

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES
Appellee

v.

Private First Class (E-3)
AUSTIN C. HAMILTON
United States Army
Appellant

**BRIEF ON BEHALF OF
APPELLANT**

Docket No. ARMY 20200347

Tried at Joint Base Lewis-McChord,
Washington, on 20 February, 15 May,
and 22-26 June 2020, before a general
court-martial appointed by
Commander, 7th Infantry Division,
Colonel Joseph Keeler, Military Judge,
presiding.

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

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TO THE HONORABLE, THE JUDGES OF
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Assignments of Error¹

I.

**WHETHER THE MILITARY JUDGE ABUSED HIS
DISCRETION WHEN HE PERMITTED TWO
WITNESSES TO PROVIDE SPC [REDACTED] ACCOUNT
OF HER ALLEGED RAPE UNDER THE EXCITED
UTTERANCE EXCEPTION TO HEARSAY.**

¹ Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 198-2), appellant personally requests this court consider those matters set forth in the Appendix.

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING THE SANE'S WRITTEN REPORT.

III.

WHETHER THE FACTS CHARGED IN SPECIFICATION 5 OF CHARGE I ARE INSUFFICIENT AS A MATTER OF LAW TO SUPPORT A CONVICTION OF AGGRAVATED SEXUAL CONTACT.

Statement of the Case

Private First Class (PFC) Austin Hamilton (appellant) was tried by a general court-martial with enlisted representation at Joint Base Lewis-McChord, Washington, on 20 February, 15 May, and 22-26 June 2020. Contrary to his pleas, he was found guilty of two specifications of Article 120, UCMJ, for rape and aggravated sexual contact. The panel acquitted appellant of two specifications of rape, one specification of aggravated sexual contact, and one specification of abusive sexual contact, in violation of Article 120, UCMJ, and one specification of assault consummated by battery, in violation of Article 128, UCMJ. (R. at 757). The military judge sentenced appellant to be reduced to the grade of E-1, to be confined for eight years, and to be discharged from the service with a dishonorable discharge. (R. at 841.) The convening authority took no action. (Action).

Statement of Facts

On 31 March 2019, appellant and a group of fellow soldiers at Joint Base Lewis-McChord gathered in the early evening near the 4th Battalion 23d Infantry Regiment barracks for a barbecue to memorialize the recent passing of a friend. (R. at 472-480). Appellant was already at the barbecue when the alleged victim, SPC ■■■, arrived with her female friend, SPC ■■■ (R. at 473). There were several other soldiers present at the barbecue, including Corporal (CPL) ■■■ and CPL ■■■. Specialist ■■■ now-husband, SPC ■■■, was not initially present. Overall, there was a fun atmosphere of music, games, drinking, eating, and socializing. (R. at 338, 475).

Throughout the barbecue, SPC ■■■ and appellant engaged in mutual flirtation, including SPC ■■■ repeatedly slapping appellant on the buttocks with her hand. (R. at 474, 490). As the night wore on, appellant and SPC ■■■ continued to engage in flirtatious behavior, and SPC ■■■ eventually agreed to go with him to his room to get more beer for the barbecue. (R. at 353).

On the walk to appellant's room, appellant began putting his hands on SPC ■■■ (R. at 355-56). After appellant entered his door code and they entered the room, he began kissing SPC ■■■ (R. at 356-57). Specialist ■■■ testified, "he had started kissing down my neck and onto my chest." (R. at 359). She stated he kissed her on her chest around her "breast area" and identified the spot he kissed

“up on near her left chest area.” (R. at 360). Specialist [REDACTED] claimed that she could not freely move due to appellant’s body weight on her. (R. at 359).

Specialist [REDACTED] also testified that appellant “had inserted three fingers inside of me” (R. at 360), that he pulled down both of their pants and “was rubbing his penis against my butt” (R. at 364), pushed her down on his bed and “put his tongue inside of my vagina” (R. at 369), before eventually “putting his penis inside of me for about four to five times.” (R. at 370). Specialist [REDACTED] claimed that that she had asked appellant to get off of her, tried to kick him off, screamed, and did not consent to any of the sexual activity. (R. at 365, 369, 370).

Specialist [REDACTED] testified that she was eventually able to “donkey kick” appellant to the chest, grab her phone, and run out of his room, down one floor to her barracks room. (R. at 372). Her immediate thought was to call her roommate, SPC [REDACTED], her best friend at the time. (R. at 372-73). Specialist [REDACTED] testified that she called SPC [REDACTED] with whom she “had a brief discussion” and then “went outside to inform Specialist [REDACTED]” (R. at 374). Specialist [REDACTED] stated that “about five minutes” passed between leaving appellant’s barracks room and going to look for SPC [REDACTED] (R. at 374). Specialist [REDACTED] did not testify on the merits of the case.

Specialist [REDACTED] testified that right before dark around 6:30 p.m., SPC [REDACTED] approached her in the courtyard, and pulled her away from SPC [REDACTED] and

CPL [REDACTED]. (R. at 477-78). Specialist [REDACTED] said that SPC [REDACTED] voice was “breaking up” and that she “just really wanted to tell someone immediately what had happened.” (R. at 478). Specialist [REDACTED] stated that SPC [REDACTED] showed her that there were bruises on her arm and chest. (R. at 478, 496). Upon eliciting this testimony from SPC [REDACTED] trial counsel then asked her what SPC [REDACTED] said had happened up in appellant’s room. (R. at 479). The military judge overruled defense counsel’s hearsay objection and allowed the testimony as an excited utterance exception to hearsay. (R. at 479-80). He provided no explanation of his ruling. (R. at 480). The relevant testimony proceeded as follows:

[Trial Counsel]: I’d like you to tell me to the best of your ability what she told you happened in PFC Hamilton’s room.

[SPC [REDACTED]]: She told me that he asked her to come upstairs to his room to grab beer with him, and she told him that she would. They went up to the room, and he had pushed her against the door once they got into the room, and that he was trying to kiss her. Somehow, they made it to the bed, and [h]e was trying to unbutton her pants. He said, “Let me take a bit of that pussy.” He got her pants undone as she trying to force him off, and he orally had sex with her. Then she had said that he penetrated, and she was still trying to force herself off of him. Then she came back down after that had happened.

(R. at 480-81).

Upon hearing SPC [REDACTED] account of the incident with appellant, SPC [REDACTED] grabbed CPL [REDACTED] and went to confront appellant, leaving SPC [REDACTED] with another friend, SPC [REDACTED]. (R. at 481-482, 528-29). When confronted,

appellant allegedly admitted to kissing SPC [REDACTED], performing foreplay involving oral sex, and having intercourse with her. (R. at 546-47; Pros Ex. 20 for ID).

Specialist [REDACTED] said that approximately fifteen minutes passed from the time SPC [REDACTED] exited the barracks to the time she approached him, and he began comforting her. (R. at 512-13). Specialist [REDACTED] had a discussion with SPC [REDACTED] after she had already spoken about what happened with SPC [REDACTED] and SPC [REDACTED]. (R. at 375). Specialist [REDACTED] testified that he had seen appellant and SPC [REDACTED] leave the barbecue together and next saw SPC [REDACTED] fifteen to thirty minutes later crying and looking for friends. (R. at 509). Specialist [REDACTED] showed SPC [REDACTED] bruises on her arms and her thigh and told him how she was scared. (R. at 511).

Specialist [REDACTED] testified that SPC [REDACTED] spoke to him for five to ten minutes, and he had seen her do the same with SPC [REDACTED]. (R. at 512). Upon eliciting this testimony from SPC [REDACTED], trial counsel then asked him what SPC [REDACTED] said told him happened. (R. at 514). The military judge overruled defense counsel's hearsay objection and allowed the testimony. (R. at 515). He provided no explanation of his ruling. (R. at 515). The relevant testimony proceeded as follows:

[Trial Counsel]: [P]lease tell us, to the best of your ability, what it is she told you.

[SPC ██████]: She told me initially he tried to hold her down and perform oral intercourse on her and then successfully later then penetrated her sexually.

[Trial Counsel]: Did she describe how he held her down?

[SPC ██████]: Yes, sir. At first he was holding her hands back kind of like her arms up, sir, and then he just continued holding her down like that, sir.

[Trial Counsel]: At some point did she describe to you anything that he said to her?

[SPC ██████]: No, sir.

[Trial Counsel]: Did she tell you how she got away from him?

[SPC ██████]: Yes. She said she kicked him off, sir.

(R. at 516).

Following the incident with appellant, SPC ██████ now-husband, SPC ██████, arrived at the gathering, and SPC ██████ continued to socialize. (R. at 377).

At some point that night, someone from CQ approached and asked her if she thought what happened was rape, and when she said yes, he said he had to call the police. (R. at 377). An ambulance then arrived and took SPC ██████ to the hospital. (R. at 378).

At trial, the sexual assault nurse examiner (SANE) testified about the sexual assault forensic examination she conducted on SPC ██████ around 10:00pm. (R. at 573). The government offered into evidence under the medical treatment exception to hearsay the “history of the assault” the SANE had written based on

what SPC [REDACTED] told her had happened. (R. at 578; Pros. Ex. 17). After eliciting testimony from the SANE that the examination form she followed was called a “Sexual Assault Report Form,” that it calls for “medical forensic examination and evidence collection,” that the specimens she collects are for law enforcement purposes, defense counsel objected to admission of the document. (R. at 580). The military judge overruled the objection, stating that SPC [REDACTED] “did talk about going to the nurse to get medical treatment to find out if she had a sexually transmitted disease and that is what her focus was.” (R. at 581). The government proceeded to publish the report by having the SANE read the “history of the assault” to the panel. (R. at 581-584). The military judge attempted to articulate his ruling later by stating, “I found that it was a statement that is made for and is reasonably pertinent to the medical diagnosis or treatment and it describes the medical history, past and present symptoms, and sensations.” (R. at 602).

Ultimately, the only two offenses the panel convicted appellant of were Specification 1 of Charge I for SPC [REDACTED] account of a rape that they heard repeated through SPC [REDACTED], SPC [REDACTED], and the SANE; and Specification 5 of Charge I for an account of kissing on SPC [REDACTED] chest for which there was evidence of a suction mark. (R. at 585; Pros. Ex. 19).

Argument

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE PERMITTED TWO WITNESSES TO PROVIDE SPC [REDACTED] ACCOUNT OF HER ALLEGED RAPE UNDER THE EXCITED UTTERANCE EXCEPTION TO HEARSAY.

Standard of Review

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003). "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). Military judges are afforded less deference if they fail to articulate the basis for their evidentiary ruling on the record. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010). For non-constitutional errors, the Government must demonstrate that the error did not have a substantial influence on the findings. *McCollum*, 58 M.J. at 342.

Law

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," is admissible as an exception to the general prohibition on hearsay. Military Rule of Evidence [Mil. R. Evid.] 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). In order for a hearsay statement to qualify as an excited utterance it must satisfy the following three-prong test: (1) the statement must be "spontaneous, excited or impulsive rather than the product of reflection and deliberation;" (2) the event prompting 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) (citations omitted).

Relevant to the third 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.” *Donaldson*, 58 M.J. at 483 (internal quotation marks omitted) (citation omitted). However, “[i]t is the totality of the circumstances, not simply the length of time that has passed between the event and the statement, that determines whether a hearsay statement was an excited utterance.” *United States v. Belfast*, 611 F.3d 783, 817 (11th Cir. 2010). Further, M.R.E. 803(2) does not require corroboration—the declarant’s statement is sufficient to prove the existence of the startling event. Drafters’ Analysis at A22-63.

The proponent of the excited utterance has the burden to show by a preponderance of the evidence that each element is met. *See 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”); *see also United States v. Mehanna*, 735 F.3d 32, 56 (1st Cir. 2013).

In *United States v. Johnson*, this Court held that the victim’s statement was not an excited utterance, and the military judge should have excluded it because (1) the victim reflected on the sexual assault while showering before going to her friend’s room; (2) she continued to reflect while waiting 30 minutes for her friend; (3) she made the statement in response to a question from her friend; and (4) the statement was unreliable because it was inconsistent with the victim’s in-court testimony. *Johnson*, 2020 CCA LEXIS 249, at *9 (Army Ct. Crim. App. 23 Jul. 2020).

Further, this Court reasoned, “[t]here is a strong presumption against admitting a statement as an excited utterance when it is not made immediately after the startling event. *Jones*, 30 M.J. at 129. However, case law has not delineated a specific period of time; instead, “[t]he critical determination is whether the declarant was under the stress of or excitement caused by the startling event.” *United States v. Feltham*, 58 M.J. 470, 475 (C.A.A.F. 2003) (citing *United States v. Lemere*, 22 M.J. 61, 68 (C.M.A. 1986). In *Johnson*’s case, by the time CDT [REDACTED] spoke to LT [REDACTED] and LT [REDACTED], this court found that she was no longer

under the stress of or excitement caused by the sexual assault, reasoning that, although CDT [REDACTED] was upset, her upset state was not a result of the event itself, but rather a result of her reflection and processing of the event. *Johnson*, 2020 CCA LEXIS 249, at *7.

"[A] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." UCMJ, art. 59(a). We evaluate the harmlessness of an 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. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999).

Argument

The military judge erroneously admitted two hearsay statements from the alleged victim as ‘excited utterances’ that did not meet the prongs required for such. These statements furthermore materially prejudiced the substantial rights of appellant, as they provided the sole corroborating evidence to the specifications of which appellant was convicted.

A. Specialist [REDACTED] statement to SPC [REDACTED] was not an excited utterance because it fails to meet the first and third criteria of the three-pronged test.

Over defense objection, the military judge admitted a hearsay statement of SPC [REDACTED] through the testimony of her friend, SPC [REDACTED], as an excited utterance

(R. at 479-80). This statement was not spontaneous, excited or impulsive, and it did not occur in the immediate aftermath of the supposedly startling event.

Instead, SPC [REDACTED] first departed appellant's room, returned to her own room, placed a phone call to her roommate, SPC [REDACTED], had "a brief discussion" with SPC [REDACTED], returned to the barbecue outside, and struck up a conversation with SPC [REDACTED] in which she relayed the hearsay statement at issue. (R. at 374-75).

Specialist [REDACTED] did not testify at trial, and the contents of SPC [REDACTED] conversation with her are entirely unknown. (R. at 479).

At trial, the prosecution offered SPC [REDACTED] conversation with SPC [REDACTED] into evidence as an excited utterance. *Id.* The defense objected based upon the fact that SPC [REDACTED] had returned to her room and called SPC [REDACTED] prior to this conversation. The prosecution countered that the conversation happened within "five or ten minutes tops." (R. at 480). The military judge admitted the statement as an excited utterance with no further analysis. *Id.* Specialist [REDACTED] then testified regarding the statements she allegedly received from SPC [REDACTED] (R. at 480).

There is no question that SPC [REDACTED] was well removed from the prompting event at the time she spoke to SPC [REDACTED] to relay her allegations against appellant. She had already departed from appellant's room, returned to the safe haven of her own room, placed a telephone call to another friend, and then returned

to the barbecue of her own volition, speaking alone for upwards of ten minutes to SPC [REDACTED]. (R. at 374-75; 514-16).

Specialist [REDACTED] not only had the opportunity to reflect and deliberate on the situation before making these statements to SPC [REDACTED], but she literally did so by having a prior conversation on the topic before discussing with SPC [REDACTED]. This is nowhere close to a situation where SPC [REDACTED] left appellant's room and yelled out to the first person she encountered about what had occurred, banged on the door of a stranger, or called 911. Instead, she first returned alone to her room, placed a phone call to a friend, then engaged in a deliberative decision to confide in certain individuals before engaging in lengthy conversations – not uncontrollably sputtering out 'excited utterances.'

Additionally, while a relatively short period of time elapsed between the incident with appellant and SPC [REDACTED] statements to SPC [REDACTED], "the lapse of any particular period of time, is not the focus of the excited utterance rule. The critical determination is whether the declarant was under the stress or excitement caused by the startling event." *Feltham*, 58 M.J. at 475. Just as this court noted in *Johnson*, although SPC [REDACTED] was upset at the time of her statements to SPC [REDACTED], "her upset state was not a result of the incident itself, but rather a result of her reflection and processing of the event." *Johnson*, 2020 CCA LEXIS 249, at *7.

The military judge's ruling admitting SPC [REDACTED] statements to SPC [REDACTED] was clearly erroneous.

B. Specialist [REDACTED] statements to SPC [REDACTED] are not excited utterances because they fail to meet the first and third criteria of the three-pronged test.

Later in trial, the military judge admitted yet another hearsay statement as an excited utterance through the testimony of SPC [REDACTED] who testified regarding a statement made by SPC [REDACTED] after the alleged assault. (R. at 514-516). SPC [REDACTED] statement to SPC [REDACTED] occurred even later than the statement SPC [REDACTED] gave to SPC [REDACTED], and obviously after SPC [REDACTED] telephone conversation with SPC [REDACTED]. Nevertheless, the military judge – after asking only if this were the first time that SPC [REDACTED] had spoken to SPC [REDACTED] - admitted the statement as an excited utterance. (R. at 515). Accordingly, SPC [REDACTED] testified that SPC [REDACTED] relayed the following to him:

[Trial Counsel]: In this moment, while you are comforting her and while she is under the stress of the situation that just happened, please tell us, to the best of your ability, what is it she told you?

[SPC [REDACTED]]: She told me initially that he tried to hold her down and perform oral intercourse on her and then successfully later then penetrated her sexually.

(R. at 515).

C. The improper admission of the hearsay statements prejudiced appellant.

Applying the *Kerr* factors, it is clear that the military judge's error was not harmless. The admitted hearsay improperly bolstered the government's case for those acts described in the hearsay statements. First, the government's case was relatively weak, as SPC [REDACTED] provided the only direct evidence of the alleged offenses, which resulted in appellant's acquittal for the five remaining specifications based solely upon her uncorroborated testimony. Thus, these two hearsay statements seemingly became the proverbial "straw that broke the camel's back." Without these statements, there is no reason to believe appellant would have been convicted based solely upon the trial testimony of SPC [REDACTED] without her out-of-court statements unjustly bolstering her claims.

As to the second factor, the defense case was relatively strong. All other evidence presented—to include CPL [REDACTED] recollection of conflicting stories (R. at 546; Pros. Ex. 20 for ID), SPC [REDACTED] description of flirting between SPC [REDACTED] and appellant (R. at 490), SPC [REDACTED] statement that SPC [REDACTED] was interested in appellant (R. at 521), appellant's denials of rape (R. at 495), the SANE's description of marks on SPC [REDACTED] body and lack of vaginal findings (R. at 585, 593), and SPC [REDACTED] belief that he was in a relationship with SPC [REDACTED] (R. at 635, 643)—could easily be interpreted to support a consensual sexual encounter between SPC [REDACTED] and appellant that SPC [REDACTED] regretted. Defense counsel highlighted

the implausibility in SPC [REDACTED] account of the sexual encounter, the lack of any corroboration, the notably absent first statement to her roommate, the conflicting statements all around, and SPC [REDACTED] potential ulterior motives, all leading to a failure of the government to meet its burden.

Lastly, the wrongfully admitted evidence was quite compelling. Repetition makes a fact seem truer, regardless of whether it is or not.² These hearsay statements from SPC [REDACTED] improperly bolstered her trial testimony by repeating her story sufficient for the members to convict on the allegations contained therein. (R. at 757). Of the three specifications alleging distinct rapes, the panel convicted appellant only of the one offense for which multiple witnesses repeated SPC [REDACTED] claims, and which was not based solely upon her word. It is evident that the materiality of this evidence was critical to the members – their findings reflect as much.

² The adage, “Repeat a lie often enough and people will eventually come to believe it” is often attributed to the infamous Nazi, Joseph Goebbels, and has been proven true and validated by decades of research on what psychologists call the “illusory truth effect.” *See, e.g.* Joe Pierre, M.D., Illusory Truth, Lies, and Political Propaganda, Par 1, Jan. 20, 2020, <https://www.psychologytoday.com/us/blog/psych-unseen/202001/illusory-truth-lies-and-political-propaganda-part-1>

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING THE SANE'S WRITTEN REPORT.

Standard of Review

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *McCollum*, 58 M.J. at 335. "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." *Donaldson*, 58 M.J. at 482.

Law

Military Rule of Evidence 803(4) provides an exception to the general hearsay rule and allows the admission of statements made for the purpose of medical diagnosis or treatment; statements which are offered as exceptions to hearsay under Mil. R. Evid. 803(4) must satisfy two conditions: first the statements must be made for the purposes of medical diagnosis or treatment; and second, the patient must make the statement with some expectation of receiving medical benefit for the medical diagnosis or treatment that is being sought.

Argument

After the alleged assault, SPC [REDACTED] claimed that she immediately ran to her barracks room where she called her roommate, SPC [REDACTED], and that they had a "brief discussion." (R. at 374). SPC [REDACTED] then returned to the barbecue where she

spoke to SPC [REDACTED] about her allegations. (R. at 375). Following her conversation with SPC [REDACTED], SPC [REDACTED] then spoke to CPL [REDACTED] and SPC [REDACTED] about the same topic. (R. at 375). Soon thereafter, SPC [REDACTED] her husband at the time of trial, arrived and she relayed her allegations to him. (R. at 376).

As SPC [REDACTED] continued hang out at the barbecue and take a shot of alcohol with the group, she was suddenly approached by someone from CQ who asked if she believed she had been raped. (R. at 377). She said she did, and was then informed that the police would be called. (R. at 377). Specialist [REDACTED] then testified about what transpired following this conversation:

[Trial Counsel]: After CQ told you that they had to call the cops, what happened next?

[SPC [REDACTED]]: SPC [REDACTED] and SPC [REDACTED], she had showed up, they had sat with me and had waited for me for the police to show up. The ambulance to Madigan had showed up and we had went to Madigan to get a SAFE exam done, ma'am.

[Trial Counsel]: You mentioned you went in the ambulance to Madigan to get a SAFE exam; what's a SAFE exam?

[SPC [REDACTED]]: It is an exam to see if the person that you had encounters with was clean so that there was no diseases and to see if there was any unfortunate injuries within this encounter.

(R. at 377).

Over defense objection, the military judge admitted the entirety of the narrative that SPC [REDACTED] provided to the SANE, finding that SPC [REDACTED] motivation in

providing the narrative was for the purpose of medical diagnosis or treatment under Mil. R. Evid. 804(d)(3). (R. at 577, 581; Pros. Ex. 17).

A. The “history of assault” statement fails to meet the criteria to be admissible as an exception to hearsay under Mil. R. Evid. 803(4).

1. Specialist [REDACTED] did not make the statement for the purpose of medical diagnosis or treatment.

The military judge erred in admitting this statement under Mil. R. Evid. 803(4). In arguing for its admission under Mil. R. Evid. 804(4), the government misstated SPC [REDACTED] testimony about the exam, and the military judge relied on those erroneous statements. The government stated that SPC [REDACTED] had testified “that her intent in going to the hospital was to get medical treatment and make sure that she didn’t get a STD and get a prophylactic. She testified to all of that on direct.” (R. at 578). In overruling defense’s objection, the military judge stated that “[SPC [REDACTED]] did talk about going to the nurse to get medical treatment to find out if she had a sexually transmitted disease and that is what her focus was. I’m going to admit it into evidence.” (R. at 581). In actuality, the government never specifically elicited SPC [REDACTED] intent with going to the hospital or undergoing the exam, and SPC [REDACTED] actually implied she only went because an ambulance came to transport her there. (R. at 378).

2. Specialist [REDACTED] did not make the statement with an expectation of receiving medical benefit for any medical diagnosis or treatment.

In making the determination as to whether statements were made with some expectation of receiving medical benefit or treatment, “the military judge should look to the circumstances surrounding the proffered testimony to determine that the appropriate indicia of reliability are present.” *United States v. Cucuzzella*, 66 M.J. 57, 60 (C.A.A.F. 2008). The subjective state of mind of the declarant may be a key factor in evaluating this prong, specifically, “the state of mind or motive of the patient in giving the information” *Id.* (citing *United States v. Kelley*, 45 M.J. 275, 279 (C.A.A.F. 1996)). In this case, the evidence shows that SPC [REDACTED] gave her statement with the expectation of bolstering her case against appellant, not with the expectation of receiving medical benefit.

Though the trial counsel apparently prepared SPC [REDACTED] for trial to indicate symptoms and injury from the alleged rape (R. at 379), she actually reported no bruising, injury, or pain to the SANE the night of the alleged offenses. (R. at 595-96). In fact, SPC [REDACTED] testimony that after the alleged rape she was “in shock,” her “vagina literally felt tore open,” and “[t]here was blood in my urine” (R. at 379) completely contradicts her reporting to the SANE. (R. at 595). Though the SANE testified that the “history of the assault” guides examination and treatment, SPC [REDACTED] seized the opportunity to further spread her account of the incident, not to provide information to guide medical examination or treatment.

In the two full pages of the record that reflect publishing of the statement (Pros. Ex. 17), there is not one mention of bruising, bleeding, tearing, pain, or any other injury. (R. at 582-84). The majority of the statement describes appellant's earlier flirtations with SPC [REDACTED]. (R. at 582-83). Much of the statement describes the words exchanged between SPC [REDACTED] and appellant. (R. at 582-83). The only portion of the statement that would even remotely call for potential medical assessment is in the last few lines in which SPC [REDACTED] said appellant "inserted himself into me." (R. at 583). It is evident that SPC [REDACTED] used the opportunity with the SANE to build on what she already told her friends and document her story of the encounter with appellant. The military judge's ruling admitting the "history of the assault" (Pros. Ex. 17) as a statement made for medical diagnosis or treatment was clearly erroneous.

Additionally, with respect to SPC [REDACTED] expectation in making her statement to the SANE, it is important to highlight the significant law enforcement undertones that were prevalent throughout: the police were involved in arranging the examination of SPC [REDACTED] (R. at 378); the consent form for the examination stated that the medical report was for the purpose of evidence collection; the consent form further stated that it would be provided to law enforcement; and the form was, in fact, sent to law enforcement. (R. at 573). Furthermore, while Ms. [REDACTED] testified that the patient's narrative summary of the assault is important for the

examiner to consider in deciding which exams to conduct, the entire narrative summary in this case contained extensive non-medical details wholly unrelated to determining needed medical treatment or testing. (R. at 577, 582-84).

Most troubling, the SANE exam itself stemmed directly from the involvement of law enforcement, so much so that it is unclear whether SPC [REDACTED] even understood that the SANE was not simply another arm of law enforcement, as she was taken to the hospital in an ambulance with a police escort after first speaking to law enforcement officers. (R. at 378). Notwithstanding, the military judge ruled that SPC [REDACTED] entire narrative to the SANE was admissible under MRE 803(d)(4), providing:

[MJ]: I am going to overrule the defense's objection. I'm going to admit it as a statement for medical diagnosis or treatment. In the direct examination of Specialist [REDACTED] she did talk about going to the nurse to get medical treatment to find out if she had a sexually transmitted disease and that is what her focus was. I'm going to admit it into evidence.

(R. at 581).

3. The improperly admitted hearsay prejudiced appellant.

This hearsay statement prejudiced appellant by providing key corroborating details of the penile-vaginal penetration that the members used to convict appellant. This statement falls far outside the hearsay exception for a statement made for purpose of medical diagnosis, and as such, it was erroneously admitted to the substantial detriment of appellant.

As discussed *supra*, Assignment of Error I, the government case was fairly weak, the defense case was fairly strong, and the panel’s findings reflect how material and compelling it found the improperly admitted hearsay. The panel—apparently suffering from the “illusory truth effect” (noted *supra* p.17)—found appellant not guilty of offenses for which the evidence came solely from SPC [REDACTED] testimony, and convicted appellant only of the specifications that were supported by hearsay testimony of SPC [REDACTED] friends and the SANE. Appellant was materially prejudiced by the military judge’s erroneous admission of the “history of the assault.” (Pros. Ex. 17).

III.

THE FACTS CHARGED IN SPECIFICATION 5 OF CHARGE I ARE INSUFFICIENT AS A MATTER OF LAW TO SUPPORT A CONVICTION OF AGGRAVATED SEXUAL CONTACT.

Standard of Review

“Whether a specification is defective and the remedy for such error are questions of law, which we review de novo.” *United States v. Humphries*, 71 M.J. 209, 212 (C.A.A.F. 2012) (citing *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012)). “While a specification that fails to properly allege an element of a charged offense, is defective, and while such a defect affects constitutional rights, it does not constitute structural error subject to automatic dismissal.” *Humphries*, 71 M.J.

at 212. Where defects are raised for the first time on appeal,³ dismissal will depend on whether there is plain error and in most cases will turn to the question of prejudice. *Id.* at 213. Under a plain error analysis, appellant “has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (2) the error materially prejudiced a substantial right of the accused.” *United States v. Girouard*, 70 M.J. 5, 6 (C.A.A.F. 2011).

Law

A specification is sufficient when first scrutinized on appeal, "if the necessary facts appear in any form or by fair construction can be found within the terms of the specification." *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (quoting *United States v. Mayo*, 12 M.J. 286, 288 (C.M.A. 1982)). A specification is sufficient in general if it alleges every element of the charged offense expressly or by necessary implication. Rule for Courts-Martial 307(c)(3); *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011); *Crafter*, 64 M.J. at 211.

³ At trial, defense counsel did move to dismiss Specifications 3, 4, 5, and 6 of Charge I for failure to state an offense, although the alleged error was that the specifications were “void for vagueness.” (R. at 47-48).

Defective specifications implicate an accused soldier's constitutional right to notice. "A charge and specification will be found sufficient if they, 'first, contain[] the elements of the offense charged and fairly inform[] the [accused] of the charge against which he must defend, and second, enable[] him to plead an acquittal or conviction in bar of future prosecutions for the same offense.' " *Fosler* 70 M.J.. at 229 (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)).

Due process requires "fair notice" that an act is forbidden and subject to criminal sanction. *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003). The Court of Appeals for the Armed Forces [CAAF] has found such notice in the *Manual for Courts-Martial [MCM]*, federal law, state law, military case law, military custom and usage, and military regulations. *Id.* Due process also requires fair notice as to the standard applicable to the forbidden conduct. *Parker v. Levy*, 417 U.S. 733, 755 (1974); *Vaughan*, 58 M.J. at 31.

The 2019 *MCM* contains the following binding definitions pertinent to the charges in this case:

Rape -Any person subject to this chapter who commits a sexual act upon another person by- (1) using unlawful force against that other person...is guilty of rape and shall be punished as a court-martial may direct. *MCM*, pt. IV, ¶60.a.(g)(2).

Aggravated Sexual Contact -Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct. *MCM*, pt. IV, ¶60.a.(g)(2).

Sexual contact - The term "sexual contact" means touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body or an object. *MCM*, pt. IV, ¶60.a.(g)(2).

Argument

Appellant was convicted of one specification of rape and one specification of aggravated sexual contact at trial. The specification alleging aggravated sexual contact was drafted as follows:

SPECIFICATION 5 (Aggravated Sexual Contact): In that Private First Class Austin Hamilton, U.S. Army, did, at or near Joint Base Lewis McChord, Washington, on or about 31 March 2019, touch the chest of Private (PV2) [REDACTED] with Private First Class Hamilton's mouth with an intent to arouse, or gratify the sexual desire of any person by using unlawful force.

(Charge Sheet).

Specification 5 of Charge I fails to state an offense. Under the 2019 version of *MCM*, a charge of aggravated sexual assault applies only to touching of enumerated body parts, which include: the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks. *MCM* (2019 ed.), pt. IV, ¶60.a.(c); 60.a.(a)(1). The "chest" is not included. Thus, this charge fails to state an offense in violation of Article 120, UCMJ.

The military judge's instructions to the panel were consistent with these elements and definition. (R. at 677-78; App. Ex. LV, p. 5). Upon comparison of

the charge sheet to the relevant portion of the *MCM*, the error in this case is plain and obvious. The government failed to state the offense of aggravated sexual contact, as a touching on the “chest” does not fall within the applicable *MCM* definition of “sexual contact.” While the evidence did lend support to a touching on SPC [REDACTED] chest, such an act could not constitute an aggravated sexual contact.

The error with this specification materially prejudiced a substantial right of appellant. The error here, that appellant, in a contested case, was charged and convicted of a specification that failed to allege an element of the offense charged – implicated his substantial right to notice under the Fifth and Sixth Amendments. *Humphries*, 71 M.J. at 215. Appellant was convicted of an offense—a sex offense no less—of which he was not charged. When determining prejudice from a defective specification, as the court states in *Humphries*, “we look to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is ‘essentially uncontroverted.’” *Humphries*, 71 M.J. at 215-16.

Examination of the record reveals no such notice of an intended aggravated sexual contact for Specification 5 of Charge I. This is not a defective specification case like the many Article 134, UCMJ, violation cases in which the government failed to plead the terminal element. This is a defective specification case in which the government charged, presented evidence on, and argued an unlawful touch on

SPC [REDACTED] chest, apparently not realizing that such a touch cannot constitute an aggravated sexual contact under the applicable definitions. The government did not even attempt to prove or argue an aggravated sexual contact for the touching on SPC [REDACTED] body by appellant's mouth.⁴ In sum, the defective specification fails to allege sexual contact, the crux of the offense. The record reflects that the government's charging error caused material prejudice to appellant's substantial right to constitutional notice. The proper remedy is dismissal of the specification and a rehearing on sentence.

⁴ In his opening statement, trial counsel stated, "He pulled her shirt to the side and he sucked on her chest. This is the evidentiary basis for Charge I, Specification 5." (R. at 306). Specialist [REDACTED] testified, "he was kissing me and then he had started kissing down my neck and onto my chest. . . he started kissing my chest and I had told him to stop." (R. at 359-60). She pointed "up on near her left chest area" to show where appellant kissed her. (R. at 360). The SANE noted "a suction injury on the chest." (R. at 585). In closing argument, trial counsel argued, "From there he moved down to her chest where he sucked on her chest as she was pinned to that door. . . . That is Specification 5 of Charge I, the aggravated sexual contact." (R. at 705).

Conclusion

Appellant respectfully requests this court set aside the findings and sentence.



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APPENDIX

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant, through appellate defense counsel, personally requests that this court consider the following matters:

THE EVIDENCE IS FACTUALLY AND LEGALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR RAPING AND SEXUALLY ASSAULTING SPC [REDACTED]

Standard of Review

Legal and factual sufficiency are reviewed *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007).

Law

The test for legal sufficiency of the evidence is, “whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt.” *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); see also *United States v. Humphreys*, 57 M.J. 83, 94 (C.A.A.F. 2002). “[I]n resolving questions of legal sufficiency, the CCA is bound to draw every reasonable inference from the evidence of record in favor of the prosecution.” *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001).

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 CCA is convinced of the [appellant’s] guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. In conducting this unique appellate role, the CCA takes, “a fresh, impartial look at the evidence,” applying “neither a presumption of innocence nor a presumption of guilt” to “make their own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.” *Washington*, 57 M.J. at 399.

Argument

Specialist ██████ incredulous claim of sexual assault is inconsistent with the balance of the evidence presented in this case and is riddled with questions regarding her motive to report and fabricate the allegation.

A. Specialist ██████ prior conduct with appellant casts significant doubt on her claims of nonconsensual touching and alternatively demonstrate appellant’s reasonable mistake of fact as to consent.

Prior to the alleged incident, SPC ██████ was openly “flirting” with appellant, including repeatedly hitting him on the buttocks with her hand in view of other barbecue attendees. (R. at 490). Furthermore, although the prosecution hinged their case theory on the idea that SPC ██████ had sternly and unequivocally rejected appellant, the evidence adduced at trial was quite to the contrary. In fact, the evidence suggested that SPC ██████ wanted the flirtation with appellant to continue,

despite describing it as “aggressive.” (R. at 476). Specifically, SPC [REDACTED] testified on direct that SPC [REDACTED] “didn’t really want [the flirtation from appellant] to stop. (R. at 416).

As the above facts demonstrate, SPC [REDACTED] flirtatious acts with appellant, up to and including her decision to go alone up to his room after he had allegedly kissed her without consent, fly in the face of her allegations that she was inappropriately touched. Although SPC [REDACTED] attempted to portray appellant as the aggressor both in terms of their physical activity, the evidence shows that she actively encouraged him, including repeatedly touching his buttocks with her hand. Indeed, had appellant been as aggressive as SPC [REDACTED] testified and had she been as afraid of his “aggressive” flirtation as she claimed, it would be unreasonable to believe that she would have accompanied such an aggressive, intoxicated suitor alone to his bedroom under the dubious premise that they “needed more beer” when SPC [REDACTED] was not even personally consuming alcohol. (R. at 354, 378).

This characterization of the mutual flirtation between appellant and SPC [REDACTED] is in no way meant to suggest that simply because SPC [REDACTED] had previously flirted with appellant that he then had *carte blanche* to touch her in any manner he desired. The point is that the characterization of the dynamic that SPC [REDACTED] testified to is wholly inconsistent with the reality of what transpired. SPC [REDACTED] reshaping of history as it pertains to the timeframe directly preceding the alleged assault

severely undercuts her credibility and should likewise cause this court to call into question her description of the alleged assault itself.

First, if SPC [REDACTED] were actually as offended by appellant's prior conduct towards her as she claimed (R. at 350), she would have surely not volunteered to accompany him alone to his bedroom (R. at 353-354). Instead, SPC [REDACTED] voluntarily accompanied appellant to his room after he had unquestionably communicated a sexual interest in her, and according to SPC [REDACTED], had already kissed her (R. at 535). These facts simply do not support SPC [REDACTED] version of events, and a reasonable fact-finder would have significant doubt as to her allegations.

Even assuming *arguendo* that SPC [REDACTED] story is semi-accurate, the circumstances would have indicated to a reasonable person that she was willing to engage in sexual activities. Given the outward and public flirtation between appellant and SPC [REDACTED] prior to SPC [REDACTED] arrival, and the prior mutual touching, it was reasonable for appellant to believe SPC [REDACTED] would consent to sexual acts.

B. The SANE findings cast substantial doubt as to appellant's conviction for rape.

SPC [REDACTED] testified that appellant inserted his penis into her vagina without her consent. (R. at 370). She claims that afterwards her "vagina literally felt tore open...and there was blood in [her] urine." (R. at 379).

Despite the fact that SPC [REDACTED] was examined by a SANE immediately following her interaction with appellant, there were absolutely no vaginal findings from the exam to corroborate her claims of vaginal trauma. (R. at 593).

C. Specialist [REDACTED] sexual encounter with SPC [REDACTED] the night prior casts substantial doubt as to his conviction for Charge I Specification 5.

At trial, SPC [REDACTED] testified that appellant left a mark on her chest by kissing her in her bedroom. (R. at 381). The night prior to the alleged assault, SPC [REDACTED] had a sexual encounter with SPC [REDACTED] who did not testify at trial.

Of the six specifications of sexual assault, appellant was convicted of only two: penetrating SPC [REDACTED] vulva with his penis using unlawful force, and touching SPC [REDACTED] chest with his mouth using unlawful force.

Specialist [REDACTED] was never asked if he was responsible for the mark. Furthermore, the SANE could not determine whether the mark came from consensual or non-consensual touching. (R. at 585).

D. Specialist [REDACTED] had a personal motive to fabricate her claims against appellant.

Specialist [REDACTED] report appellant – based on its timing and details – appears to have stemmed more from personal benefit than an outcry of a legitimate attack. During the trial, it was revealed that SPC [REDACTED] was in a relationship with SPC [REDACTED]. When SPC [REDACTED] initially went upstairs with appellant, SPC [REDACTED] was not at the barbecue. However, SPC [REDACTED] did arrive soon after the alleged assault,

and was there to console SPC [REDACTED]. Furthermore, SPC [REDACTED] believed that he and SPC [REDACTED] were in a relationship at the time of the barbecue, which may have motivated SPC [REDACTED] to want to conceal the fact that she went upstairs with another male moments prior to SPC [REDACTED] arrival.


Specialist [REDACTED] had unique biases and significant personal contributing factors that severely undercut the credibility of her allegation in a manner inconsistent with a finding of guilt on the facts of her testimony alone.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on May 7, 2021.

A large black rectangular redaction box covering the signature of Melinda J. Johnson.

MELINDA J. JOHNSON
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