper methods calculated to produce a wrongful conviction." *See Berger v. United States*, 295 U.S. 78, 88 (1935). In reaching for the tempting fruit of this patently improper evidence, the trial counsel betrayed that duty.

D. Appellant Suffered Prejudice from Trial Counsel's Misconduct

As stated above, this case primarily came down to identity. It is reasonable to assume the panel wanted a confession, metadata, or anything that was proof-positive of appellant's fingers typing the inappropriate messages to Miss [REDACTED]. When the government couldn't provide that, it is again reasonable to assume the panel became frustrated, especially LTC [REDACTED]. The persistent attempt by trial counsel to admit this evidence without giving notice and despite the military judge's rulings, represents an instance of severe misconduct.

"In the *absence* of evidence to the contrary, court-martial panel members are presumed to follow the instructions of the military judge." *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000). The military judge was forced to issue four instructions to disregard evidence of appellant's phone. The clear volume of the military judge's efforts leads to a reasonable inference that the measures employed to cure the misconduct were not sufficient, that the poison had rendered the panel unable to follow the military judge's instruction. This inference is made apparent by the reasons for the military judges four instructions—the inherently prejudicial nature of the evidence itself, the actual bias displayed by LTC [REDACTED] insistent efforts to inquire further into this evidence, and the government's cynical choice to attempt to both sneak-in the inadmissible evidence and ingratiate itself with the panel.

In the face of these facts, the military judge was left with two choices: 1) either an extensive individual voir dire of every member of the panel combined with a public reprimand of government counsel and an excusal of LTC [REDACTED]; or 2) a mistrial. Neither took place; and the chosen method failed to cure the unfair prejudice caused by the government's conduct.

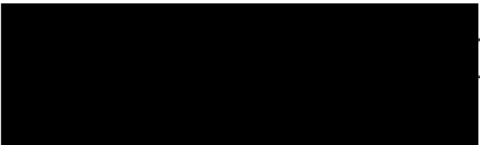
Lastly, as AE I makes clear, this was not a strong case for the government. In fact, this case was factually insufficient; the government's desperate attempt to bolster their case with the inadmissible and the immoderate interest that attempted bolstering generated only illustrate this further.

The panel was searching for a smoking gun, with the appellant's digital fingerprints on it. The government failed to deliver. But when the government tried to satiate this longing, inviting the panel to grope with them in the muck and mire of inadmissible character evidence, the panel took note, and the government doubled down—all to the detriment of appellant's right to a fair trial. The prosecutorial misconduct here demands one result: full reversal.


Conclusion

Each of the above errors alone merit full reversal of appellant's sentence and convictions. Further, the cumulative effect of these errors makes appellant's conviction and sentence truly odious.¹⁴


Appellant was subjected to trial by innuendo, buttressed by inadmissible evidence and prosecutorial misconduct. In the face of a complete defense, a complete alibi supported by unrebutted evidence of the truthfulness of appellant, this court must conclude that there is a "fair and rational hypothesis other than guilt"—that the government did not meet its burden, that fairness requires a full reversal of the findings and the sentence and dismissal with prejudice.




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¹⁴ See *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011) ("Under the cumulative-error doctrine, a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding.") (internal citation omitted).

Certificate of Filing and Service

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on 17 May 2024.



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