

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Docket No. ARMY 20190663

Specialist (E-4)

NICHOLAS R. ST. JEAN,

United States Army,

Appellant

Tried at Fort Sill, Oklahoma, on 10 May; 15 July; and 24–26 September 2019, before a general court-martial appointed by Commander, Fires Center of Excellence and Fort Sill, Lieutenant Colonel Joseph Marcee and Colonels Douglas Watkins and Robert Shuck, military judges, presiding.

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

Assignments of Error¹

I.

**WHETHER THE MILITARY JUDGE ERRED BY
ALLOWING THE GOVERNMENT TO PRESENT
HUMAN LIE DETECTOR EVIDENCE.**

II.

**WHETHER THE MILITARY JUDGE ERRED BY
ALLOWING THE GOVERNMENT TO MAKE
IMPROPER HUMAN LIE DETECTOR
ARGUMENT.**

¹ The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits they lack merit. Should this court consider any of those matters meritorious, the government requests an opportunity to respond to appellant's additional briefing on the claimed error.

III.

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO PROVIDE ANY CURATIVE INSTRUCTIONS TO THE MEMBERS AFTER THE GOVERNMENT PRESENTED HUMAN LIE DETECTOR EVIDENCE AND MADE IMPROPER HUMAN LIE DETECTOR ARGUMENT.

IV.

WHETHER THE MILITARY JUDGE ERRED BY EXCLUDING EVIDENCE UNDER MIL. R. EVID. 412.

V.

WHETHER THE MILITARY JUDGE ERRED BY PREVENTING THE DEFENSE FROM PRESENTING EVIDENCE OF PARTICIPATION AND CONSENT DURING THE RES GESTAE OF THE CHARGED SEXUAL OFFENSE.

VI.

WHETHER THE MILITARY JUDGE ERRED BY IMPOSING A TIME LIMIT ON DEFENSE COUNSEL'S CLOSING ARGUMENT.

VII.

WHETHER THE SPECIFICATION OF CHARGE I IS LEGALLY AND FACTUALLY INSUFFICIENT.

VIII.

WHETHER THE SPECIFICATION OF CHARGE II IS LEGALLY AND FACTUALLY INSUFFICIENT.

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² <https://plus.lexis.com/api/permalink/5a4680d7-cf6d-476a-8ea7-53f51020e47b/?context=1530671>

³ <https://plus.lexis.com/api/permalink/c76493a4-e3d6-4f89-93e2-59afbacbbf07/?context=1530671>

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Statement of the Case

On 26 September 2019, a general court-martial panel with enlisted representation convicted appellant, contrary to his pleas, of one specification of false official statement and one specification of sexual assault, in violation of Articles 107 and 120, Uniform Code of Military Justice [UCMJ]; 10 U.S.C. §§ 907, 920 (2016). (R. at 516). The panel sentenced appellant to reduction to the grade of E-1, forfeiture all pay and allowances, five years' confinement, and a dishonorable discharge. (R. at 564).

On 28 October 2019, the convening authority approved appellant's request for deferment of reduction in grade, deferment of adjudged forfeitures, and deferment of automatic forfeitures. (Action). The convening authority disapproved appellant's request for waiver of automatic forfeitures. (Action). The convening authority took no action on the findings or sentence. (Action). On 31 October 2019, the military judge entered judgment and noted the convening authority's prior action of deferring appellant's reduction in grade as well as both automatic and adjudged forfeitures. (Judgment of the Court).

Statement of Facts

A. [REDACTED] arrived to her first duty station at Fort Sill, Oklahoma.

[REDACTED] joined the Army in July of 2017. (R. at 131). After she completed basic training and AIT, [REDACTED] attended airborne school where she injured her leg. (R. at

132). Due to her injury, ■■■'s orders were amended to change her first duty station from Fort Bragg, North Carolina, to Fort Sill, Oklahoma. (R. at 132). She arrived at Fort Sill the evening of 2 May 2018. (R. at 132).

The morning of Thursday, 3 May 2018, ■■■ met appellant for the first time. (R. at 133). Appellant was ■■■'s sponsor and escorted her around post. (R. at 133). While he escorted ■■■ around post, appellant invited her to join him and some friends at a concert in Kansas on Saturday, 5 May 2018. (R. at 134). ■■■ excitedly agreed because she wanted to meet other Soldiers in the unit, and she had never been to a concert. (R. at 134–35). ■■■ paid appellant for her ticket the following day. (R. at 136–38; Pros. Ex. 3).

Appellant also invited ■■■ to drink alcohol with him and his friends on Friday, 4 May 2018. (R. at 135). ■■■ expressed concern that someone would attempt to have sex with her if she drank with them, but appellant said he would ensure that did not happen. (R. at 135). Concerns assuaged, ■■■ agreed to also join appellant on Friday for drinks. (R. at 135).

B. Appellant sexually assaulted ■■■ while she slept.

The night of 4 May 2018, ■■■ joined appellant as planned, and she consumed two or three alcoholic drinks. (R. at 140). ■■■ also drank alcohol at the smoke pit earlier in the evening. (R. at 139, 187).

In the early hours of 5 May 2018, ■■■ became tired and told appellant she

was heading to her room. (R. at 141). Appellant escorted [REDACTED] back to her room and asked for her keycard so that he could check on her later. (R. at 141, 434). Appellant returned to his friend's room and stayed there for approximately an hour before he left again. (R. at 425). [REDACTED] changed into pajamas and went to bed. (R. at 141). [REDACTED] also put in a tampon because she was menstruating. (R. at 141, 355).

After she fell asleep, [REDACTED] awoke with appellant on top of her penetrating her vagina with his penis. (R. at 141). She could not move due to appellant's weight, and he placed his hand over her mouth. (R. at 142). As appellant penetrated her vagina with his penis, [REDACTED] felt extremely scared and confused. (R. at 142). When appellant attempted to change positions, [REDACTED] got up and ran to the sink outside of her bathroom. (R. at 142–43, 214). Appellant followed her to the sink and then back to her bed, where he sexually assaulted her again. (R. at 143, 214–15).

During the sexual assault, [REDACTED] testified that she “felt gone mentally . . . disassociated, spaced out, very scared, and not knowing what to do.” (R. at 143). This disassociated state resulted in [REDACTED] having difficulty remembering how the sexual assault ended. (R. at 143, 203).

After he sexually assaulted [REDACTED] appellant stayed in her room and refused to leave her side. (R. at 144). When [REDACTED] went to smoke a cigarette outside, appellant stayed with her and watched her smoke. (R. at 143–44). [REDACTED] mind raced trying to figure out how this had happened to her and also where her tampon had gone.

(R. at 144, 355).

C. ■■■ struggled in the aftermath of the sexual assault.

The morning after the sexual assault, appellant would not let ■■■ out of his sight. (R. at 145). ■■■ felt compelled to go with appellant and his friends to the concert in Kansas because “I didn’t feel like I had a choice at the time. I wasn’t left out of his sight. He didn’t like leave the room. I felt like I didn’t have a choice . . . because I was just so out of it and nothing felt right.” (R. at 145). During the six-hour drive with appellant to the concert, ■■■ texted her mother and told her that she had been raped the night before. (R. at 145, 284–85). ■■■ cried quietly to herself multiple times throughout the drive. (R. at 145). ■■■ also wrote a poem in her phone during the car ride about the night prior and how it affected her. (R. at 358–59; Pros. Ex. 27). ■■■ wrote,

He grabs me
I was asleep
I don’t remember
I only remember being fucked
I cried
Why would you do that
Why did you take my key
Why did you fuck me when I was asleep

(Pros. Ex. 27). She wrote further how the sexual assault caused her to feel intense mental pain and anguish. (Pros. Ex. 27). She begged to be killed and wrote that she should, “slit [her] wrist [because] the physical pain that [she] would feel is

the pain [she] feels emotionally [right now].” (Pros. Ex. 27).

Shortly after arriving back to Fort Sill the next day from the concert, her tampon, which had been pushed inside of her during the sexual assault, fell out while she used the bathroom. (R. at 152). ■■■ also noticed multiple bruises on her legs in the days after the sexual assault. (R. at 154, 224, 351; Pros. Ex. 16, 17).

■■■ initially did not want to report the sexual assault because she was scared and wanted to see a therapist. (R. at 153). However, ■■■ accidentally disclosed the sexual assault to a fellow Soldier. (R. at 153–54, 282–84).

D. ■■■ initially refused to participate in the investigation.

On 8 May 2018, the Soldier ■■■ disclosed the sexual assault to brought her to meet his squad leader, SSG ■■■ (R. at 382–83). ■■■ told the SSG ■■■ she hung out with friends on a Friday night. (R. at 383). She further told her that, after she went to her room to go to sleep, she was raped sometime after midnight. (R. at 383). The following day, the Sexual Harassment/Assault Response Program [SHARP] office informed the squad leader that the case was already being handled. (R. at 384).

On 11 May 2018, an agent assigned to the Fort Sill Criminal Investigative Command [CID] brought ■■■ in for an interview. (R. at 299). Instead, ■■■ signed a form stating she did not want to participate in the investigation because she was not prepared to deal with the difficulty of an investigation. (R. at 299; Def. Ex. I).

It took approximately one hour for [REDACTED] to complete the simple, one-page form, and she repeatedly broke down and cried whenever the Special Agent [SA] [REDACTED] used the term “victim.” (R. at 300).

On 8 June 2018, SA [REDACTED] interviewed appellant about [REDACTED] allegations. (R. at 286–87). When asked whether he had spent any time with [REDACTED] on Friday, 4 May 2018, or Saturday, 5 May 2018, appellant answered, “no.” (R. at 357–58; Pros. Ex. 26). When SA [REDACTED] asked appellant whether he had sex with [REDACTED] or used force upon her, appellant answered “no.” (Pros. Ex. 26).

The sexual assault continued to haunt [REDACTED] even without the pressure of an investigation. (R. at 262–64). [REDACTED] confided to SPC [REDACTED] toward the end of May 2018 she did not feel safe and could not sleep. (R. at 351–52). [REDACTED] unsafe feelings continued to escalate and she had repeated flashbacks of the sexual assault. (R. at 262–64). This led [REDACTED] to attempt suicide on three separate occasions. (R. at 262–64, 366).

[REDACTED] attempted suicide for the first time, on 30 June 2018, by consuming sleeping pills and drinking alcohol, after a flashback of the sexual assault. (R. at 261–62). Consequently, [REDACTED] admitted to in-patient treatment. (R. at 261–62). During inpatient treatment, [REDACTED] wrote a 5-page journal entry that detailed appellant’s sexual assault, and described how she awoke to him assaulting her and her tampon falling out that Sunday. (Pros. Ex.

13). With the support of the in-patient behavioral health staff, [REDACTED] agreed to participate in CID's investigation. (R. at 262).

Over the next few months, flashbacks of the sexual assault caused [REDACTED] to attempt suicide two more times. (R. at 264). She was admitted to in-patient behavior health care on 3 or 4 occasions. (R. at 367). When not admitted to in-patient behavioral health, [REDACTED] slept by the Charge of Quarters [CQ] desk, which was often occupied by male Soldiers that she did not know. (R. at 267). [REDACTED] sought to get out of the Army in any way possible to avoid the continuous re-traumatization. (R. at 267, 366–67). Ultimately [REDACTED] was separated from the Army through a Medical Evaluation Board [MEDBOARD] for [REDACTED] [REDACTED]. (R. at 268, 367–68).

Assignment of Errors I–III⁶

I.

**WHETHER THE MILITARY JUDGE ERRED BY
ALLOWING THE GOVERNMENT TO PRESENT
HUMAN LIE DETECTOR EVIDENCE.**

II.

**WHETHER THE MILITARY JUDGE ERRED BY
ALLOWING THE GOVERNMENT TO MAKE**

⁶ Appellant concedes that “the first three assignments of error are closely related, and all involve the improper use of human lie detector evidence at appellant’s trial.” (Appellant’s Br. 18). Accordingly, the government addresses these three assignments of error as one.

**IMPROPER HUMAN LIE DETECTOR
ARGUMENT.**

III.

**WHETHER THE MILITARY JUDGE ERRED BY
FAILING TO PROVIDE ANY CURATIVE
INSTRUCTIONS TO THE MEMBERS AFTER THE
GOVERNMENT PRESENTED HUMAN LIE
DETECTOR EVIDENCE AND MADE IMPROPER
HUMAN LIE DETECTOR ARGUMENT.**

Standard of Review

Where an appellant raises a claim of error for the first time on appeal, that error will be forfeited in the absence of plain error. *United States v. Calderon*, 52 M.J. 213, 216 (C.A.A.F. 1999).

Law

A. Plain Error.

“A timely and specific objection is required so that the court is notified of a possible error, and so has an opportunity to correct the error and obviate the need for appeal.” *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014) (quotation and citation omitted); *see also* Mil. R. Evid. 103(a) (requiring that an objection be both timely and state the specific ground to preserve a claim of error). Where an appellant fails to properly object to the admission of evidence and raises a claim of error for the first time on appeal, that error will be forfeited in the absence of plain error. *Calderon*, 52 M.J. at 216. Courts are to use the plain error doctrine

“sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.” *United States v. Causey*, 37 M.J. 308, 311 (C.M.A. 1993) (citations and quotations omitted). Under the plain error analysis, appellant has the burden of establishing (1) error; (2) that is clear and obvious; and (3) results in material prejudice to his substantial rights. *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007).

B. Human Lie Detector Evidence.

Human lie detector evidence is inadmissible at a court-martial because the panel determines the weight and credibility of witness testimony. *United States v. Martin*, 75 M.J. 321, 324 (C.A.A.F. 2016) (citations and quotations omitted).

Human lie detector evidence is elicited when a witness provides “an opinion as to whether [a] person was truthful in making a specific statement regarding a fact at issue in the case.” *Knapp*, 73 M.J. at 36 (citation and quotations omitted). There is no litmus test for determining whether a witness has offered human lie detector evidence. *Martin*, 75 M.J. at 324.

If a witness does not expressly state that he believes a person is truthful, courts next examine the testimony to determine whether it is the functional equivalent of human lie detector testimony. *Id.* “Testimony is the functional equivalent of human lie detector testimony when it invades the unique province of the court members to determine the credibility of witnesses, and the substance of

the testimony leads the members to infer that the witness believes the victim is truthful or deceitful with respect to an issue at trial.” *Id.* “Although it is inadmissible, we will not find reversible error from the introduction of human lie detector evidence at trial when the accused invites its admission.” *Id.* at 325. “Appellant cannot create error and then take advantage of a situation of his own making. Invited error does not provide a basis for relief.” *United States v. Raya*, 45 M.J. 251, 254 (C.A.A.F. 1996).

Facts Specific to this Assignment of Error

A. The defense introduced evidence of [REDACTED]’s MEDBOARD and disability rating as a motive for her to fabricate her allegations against appellant.

During his court-martial, appellant relied upon [REDACTED]’s disability assessment through the MEDBOARD process as a motive for her to fabricate her allegations. (R. at 85–86, 125, 255–57, 490, 503). Appellant first raised the topic during group voir dire when he asked the panel members if they knew, “a Soldier who alleges they were a sexual assault victim can make a claim to receive a disability rating and compensation.” (R. at 85–86). The government did not ask any panel member about [REDACTED]’s MEDBOARD or disability rating during either group or individual voir dire. (R. 77–82, 92–93, 97, 100–03).

Appellant again raised [REDACTED]’s disability rating during his opening statement, “[REDACTED] now has a 70 percent disability rating associated with [REDACTED] from this

alleged sexual assault.” (R. at 125). The government did not reference [REDACTED]’s MEDBOARD or disability rating in its opening statement. (R. at 112–121).

The government called [REDACTED] as its first witness. (R. at 131). The government did not ask [REDACTED] about her disability rating or MEDBOARD during direct examination. (R. at 131–69). Appellant, however, questioned [REDACTED] about her MEDBOARD and disability rating on cross-examination. (R. at 255–57). Appellant asked [REDACTED] whether she “receive[s] a 70 percent disability rating paycheck every month” which is “directly related to [her] allegations in this case[.]” (R. at 256). [REDACTED] answered in the affirmative. (R. at 256).

On re-direct, [REDACTED] described how she had been open to getting out of the Army in any way possible after the sexual assault and did not specifically seek an MEDBOARD. (R. at 266–67). She explained she was willing to get out dishonorably because she “was tired of being triggered from the military.” (R. at 267). The government ultimately asked [REDACTED], “[j]ust in general, what is your disability rating based on?” (R. at 268). The defense objected on hearsay grounds and offered no other ground for their objection. (R. at 268). The military judge overruled the defense objection. (R. at 268). [REDACTED] answered that the basis of her disability rating was “[REDACTED]” which was based on “the assault.” (R. at 268).

B. The defense told the military judge three times that they did not want any additional instructions even though human lie detector is not proposed.

Prior to instructing the panel, the military judge informed the parties which instructions he intended to give to the panel. (R. at 459). This list of instructions did not include anything covering human lie detector testimony. (R. at 459). The military judge next asked whether the parties requested that he instruct on anything further. (R. at 459). Both parties affirmatively stated, “no, Your Honor.” (R. at 459). After ruling that a mistake of fact instruction was improper, the military judge again asked the parties if they requested any other instructions. (R. at 461). Again the parties stated that they did not. (R. at 461). Subsequently, the military judge sent his proposed instructions to the parties who both indicated that they did not have any objections to the instructions. (R. at 465).

As had been told to the parties, the military judge’s instructions to the panel did not include an instruction on human lie detector testimony. He did, however, instruct that they alone must determine the credibility of witnesses and the accused’s guilt according to the law, the evidence admitted, and their own conscience. (R. at 474).

C. Appellant used [REDACTED]’s MEDBOARD and disability during his closing argument.

During closing argument, appellant stressed [REDACTED]’s MEDBOARD as a

motive to fabricate the allegations against him. (R. at 490, 503).⁷ Appellant argued [REDACTED] committed fraud by “capitaliz[ing] on filing a disability claim” and “receiv[ing] payment every month for the rest of her life because of this false story.” (R. at 490). Appellant also claimed the “compensation she receives from this fabricated claim is compensation not able to be provided to a true disabled veteran. She played the system like a fiddle. CID and the government let the band play on.” (R. at 490). Appellant further stated, “[REDACTED] is protected from any repercussions, and is being handsomely rewarded with a 70 percent disability rating, every month, for the rest of her life.” (R. at 503).

On rebuttal, the government responded to the defense claim that [REDACTED] “play[ed] the system,” (R. at 490) by observing, “they are essentially arguing all the healthcare providers that saw her, in addition to the VA, was duped by her. That essentially, the Army doctors, and the behavioral health providers, are wrong.” (R. at 505). The defense did not object to this argument. (R. at 505).

Argument

Appellant argues for the first time on appeal that [REDACTED]’s testimony improperly constituted the functional equivalent of human lie detector testimony. (Appellant’s

⁷ The government briefly addressed [REDACTED]’s medical separation from the Army in its closing, stating that [REDACTED] had no control over the MEDBOARD process and that she just wanted to go home. (R. at 479).

Br. 15–24). *See* (R. at 268) (defense objection to ■■■'s testimony solely on hearsay grounds). Appellant also argues for the first time on appeal the military judge erred by not *sua sponte* preventing the government from arguing the evidence in closing and not providing a curative instruction. (Appellant's Br. 25–30). As these claims of error were not preserved, appellant must establish: 1) there was error; 2) such error was clear and obvious; and 3) the error results in material prejudice to his substantial rights. *Brooks*, 64 M.J. at 328. Appellant's claims are without merit as he fails to establish all three necessary components for each. Further, to the extent there was error, appellant invited such error and is therefore entitled to no relief.

A. Evidence surrounding ■■■'s MEDBOARD was not improper, therefore the government's argument and the military judge's instructions were also not error, plain or otherwise.

i. Admission of evidence surrounding ■■■'s MEDBOARD and disability rating was not error.

■■■'s testimony on re-direct did not invade the province of the fact-finder to assess her credibility or render findings and therefore was not improper. Instead, ■■■ merely clarified that her disability rating was based upon an underlying diagnosis of ■■■ and ■■■ (R. at 268). This testimony properly rebutted defense's consistent insinuation from *voir dire* through cross-examination of ■■■ that she received a disability rating solely because she made allegations of sexual

assault. (R. at 85–86, 125, 256); *see also Martin*, 75 M.J. at 327 (“preventing the Government from walking through the door already opened by the defense would have left the members with a skewed view of the evidence”). Testimony surrounding a mere diagnosis—even for █████ arising out of a sexual assault—has routinely been held admissible and not the functional equivalent of human lie detector testimony. *See Raya*, 45 M.J. at 253 (holding testimony surrounding the diagnosis of PTSD from a sexual assault was not error); *United States v. Hill-Dunning*, 26 M.J. 260, 262 (C.M.A. 1988) (holding testimony surrounding medical diagnosis and symptoms permissible); *United States v. Cardreon*, 1998 CCA LEXIS 294, *9–10 (N.M. Ct. Crim. App. July 22, 1998) (holding testimony of victim’s diagnosis of PTSD, symptoms in support of diagnosis, and childhood history did not invade the province of the panel). Accordingly, █████’s testimony to the fact that her disability rating was based on a diagnosis of █████ was not error, plain or otherwise.

ii. The government’s use of the evidence surrounding █████’s MEDBOARD and disability rating was not error.

During their closing and rebuttal arguments, the government properly argued the evidence of record and the reasonable inferences derived from it. From voir dire onward, the defense continuously tied █████’s disability pay to her sexual assault claim and insinuated that she fabricated her allegations against appellant to

get disability pay. (R. at 85–86, 125–26, 255–57). The government addressed this defense theme in their closing, arguing that the MEB was out of ■■■■■’s control and was legitimately linked to a diagnosis of ■■■■■. Such argument was not improper, especially when viewed in the context of the entire court-martial. *See United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005) (directing that prosecutorial comment “be examined in light of its context within the entire court-martial”).

Likewise, the government’s rebuttal to the defense’s incendiary comments within their closing argument was not improper. The defense argument directly tied ■■■■■’s disability claim to the sexual assault, asserted she had committed criminal fraud by making her claim, attempted to inflame the passions of the panel by saying she kept money from disabled veterans, and said the government counsel was complicit in these endeavors. (R. at 490). The two sentence response within the government’s rebuttal argument, which asserted the defense claims were far-fetched and that ■■■■■ properly received an MEB, was not improper. Accordingly, that the military judge did not *sua sponte* interject and stop trial counsel’s argument was not error. Appellant’s claim should be denied.

iii. The military judge did not err by not providing a specific instruction about the evidence surrounding [REDACTED]'s MEDBOARD and disability rating.⁸

Neither [REDACTED]'s testimony nor the government's argument invaded the province of the fact-finder to determine [REDACTED]'s credibility. To the extent that the fact-finder's province was invaded, it was sufficiently cured by the military judge's instruction to the panel that the final determination of the credibility of witnesses and the accused's guilt rested solely with them. (R. at 474); *see United States v. Mullins*, 69 M.J. 113, 117 (C.A.A.F. 2010) ("Absent evidence to the contrary, court members are presumed to comply with the Military Judge's instructions"). Accordingly, it was unnecessary for the military judge to provide any additional instruction and his failure to do so did not constitute error, plain or otherwise.

B. To the extent there was error, appellant has failed to show prejudice.

[REDACTED]'s disability pay and MEDBOARD was insignificant within the government's case. To the minimal extent that it was referenced by the government, [REDACTED]'s MEDBOARD was only raised in response to the defense's

⁸ As a preliminary matter, any objection to the military judge's failure to provide additional instruction was affirmatively waived by appellant. *See United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020). Appellant was asked twice prior to closing argument, and once afterward, whether he objected to the military judge's proposed instructions or desired any further instruction. (R. at 459, 461, 509). At all three offered opportunities, appellant affirmatively indicated that he did not object nor desire any additional instructions. (R. at 459, 461, 509). "By expressly and unequivocally acquiescing to the military judge's instructions, appellant waived all objections to the instructions. . . ." *Davis*, 79 M.J. at 331.

continued use of such evidence. Indeed, appellant consistently connected [REDACTED]'s allegations with her founded MEB and disability pay for the panel and made it a central theme of his defense. He first introduced it at voir dire. (R. at 85) ("A Soldier who alleges they were a sexual assault victim can make a claim to receive a disability rating and compensation."). He reiterated it in his opening statement. (R. at 125) ("[REDACTED] now has a 70 percent disability rating associated with [REDACTED] from this alleged sexual assault"). He connected them again during the cross-examination of [REDACTED] (R. at 255–57) ("You now receive a 70 percent disability rating paycheck every month . . . directly related to your allegation in this case?"). Finally, he connected them one last time during closing argument. (R. at 490) ("she now receives payment every month for the rest of her life because of this false story"). Appellant cannot show that [REDACTED]'s clarification on re-direct of her testimony during cross, nor the government's brief statement in argument had any significant impact on the findings. *See* Article 59, UCMJ; *see also Carter*, 61 M.J. at 33 (directing that prosecutorial comment "be examined in light of its context within the entire court-martial"). Further, any prejudicial effect was sufficiently curtailed by the military judge's instruction to the panel that the final determination of the credibility of witnesses and the accused's guilt rested solely with them. (R. at 474); *see Mullins*, 69 M.J. at 117 ("Absent evidence to the contrary, court

members are presumed to comply with the Military Judge's instructions").

Accordingly, appellant fails to establish prejudice and his claim should be denied.

C. Even if there was prejudicial error, appellant invited such error and is entitled to no relief.

To the extent evidence of [REDACTED]'s MEDBOARD and disability rating constituted the functional equivalent of lie detector, appellant invited such error and is entitled to no relief. Any government reference to [REDACTED]'s MEDBOARD was because defense injected the topic into the trial. From voir dire onward, appellant used the theme that [REDACTED] received a disability rating solely because she made allegations of sexual assault. (R. at 85–86, 125, 256). Accordingly, the defense invited any error related to [REDACTED]'s testimony during re-direct which clarified that her disability rating was based upon an underlying diagnosis of depression and PTSD. (R. at 85–86, 125, 256); *see also Martin*, 75 M.J. at 327 ("preventing the Government from walking through the door already opened by the defense would have left the members with a skewed view of the evidence").

Similarly, the defense invited any error within the government's rebuttal to the incendiary comments in furtherance of their theme within their closing argument. The defense directly tied [REDACTED]'s disability claim to the sexual assault, and argued she committed fraud. Counsel further attempted to inflame the passions of the panel by claiming [REDACTED] kept money from disabled veterans, and said

the government counsel was complicit in these endeavors. (R. at 490). Any error in the government's rebuttal argument that the defense claims were far-fetched and that ■ properly received an MEB was strictly invited by the defense. (R. at 505); see *United States v. Eggen*, 51 M.J. 159, 162 (C.A.A.F. 1999) (preventing a party from "creat[ing] error and then tak[ing] advantage of a situation of his own making [on appeal]").

To the extent it was error, the defense invited such error by first introducing evidence or argument relating to ■'s MEDBOARD or her disability pay and making it a central tenant of their case. The government's use of evidence was always done in response to the defense first raising the issue. Appellant consistently used ■'s MEDBOARD and disability pay "as a sword to strike a blow to the government's case; invited error principles illustrate the unfairness which would obtain if he were allowed to simultaneously use it as a shield" on appeal. *United States v. Ahern*, 2016 CCA LEXIS 528 at *27 (Army Ct. Crim. App. 2016) (unpub.). Accordingly, this court should not allow appellant to take advantage of the situation he created and deny his request for relief under these three assignments of error. See *Martin*, 75 M.J. at 324 ("Although it is inadmissible, [courts] will not find reversible error from the introduction of human lie detector evidence at trial when the accused invites its admission").

Assignment of Error IV

WHETHER THE MILITARY JUDGE ERRED BY EXCLUDING EVIDENCE UNDER MIL. R. EVID. 412.

Standard of Review

A military judge's decision whether to admit evidence is reviewed for abuse of discretion. *United States v. Erickson*, 76 M.J. 231, 234 (C.A.A.F. 2017).

Law

A military judge abuses his discretion when: (1) "his findings of fact are clearly erroneous," (2) "the military judge's "decision is influenced by an erroneous view of the law," or (3) when "the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008) (citations omitted). To find an abuse of discretion under the last of these tests requires "more than a mere difference of opinion"; rather, the military judge's ruling "must be arbitrary, fanciful, clearly unreasonable or clearly erroneous." *United States v. Collier*, 67 M.J. 347, 353 (C.A.A.F. 2009) (internal quotation marks omitted) (citations omitted).

Military Rule of Evidence 412 is a rule of exclusion. *United States v. Banker*, 60 M.J. 216, 221 (C.A.A.F. 2004). It prohibits the admission of "evidence that the victim engaged in other sexual behavior" except as provided within the

rule. Mil. R. Evid. 412(a). Other sexual behavior is defined as “any sexual behavior not encompassed by the alleged offense.” Mil. R. Evid. 412(d). Among the listed exceptions to the rule are: (1) evidence of specific instances of sexual behavior by the alleged victim with the accused to prove consent; and (2) evidence the exclusion of which would violate the accused’s constitutional rights. Mil. R. Evid. 412(b)(2), (3). Any evidence offered under the rule is subject to challenge under the standards outlined within the rule itself and also under Mil. R. Evid. 403. Mil. R. Evid. 412(c)(3).

It is appellant’s burden to demonstrate that the proffered evidence is relevant and admissible. Mil. R. Evid. 412(c)(3). Additionally, he must show that the probative value outweighs the danger of unfair prejudice. Mil. R. Evid. 412(c)(3); *Banker*, 60 M.J. 223 (“when balancing the probative value of the evidence against the danger of unfair prejudice under M.R.E. 412, the military judge must consider not only the M.R.E. 403 factors . . . but also prejudice to the victim’s legitimate privacy interests”).

The exception for constitutionally required evidence includes an accused’s ability to cross-examine the witnesses against him. *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011) (citations omitted). However, “trial judges retain wide latitude to limit reasonably a criminal defendant's right to cross-examine a witness based on concerns about, among other things, harassment, prejudice,

confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.” *Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (quotation and citation omitted). Such evidence, provided it passes the Mil. R. Evid. 403 balancing test, is admissible if relevant, material, and favorable (i.e., “vital”) to the Defense, no matter how embarrassing it may be to the alleged victim. *Banker*, 60 M.J. at 222–23. Relevance is determined in accordance with Mil. R. Evid. 401. *Id.* Materiality is determined through a multi-factored test that considers the importance of the issue for which the evidence was offered in relation to the other issues in the case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to the issue. *Id.* (citation and quotation omitted).

To sustain a conviction for sexual assault when the other person is asleep, unconscious or otherwise unaware the act is occurring, in violation of Article 120(b), UCMJ, the government must prove: (a) that the accused committed a sexual act upon another person; (b) that the person was asleep, unconscious, or otherwise unaware that the sexual act was occurring; and (c) that the accused knew or reasonably should have known that the other person was asleep, unconscious, or otherwise unaware that the sexual act was occurring. Article 120(b)(2); *MCM*, 2016, pt. IV, ¶ 45.b.(3)(e).

“The term ‘sexual act’ means the penetration, however slight, of the penis into the vulva or anus or mouth.” Article 120(g)(1)(A). “A sleeping, unconscious, or incompetent person cannot consent.” Article 120(g)(7)(B).

Facts Specific to this Assignment of Error

The only theory of liability for appellant’s charge of sexual assault was that he committed a sexual act upon [REDACTED] when she was asleep, unconscious or otherwise unaware the act is occurring. (Charge Sheet). In support of the charge, [REDACTED] testified that she awoke in the early hours of 5 May 2018 to appellant penetrating her vagina with his penis. (R. at 141).

In a pretrial motion under Mil. R. Evid. 412, appellant sought to introduce evidence of his minor romantic activity with [REDACTED] the first day they met on 3 May 2018, which resulted in marks left upon appellant’s body. (App. Ex. XV) (Sealed). The defense sought to introduce this evidence under both Mil. R. Evid. 412(b)(2) and 412(b)(3). (App. Ex. XV) (Sealed).

In support of its motion, defense provided a sworn affidavit from appellant, which stated that on 3 May 2018, he went to [REDACTED]’s barracks room to purchase concert tickets. (App. Ex. XV, pp. 12–13) (Sealed). He claimed, [REDACTED] asked him to sit on her bed and, after talking for a bit, they engaged in minor romantic activity which resulted in some marks upon appellant. (App. Ex. XV, pp. 12–13) (Sealed). The defense later supplemented its motion with disclosures from the government

which included statements that [REDACTED] denied that any romantic activity occurred. (App. Ex. XXXIV, p. 5) (Sealed).

After a closed hearing with argument from both sides, the military judge issued a 7-page denial of appellant's motion. (App. Ex. XXXV) (Sealed). The military judge detailed the evidence presented and laid out the legal standard of admissibility of evidence pursuant to both Mil. R. Evid. 412(b)(2) and 412(b)(3). (App. Ex. XXXV) (Sealed). The military judge found the probative value of the sought after evidence "very slight." (App. Ex. XXXV) (Sealed). The military judge reasoned, in part, that the prior activity bore little similarity to the charged act, which significantly reduced its relevance. (App. Ex. XXXV) (Sealed). The military judge found that the evidence's "very slight" probative value was outweighed by the "very great" concerns under Mil. R. Evid. 403. (App. Ex. XXXV) (Sealed). Accordingly, the military judge denied the defense motion. (App. Ex. XXXV) (Sealed).

Argument

The military judge did not abuse his discretion when he denied appellant's motion to admit evidence under Mil. R. Evid. 412. The military judge applied the correct law to the facts presented and reasonably concluded that appellant failed to meet his burden to overcome Mil. R. Evid. 412. (App. Ex. XXXV) (Sealed). The evidence was irrelevant to the charged offenses and the danger of prejudicial effect

significantly outweighed the minimal probative value it possessed. Accordingly, the military judge issued a proper ruling well within the reasonable range of options. The ruling should not be disturbed.

A. Evidence of the proffered prior consensual activity was irrelevant.

Appellant's requested evidence did not make a fact of consequence more or less probable and was irrelevant. *See* Mil. R. Evid. 401. The fact-finder was charged with assessing whether appellant committed a sexual act upon ■■■ while she was asleep, unconscious, or otherwise unaware. (Charge Sheet).

Consequently, the question presented to the fact-finder was whether the evidence established that ■■■ was legally unable to consent at the time of the sexual act. Article 120(g)(8)(B) ("A sleeping, unconscious, or incompetent person cannot consent"). By solely alleging that ■■■ was legally unable to consent at the time of the offense, the government "effectively removed from the equation at trial any issue of consent."

The evidence appellant wished to enter had no bearing upon whether or not ■■■ could legally consent at the time of the offense, regardless of its truth. The question posed was not whether ■■■ would have consented if able, but instead,

whether she legally was unable to consent.⁹ Even if [REDACTED] and appellant had engaged in consensual romantic activity two days prior to the charged offense,¹⁰ such evidence would not make it any more or less likely that she was asleep—and therefore unable to provide consent—at the time of the sexual act.¹¹ Consequently, the evidence was wholly irrelevant to appellant’s case and was properly rejected.

The military judge appropriately concluded the proffered evidence of prior minor romantic activity provided scant probative value as to whether [REDACTED] previously consented to appellant’s sexual advances as she was asleep. (App. Ex. XXXV) (Sealed). The military judge correctly determined that the dissimilarity of the two acts made the relevance of the prior activity negligible. (App. Ex. XXXV)

⁹ Appellant premises his argument on the misguided notion that “the relevant question was only whether the named victim would be likely to consent to sexual conduct with appellant.” (Appellant’s Br. 45). While this may have been the case if the government had charged appellant under a bodily harm theory of liability (i.e. requiring that the act was non-consensual), it is inaccurate given the allegation that [REDACTED] was legally incapable of providing consent at the time of the charged event. Article 120(g)(8)(B) (“A sleeping, unconscious, or incompetent person cannot consent.”). The proffered evidence is no more relevant than would be evidence that a child—one legally unable to provide consent—previously flirted with an appellant where it is alleged he engaged in a sexual act with her. The question presented is not whether the victim “would be likely to consent to sexual conduct,” but instead whether she is legally able to do so.

¹⁰ Appellee does not concede that [REDACTED] and appellant did actually engage in prior consensual activity given that she affirmatively denied it when asked. (App. Ex. XXXIV, p. 5) (Sealed).

¹¹ Alternatively, evidence that [REDACTED] actively consented and participated *at the time of charged activity* certainly would be relevant to the fact-finder’s determination of whether she was asleep.

(Sealed). *See also United States v. Andreozzi*, 60 M.J. 727, 739 (Army Ct. Crim. App. 2004) (“Relevance of prior sexual activity between an accused and an alleged victim is increased by the degree of its similarity to the charged conduct . . . the dissimilar characteristics reduce the relevance”); *United States v. Grimes*, 2014 CCA LEXIS 63, *15–23 (Army Ct. Crim. App. 2014) (mem. op.) (finding a military judge did not err by ruling evidence irrelevant saying, “appellant never asserted how the facts and behaviors leading up to the point of alleged consent for the charged incident were similar to the previous encounters”).

According to appellant, the prior activity included minor consensual activity, which occurred in the afternoon while [REDACTED] was awake and invited appellant to sit on her bed. (App. Ex. XV, pp. 12–13) (Sealed). This event can hardly be said to show that [REDACTED] consented for appellant to enter her room unannounced the following night and penetrate her vulva with his penis while she slept. Put simply, the dissimilarity of the two events made the alleged prior consensual activity irrelevant to the determination of any matter of consequence for the charged offense. Therefore, the military judge did not err in excluding such evidence.

B. The danger of prejudice significantly outweighed any probative value of the proffered evidence of prior consensual activity.

The danger of the prejudicial effect of the proffered consensual encounter on 3 May 2018 between [REDACTED] and appellant greatly outweighed any probative value of

the evidence. The question before the fact-finder pertained to whether [REDACTED] could legally provide consent, not whether she would have consented. Accordingly, evidence of consensual activity conducted two-days prior to the charged offense presented the risk of confusion of the issues and misleading the members. Mil. R. Evid. 403. Compounding the risk of confusion of the issues and misleading the members, [REDACTED] denied that the proffered consensual encounter ever took place. Mil. R. Evid. 403. *See also United States v. Berry*, 61 M.J. 91, 97 (C.A.A.F. 2005) (holding that the military judge must consider the “possible distraction of the fact-finder that might result from admission of the testimony.”). In sum, the very real dangers of prejudicial effect to the court-martial supported the military judge’s conclusion that the concerns under Mil. R. Evid. were “very great.” (App. Ex. XXXV) (Sealed). As a result, the military judge’s determination that the evidence of prior consensual romantic activity should not be admitted fell well within the reasonable range of options and his ruling should not be disturbed.

C. Evidence that [REDACTED] omitted the proffered event was not constitutionally required.

[REDACTED]’s omission of the alleged prior consensual romantic activity on 3 May 2018 from her previous statements was not constitutionally required and had no bearing upon her credibility. There is no evidence that any party ever asked [REDACTED] about whether she had engaged in any prior romantic consensual activity with

appellant, or any other question where discussion of such events would have been expected, until after the Mil. R. Evid. 412 hearing. (App. Ex. XXXIV, p. 5) (Sealed). Furthermore, the proffered event was irrelevant to the charged offense, so ■■■'s silence on a nonrelevant, collateral matter had no bearing on her credibility.

While appellant argues that ■■■'s omission "is a major credibility issue that appellant was constitutionally entitled to explore on cross examination for the purpose of challenging her credibility," it is unclear which rule of evidence would have permitted such cross-examination. (Appellant's Br. 49). 412 is a rule of exclusion. Appellant merely disagrees with the rule. Were he able to cross examine ■■■ on his prior romantic interlude with her, the rule would cease to have any meaning.

D. Assuming *arguendo* that the military judge erred, such error did not result in prejudice.

Assuming *arguendo* that the military judge erred by excluding the proffered evidence, such error had no bearing on the outcome of his case. By convicting appellant of the charged sexual assault offense, the panel necessarily found that ■■■ was asleep at the time of the sexual act. (Charge Sheet; R. at 516). As such, the panel concluded beyond a reasonable doubt that ■■■ was legally unable to provide consent. Article 120(g)(8)(B) ("A sleeping, unconscious, or incompetent

person cannot consent”). Accordingly, evidence supporting that ■ might have consented if she had not been asleep would not have changed the outcome of the case.

The government’s case was strong. ■ made an outcry to her mother shortly after the sexual assault and also wrote a poem that noted she was asleep when appellant penetrated her vulva. (R. at 284; Pros. Ex. 27). Further, third parties corroborated her recollection of the evening. SPC ■ testified appellant took ■ to her room sometime after midnight, returned to SPC ■’s room for approximately an hour, and then left again toward ■’s room with her door card. (R. at 424–5, 434). In contrast, the defense case relied heavily upon the testimony of two of appellant’s close friends, whose bias shown throughout their testimony. (R. at 152, 411, 439, 451–54).

In sum, evidence of a prior consensual romantic encounter, far short of intercourse, was irrelevant, and the danger of prejudice outweighed any minimal probative value. Furthermore, evidence that ■ did not mention the underlying event within her prior statements was not constitutionally required. Accordingly, the military judge did not abuse his discretion by excluding the evidence and appellant’s claim of error should be denied.

Assignment of Error V

WHETHER THE MILITARY JUDGE ERRED BY PREVENTING THE DEFENSE FROM PRESENTING EVIDENCE OF PARTICIPATION AND CONSENT DURING THE RES GESTAE OF THE CHARGED SEXUAL OFFENSE.

Standard of Review

A military judge's decision whether to admit evidence is reviewed for an abuse of discretion. *Erickson*, 76 M.J. at 234.

Facts Specific to this Assignment of Error

During trial, appellant attempted to introduce evidence of marks on his body the morning after the charged assault. (R. at 388). The government objected under Mil. R. Evid. 412 and the military judge conducted a closed hearing. (R. at 390–94) (Sealed).

At the hearing, the military judge reminded appellant of the prior ruling prohibiting the introduction of evidence relating to marks caused during a supposed consensual romantic encounter between appellant and [REDACTED] on 3 May 2018. (R. at 390–91) (Sealed). Appellant argued that the marks were caused during the res gestae of the charged encounter. (R. at 391–92).

In response, the military judge asked appellant to identify any evidence that had been introduced that tied any marks seen on appellant to the charged period. (R. at 392) (Sealed). Appellant conceded that there had been no evidence

introduced connecting the marks to the charged event at that point. (R. at 393) (Sealed). The military judge asked appellant for a proffer of what evidence he would introduce to connect the marks to the charged event. (R. at 393) (Sealed). Appellant elected to move on from the line of questioning. (R. at 393) (Sealed) Appellant informed the military judge he would possibly readdress the issue if evidence was later presented that tied the marks to the sexual assault event, but never did. (R. at 393) (Sealed).

Law and Argument

The military judge did not err in excluding evidence of marks upon appellant's body because he failed to establish the relevance of such evidence.¹² *See* Mil. R. Evid. 104(b) ("When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist."); *see also* Mil. R. Evid. 401. The mere fact that appellant had marks on him, absent evidence to provide context, does not have a tendency to make any fact of consequence more or less likely. Further, the danger of the prejudicial

¹² Preliminarily, appellant seemingly abandoned his effort to admit the evidence without the military judge making a ruling. (R. at 393) (Sealed) (Appellant's defense counsel stating that he would "move on" and would readdress the issue at a later time which never occurred). Accordingly, this issue is waived and there is nothing for this court to correct on appeal. *See United States v. Gladue*, 67 MJ 311, 313 (C.A.A.F. 2009) ("Waiver is the intentional relinquishment or abandonment of a known right") (citations and quotations omitted).

effect of the evidence substantially outweighed any possible relevance.

Accordingly, the military judge did not err.

Appellant's entire argument that the marks seen on appellant evince [REDACTED]'s participation and consent to the sexual activity presupposes an established nexus between the marks and the *res gestae* of the charged offense. (Appellant's Br. 58–65). When the military judge asked appellant to establish the requisite link, he provided no connection between any marks found and charged offense. (R. at 393) (Sealed).¹³ Unable to even connect his marks to 5 May 2018, appellant certainly cannot reasonably establish a connection to [REDACTED] or as a result of his assault of her. The evidence was appropriately excluded. Mil. R. Evid. 104(b).

To the limited extent that the marks, without context, may have been relevant, the danger of undue prejudice substantially outweighed any probative value. *See* Mil. R. Evid. 403. Providing the members with evidence of marks on appellant, without context, would leave them confused. As such, even if the evidence presented some marginal probative value, the prejudicial effect would substantially outweigh any value. Consequently, the military judge's exclusion of

¹³ Similarly, appellant's affidavit in support of his motion under Mil. R. Evid. 412 is void of any evidence to support that the marks were caused during the charged incident. (R. at 40–41; App. Ex. XV, pp. 12–13) (Sealed). Consequently, there is no evidence within the record at all to support that the marks resulted from the charged incident.

evidence related to marks on the appellant fell well within the reasonable range of options at his disposal.

Assignment of Error VI

WHETHER THE MILITARY JUDGE ERRED BY IMPOSING A TIME LIMIT ON DEFENSE COUNSEL’S CLOSING ARGUMENT.

Standard of Review

A military judge’s decision to limit the time allotted for closing argument is reviewed for an abuse of discretion. *United States v. Gravitt*, 5 C.M.A. 249, 257 (C.M.A. 1954).

Law

“There can be no doubt that closing argument for the defense is a basic element of the adversary fact-finding process in a criminal trial.” *Herring v. New York*, 422 U.S. 853, 859 (1975). Closing arguments, however, are not uncontrolled or unrestrained. *Id.* at 862. “The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summation.” *Id.*; accord R.C.M. 801(a)(3), Discussion (“the military judge may determine . . . the time limits for argument”). The trial judge “may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant.” *Id.* The amount of time which is reasonable depends upon the facts of the case. *Gravitt*, 5 U.S.C.M.A. at 257.

Facts Specific to this Assignment of Error

During an Article 39(a) session, the military judge asked the parties how long they anticipated their closing arguments to be. (R. at 465). The government stated 15–20 minutes while the defense stated 30 minutes to an hour. (R. at 465). In response, the military judge said, “I can’t envision an hour-long close, defense counsel. So, be prepared for an instruction to wrap it up in 5 minutes, if I feel that you’re taking too long. Understood?” (R. at 465). The defense did not object but instead responded, “Yes, your honor.” (R. at 465).

During trial defense counsel’s closing argument, the military judge interjected and said, “counsel, you’re 25 minutes in.” (R. at 500). The military judge did not interject again during defense’s closing argument or terminate his argument. (R. at 482–505).

Within his post-trial matters, appellant’s trial defense counsel stated that the military judge “rushed” him, which caused him to “lose track of his thoughts” and “accidentally skip over parts of his closing argument.” (Post-trial Submission under R.C.M. 1106, p. 6). Appellant also stated that during the “bridging the gap,” the military judge told defense counsel that he went “too fast” during closing argument and that “he might be partly to blame” for this. (Post-trial Submission under R.C.M. 1106, p. 6).

Argument

The evidence within the record of trial does not establish that the military judge abused his discretion by improperly limiting the duration of appellant's closing argument. Indeed, the record of trial does not even establish that the military judge limited the duration of appellant's argument.

Prior to arguments, the military judge told counsel that he "could not envision an hour-long close" and that the defense should be "prepared for an instruction to wrap it up in 5 minutes." (R. at 465). This instruction never came. Instead, the military judge merely alerted defense counsel that 25 minutes had elapsed during their argument. (R. at 500); *see Gravitt*, 5 U.S.C.M.A. at 257 (finding military judge did not abuse his discretion when he "call[ed] defense counsel's attention to the length of his argument"). To be clear, the military judge did not prevent appellant's trial defense counsel from making a complete argument. Instead, appellant merely contends the military judge's statement caused him to "*accidentally* skip over parts of his closing argument." (Post-trial Submission under R.C.M. 1106, p. 6) (emphasis added). Accordingly, because there is no evidence in the record to support appellant's contention that the military judge limited the duration of his closing argument, this court should deny his request for relief.

Even if the military judge's comments somehow limited appellant's closing

argument, such limitations were not unreasonable. Appellant’s case was not overly complex. Appellant faced only 2 specifications. (Charge Sheet). One of these specifications simply concerned whether appellant was truthful during a seventy-nine-second audio clip. (Charge Sheet; Pros. Ex. 26). The closing argument is meant to be a summation, not a recitation, of the evidence. It took the government only nine record pages to argue both their close and rebuttal arguments with only one page devoted to the false official statement. (R. at 475–81, 505–06). Simply put, it was not an abuse of discretion for the military judge to allow appellant to argue more than twice as long as government counsel. *Compare* (R. at 475–81, 505–06) *with* (R. at 482–505); *see United States v. Salazar*, 485 F.2d 1272, 1279 (2d Cir. 1973) (“[T]he judge was entirely within his discretion in limiting appellant’s summation to forty-five minutes, the same time allotted to the government”). Accordingly, appellant’s claim should be denied.

Assignment of Error VII

WHETHER THE SPECIFICATION OF CHARGE I IS LEGALLY AND FACTUALLY INSUFFICIENT.

Standard of Review

Questions of legal and factual sufficiency are reviewed de novo. *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017).

Law¹⁴

The test for legal sufficiency is extremely deferential to the fact finder. Accordingly, “evidence is legally sufficient if, viewed in the light most favorable to the [g]overnment, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Winckelmann*, 70 M.J. 403, 406 (C.A.A.F. 2011). This court is “bound to draw every reasonable inference from the evidence of record in favor of the prosecution.” *United States v. Craion*, 64 M.J. 531 (Army Ct. Crim. App. 2006).

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 court is convinced of the accused’s guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). To sustain appellant’s conviction, a court of criminal appeals “must find that the government has proven all essential elements and, taken together as a whole, the parcels of proof credibly and coherently demonstrate that appellant is guilty beyond a reasonable doubt.” *United States v. Gilchrist*, 61 M.J. 785, 793 (Army Ct. Crim. App. 2005). Under this analysis, “[r]easonable doubt . . . does not mean the

¹⁴ These statements of the law also apply to the resolution of Assignment of Error VIII.

evidence must be free from conflict.” *United States v. Rankin*, 63 M.J. 552, 557 (N.M. Ct. Crim. App. 2006).

An appellate court applies “neither a presumption of innocence nor a presumption of guilt.” *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Additionally, if “witness credibility plays a critical role in the outcome of trial this court should hesitate to second-guess the trial court’s findings.” *United States v. Stanley*, 43 M.J. 671, 674 (Army Ct. Crim. App. 1995).

To sustain a conviction for sexual assault when the other person is asleep, unconscious or otherwise unaware the act is occurring, in violation of Article 120(b), UCMJ, the government must prove: (a) That the accused committed a sexual act upon another person; (b) That the person was asleep, unconscious, or otherwise unaware that the sexual act was occurring; and (c) That the accused knew or reasonably should have known that the other person was asleep, unconscious, or otherwise unaware that the sexual act was occurring. Article 120(b)(2); *MCM*, 2016, pt. IV, ¶ 45.b.(3)(e).

“The term ‘sexual act’ means the penetration, however slight, of the penis into the vulva or anus or mouth.” Article 120(g)(1)(A). “A sleeping, unconscious, or incompetent person cannot consent.” Article 120(g)(8)(B).

Argument

The government proved beyond a reasonable doubt that appellant sexually

assaulted ■ while she slept. Accordingly, his conviction is both legally and factually sufficient. As an initial matter, despite his initial denial to CID, (Pros. Ex. 26), appellant does not dispute that he penetrated ■'s vagina on 5 May 2018. (R. at 123, 484–85, 491) (Appellant's Br. 36). Accordingly, the only remaining question is whether the government proved beyond a reasonable doubt that he had sex with ■ while she was asleep unconscious, or otherwise unaware of the sexual act. (Charge Sheet); Article 120(g)(8)(B) ("A sleeping, unconscious, or incompetent person cannot consent"). The overwhelming evidence showed that ■ could not consent to sexual intercourse because she was asleep. (R. at 141, 211, 425). Accordingly, appellant's conviction and sentence should be affirmed.

At trial, and on appeal, appellant challenged ■'s assertion that she was asleep at the time appellant penetrated her vulva almost entirely by attacking her credibility. (R. at 482–501) (Appellant's Br. 75–80). The trier of fact, however, found ■'s testimony to be credible after they observed the mannerisms, demeanor, tone, and other characteristics while ■ and the other witnesses testified. Such observations do not carry over to a cold record. *See Turner*, 25 M.J. at 325. As such, the fact-finder was in the best position to assess ■'s credibility and an appellate court should hesitate to overturn their findings. *Stanley*, 43 M.J. at 674 ("[if] witness credibility plays a critical role in the outcome of trial this court should hesitate to second-guess the trial court's findings").

Even without being able to observe her testimony, the evidence within the record shows that ■■■'s account of the charged event was credible. ■■■'s description of when appellant assaulted her was corroborated by SPC ■■■'s testimony of appellant's movements on 4–5 May 2018. ■■■ testified appellant took her to her room from SPC ■■■'s after she got tired and that he kept her key card to check on her. (R. at 141). She also testified after she fell asleep she later awoke to appellant penetrating her vagina. (R. at 141–43). ■■■'s account matched SPC ■■■'s account of appellant's movement. SPC ■■■ noted that appellant left with ■■■ sometime after midnight, returned to SPC ■■■'s room for approximately an hour, and then left again for the night. (R. at 425). Specialist ■■■ also testified that when appellant returned, he said that ■■■ gave him her door card to check to make sure she was okay. (R. at 434). Key details of ■■■'s description of the evening were directly corroborated. Appellant had her key. Appellant waited approximately an hour for ■■■ to fall asleep before he departed SPC ■■■'s room, never to return. The corroboration of ■■■'s account by another witness, a friend of appellant, bolsters ■■■'s account that she was asleep at the time of the sexual act. *See United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (noting that “the government is free to meet its burden of proof with circumstantial evidence”).

Due to the defense's continued attacks on ■■■'s credibility, the government was able to introduce multiple prior statements of hers consistent with her

testimony that she was asleep when appellant sexually assaulted her. Merely hours after the sexual assault, ■■■ described appellant's assault in a poem she wrote on her phone. (Pros. Ex. 27) ("why did you take my key[?] why did you fuck me when I was asleep[?]"). Additionally, around that same time, ■■■ informed her mother that she had been sexually assaulted the night prior. (R. at 284–85); *see United States v. Owens*, 2016 CCA LEXIS 757, at *9 (A.F. Ct. Crim. App. 16 Dec. 2016) (unpub.) (noting that "the facts surrounding [the victim's] immediate reporting of the assault to a friend solidifies our belief as to the factual and legal sufficiency"). Two months later, ■■■ reiterated that she was asleep when appellant sexually assaulted her within a journal entry for her therapist. (R. at 196; Pros. Ex. 13) ("When I semi-woke up, I was being raped"). ■■■ had little reason to fabricate these statements as she had no reason to believe that they would ever reach military authorities. Within her multiple statements to military authorities, however, ■■■ also repeatedly stated that she had been asleep when appellant began penetrating her. (R. at 210–11, 213). ■■■'s consistent repetition that she awoke to appellant penetrating her, especially in private statements that she had no reason to believe anyone would become privy to, clearly established that she was asleep, unconscious, or otherwise unaware of the sexual act.

In addition to her statements, the downward progression in ■■■'s behavior also provided evidence that appellant had assaulted her. Immediately following

the assault, a witness characterized [REDACTED] as distant and quiet during the concert with appellant and the other members of the unit. (R. at 397); see *United States v. Washington*, 80 M.J. 106, 110 (C.A.A.F. 2020) (noting evidence of “the parties’ demeanor immediately afterward” corroborated the victim’s testimony that she told the appellant to “stop”). When she returned to Fort Sill, [REDACTED]’s tampon, which became compacted as a result of the sexual assault, fell out of her vagina, forcing her to directly face the fact that she had been sexually assaulted. (R. at 152, 355). Finally accepting that she had been victimized clearly weighed on [REDACTED]. Shortly after the sexual assault, one of [REDACTED]’s close friends within the unit stayed in her room because [REDACTED] felt unsafe and could not sleep. (R. at 351–52). [REDACTED]’s fears progressed and caused her to attempt suicide on three separate occasions. (R. at 366–67). This resulted in [REDACTED] continuously being admitted for inpatient treatment. (R. at 366–67). [REDACTED] explained that the flashbacks of the sexual assaults continuously haunted her and she “felt like she had to die to keep [herself] safe.” (R. at 262). Within the inpatient environment—after attempting suicide the first time and [REDACTED]—that [REDACTED] finally felt supported enough to assist law enforcement with their investigation. (R. at 263).¹⁵ The rapid

¹⁵ Alternatively, [REDACTED] did not feel support within her brand new unit. (R. at 263). She admitted that when she first informed several members of her unit of the sexual assault, she incorrectly told them that appellant had pushed his way into her

deterioration of ■■■'s mental well-being after the night in question further evidenced that she was sexually assaulted.

While there was significant evidence supporting ■■■'s testimony, there was minimal evidence supporting an alternate version of events. The only evidence that supported that ■■■ and appellant may have engaged in a consensual sexual encounter during the charged period came from two close friends of appellant, whose bias in his favor, and against ■■■ shone throughout their testimony.¹⁶ In addition to their clear bias, their testimony was directly contradicted by several key pieces of evidence. Most telling, when provided an opportunity to give his version of events, appellant showed he was conscious of his guilt by denying that he spent any time with ■■■ whatsoever during the charged timeframe. (Pros. Ex. 26). Also,

room. (R. at 218). She explained that she “didn’t feel like people would have believed [her] if [she] told them [she] gave him [her] room card into [her] door.” (R. at 218). These outlying inconsistent statements that she was not asleep are understandable given that ■■■ was speaking to unsupportive individuals she hardly knew about how appellant—her assigned sponsor and standing member of the unit—assaulted her within days of her arriving to her very first unit.

¹⁶ Both of these witnesses were good friends with appellant and had been for some time. (R. at 152, 411, 439, 451). Both strongly favored appellant over ■■■ (R. at 152, 412). SPC ■■■ went so far as to secretly provide appellant with protected information she obtained in the course of her duties as the unit paralegal about ■■■'s allegations and the investigation. (R. at 451–54). Unsurprisingly, the fact-finder—observed their testimony, assessed their bias, and weighed their credibility—seemingly gave little weight to their testimony that ■■■ had said she consented to sexual behavior with appellant (R. at 445) and slept in the same bed as appellant during the trip. (R. at 409–10).

during the night in question, ■■■ showed no indication that she desired to engage in sexual activity with appellant and hardly interacted with him. (R. at 424, 440–41). Furthermore—only hours before the purported events the two witnesses claimed to have occurred—■■■ told her mother she had been sexually assaulted, wrote a poem about the sexual assault, and quietly cried to herself. (R. at 144–45, 284; Pros. Ex. 27). Put simply, the evidence presented foreclosed any reasonable conclusion that ■■■ and appellant engaged in a consensual encounter.

The trier of fact observed the mannerisms, demeanor, tone, and other characteristics while ■■■ and the other witnesses testified. Such observations do not carry over to a cold record. *See Turner*, 25 M.J. at 325. The fact-finder also had the ability to use this evidence in conjunction with appellant’s statement to CID to determine what transpired in the early morning hours of 5 May 2018. The evidence presented—including appellant’s consciousness of guilt shown through his denial of spending any time with ■■■ during the charged period—leaves no reasonable doubt that appellant knew or should have known that ■■■ was asleep, unconscious, or otherwise unaware of the sexual act when he penetrated her with his penis. *See United States v. Rhodes*, 61 M.J. 445, 456 (C.A.A.F. 2005) (Crawford J. concurring in part and dissenting in part) (“consciousness of guilt is very probative and second only to a confession in terms of probative value.”) (citations and quotations omitted). The trier of fact found appellant guilty of

sexual assault, beyond reasonable doubt, after hearing all the evidence and observing the witnesses first hand. This court should do the same.

Assignment of Error VIII

WHETHER THE SPECIFICATION OF CHARGE II IS LEGALLY AND FACTUALLY INSUFFICIENT.

Standard of Review

Questions of legal and factual sufficiency are reviewed de novo. *Rosario*, 76 M.J. at 117.

Law

Adopted from Assignment of Error VII with the following additions:

To sustain a conviction for false official statement, in violation of Article 107, UCMJ, the government must prove that the accused, with an intent to deceive, made a false official statement knowing it to be false. Article 107(a); *MCM*, 2016, pt. IV, ¶ 41.b. Statements include all official statements, oral or written, made in the line of duty. *MCM*, pt. IV, ¶ 31.c.(1). Official statements include situations where the accused makes a statement to a military member who is carrying out a military duty at the time the statement is made. *MCM*, pt. IV, ¶ 41.c.(2).

Argument

The government proved beyond a reasonable doubt that appellant lied when he told SA [REDACTED] that he had not seen [REDACTED] between 4–6 May 2018. During his

interview on 8 June 2018, appellant denied that he spent any time with [REDACTED] on Friday or Saturday. (Pros. Ex. 26). The Friday and Saturday referenced were clarified as being the 4th and 5th of May, 2018.¹⁷ (R. at 357–58). Appellant’s oral statement to a CID agent carrying out his duty to investigate the allegations of sexual assault constituted an official statement. (R. at 286, 356–57; Pros. Ex. 26); *MCM*, pt. IV, ¶ 41.c.(2). Appellant’s statement was also entirely false. Appellant drank alcohol with [REDACTED] on 4 May 2018 (R. at 140–41, 425–26, 440–41), sexually assaulted her early 5 May 2018 (R. at 141–43), and went to a concert with [REDACTED] from 5–6 May 2018. (R. at 145–50, 426–28). Therefore, appellant’s conviction for the Specification of Charge II is factually and legally sufficient.

Appellant argues that the government failed to prove that appellant denied having seen [REDACTED] as the evidence only showed that he denied having spent time with her. (Appellant’s Br. 83–86). Contrary to appellant’s assertions however, spending time with someone is synonymous with seeing them. *See definition*, dictionary.com, <https://www.dictionary.com/browse/see> (last visited 24 May 2021) (defining “see” as including: “to meet and converse with”; “to receive as a visitor”; “to visit”; “to keep company with”; “to take care of”; and “to attend or escort”).

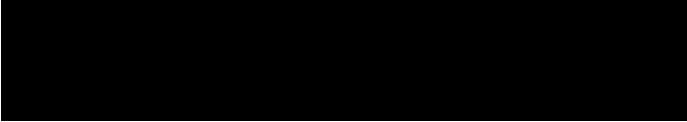
¹⁷ Appellee notes that 4 May 2018 was a Friday and 5 May 2018 was a Saturday. The testimony that the 3rd and 4th of May, 2018 were the Friday and Saturday in question was a simple misstatement by the agent at trial who testified more than one year later that would have been apparent at the time of the interview.

Evidence of appellant's understanding of this fact is found in his opening statement, where he used the phrases "he didn't even see her" and "they weren't even together" as synonymous. (R. at 125).

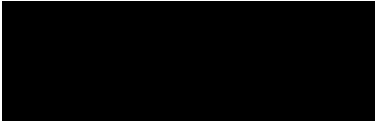
The fact-finder appropriately found appellant guilty of the Specification of Charge II because his knowingly false statement that he had not "spent time with" ■■■ encompassed a statement that he had not "seen" her. *See United States v. Crafter*, 64 M.J. 209, 212 (C.A.A.F. 2006) (affirming a conviction because "the necessary facts can be found under a fair construction of the specification"). Accordingly, appellant's conviction for false official statement is legally and factually sufficient and this court should affirm appellant's conviction for the Specification of Charge II.

Conclusion


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



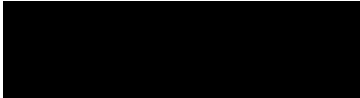
MARC J. EMOND
MAJ, JA
Appellate Government
Counsel



CRAIG J. SCHAPIRA
LTC, JA
Branch Chief, Government Appellate
Division



THOMAS J. DARMOFAL
CPT, JA
Acting Branch Chief, Government
Appellate Division



WAYNE H. WILLIAMS
LTC, JA
Deputy Chief, Government Appellate
Division

CERTIFICATE OF SERVICE, U.S. v. ST. JEAN (20190663)

I certify that a copy of the foregoing was sent via electronic submission to Mr. Daniel Conway, civilian appellate defense counsel, at [REDACTED], and the Defense Appellate Division, at [REDACTED] [REDACTED], on the 28th day of June 2021.

[REDACTED]
Senior Paralegal Specialist
Government Appellate Division
[REDACTED]