

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Docket No. ARMY 20200337

Sergeant (E-5)
TREVAR D. TINSLEY,
United States Army,
Appellant

Tried at Fort Bragg, North Carolina,
on 14 April, 22–24 June, and 1 July
2020, before a general court-martial
convened by Commander, United
States Army John F. Kennedy Special
Warfare Center and School, Colonel
Charles Pritchard and Lieutenant
Colonel Christopher Martin, Military
Judges, presiding.

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

Assignment of Error I¹

**WHETHER THE MILITARY JUDGE ERRED
WHEN HE DENIED THE DEFENSE REQUEST
FOR A FORENSIC PSYCHOLOGIST.**


Assignment of Error II

**WHETHER THE MILITARY JUDGE ERRED
WHEN HE DENIED THE DEFENSE REQUEST TO
EXAMINE [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED].**

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 that they lack merit. Should this court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

Assignment of Error III

**WHETHER THE MILITARY JUDGE ERRED
BY DENYING THE DEFENSE THE ABILITY
TO CONFRONT**



Assignment of Error IV

**WHETHER THE SPECIFICATION OF
THE CHARGE IS FACTUALLY AND
LEGALLY SUFFICIENT.²**

² In accordance with Army Court of Criminal Appeals Rules of Practice and Procedure Rule [A.C.C.A. R.] 17, appellee has “restyle[d] the assignment of error to reflect the issue or matter in controversy raised by appellant.” A.C.C.A. R. 17.1(d).

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Statement of the Case

On 24 June 2020, an officer panel with enlisted representation sitting as a general court-martial convicted appellant, contrary to his plea, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2019) [UCMJ]. (R. at 554; Statement of Trial Results). The panel sentenced appellant to a reprimand, reduction to the grade of E-1, and a dishonorable discharge. (R. at 641). On 21 July 2020, the convening authority deferred the adjudged reduction effective 15 July 2020, and approved the sentence as adjudged. (Action). On 23 July 2020, the military judge entered judgment. (Judgment). On 5 August 2020, the military judge entered a modified judgment to reflect a post-trial session under Article 39(a), UCMJ. (Modified Judgment).

Statement of Facts

A. Appellant and Ms. ■ met in Arlington, Virginia.

Appellant was a non-commissioned officer stationed at Fort Bragg, North Carolina. (Def. Ex. I, p. 26). On 21 January 2018, he was in Arlington, Virginia, “for a funeral.” (R. at 299; Pros. Ex. 1). One of the squad leaders in 10th Special Forces Group was killed in Afghanistan, and members of his unit went to Arlington National Cemetery for the funeral. (R. at 454). Appellant’s former platoon leader helped book “a set of rooms at [the Sheraton] [H]otel.” (R. at 454–57). The rooms held two queen beds, and generally four individuals stayed in each

room. (R. at 456, 461). On 21 January 2018 after everyone arrived, the group watched football, got food, and went to a strip club across the street. (R. at 457–58).

While appellant was in Virginia, he met Ms. [REDACTED] on Bumble, a dating application.³ (R. at 298). Ms. [REDACTED] joined Bumble in January 2018 because she “wanted to find a long-term relationship.” (R. at 298). Ms. [REDACTED] thought appellant “looked nice,” and appellant told her he was “from Fort Bragg[] [and] that he was Special Forces.” (R. at 299). He explained he was in town for a funeral and wanted to meet. (R. at 299).

Ms. [REDACTED] was “about 45 minutes” from Arlington, Virginia, and agreed to meet appellant at the strip club on 21 January 2018. (R. at 299, 302; Pros. Ex. 2, p. 8). Before they met in person, she told him that she was “[l]ooking for something long term” as opposed to just “casual dating/hookups.” (Pros. Ex. 1, p. 3). When he told her to “[w]ear black for the funeral” if she “stay[ed] the night,” she told him that she had work in the morning and did not plan to stay. (Pros. Ex. 2, p. 9).

Ms. [REDACTED] met appellant at the strip club at approximately 2200 that evening. (R. at 302; Pros. Ex. 2, p. 10). She found him “handsome” and “well put together.”

³ On the Bumble application, if you “are interested in the person” you “swipe right” on their picture, and if that person “also swipes right on you, then you create a match.” (R. at 298). Upon matching, the “female has to reach out first.” (R. at 298).

(R. at 303). She felt like she was meeting “a genuine person, who was interesting, who served their country, who was, you know, a person who’s admirable.” (R. at 303). She immediately trusted him. (R. at 304).

Ms. [REDACTED] and appellant split “a bottle of Moet Rose” and a beer. (R. at 304). When he asked and then continued to insist that she sit on his lap, she felt uncomfortable but “wanted to make a good impression,” so she complied. (R. at 304–05). Throughout the night, appellant moved his hand towards Ms. [REDACTED] chest and hips, which made her think he was “just trying to see how far [he] can go.” (R. at 305). Ms. [REDACTED] repeatedly repositioned his hand. (R. at 305).

After departing the strip club, they walked to a sports pub and ordered chili, wings, and cider. (R. at 307). Ms. [REDACTED] declined the shot of “Fireball” that appellant urged her to pour into her cider. (R. at 308–09). She was “intoxicated” to the point where she would not drive a car. (R. at 310). However, she could walk and talk, and she did not black out. (R. at 310). Ms. [REDACTED] decided she did not want to take an “Uber home at that time because it was going to be really expensive,” and she was “tired” and “just wanted to sleep.” (R. at 310). She thought to herself, “I trust him. Everything is going to be okay.” (R. at 310).

Appellant and Ms. [REDACTED] went to the Sheraton Hotel around midnight. (R. at 310–11). They entered a hotel room where four of appellant’s friends were staying. (R. at 312). Ms. [REDACTED] wished to “sleep on the floor,” but appellant asked

her to sleep on the bed. (R. at 312). They “all somehow crammed four people into a queen-sized bed.”⁴ (R. at 312). When this arrangement no longer worked, appellant secured another hotel room, and the two went to sleep. (R. at 315). Appellant “removed all of his clothing and went to bed naked,” and he asked Ms. ■■■ to take off her “suit” so that she slept in her romper. (R. at 315.)

B. Appellant sexually assaulted Ms. ■■■ after she woke up in the morning.

At 0545 on 22 January 2018, Ms. ■■■ alarm went off so that she could “be out of the hotel” in time for the first day of her internship. (R. at 316). While she felt tired, she also felt “completely sober at this point.” (R. at 317). When appellant woke up, he took Ms. ■■■ hand and put it on his genitals. (R. at 317). Ms. ■■■ thought, “[w]ell, he’s not going to let me leave unless I do something to please him.” (R. at 317). She “figured that if [she] perform[ed] oral sex on him, that maybe that would satisfy him and that [she] could leave.” (R. at 318). So she told appellant, “[f]uck my mouth” because she “just wanted to get it over with” and leave. (R. at 318).

She performed oral sex on appellant, but he told her that “he would not be able to finish” without vaginal intercourse. (R. at 319). Appellant attempted to

⁴ A defense witness testified that during this time in the first hotel room, the two were “touching,” “kissing,” and displaying “affectionate physical body language.” (R. at 465). However, Ms. ■■■ testified she did not recall kissing him at that point in the evening. (R. at 315).

perform oral sex upon Ms. [REDACTED] but she “told him no” and “closed [her] legs.” (R. at 319). Appellant “pried” her legs apart and performed oral sex on her against her will despite her protest. (R. at 319). Appellant also tried to “position himself on top of [Ms. [REDACTED]] so that he could penetrate her with his penis, but she closed her legs, “wiggle[d] [her] way out of it,” again telling “him no.” (R. at 319–20). “He wasn’t listening.” (R. at 319).

When appellant repeatedly attempted to initiate sexual intercourse, Ms. [REDACTED] told him no “over and over and over.” (R. at 321). She did not want to “risk pregnancy,” and she did not “want to have sex with him on the first date.” (R. at 321). [REDACTED]

[REDACTED] she also did not want “him to perform oral sex on her” because she “[REDACTED]” (R. at 322). When he kept pushing, she “fe[lt] scared because [she] didn’t feel heard.” (R. at 321).

Appellant finally said, “I just want to see what you look like bent over the bed.” (R. at 323). Ms. [REDACTED] thought, “[m]aybe if I do this, then he’ll let me go.” (R. at 323). When she complied and bent over the bed, he “pressed his hips” into her and—even though Ms. [REDACTED] said no “one last time”—appellant penetrated her vulva with his penis from behind. (R. at 323). At this point, she “couldn’t fight him” as her body was “completely shut down.” (R. at 323). This lasted for “1 to 3

minutes” until appellant stopped and said, “I guess you didn’t like that.” (R. at 324). She responded, “No.” (R. at 324).

C. Ms. [REDACTED] immediately reported the sexual assault.

After appellant stopped, Ms. [REDACTED] gathered her belongings and went to the lobby. (R. at 324). While she waited on her Lyft to arrive, she texted two close friends and told them she had been raped. (R. at 325–26, 425, 443; Pros. Ex. 12). She also texted appellant and told him what he did was wrong. (R. at 326–29). When she got into the taxi, she “burst into tears and just started crying.” (R. at 326). She was in no condition to report to her internship, as she was upset and already late. (R. at 329).

Instead, she went back to her house in [REDACTED], where her friend picked her up to take her to the hospital. (R. at 335–36). When her friend was with her, Ms. [REDACTED] was “very emotional, very distraught,” and “couldn’t stop crying.” (R. at 444). Ms. [REDACTED] arrived at the hospital around “8:00 a.m.” and “waited until 4:00 for [her] rape kit.” (R. at 337). Around this same time, she “reach[ed] out to law enforcement,” and two police officers from Arlington County came to interview her. (R. at 336–37, 338–40).

Assignment of Error I

**WHETHER THE MILITARY JUDGE ERRED
WHEN HE DENIED THE DEFENSE REQUEST
FOR A FORENSIC PSYCHOLOGIST.**

Additional Facts

A. The convening authority denied appellant's request for an expert consultant.

During an interview with government counsel, Ms. [REDACTED] mentioned that [REDACTED]

[REDACTED]
(App. Ex. III, p. 18 (sealed)). She [REDACTED]

[REDACTED] (App. Ex. III, p. 18 (sealed)). She

[REDACTED].” (R. at 79 (sealed)).

Based on this information, appellant requested the appointment of Dr. [REDACTED], a licensed psychologist, as an expert consultant. (App. Ex. VIII, p. 10). When the convening authority disapproved appellant's request, appellant filed a motion to compel requesting that Dr. [REDACTED] be appointed as “an expert consultant and witness” named “as a member of the Defense team.” (App. Ex. VIII, p. 1). At trial, appellant argued expert assistance was necessary for three reasons:

(a) [REDACTED]

and (b) [REDACTED]

and (c) an u [REDACTED]

(App. Ex. VIII, pp. 6–7). The government responded that Dr. [REDACTED] did not have the requisite skill to help appellant with his request, and even if she did, appellant

failed to demonstrate assistance was necessary. (App. Ex. IX, p. 2). The parties litigated this issue in a closed session because “the issues overlap” with appellant’s motion [REDACTED]. (R. at 76 (sealed)).

B. The military judge denied appellant’s motion to compel Dr. [REDACTED]

The military judge held an Article 39(a), UCMJ, session where Dr. [REDACTED] testified [REDACTED] [REDACTED]. (R. at 77–80 (sealed)). Following oral argument on appellant’s motion, the military judge issued a five-page ruling denying relief. (App. Ex. XV). The military judge concluded appellant failed “to demonstrate the necessity of expert assistance in this case” and analyzed why each of the *Gonzalez*⁵ prongs were lacking. (App. Ex. XV, pp. 3–5).

Standard of Review

A military judge’s denial of an expert consultant is reviewed for an abuse of discretion. *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010). A military judge’s ruling regarding the appointment of a government-funded expert “will only be overturned if the findings of fact are clearly erroneous or the decision is influenced by an erroneous view of the law.” *United States v. Anderson*, 68 M.J. 378, 383 (C.A.A.F. 2010); *see also United States v. Lee*, 64 M.J. 213, 217 (C.A.A.F. 2006) (quoting *United States v. Gunkle*, 55 M.J. 26, 32 (C.A.A.F.

⁵ *United States v. Gonzales*, 39 M.J. 459, 461 (C.M.A. 1994).

2001)). The abuse of discretion standard is a “strict one, calling for more than a mere difference of opinion”—“[t]he challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.” *United States v. Hendrix*, 76 M.J. 283, 288 (C.A.A.F. 2017) (citations omitted).

Law and Argument

In this case, appellant does not assert any erroneous findings of fact or views of the law. *Anderson*, 68 M.J. at 383. Instead, appellant only disagrees with the military judge’s decision regarding necessity of the assistance—articulating the same justifications on appeal that appellant used at trial. (App. Ex. VIII; Appellant’s Br. 13–16). This position is unavailing, as appellant’s attacks on the military judge amount to nothing more “than a mere difference of opinion.” *Hendrix*, 76 M.J. at 288; *see also United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (“The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion.”). He cannot show the military judge abused his discretion.

A. The military judge’s ruling merits deference.

As a starting point, the military judge’s ruling merits deference. *See United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002) (“While not required, where the military judge places on the record his analysis and application of the law to the facts, deference is surely warranted.”). Here, the military judge issued a five-page,

written ruling where he not only adopted the facts that the parties stipulated to, but he made his own findings following an Article 39(a), UCMJ, session on 14 April 2020. (App. Ex. XV, p. 1). His analysis correctly cited binding precedent. (App. Ex. XV, pp. 3–4). As such, his ruling on the defense motion warrants deference.

B. The military judge properly analyzed appellant’s request as one for an expert consultant.

As a second threshold matter, the military judge appropriately constrained his ruling to a request for an expert consultant, not a witness. Although appellant now faults the military judge for focusing “only on the consultant role,” (Appellant’s Br. 15), this complaint is contrary to appellant’s original request. (App. Ex. VIII). Appellant asked the military judge to compel Dr. [REDACTED] as an expert consultant “and witness,” but still requested she be appointed as a privileged “member of the Defense team.” (App. Ex. VIII, p. 1). This request consigns Dr. [REDACTED] to the role of an expert consultant who “receive[s] confidential communications from the accused and his counsel.” *United States v. Turner*, 28 M.J. 487, 488 (C.M.A. 1989). Prosecutors cannot interview consultants, as they fall under Mil. R. Evid. 502, recognizing the lawyer-client privilege. *Id.* at 489.

Nowhere in appellant’s written motion or oral argument did he request Dr. [REDACTED] be produced without the veil of privilege—a form of relief he could have alternatively requested but declined to do so. (App. Ex. VIII; R. at 77–80 (sealed)); *see* Rule for Courts-Martial [R.C.M.] 703(d) (authorizing employment of

expert witnesses when the military judge determines “the testimony of the expert is relevant and necessary”). As witnesses maintain no privilege and are subject to government interviews, it appears appellant tactically chose to request Dr. [REDACTED] exclusively as a consultant. *Turner*, 28 M.J. at 488.

Accordingly, the military judge appropriately cabined his ruling to that which appellant specifically requested and even noted in a footnote that appellant’s request “alludes to the fact that Dr. [REDACTED] may be called to testify if needed,” but constrained his analysis to “the specific request for an expert *consultant*.” (App. Ex. XV, p. 4) (emphasis in original). This was an appropriate exercise of judicial restraint and an additional basis for deference.⁶

C. Appellant failed to establish each *Gonzalez* factor.

To “prevail on [a] request” for expert assistance, “the accused has the burden of establishing that a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial.” *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F.

⁶ For this reason, any argument as to what Dr. [REDACTED] “would have informed the fact-finder” about is not relevant. (Appellant’s Br. 15). The assessment of appellant’s need for Dr. [REDACTED] is limited to what she could have done for appellant outside of testifying. See *United States v. Langston*, 32 M.J. 894, 896 (A.F.C.M.R. 1991) (urging practitioners “to distinguish between a request for an expert witness and a request for an expert consultant,” noting the distinct purposes of each). Dr. [REDACTED] testimony is a nonfactor when assessing whether the military judge abused his discretion.

2008) (citations omitted). When an accused seeks appointment of an expert consultant, “he must demonstrate the necessity for the services.” *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986). To demonstrate necessity, an accused must show “more than a mere possibility of assistance from a requested expert.” *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994). The Court of Military Appeals set forth a three-pronged test to establish the necessity of expert assistance: “First, why the expert assistance is needed. Second, what would the expert accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop.” *Gonzalez*, 39 M.J. at 461.

Here, the military judge correctly held that appellant failed to meet each of the three *Gonzalez* factors. (App. Ex. XV, pp. 3–5).

1. Doctor [REDACTED] expert assistance was not necessary.

[REDACTED]
[REDACTED] that an expert consultant on the subject was unnecessary.

Specifically, [REDACTED]
[REDACTED] (App. Ex. V, p. 3; R. at 79 (sealed)). The government charged appellant with sexual assault by a theory of bodily harm—not substantial incapacitation or unconsciousness. (Charge Sheet). The government called no expert witnesses, and instead called only Ms. [REDACTED] and her two friends to testify.

(R. at 296, 423, 440–41). Even appellant foreshadowed to the panel in his opening statement that “this is not a complicated case,” insinuating no need for any expert consultant.⁷ (R. at 286).

Critically, appellant’s cross-examination of Ms. [REDACTED] indicated he believed [REDACTED]. He did not ask a single question regarding [REDACTED], lengthy cross-examination. (R. at 340–401). Instead, appellant actually confirmed with Ms. [REDACTED] that she “remember[ed] everything that happened,” leading to the conclusion that he did not want to suggest [REDACTED] [REDACTED] (R. at 357). Appellant’s theory she consented—or appeared to have consented—to appellant, a theory that relied on her being in full control of her faculties. (R. at 368) (Q: “And you’re not drunk at this point?” A: “No.” Q: “Completely sober?” A: “Completely sober.”). As such, Ms. [REDACTED] [REDACTED] [REDACTED] was not relevant to the defense theory, and therefore such a nonissue for appellant’s case that he fails to demonstrate the necessity of an expert. *See United States v. Warner*, 62 M.J. 114, 118 (C.A.A.F. 2005) (noting an

⁷ Defense counsel explained, “Gentlemen, I’ll be the first one to tell you that this is not a complicated case. There will be no DNA testimony. There will be no scientific measurements. There will be no expert on the stand to participate (sic) about numbers and figures. You can put your calculators aside, because in this case, perception is reality.” (R. at 286–87).

“important function of defense experts is to test and challenge the Government’s case”).

Accordingly, the military judge appropriately found “[t]he necessity of assistance is, at best, speculative.” (App. Ex. XV, p. 3). *United States v. Lloyd* addressed this exact type of conjecture and declined to accept “possibilities” as a sufficient basis to establish why expert assistance is necessary. 69 M.J. 95, 99 (C.A.A.F. 2010) (the “defense’s stated desire to ‘explor[e] all possibilities,’ however, does not satisfy the requisite showing of necessity”). Thus, when the military judge concluded that appellant failed “to demonstrate how this undisputed fact has any impact on the case,” the military judge appropriately applied the facts to the law and did not abuse his discretion. (App. Ex. XV, p. 3).

2. Doctor █████ would not be able to accomplish that which appellant claims.

Appellant’s requested consultant could provide nothing more to appellant’s defense than what he already asserted at trial. Appellant’s theme and theory throughout his entire case was actual consent or mistake of fact as to consent. (R. at 287–93, 527). Indeed, appellant strategically focused on Ms. █████ outward displays of affection—frequently distinguishing her external behavior from what she was “internally” thinking. (R. at 354–55, 372). “It’s reasonable to think that everything she’s outwardly showing you is consent,” appellant argued during closing. (R. at 532).

Importantly, appellant asserted the mistake of fact as to consent defense and received appropriate instructions. (R. at 508–09). The military judge told the members, “[t]here has been testimony tending to show that, at the time of the alleged offense, the accused mistakenly believed that Ms. [REDACTED] consented to the sexual conduct alleged.” (R. at 509). The military judge further instructed the members that a reasonable mistake of fact is “a defense” to appellant’s offense, and explained its requirements. (R. at 509). As such, the panel already weighed—and rejected—this defense theory against the facts as presented at trial. (R. at 554).

Therefore, any expert testimony regarding [REDACTED]
[REDACTED].⁸ Such a trivial detail actually pales in comparison to the concessions appellant accomplished during cross-examination. Notably, the victim agreed she “consented” to appellant’s initial touching, was “faking” pleasure, and “moaned” while appellant performed oral sex on her. (R. at 371–75). There was no need for an expert witness to testify that Ms. [REDACTED]
[REDACTED] as appellant argued, because the victim accounted for the event herself. (R. at 80 (sealed), 527). Thus, [REDACTED] as to consent was of no

⁸ Appellant stated Dr. [REDACTED] could evaluate [REDACTED]
[REDACTED]
[REDACTED] (App. Ex. VIII, p. 8).

importance, and the military judge appropriately ruled that appellant's "generalized assertions" [REDACTED] "demonstrate that expert assistance [would] assist the Defense team." (App. Ex. XV, p. 4).

3. Doctor [REDACTED] provided no new information beyond that which appellant already gathered in his own research.

The military judge correctly found appellant also failed to establish the third *Gonzalez* prong, as he offered "no specifics as to what exactly they are unable to develop without expert assistance." (App. Ex. XV, p. 4); *see also United States v. Kelly*, 39 M.J. 235, 238 (C.M.A. 1994) (noting that "[d]efense counsel are expected to educate themselves to attain competence in defending an issue presented in a particular case," which may include consulting "a number of primary and secondary materials"). The multiple enclosures to appellant's own motion to compel exposed this deficiency, given—as the trial counsel argued—"a brief Google search can tell you" everything. (R. at 78; App. Ex. VIII, pp. 14–20); *see United States v. Short*, 50 M.J. 370, 373 (C.A.A.F. 1999) (noting that a "defense counsel is responsible for doing his or her homework"). Here, defense counsel completed their "homework" such that Dr. [REDACTED] could not provide any additional assistance when they performed their own research prior to the motions hearing. *Id.* Therefore, appellant's request for this expert consultant was insufficient, and the military judge did not abuse his discretion in ruling such expedition was unnecessary.

D. Appellant fails to demonstrate why his trial was fundamentally unfair without expert assistance.

Appellant likewise fails to demonstrate that without this expert assistant, his trial was fundamentally unfair. A trial is fundamentally unfair when the government's conduct is "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States v. Russell*, 411 U.S. 413, 431–32 (1973). The Court of Appeals for the Armed Forces (CAAF) has held that where the government found it necessary to "grant itself an expert and present expert forensic analysis often involving novel or complex scientific disciplines," fundamental fairness compels expert assistance. *Lee*, 64 M.J. at 218.

No such situation occurred in this case. The government offered no expert testimony at trial, and therefore employed no unfair advantages over appellant. Even the prejudice appellant now asserts on appeal is inadequate when measured in light of appellant's tactical choices at trial. (Appellant's Br. 15–16). Notably absent from these examples is the "reasonable probability" that Dr. ■ would assist the defense. *See United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005) ("[t]he accused must show that a reasonable probability exists 'both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial'") (citations omitted). "Even with the benefit of post-trial hindsight," appellant fails to articulate to any concrete example of

unfairness in his criminal proceeding. *Short*, 50 M.J. at 373. Therefore, the military judge did not abuse his discretion when he found appellant did not meet his burden to justify expert assistance. *Freeman*, 65 M.J. at 458.

Assignment of Error II

**WHETHER THE MILITARY JUDGE ERRED
WHEN HE DENIED THE DEFENSE REQUEST TO**

[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED].

Additional Facts

[REDACTED]
[REDACTED]
[REDACTED]. (App. Ex. V (sealed)). She provided no information about what she discussed, [REDACTED]. (R. at 75 (sealed); App. Ex. VI, p. 6 (sealed)). Based on this information, appellant requested the government [REDACTED]. (App. Ex. V, p. 12 (sealed)). Appellant proclaimed he had “[REDACTED]”
[REDACTED]
[REDACTED]
[REDACTED].
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] R. at 57 (sealed)).

Regarding [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (R. at 71 (sealed)).

Appellant's request [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Standard of Review

This court reviews a military judge's ruling on a discovery or production request for an abuse of discretion. *United States v. Chisum*, 77 M.J. 176, 179 (C.A.A.F. 2018).

Law

The psychotherapist privilege is one that “serves the public interest,” as the “mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.” *Jaffee v. Redmond*, 518, U.S. 1, 11 (1996). Military Rule of Evidence [Mil. R. Evid.] 513 sets forth a psychotherapist-patient privilege:

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the [UCMJ], if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

Mil. R. Evid. 513(a). A communication is confidential if “not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.” Mil. R. Evid. 513(b)(4). The holder of the privilege waives it when he or she voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such

circumstances that it would be inappropriate to allow the claim of privilege. Mil. R. Evid. 510(a); *United States v. Jasper*, 72 M.J. 276, 280 (C.A.A.F. 2013).

Military Rule of Evidence 513(e)(3) makes in-camera review of evidence a matter of discretion for the military judge. Before ordering such privileged material produced even for in-camera review, the military judge must find the moving party has demonstrated four things by a preponderance of the evidence:

- (A) a specific, credible factual basis demonstrating a reasonable likelihood that the records or communications would contain or lead to the discovery of evidence admissible under an exception to the privilege;
- (B) that the requested information meets one of the enumerated exceptions under subsection (d) of [MRE 513];
- (C) that the information sought is not merely cumulative of other information available; and
- (D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

Mil. R. Evid. 513(e)(3)(A)–(D). If the military judge determines each of the above factors is met except for one of the rule’s enumerated exceptions, the military judge must then determine whether in-camera review is constitutionally required and, if so, take further action as necessary. *J.M. v. Payton-O’Brien*, 76 M.J. 782, 789–90 (N.M. Ct. Crim. App. 2017).

Argument

[REDACTED]

[REDACTED] R. at 71

(sealed)). Now on appeal, appellant's analysis points to no erroneous finding of fact or conclusion of law from the military judge. (Appellant's Br. 17–18).

Instead, [REDACTED]
[REDACTED]. (R. at 72 (sealed)). The military judge appropriately concluded [REDACTED]
[REDACTED]. (App. Ex. XVII, p. 3); Mil. R. Evid. 513(e)(3)(A). This court should similarly find appellant's assignment of error to be without merit.

A. Appellant failed to show that an in-camera review was warranted.

Appellant failed to demonstrate any of the prerequisites to an in-camera review. Mil. R. Evid. 513(e)(3)(A)–(D). Key to the military judge's conclusions of law, appellant failed to provide “a specific, credible factual basis demonstrating a reasonable likelihood that [REDACTED]
[REDACTED] Mil. R. Evid. 513(e)(3)(A); (App. Ex. XVII, p. 3 (sealed)). Appellant's own frequent use of speculative terminology throughout litigation cements this to be an accurate conclusion.

First, [REDACTED]
[REDACTED]. (R. at 75 (sealed)). Instead, appellant [REDACTED]

[REDACTED].” (R. at 75 (sealed)). Left to speculate [REDACTED]

[REDACTED] (R. at 71 (sealed)). In other words, [REDACTED]

[REDACTED] did not provide this specific, credible factual basis demonstrating a reasonable likelihood that the records would yield evidence admissible under an exception to the privilege. Mil. R. Evid.

513(e)(3)(A). In a session under Article 39(a), UCMJ, the defense’s witness, Dr.

[REDACTED] (Appellant’s Br. 18). Here, [REDACTED]

[REDACTED]” (App.

Ex. V, p. 13 (sealed)), and simply requesting [REDACTED]

[REDACTED] (R. at 69 (sealed)).

[REDACTED] does not unlock the whole vault, allowing an appellant to freely explore a victim’s privileged mental health statements. *United*

States v. Rodriguez, ARMY 20180138, 2019 CCA LEXIS 387, at *8 (Army Ct. Crim. App. 1 Oct. 2019) (mem. op.), *pet. for rev. denied*, 79 M.J. 430 (C.A.A.F. 2020) (distinguishing between “statements and records that reveal the substance of conversations that may have been for the ‘purpose of facilitating diagnosis or treatment’” and “the diagnosis or treatment itself”); *but see United States v. Mellette*, __ M.J. __, 2021 CCA LEXIS 234, at * 13–14 (N. M. Ct. Crim. App. 14 May 2021) (quoting *Rodriguez*, 2019 CCA LEXIS 387, at *8) (“[W]e disagree with our sister court’s view that the psychotherapist-patient privilege ‘extends to statements and records that reveal the substance of conversations that may have been for the ‘purpose of facilitating diagnosis or treatment,’ but not to the diagnosis or treatment itself.”). Such practice would be to contort Mil. R. Evid. 513 into a discovery tool—a practice already rejected. *See Lk v. Acosta*, 76 M.J. 611, 616 (Army Ct. Crim. App. 2017) (“The right to confront witnesses does not include the right to *discover* information to use in confrontation.”) (emphasis in original). Thus, appellant failed to meet his burden to show why he was entitled to an in-camera review, and the military judge did not abuse his discretion in denying appellant’s motion.

B. The constitution does not otherwise mandate disclosure of mental health records.

Relying on the constitutional exception to Mil. R. Evid. 513, appellant generally points to “his right to confrontation and a fair trial,” referencing Ms.

[REDACTED].” (Appellant’s Br. 18). However, the right to confront witnesses does not include the right to discover information to use in confrontation. *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) (noting the constitutional “right to confrontation is a trial right”). Further, there is “no general constitutional right to discovery in a criminal case.” *Weatherford v. Bursey*, 429 U.S. 545, 559 (1997). Rather, “constitutional ‘discovery’ is usually delineated by the contours of the seminal case of *Brady*.” *Acosta*, 76 M.J. at 615.

Thus, appellant has no pretrial constitutional right to the [REDACTED]

[REDACTED] t. While there are certainly occasions where the Constitution requires disclosure of “otherwise privileged matter under Mil. R. Evid. 513,” this is not one of them. *Acosta*, 76 M.J. at 615. The victim’s [REDACTED]

[REDACTED] (App. Ex. VI, p. 4 (sealed)); *see also Acosta*, 76 M.J. at 616 (“Mental health records located in military or civilian healthcare facilities *that have not been made part of the investigation* are not ‘in the possession of prosecution’ and therefore cannot be ‘Brady evidence.’”) (emphasis in original). Therefore, appellant was not entitled to these documents.

Offering a different explanation on appeal for why he is entitled to the privileged mental health records,⁹ appellant faults the military judge for not [REDACTED] [REDACTED] [REDACTED].” (Appellant’s Br. 18). This court has already ruled that such pretrial exploration is a deficient basis to disclose privileged mental health records. *Acosta*, 76 M.J. 615 (distinguishing between “disclosure” pretrial rights, which is “to possess information that one currently does not possess,” and “admission” trial rights involving “the right to introduce into a criminal trial information one already possesses”). Thus, appellant lacks any constitutional right to discovery or “disclosure” of these documents, and appellant’s claim fails. *Id.*

Assignment of Error III

WHETHER THE MILITARY JUDGE ERRED BY DENYING THE DEFENSE THE ABILITY TO

[REDACTED]

⁹ In pleadings at trial, appellant asserted he had good faith to believe Ms. [REDACTED] had a [REDACTED] (App. Ex. V, p. 13 (sealed)). During the session under Article 39(a), UCMJ, he stated that Ms. [REDACTED] “probably made” statements to her therapist that “may differ than what was provided to us.” (R. at 72 (sealed)). On appeal, he generally asserts he is entitled to these records to assess her perception, decision-making, and ability to recall events. (Appellant’s Br. 18).

Additional Facts

When appellant and Ms. ■ discussed sleeping arrangements that evening, appellant told her he had “a room and we can share it.” (R. at 310). Ms. ■ believed he intended to share a hotel room that he had already reserved “with his friends.” (R. at 310). When the two returned to the Sheraton Hotel close to midnight, appellant “took [them] up to the room where his friends were.” (R. at 311–12).

Inside, there were already “two people to a bed,” so Ms. ■ stated she would “sleep on the floor.” (R. at 312). Appellant asked her to sleep on the bed, and they “crammed four people into a queen-sized bed.” (R. at 312). When appellant “realize[d] that it’s too cramped,” he offered “to get a room for the two of us.” (R. at 312). Appellant left the victim in this hotel room to go “get a new room.” (R. at 312). He was gone “maybe 10, 15 minutes.” (R. at 313). During this time, Ms. ■ sat on the bed, and remained with four other members of appellant’s unit. (R. at 463, 467).

After appellant left, Mr. ■ said he felt “a little exposed” that “there was a female [he] had never met before” in his room. (R. at 467). He wished to document the situation, taking “a photo to show that everything that was happening there was on the up,” even going so far as to tell everyone in the room that “everyone’s a consenting adult.” (R. at 467; Def. Ex. B).

Later, [REDACTED]

[REDACTED]
[REDACTED] (App. Ex. III, p. 4 (sealed)). The victim
stated [REDACTED]
(App. Ex. III, p. 16 (sealed)). She [REDACTED]
[REDACTED]
[REDACTED]

Prior to trial, [REDACTED] (App.
Ex. III (sealed)). [REDACTED]. (App. Ex. IV (sealed)). In a closed
session, [REDACTED]
[REDACTED] (R. at 26–27 (sealed)). Appellant argued
that [REDACTED]
[REDACTED]

[REDACTED] (R. at 26–27 (sealed)). He continued [REDACTED]
[REDACTED]
[REDACTED] (R. at 35 (sealed)).

The military judge issued a written ruling denying appellant’s motion. (App.
Ex. XVII (sealed)). He concluded [REDACTED]
[REDACTED]
[REDACTED]”

[REDACTED]

[REDACTED]. (App. Ex. XVII, p. 6 (sealed)).

Standard of Review

A military judge's ruling on whether to exclude evidence pursuant to Mil. R. Evid. 412 is reviewed for an abuse of discretion. *United States v. Ellerbrock*, 70 M.J. 314, 317 (C.A.A.F. 2011).

Law

Military Rule of Evidence 412 is a rule of exclusion that serves “to protect victims of sexual offenses from the degrading and embarrassing disclosure of intimate details of their private lives while preserving the constitutional rights of the accused to present a defense.” *United States v. Banker*, 60 M.J. 216, 219 (C.A.A.F. 2004) (citations omitted); *United States v. Gaddis*, 70 M.J. 248, 251 (C.A.A.F. 2011). The purpose of this rule of evidence is “to safeguard the alleged victim against the invasion of privacy and potential embarrassment that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process.” *Manual for Courts-Martial, United States* (2016 ed.) [MCM], Analysis of the Military Rules of Evidence, at A22-24. “Under M.R.E. 412, not only is evidence of the alleged victim's sexual propensity generally inadmissible, evidence offered to prove an alleged victim engaged in ‘other sexual behavior’ is also generally excluded.” *Banker*, 60 M.J. at 221.

There are three exceptions to this general rule of exclusion. Mil. R. Evid. 412(b)(1)–(3). The third exception allows admission of “evidence the exclusion of which would violate the accused’s constitutional rights.” Mil. R. Evid. 412(b)(3).¹⁰ The proponent of the evidence bears the burden of proof to demonstrate why the evidence is admissible. *Banker*, 60 M.J. at 223 (citations omitted).

Argument

A. Appellant fails to demonstrate an exception to Mil. R. Evid. 412’s general rule of exclusion.

The only plausible exception that could apply in appellant’s case is the third exception, “evidence the exclusion of which would violate the accused’s constitutional rights.”¹¹ Mil. R. Evid. 412(b)(3). At trial, appellant argued this information was necessary [REDACTED]

[REDACTED]

¹⁰ The first two exceptions include (1) evidence of specific instances of a victim’s sexual behavior, if offered to prove that someone other than the accused was the source of semen, injury, or other physical evidence, and (2) evidence of specific instances of a victim’s sexual behavior with respect to the person accused of the sexual misconduct, if offered by the accused to prove consent or if offered by the prosecution. Mil. R. Evid. 412(b)(1)–(2).

¹¹ Appellant does not clearly state which exception applies to his case, but includes within his law section citations regarding “constitutionally-required evidence” and calls this “a constitutional error.” (Appellant’s Br. 20–21). The military judge held appellant “failed to demonstrate that [the evidence] is subject to any M.R.E. 412 exception.” (App. Ex. XVII, p. 6).

“ [REDACTED] (R. at 35 (sealed)). [REDACTED]
[REDACTED].¹² (App. Ex. III, p. 14 (sealed)). Now on
appeal, [REDACTED]
[REDACTED].” (Appellant’s Br. 21). None of
these reasons trigger an exception to Mil. R. Evid. 412’s general rule of exclusion,
and appellant fails to meet his burden to show otherwise.

First, appellant [REDACTED]
[REDACTED]. *United States v. Erikson*, 76 M.J. 231, 234
(C.A.A.F. 2017) (“Evidence of an alleged victim’s prior accusation of sexual
assault is only admissible if the prior accusation is shown to be false.”). In these
scenarios, an “accused’s Sixth Amendment right to confrontation” is not unlimited
in scope, and the military judge may reasonably limit cross-examination.” *Id.* at
235 (quoting *Ellerbrock*, 70 M.J. at 318).

[REDACTED]
[REDACTED]” (Appellant’s Br. 21). This is
even less persuasive than that already deemed insufficient in *Erickson*, where the
subject of a prior accusation was actually acquitted at trial. 76 M.J. at 236. [REDACTED]
[REDACTED]

¹² The military judge noted appellant “failed to address the third-party encounter at
all in the argument section of their motion.” (App. Ex. XVII, p. 6).

[REDACTED]. *See* *McElhaney*, 54 M.J. at 130 (affirming a military judge’s exclusion of evidence because “defense counsel proffered no evidence showing the complaint to be false, other than the unsurprising denial by [the accused]”). Notably, something occurred in that hotel room that made Mr. [REDACTED] uncomfortable enough he spontaneously proclaimed across the room that “everyone’s a consenting adult,” and even photograph the situation—a suspicious and revealing act. (R. at 467; Def. Ex. B). Thus, appellant presented no evidence of a false allegation, and therefore fails in his burden to show an exception to Mil. R. Evid. 412’s general rule of exclusion.

Second, this third-party assault does not fit within the constitutional exception because [REDACTED]
[REDACTED]. (Appellant’s Br. 21). Despite appellant’s position that this [REDACTED]
[REDACTED]
[REDACTED]t. *See, e.g., United States v. Gaddy*, ARMY 20150227, 2017 CCA LEXIS 179, at *4 (Army Ct. Crim. App. 20 Mar. 2017) (summ. disp.) (holding highly sexualized dancing immediately preceding the alleged assault was “*res gestae* of the offense,” and without the evidence the defense was “forced to start mid-sentence”).

[REDACTED]

[REDACTED]

(R. at 317). Here, [REDACTED]

[REDACTED] 13

Quite the contrary, [REDACTED]

[REDACTED] (R. at 300), is not “strange” at all. (Appellant’s Br. 21). This detail has no tendency to make the existence of any fact more or less probable than it would be without the evidence. Mil. R. Evid. 401. Therefore, the

[REDACTED]

[REDACTED], “to which the members could have attached credit if they had so desired.” *United States v. Davis*, 76 M.J. 224, 228 (C.A.A.F. 2017) (quoting *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003)).

The remaining details of the third-party assault are a not-so-veiled attempt to attack the victim’s [REDACTED]

[REDACTED] (R. at 27

¹³ Appellant incorrectly stated [REDACTED]

[REDACTED]

(sealed)). In other words, appellant wishes to insinuate she was promiscuous—something universally rejected. *See United States v. Lauture*, 46 M.J. 794, 1997 CCA LEXIS 194, at *8 (Army Ct. Crim. App. 1997) (“Evidence of a victim’s unchaste history . . . may be misused by the fact-finder to conclude, for example, that whether or not the victim consented is not important because the victim ‘deserved it’ or ‘asked for it.’”). The military judge correctly caught this insinuation, [REDACTED]

[REDACTED]
[REDACTED] (App. Ex. XVII, p. 7 (sealed)).

Accordingly, the military judge did not abuse his discretion when he denied the defense motion.

B. Even assuming error, it was harmless beyond a reasonable doubt.

“If a military judge abuses his discretion by excluding evidence pursuant to Mil. R. Evid. 412, [this court] must then determine whether the military judge’s error was harmless beyond a reasonable doubt.” *United States v. Lopez*, ARMY 20100457, 2013 CCA LEXIS 603, at *12 (Army Ct. Crim. App. 30 July 2013) (mem. op.) (citing *United States v. Roberts*, 69 M.J. 23, 26 (C.A.A.F. 2010)). In assessing harmlessness, appellate courts assess the five *Van Arsdall* factors: (1) importance of the testimony; (2) whether the testimony was cumulative; (3) the presence or absence of corroborating or contradictory evidence on material points;

(4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution’s case. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

Here, appellant cross-examined Ms. [REDACTED] about how her “pasty”¹⁴ fell off in the first hotel room and how she “stayed in the room” when appellant left. (R. at 364; Def. Ex. C). They already presented this information to the panel when a defense witness testified that the officers found “a silicone pasty” on the floor between the two beds. (R. at 474). [REDACTED]
[REDACTED], appellant was able to insinuate through this line of questioning that *something* occurred in the room in order to make the pasty fall off. If anything, this detail benefitted appellant because it corroborated his later argument to the panel that she was already “very friendly” with him before they went to their own room. (R. at 526). Such information would be more valuable to appellant [REDACTED]
[REDACTED]

[REDACTED] Accordingly, even assuming error, it was harmless beyond a reasonable doubt. *See Lopez*, 2013 CCA LEXIS 603, at *12.

¹⁴ A “pasty” is an adhesive strapless bra that covers just the nipples. (R. at 313).

Assignment of Error IV

WHETHER THE SPECIFICATION OF THE CHARGE IS FACTUALLY AND LEGALLY SUFFICIENT.

Standard of Review

Questions of legal and factual sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Argument

Under Article 66(d)(1), UCMJ, this court may affirm only those findings of guilty that it finds correct in law and fact and determines, based on the entire record, should be affirmed. “The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (quoting *United States v. Gutierrez*, 73 M.J. 172, 175 (C.A.A.F. 2014)). In resolving questions of legal sufficiency, this court is “not limited to appellant’s narrow view of the record.” *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996) (citing *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993)). Instead, courts “draw every reasonable inference from the evidence of record in favor of the

prosecution.” *United States v. Winckelmann*, 70 M.J. 403, 406 (C.A.A.F. 2011) (quoting *United States v. Bright*, 66 M.J. 359, 365 (C.A.A.F. 2008)).

“The test for factual sufficiency is whether, after weighing the evidence of record and making allowances for not having personally observed the witnesses,” the court is “convinced of appellant’s guilt beyond a reasonable doubt.” *United States v. Craion*, 64 M.J. 531, 534 (Army Ct. Crim. App. 2006) (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). This court applies “neither a presumption of innocence nor a presumption of guilt,” but “must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.” *Washington*, 57 M.J. at 399.

A. Appellant’s conviction is legally sufficient.

Viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have convicted appellant of sexual assault. *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011). To sustain appellant’s sexual assault conviction, the government must prove: (1) appellant engaged in a “sexual act” upon another person, and (2) the accused did so by causing bodily harm. Article 120(b)(1), UCMJ; *MCM*, pt. IV, ¶ 45.a.(b)(1)(B). A “sexual act” is “contact between the penis and the vulva . . . however slight.” Article 120(g)(1), UCMJ; *MCM*, pt. IV, ¶ 45.a.(g)(1)(A). “Bodily harm” means “any offensive

touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact.” Article 120(g)(3), UCMJ.

Here, the government proved beyond a reasonable doubt that appellant sexually assaulted Ms. [REDACTED] when he got behind MS. [REDACTED] and inserted his penis into her vagina without her consent. (R. at 323–24; 383–85). When appellant penetrated her vulva with his penis, it met the definition of “sexual act.” Article 120(g)(1), UCMJ. Despite appellant’s attempt on cross-examination to focus on Ms. [REDACTED] outward displays of affection, he actually confirmed that when Ms. [REDACTED] bent over, she had “already said ‘No’ to sex multiple times at this point.” (R. at 385). Ms. [REDACTED] verbal protestations showed this touching was “offensive” and a “nonconsensual sexual act,” which meets the definition of bodily harm. Article 120(g)(3), UCMJ. Thus, when he pressed his hips into hers and penetrated Ms. [REDACTED] vulva without her consent, (R. at 323, 382, 386), any rational trier of fact could have found all of the elements of sexual assault beyond a reasonable doubt. *Rosario*, 76 M.J. at 117.

B. Appellant’s conviction is factually sufficient.

Taking a fresh, impartial look at the evidence, and applying neither a presumption of innocence nor a presumption of guilt, this court will also find appellant’s conviction to be factually sufficient. *Turner*, 25 M.J. at 325.

1. The immediate reactions of both Ms. [REDACTED] and appellant verify her testimony.

Appellant exceeded the scope of consent that Ms. [REDACTED] had provided and essentially tricked her into bending over so that he could insert his penis into her vagina. (R. at 323–24). Despite Ms. [REDACTED] steadfast resolve the entire time that she would not have sex with him, appellant pushed beyond the boundaries she set and sexually assaulted her. (R. at 321). The immediate reactions of both parties prove appellant’s guilt. *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”).

First, Ms. [REDACTED] left the hotel at approximately 0700. (R. at 329). By 0708, she already texted her close friend, [REDACTED] that she felt “like [she] was raped” and asked [REDACTED] “What should I do[?]” (Pros. Ex. 12); *see United States v. Owens*, ACM 38834, 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”). And—in an entirely consistent manner with her law enforcement report and court-martial testimony—Ms. [REDACTED] explained to [REDACTED] that they were “messaging around and he decided to force himself on me after I said no multiple times.” (Pros. Ex. 12). When another friend picked her up to take her to the hospital, he confirmed she was “very emotional, very distraught. She wasn’t the [REDACTED] that I know. . . she couldn’t contain herself.” (R. at 444). Ms. [REDACTED] “couldn’t stop crying.” (R. at

444); *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”).

Appellant, on the other hand, demonstrated consciousness of guilt. Once appellant stopped he said, “I guess you didn’t like that” to which she replied “no.” (R. at 324). This confirms he knew that Ms. [REDACTED] was a nonconsenting party while he was engaging in sexual intercourse with her, especially because during the assault Ms. [REDACTED] “immediately tensed up” and her “whole body language” changed. (R. at 387).¹⁵ This conversation demonstrates an acknowledgment that he had sexual intercourse with Mr. [REDACTED] without her consent.

2. Prior consensual sexual relations do not constitute consent.

Appellant essentially argues that because Ms. [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]. (Appellant’s Br. 24). However, it does not
matter [REDACTED]
[REDACTED].” (R. at 393). Appellant completed the sexual assault after

¹⁵ Appellant’s assertion that “Ms. [REDACTED] provided important and relevant information to the police only after SGT Tinsley provided the truth as to what happened between them” exaggerates the record. (Appellant’s Br. 25). Civilian law enforcement spoke with appellant and then followed up with Ms. [REDACTED] but the record is otherwise entirely absent as to appellant’s version of events. (R. at 377–78; 496).

he tricked Ms. [REDACTED] into bending over so that he could penetrate her from behind. (R. at 382). Appellant told her he simply wanted “to see what [she] look[ed] like bent over the bed.” (R. at 382). Ms. [REDACTED] choice to bend over was not an invitation for sex—it was her attempt to appease him so that she could go home. (R. at 383). The fact that she told appellant “no” multiple times before he penetrated her removes any reasonable doubt that she did not consent. (R. at 385–87).

3. The motives to fabricate that appellant alleges are unpersuasive.

Ms. [REDACTED] was a civilian victim—one that received no pecuniary, medical, or administrative benefit from reporting appellant’s sexual assault. *See* Army Reg. 600-20, Army Command Policy, para. 7-4 (24 July 2020) [AR 600-20] (generally limiting “SHARP Program” eligibility to “Soldiers and their dependent Family members who are 18 years and older”). She readily admitted her apprehension that “[i]f [she] came forward with this, then his life is going to be ruined.” (R. at 326). Yet, appellant posits that this court must find his convictions insufficient due to certain motives to fabricate. However, the record of trial debunks each of these motives and serves to confirm appellant’s conviction.

Ms. [REDACTED] did not accuse appellant of sexual assault because he “blocked her number.” (Appellant’s Br. 26). Instead, appellant blocked Ms. [REDACTED] *after* she texted him that what he did was wrong. (Pros. Ex. 2, pp. 11–12). Moreover, Ms. [REDACTED] had

already told her friend [REDACTED] “that she was raped” before appellant ever blocked her number. (R. at 429; Pros. Ex. 12). Indeed, because Ms. [REDACTED] shared to her friend in real time that appellant blocked her—after she already disclosed the assault—any such motive does not exist. (R. at 429).

Ms. [REDACTED] did not accuse appellant of sexual assault because she “was going to be late for her first day at the internship.” (Appellant’s Br. 26). As far as the record shows, this was only one day of a presumably semester-long internship to attain her psychology degree. (R. at 316). She was not going to flunk college due to one tardy morning. Instead, this was furthest from Ms. [REDACTED] mind when she decided what to do about the sexual assault the following morning, as she was actually more concerned about how her accusation would impact appellant’s future. (R. at 326).

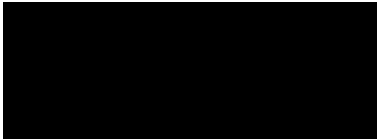
Finally, Ms. [REDACTED] did not falsely accuse appellant of sexual assault [REDACTED] [REDACTED] (Appellant’s Br. 26). In fact, she tried to [REDACTED] [REDACTED] (R. at 322). Appellant chose to pry her legs apart anyway. (R. at 374). She [REDACTED] [REDACTED], and certainly not a reason to turn around and blame the person she was trying to protect. (R. at 322).

Ultimately, the panel already took each of these factors into account when they saw and heard Ms. ■■■ testify, and still found appellant guilty. (R. at 554) (“[T]his court-martial finds you: Of the Charge and its Specification: Guilty.”). In a case like this, where the credibility assessment of witnesses is especially critical, this merits some deference. *See United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015) (en banc), *aff’d on other grounds*, 76 M.J. 224 (C.A.A.F. 2017) (“[T]he degree to which we ‘recognize’ or give deference to the trial court’s ability to see and hear the witnesses will often depend on the degree to which the credibility of the witness is at issue.”); *see also United States v. Feliciano*, ARMY 20140766, 2016 CCA LEXIS 512, at *8 (Army Ct. Crim. App. 22 Aug. 2016) (mem. op.) (when making credibility determinations on appeal, no deference is given to the factual sufficiency decisions of the trial court, but the “assessment of the evidence must be sifted through a filter that recognizes our inferior fact-finding viewpoint.”); *United States v. Crews*, ARMY 20130766, 2016 CCA LEXIS 127, at *11–12 (Army Ct. Crim. App. 19 Feb. 2016) (mem. op.) (a transcript cannot “reflect the pauses, intonation, defensiveness, surprise, calm reflection, or deception that is often apparent to those present at the court-martial.”).

Consequently, the evidence is sufficient for this court to “make its own independent determination [that] the evidence constitutes proof of each required element beyond a reasonable doubt.” *Washington*, 57 M.J. at 399.

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and the sentence as approved by the convening authority.



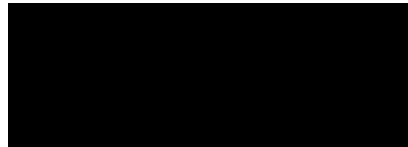
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APPENDIX

United States v. Crews

United States Army Court of Criminal Appeals

February 29, 2016, Decided

ARMY 20130766

Reporter

2016 CCA LEXIS 127 *

UNITED STATES, Appellee v. Sergeant JASON R.
CREWS, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by United States
v. Crews, 75 M.J. 369, 2016 CAAF LEXIS 552
(C.A.A.F., June 9, 2016)

Motion granted by United States v. Crews, 76 M.J. 37,
2016 CAAF LEXIS 1037 (C.A.A.F., Dec. 5, 2016)

Review granted by, in part United States v. Crews, 76
M.J. 70, 2017 CAAF LEXIS 156 (C.A.A.F., Jan. 25,
2017)

Affirmed by, Without opinion by United States v. Crews,
2017 CAAF LEXIS 560 (C.A.A.F., May 4, 2017)

Vacated by United States v. Crews, 2017 CAAF LEXIS
398 (C.A.A.F., May 5, 2017)

Motion denied by United States v. Crews, 2017 CAAF
LEXIS 479 (C.A.A.F., May 16, 2017)

Affirmed by United States v. Crews, 2017 CAAF LEXIS
485 (C.A.A.F., May 17, 2017)

Prior History: [*1] Headquarters, 1st Infantry Division
and Fort Riley. Gregory A. Gross, Military Judge,
Lieutenant Colonel John A. Hamner, Staff Judge
Advocate (pretrial), Colonel Craig E. Merutka, Staff
Judge Advocate (post-trial).

Core Terms

video, indecent exposure, lesser-included, touched,
specification, witnesses, deference, military, assault,
trial court, penis, instructions, daughter, exposure,
sitting, notice, sexual abuse of child, factual sufficiency,
indecent act, plain error, guilt, appellate court, hearsay,
playing, sexual

Case Summary

Overview

HOLDINGS: [1]-Testimony provided by two children and
a child's mother during a servicemember's trial on a
charge alleging that he committed rape of a child, in
violation of UCMJ art. 120b, 10 U.S.C.S. § 920b, that
was based on a conversation the mother had with her
six-year-old daughter after she viewed a video of the
servicemember interacting with the child, was inclusive
and not sufficient as a matter of law to sustain the
servicemember's conviction for the lesser-included
offense of sexual abuse of a child; [2]-The
servicemember waived his right to appeal the military
judge's decision to instruct the panel that indecent
exposure was a lesser-included offense of committing
an indecent act, in violation of UCMJ art. 120, 10
U.S.C.S. § 920, when he did not object to the
instruction, and the judge did not commit plain error
when he instructed the panel on indecent exposure.

Outcome

The court set aside the servicemember's conviction for
sexual abuse of a child and dismissed that charge,
affirmed the servicemember's conviction for indecent
exposure, set aside the servicemember's sentence, and
authorized a rehearing to determine a sentence on the
servicemember's conviction for indecent exposure.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial
Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts
Martial > Evidence > Weight & Sufficiency of
Evidence

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1 **Judicial Review, Courts of Criminal Appeals**

The United States Army Court of Criminal Appeals ("ACCA") has the independent duty to review the record to determine whether it is correct in law and fact. Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. § 866(c). The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The test for factual sufficiency, on the other hand, involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c) to take into account the fact that the trial court saw and heard the witnesses. In exercising this authority, the ACCA gives no deference to the decisions of the trial court (such as a finding of guilty), but does recognize the trial court's superior ability to see and hear the witnesses. In reviewing for factual sufficiency, the ACCA is limited to the facts introduced at trial and considered by the court-martial. The ACCA may affirm a conviction only if it concludes, as a matter of factual sufficiency, that the evidence proves an appellant's guilt beyond a reasonable doubt.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > US Court of Appeals for the Armed Forces

HN2 **Judicial Review, Courts of Criminal Appeals**

The United States Court of Appeals for the Armed Forces ("CAAF") does not share either the United States Army Court of Criminal Appeals' ("ACCA's") factual review authority or responsibility. Nonetheless, ACCA decisions are subject to review by the CAAF.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts

Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN3 **Judicial Review, Courts of Criminal Appeals**

The deference given to a trial court's ability to see and hear the witnesses and evidence—or "recognition" as phrased in Unif. Code Mil. Justice art. 66, 10 U.S.C.S. § 866—reflects an appreciation that much is lost when the testimony of live witnesses is converted into the plain text of a trial transcript. While court-reporter notes may sometimes reflect a witness's gesture, laugh, or tearful response, they do not attempt to reflect the pauses, intonation, defensiveness, surprise, calm reflection, or deception that is often apparent to those present at a court-martial. A panel hears not only a witness's answer, but may also observe the witness as he or she responds. To say that an appellate court is at a relative disadvantage in determining questions of fact as compared to a trial court is to state the obvious. In New York State—where the intermediate appellate court conducts a review for factual sufficiency—the intermediate appellate court gives great deference to the fact-finder's opportunity to view the witnesses, hear the testimony, and observe demeanor. However, neither the United States Army Court of Criminal Appeals nor the United States Court of Appeals for the Armed Forces has quite so clearly delineated the amount of deference due a trial court when conducting a factual sufficiency review.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts
Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN4 **Judicial Review, Courts of Criminal Appeals**

In *United States v. Johnson*, the United States Army Court of Military Review distinguished between evidence whose weight depended on the factfinder's assessment of credibility, and evidence where the

appellate court was at little or no disadvantage in reviewing the evidence. Similarly, in *United States v. Davis*, the United States Army Court of Criminal Appeals noted that the degree to which it recognizes or gives deference to a trial court's ability to see and hear the witnesses will often depend upon the degree to which the credibility of the witnesses is at issue.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN5 **Judicial Review, Courts of Criminal Appeals**

In *United States v. Johnson*, the United States Army Court of Military Review (now the United States Army Court of Criminal Appeals ("ACCA")) stated that Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. § 866(c), cautioned the court to bear in mind that a trial court saw and heard the witnesses, and that in cases where witness credibility played a critical role in the outcome of the trial, it hesitated to second-guess the court's findings. This was inartfully stated as it is the ACCA's duty to "second-guess" a court-martial's findings and the ACCA does not hesitate in that duty. However, the underlying concept—that more deference is due when credibility is key to determining the weight of the evidence—remains sound. The court of military review went on to say in *Johnson* that when the evidence does not depend on credibility determinations, its independence as a fact-finder should only be constrained by the evidence of record and the logical inferences emanating therefrom.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN6 **Judicial Review, Courts of Criminal Appeals**

The admonition that the United States Army Court of Criminal Appeals recognizes a court-martial panel's ability to see and hear the witnesses applies not only to credibility determinations, but also to weighing the evidence. Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. § 866(c).

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Witnesses

HN7 **Judicial Review, Standards of Review**

Children sometimes testify with shocking candor, but may also be easily manipulated on the stand. A dry transcript will contain some of these elements, but a trial court is far better positioned to determine the appropriate weight such testimony should be given.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Military & Veterans Law > ... > Courts Martial > Sentences > Maximum Limits

Military & Veterans Law > ... > Courts Martial > Sentences > Confinement

HN8 **Military Offenses, Rape & Sexual Assault**

The maximum authorized punishment for committing an indecent act in violation of Unif. Code Mil. Justice ("UCMJ") art. 120, 10 U.S.C.S. § 920, includes up to five years of confinement. Manual Courts-Martial ("MCM") pt. IV, para. 45.f.(6) (2008). The maximum authorized punishment for indecent exposure in violation of art. 120, 10 U.S.C.S. § 920, includes up to one year of confinement. MCM pt. IV, para. 45.f.(7) (2008). That is, a conviction on indecent exposure reduces the possible confinement that could be adjudged for that offense by 80 percent.

Criminal Law &
Procedure > Appeals > Reviewability > Waiver

Military & Veterans Law > Military Justice > Judicial
Review > Standards of Review

HN9 **Reviewability, Waiver**

Deviation from a legal rule is error unless the rule has been waived. Waiver is the intentional relinquishment or abandonment of a known right. Whether a particular right is waivable, whether a defendant must participate personally in the waiver, whether certain procedures are required for waiver, and whether a defendant's choice must be particularly informed or voluntary, all depend on the right at stake.

Criminal Law & Procedure > ... > Standards of
Review > Plain Error > Definition of Plain Error

Military & Veterans Law > Military Justice > Judicial
Review > Standards of Review

HN10 **Plain Error, Definition of Plain Error**

Under a plain error analysis, an appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the appellant.

Military & Veterans Law > Military Offenses

HN11 **Military & Veterans Law, Military Offenses**

The element of indecent exposure, in violation of Unif. Code Mil. Justice art. 120, 10 U.S.C.S. § 920, that requires the conduct to occur somewhere other than in front of his own family or household serves as a limitation on what conduct is indecent. That is, being seen naked by your own family—while an "exposure"—is not an indecent exposure.

Criminal Law & Procedure > ... > Standards of
Review > Plain Error > Burdens of Proof

Military & Veterans Law > Military Justice > Judicial
Review > Standards of Review

HN12 **Plain Error, Burdens of Proof**

When it comes to unpreserved error, the burden is on an appellant to establish prejudice. An appellant bears the burden of proving prejudice because he did not object at trial, and must show that under the totality of the circumstances, the Government's error resulted in material prejudice to his substantial, constitutional right to notice.

Military & Veterans Law > Military Offenses

HN13 **Military & Veterans Law, Military Offenses**

One commits indecent exposure, in violation of Unif. Code Mil. Justice art. 120, 10 U.S.C.S. § 920, when one intentionally exposes, in an indecent manner, the genitalia. Manual Courts-Martial pt. IV, para. 45.a.(n) (2008).

Counsel: For Appellant: Captain Matthew L. Jalandoni, JA (argued); Colonel Kevin Boyle, JA; Major Yolanda McCray Jones, JA; Captain Patrick J. Scudieri, JA (on brief); Colonel Mary J. Bradley, JA; Major Christopher D. Coleman, JA; Captain Patrick J. Scudieri, JA (on brief on specified issue).

For Appellee: Captain Timothy C. Donahue, JA (argued); Major Daniel D. Derner, JA; Captain James P. Curtin, JA (on brief); Colonel Mark H. Sydenham, JA; Major Daniel D. Derner, JA; Captain Timothy C. Donahue, JA (on brief on specified issue).

Judges: Before HAIGHT, PENLAND, and WOLFE, Appellate Military Judges. Senior Judge HAIGHT and Judge PENLAND concur.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION

WOLFE, Judge:

A panel composed of officer and enlisted members sitting as a general court-martial convicted appellant, contrary to his pleas, of indecent exposure (as a lesser-included offense of indecent acts) and sexual abuse of a child (as a lesser-included offense of rape of a child), in violation of Articles 120 and 120b, Uniform [*2] Code of Military Justice, 10 U.S.C. §§ 920 and 920b (2006 &

Supp. IV; 2012) [hereinafter UCMJ]. Appellant was arraigned on charges that included one specification of rape of a child (KG) under the age of 12 years, and one specification of indecent acts in the presence of Mrs. SG.¹ The convening authority approved the adjudged sentence of a dishonorable discharge, confinement for one year, forfeiture of all pay and allowances, and reduction to the grade of E-1.

Appellant's case is now before this court for review pursuant to Article 66(c), UCMJ. Appellant assigns two errors, both of which merit discussion, and one of which merits relief. Specifically, we find the evidence supporting appellant's conviction for sexual abuse of a child to be factually insufficient.

BACKGROUND

The facts surrounding this case all took place in 2012 in a neighborhood of family housing at Fort Riley, Kansas. While not strictly neighbors, appellant, KG, and Mrs. SG all lived within a few minutes' drive of each other. KG is the five-year-old daughter of an Army specialist who served in the same company as appellant. Appellant, however, did not have any supervisory relationship or [*3] responsibilities over KG's father. Mrs. SG was the wife of an Army soldier. Mrs. SG and KG are not related and lived in separate homes in the neighborhood.

DISCUSSION

A. Factual Sufficiency of Sexual Abuse of a Child

Appellant visited KG's house often. KG's mother testified that appellant stopped by nearly every workday during his lunch break for a brief visit, and often on weekends. During these visits, KG would ask appellant for piggyback rides, and crawl over him while he was on the floor. KG's mother testified that several times appellant volunteered to babysit KG, which she and her husband declined. Appellant was also very gracious with helping around the house, to include changing the brakes and oil on the family car, fixing the dryer, and assisting with an intra-post move to a one-story house necessitated by a back injury to KG's father.

KG had an electronic toy which in addition to playing math and reading games allowed the user to take short 30-second videos. In October of 2012, KG's mother was looking at the toy when she saw a video of appellant and KG that she found disturbing. She asked KG if anyone had ever done anything inappropriate with her. KG answered yes, and indicated [*4] that appellant had touched her genitals. During a subsequent child forensic interview, KG stated that appellant had touched her genitals and penetrated her vagina.

At trial, the government attempted to prove their case that appellant raped KG through the admission of the video and the testimony of KG, KG's mother, and the boy who filmed the video, DH. We will discuss each at length.

1. Facts

a) Testimony of KG's Mother

KG's mother was the government's first witness. She provided background information and the history of interactions between appellant and KG. Most crucially, she also testified to her daughter's statement that appellant had inappropriately touched KG's genitals. Her key testimony was as follows:

Q [TC]: Has anything between your family and Sergeant Crews changed that relationship?

A: The instant [sic] that happened with our daughter.

Q: Can you tell the panel members a little bit about that?

A: It was one September evening, my friend has just gotten back from her grandmother's funeral. So we had a little barbeque and [appellant] was also over there with us, and we were just -- all the adults were outside and the kids were playing in [KG's] bedroom. And my daughter had one of [*5] those Leap Frogs that records videos and stuff. And I actually didn't notice it until October, but I was watching the video and it was actually recorded with [appellant] sitting on the edge of my daughter's bed with her completely covered underneath the jacket sitting on his lap, and that is when I discovered it. And I went and told my husband about it because he was in the bathroom -- and our daughter was in the living room when I discussed it with him; and I had walked back into the living room to ask her if anybody had done anything that she thought was wrong, and she shook her head yes; and I asked her, "Who?" I never said any name, but

¹ A third charge of indecent language was dismissed after arraignment.

she said, "Sergeant Crews," and I asked her, "What did he do?" and she doesn't know the term names for her body parts because she is only six, but I asked her can -- I said, "Can you show me where he touched you?" and she proceeded to move the blanket and pointed down to her vaginal area, and that is how I discovered what had happened in her bedroom.

KG's mother further clarified that she discovered the video about a month and a half after it was taken. The defense did not object to KG's mother's testimony as hearsay or otherwise. The record provides [*6] no basis to believe that a plausible hearsay exception would have applied.²

b) The Video

The video, which was admitted over defense objection, is somewhat grainy.³ Additionally, the video's camerawork reflects the fact that the video was taken by KG's friend, DH, a six-year-old neighborhood boy.

At the outset of the 30-second video, appellant is seen sitting on the edge of KG's bed. KG is sitting on appellant's lap and has a large adult jacket wrapped around her midsection and waist. Approximately halfway through the video, KG pulls the jacket over her head while appellant embraces KG by the waist with his left arm, [*7] which remains above the jacket. However, appellant then places his hand beneath the jacket, although his upper arm, elbow, and parts of his forearm remain visible. The angle of his forearm makes it possible that appellant has placed his hand near either KG's stomach or pelvic area. The video ends a few seconds later.

c) Testimony of KG

At trial KG's mother generally testified consistently with her initial statement to investigators and her testimony at the Article 32, UCMJ, investigation. KG, however, did

not. While KG answered some initial background questions, such as the name of her dog, her answer to every question of substance on direct exam was "I don't know."⁴

d) Testimony of DH

Finally, the government called DH, the boy who recorded the video. DH's direct testimony, at least when reduced to a written transcript, could generously be described as muddled. It appears that DH, who the government [*8] relied on in authenticating the video, hadn't seen the video at any time between when it was first filmed and when it was played in court. DH at times appears to testify about videos he made which were not admitted into evidence. When recounting a conversation he had with his mother (where he told his mother that KG "got touched in the private") he appears to confuse counsel's questions about where he was when he was talking to his mother, and where he was when KG was touched. DH testified he saw KG get touched, and immediately thereafter said he did not see it. In short, it is not possible to make any sense of DH's testimony one way or the other with respect to the charged misconduct he was called to testify about.

e) The Defense Case

The defense case-in-chief consisted of several witnesses. The first, a child psychologist, testified as an expert witness about child memories. The defense also called several character witnesses who had daughters the same age as KG. After laying the foundation that appellant also spent a lot of time playing with their kids, they testified that they had high opinions of appellant's "character towards children"⁵ and that he was helpful.

2. Law

On appeal, appellant claims that the evidence of child

²We note of course that as there was no objection, the government did not attempt to lay down a foundation for a hearsay exception. Our review of the record, to include the criminal investigation, Article 32, UCMJ, investigation, and other allied papers attached to the record under Rule for Courts-Martial [hereinafter R.C.M.] 1103, does not reveal any indication of an applicable exception, such as an excited utterance.

³Testimony at trial revealed that a technician was unable to digitally copy the video. Instead the copy presented at trial was made by filming the screen of the video player.

⁴The record does not indicate any request for remote live testimony under R.C.M. 914A, or any other accommodation to assist a six-year-old testifying about a difficult subject. Nor was there any attempt by the trial counsel to declare KG unavailable and admit her testimony at the Article 32 investigation. See Mil. R. Evid. 804(a)(3).

⁵The testimony was [*9] admitted without objection and it is not necessary for us to address whether this was testimony about the appellant's *behavior* around children, or whether it was a pertinent character trait and admissible under Mil. R. Evid. 404(a)(1).

sexual abuse is factually insufficient to support the conviction. In response, the government argues that KG's hearsay statement to her mother, in light of the video, is sufficient.⁶

Nonetheless, **HN1**[↑] we have the independent duty to review the record to determine whether it is correct in law *and* fact. UCMJ art. 66(c). The test for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact **[*10]** could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560, (1979); *see also United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011). The test for factual sufficiency, on the other hand, "involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c), UCMJ, to take into account the fact that the trial court saw and heard the witnesses." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). In exercising this authority this court gives no deference to the *decisions* of the trial court (such as a finding of guilty), but does recognize the trial court's superior ability to see and hear the witnesses. *Id.* (A court of criminal appeals gives "no deference to the decision of the trial court" but is required to adhere to the admonition to take into account the fact that the trial court saw and heard the witnesses).

In reviewing for factual sufficiency we are limited to the facts introduced at trial and considered by the court-martial. *United States v. Beatty*, 64 M.J. 456 (C.A.A.F. 2007). Thus, for example, we do not consider KG's unadmitted pretrial statements, no matter how compelling, in determining whether there was sufficient evidence to support the findings. We may affirm a conviction only if we conclude, as a matter of fact **[*11]** sufficiency, that the evidence proves appellant's guilt beyond a reasonable doubt. *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002); *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987).

⁶The government's brief argued only that the evidence was legally sufficient. That is, the government argued that "[w]hen viewed in a light most favorable to the government, there was sufficient evidence for a rational fact finder to find beyond a reasonable doubt that appellant sexually abused a child under the age of twelve." At oral argument, the government made clear that the position of the United States was that the evidence was both legally and factually sufficient.

HN2[↑] Our superior court does not share either our factual review authority or responsibility. *Compare* Article 66 *with* Article 67, UCMJ. Nonetheless, our decisions are subject to review by the United States Court of Appeals for the Armed Forces (C.A.A.F.). *United States v. Nerad*, 69 M.J. 138, 140 (C.A.A.F. 2010) ("[W]hile CCAs have broad authority under Article 66(c), UCMJ, to disapprove a finding, that authority is not unfettered. It must be exercised in the context of legal—not equitable—standards, subject to appellate review.").

3. Analysis

This case, somewhat uniquely, raises the degree to which we recognize the trial court's superior position in seeing and hearing the evidence. Accordingly, and as we find the evidence factually insufficient, we believe it wise to discuss how we arrive at our conclusion in light of these considerations.

HN3[↑] The deference given to the trial court's ability to see and hear the witnesses and evidence—or "recogni[tion]" as phrased in Article 66, UCMJ—reflects an appreciation that much is lost when the testimony of live witnesses is converted into the plain text of a trial transcript. While court-reporter notes may sometimes reflect a witness's gesture, laugh, or tearful response, **[*12]** they do not attempt to reflect the pauses, intonation, defensiveness, surprise, calm reflection, or deception that is often apparent to those present at the court-martial. A panel hears not only a witness's answer, but may also *observe* the witness as he or she responds. For instance, a transcript may state "I am showing the witness prosecution exhibit 13 for identification" but will leave unstated the witness's demeanor—whether surprise, recognition, or dread, when reviewing or confronted with evidence.

To say that an appellate court is at a relative disadvantage in determining questions of fact as compared to a trial court is to state the obvious. In New York State—the only other jurisdiction we are aware of where the intermediate appellate court conducts a review for factual sufficiency—the intermediate appellate court gives "[g]reat deference . . . to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor." *People v. Romero*, 7 N.Y.3d 633, 644, 859 N.E.2d 902, 826 N.Y.S.2d 163 (2006) (emphasis added) (quoting *People v. Bleakley*, 69 N.Y.2d 490, 495, 508 N.E.2d 672, 515 N.Y.S.2d 761 (1987)). However, neither this court, nor our superior

court, has quite so clearly delineated the amount of deference due the trial court when conducting a factual sufficiency review.

HN4 [↑] In *United States v. Johnson*, 30 M.J. 930, 934 (A.C.M.R. 1990), [*13] we distinguished between evidence whose weight depended on the factfinder's assessment of credibility, and evidence where the appellate court was at little or no disadvantage in reviewing the evidence.⁷ Similarly, and more recently, in *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015) (en banc), we noted that "the degree to which we 'recognize' or give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witnesses is at issue."

As related above, the government sought to introduce four substantive components of evidence to support the conviction involving KG: First, KG's mother testified that KG had told her that appellant had touched her sexually; second, a video, that while certainly concerning, does not explicitly depict any sexual touching; third, the government's attempt to present testimony by the alleged victim, KG; and fourth, the testimony of DH, who stated both that he saw and didn't see appellant touch KG's "privates."

With regards to the video, our ability to review the evidence and assign it proper weight is nearly identical to that of the panel members.⁸ The record of trial

contains the same digital copy of the video that was played for the members. It is what it is. While the video was relevant evidence that explains how the allegations came to light, as well as demonstrating opportunity, the video does not explicitly depict a sexual assault.

While we give little or no deference to the trial court's weighing of a video, the testimony of the two child witnesses falls on the other side of the spectrum. **HN7** [↑] Children sometimes testify with shocking candor, but may also be easily manipulated on the stand. A dry transcript will contain some of these elements, but the trial court is *far* better positioned to determine the appropriate weight such testimony should be given.

Nonetheless, the testimony of the two child eyewitnesses does not support the court-martial's findings. KG's testimony of "I don't know" can be interpreted in two ways: first, as some evidence that the assault did not happen; or second, that she was essentially refusing to answer any questions. Neither interpretation provides evidence of appellant's guilt. Similarly, it is hard to draw any inferences, one way or the other, from DH's internally contradictory testimony. Even applying the "great deference" standard employed by New York intermediate appellate courts, see, e.g. *Romero*, 7 N.Y.3d at 644, the testimony of the [*16] two children in this case does not weigh in favor of appellant's guilt.⁹

Accordingly, the only evidence of weight of appellant's guilt is the testimony of KG's mother. As discussed above, KG's mother had no firsthand evidence of the offense. Rather, the inculpatory evidence consisted of repeating KG's statements that appellant had touched her inappropriately. While these unobjected-to hearsay statements were admitted for their truth—and we consider them as such—the lack of an applicable hearsay exception is concerning. Additionally, as recounted at trial, the key statement by KG was in response to a leading question from her mother. After KG indicated that appellant had done something wrong, her mother asked "can you show me where he touched you" which presupposed that an inappropriate touch was the "something wrong."

Having reviewed the entire record, we are not convinced beyond a reasonable doubt that appellant committed the offense of sexual abuse of a child. The evidence in this case did not "exclude every fair and reasonable

⁷ **HN5** [↑] In *Johnson* we stated that Article 66(c), UCMJ, "cautions us to bear in mind that 'the trial court saw and heard the witnesses.' Thus, in cases where witness credibility plays a critical role in the outcome of the trial, we hesitate to second-guess the court's findings." 30 M.J. at 934 (citation omitted). This was inartfully stated as it is our duty to "second-guess" a court-martial's findings and we do not hesitate in this duty. However, the underlying concept—that more deference is due when credibility is key to determining the weight of evidence—remains sound. We went on to say in *Johnson*, for example, that when the evidence does not depend on credibility determinations, "our independence as a fact-finder should only [*14] be constrained by the evidence of record and the logical inferences emanating therefrom." *Id.*

⁸ We say "nearly identical" for two reasons. First, the panel members had the ability to observe the witness's reaction when the video was played in court. Second, **HN6** [↑] the [*15] admonition that we recognize the panel's ability to see and hear the witnesses applies not only to credibility determinations, but also to "weigh[ing] the evidence." UCMJ art. 66(c).

⁹ In its brief the government does not rely on either child's testimony in arguing in favor of affirmance.

hypothesis of the evidence except that of guilt." Dep't [*17] of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook [hereinafter Benchbook], para. 8-3 (10 Sept. 2014). Accordingly, we will set aside the finding of guilty in our decretal paragraph.

B. Indecent Exposure

During the course of appellant's friendship with KG's family, he was also introduced to Mrs. SG. Mrs. SG was an adult woman also living in family housing on Fort Riley. Appellant would stop by and talk to Mrs. SG while she was sitting outside on her porch. At trial, however, one instance stood out in her mind.

Mrs. SG stated she was sitting on her porch talking with appellant. She stated it was a perfectly normal conversation, until it suddenly wasn't. Specifically, she testified it got awkward when appellant unbuttoned his ACU pants, took out his penis, and began "messaging" with himself by stroking his penis. Mrs. SG estimated this went on for twenty minutes while she tried to ignore what appellant was doing and concentrated on her laptop. She stated she discussed this event with her husband that night but decided not to report the incident as it did not happen again.

Prior to instructing the members on findings, the military judge conducted an Article 39(a), UCMJ, session [*18] to discuss instructions. Specifically, the military judge addressed whether indecent exposure was a lesser-included offense of indecent acts:

MJ: Now regarding Charge II and its Specification as I mentioned in the 802 conference this morning I saw one lesser include [sic] of indecent exposure; does either side want to be heard on that?

DC: No, Your Honor.

At the end of the Article 39(a), UCMJ, session, and again at several more instances during the remainder of the trial, the defense did not object to the military judge's proposed instruction on the lesser-included offense.¹⁰

¹⁰ HN8 [↑] The maximum authorized punishment for an indecent act includes up to five years of confinement. See *Manual for Courts-Martial, United States* (2008 ed.) [hereinafter *MCM*, 2008 ed.] pt. IV, ¶ 45.f.(6). The maximum authorized punishment for indecent exposure includes up to one year of confinement. *MCM*, 2008 ed. at ¶ 45.f.(7). That is, a conviction on indecent exposure reduced the possible confinement that could be adjudged for that offense [*19] by 80%.

After being notified of the issue first at a R.C.M. 802 conference, and later at the Article 39(a), UCMJ, session, the defense chose not to object to the instruction on the lesser-included offense.

We find that this amounted to an affirmative waiver of the matter.

HN9 [↑] "Deviation from a legal rule is 'error' unless the rule has been waived." *United States v. Olano*, 507 U.S. 725, 732-33, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). Waiver is the "intentional relinquishment or abandonment of a known right." *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008) (quoting *United States v. Olano*, 507 U.S. 725, 732-33, 113 S. Ct. 1770, 123 L. Ed.2d 508 (1993)). "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *Id.* (quoting *Olano*, 507 U.S. at 733).

United States v. Girouard, 70 M.J. 5, 10 (C.A.A.F. 2011). In *Girouard*, the court found that waiver was not present, because (unlike this case), the case law governing what constituted a lesser-included offense had changed between trial and appeal. That is, the defense counsel in *Girouard* did not intentionally relinquish a known right, as the right had not yet been clearly identified in *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010). The present case was tried well after *Jones*. Here, the military judge specifically notified the defense that he intended to instruct on the lesser-included offense of indecent exposure, and the defense declined the military judge's invitation to be heard on the matter. Moreover, the defense was provided a copy of the written instructions to [*20] review, and heard the instructions given to the panel. In each instance, the elements of the two offenses in question were laid out one after the other without objection. Under the circumstances of this case, this constituted waiver.

Even assuming that an objection to the instruction on the lesser-included offense of indecent exposure was not affirmatively waived, the failure to object to the instructions forfeited the objection, absent plain error. R.C.M. 920(f); *United States v. Tunstall*, 72 M.J. 191, 193 (C.A.A.F. 2013); see also *United States v. Wilkins*, 71 M.J. 410, 412 (C.A.A.F. 2012) (citing *United States v. Arriaga*, 70 M.J. 51, 54 (C.A.A.F. 2011)); *Davis*, 75 M.J. 537.

HN10 [↑] "Under a plain error analysis, [an appellant] 'has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused.'" *Tunstall*, 72 M.J. at 193-94 (quoting *Girouard*, 70 M.J. at 11).

Applying the elements test, appellant claims that the military judge committed error as an "indecent act does not require proof of an additional element not found in the instruction for indecent exposure" and that "proof of indecent exposure requires proof that the exposure was intentional and that it was made at a place where the conduct could reasonably be expected to be viewed by people other than members of the accused's family or household."

We first note that a reasonable panel could [*21] have credited the testimony that appellant pulled out and exposed his penis on Mrs. SG's front porch, but not credited the testimony that he then stroked his penis for twenty minutes while she continued to work on her computer. That is, the panel could have credited the evidence supporting the *exposure*, while not crediting the *act* of masturbation.

We also note that **HN11** [↑] the element of indecent exposure that requires the conduct to occur somewhere other than in front of his own family or household serves as a limitation on what conduct is indecent. That is, being seen naked by your own family—while an "exposure"—is not an indecent exposure. Appellant was charged with exposing his penis to Mrs. SG, a person he clearly knew not to be a member of his family. Moreover, as charged, the specification alleged that appellant pulled out his penis and stroked it on the front porch of Mrs. SG. That is, as charged, appellant's exposure of his penis was an intentional act, committed in public; it was not an accidental or negligent exposure or an exposure in front of his family.

HN12 [↑] When it comes to unpreserved error, the burden is on the appellant to establish prejudice. *Wilkins*, 71 M.J. at 413; *United States v. Humphries*, 71 M.J. 209, 217 n.10. "Appellant bears the burden of [*22] proving prejudice because he did not object at trial. Appellant must show 'that under the totality of the circumstances in this case, the Government's error . . . resulted in material prejudice to [his] substantial, constitutional right to notice.'" *Wilkins*, 71 M.J. at 413 (alterations in original) (quoting *Humphries*, 71 M.J. at 215) (internal citation omitted).


In *Wilkins* the United States Court of Appeals for the

Armed Forces (C.A.A.F.) found that the military judge committed error by instructing the panel on abusive sexual contact as a lesser-included offense of aggravated sexual assault based on how the offense was charged. However, as the appellant had not objected at trial, the C.A.A.F. tested for plain error. The C.A.A.F. found that the appellant was "on notice of all of the elements he had to defend against." *Wilkins*, 71 M.J. at 414. Additionally, the lesser-included offense did not change the defense's strategy at trial. *Id.* Thus while finding error, and finding that it was plain and obvious, the court affirmed the findings as the appellant in *Wilkins* did not carry his burden of demonstrating a material prejudice to a substantial right. *Id.* at 413 ("Appellant has not met this burden because he cannot establish prejudice to his ability to defend against [*23] the charge he was convicted of or his right to notice."). *Cf. United States v. Riggins*, 75 M.J. 78, 85 (C.A.A.F. 2016) (preserved constitutional error reviewed for harmlessness beyond a reasonable doubt).

In the present case, appellant does not even attempt to meet his burden. While appellant's brief identifies that plain error is the appropriate test, the brief addresses only the first prong of the plain error test, and does not address whether the error was plain or obvious, and if so, how the error resulted in a material prejudice to a substantial right of appellant. Accordingly, appellant has failed to meet his burden and is not entitled to relief. Even if we were to attempt to meet appellant's burden for him regarding the plain and obvious nature of the error, we find that as in *Wilkins*, the instruction on the lesser-included offense did not deprive appellant of notice regarding what he was defending against or alter his trial strategy. The defense in this case did not hinge on whether appellant's actions were an exposure or an indecent act. Rather, the defense's case claimed that the charged misconduct simply never happened, a theory that applies with equal force to both indecent acts and indecent exposure.

Finally, setting aside whether [*24] appellant waived, forfeited, or met his plain error burden in this case, we find that this issue is controlled by our superior court's decision in *United States v. Rauscher*, 71 M.J. 225 (C.A.A.F. 2012). In that case, the appellant was charged with assault with intent to commit murder (a violation of Article 134), but convicted of the lesser-included offense of aggravated assault with a dangerous weapon or means likely to cause death or grievous bodily harm (a violation of Article 128). *Id.* In a per curiam opinion, our superior court never addressed the elements test to determine whether aggravated assault is a lesser-

included offense of assault with intent to commit murder. Rather, the C.A.A.F. looked at the words of the specification which alleged that the appellant committed "an assault . . . by stabbing [the victim] in the hand and chest with a knife." *Id.* at 226. *Id.* The court was "convinced that the specification clearly allege[d] every element of [aggravated assault]." *Id.* That is, an elements test is unnecessary if the specification itself alleges the lesser-included offense in question.

In this case, the specification alleged that appellant did "wrongfully commit indecent conduct, to wit: pulling his penis out and openly stroking it with his hand [***25**] in the presence of [SG]." **HN13** One commits indecent exposure when one "intentionally exposes, in an indecent manner, the genitalia" *MCM*, 2008 ed. at ¶ 45.a.(n). As every element of indecent exposure was contained in the specification, appellant was on notice that he was charged with indecent exposure. *Jones*, 68 M.J. at 472 ("The charge sheet itself gives content to that general language, thus providing the required notice of what an accused must defend against.").

CONCLUSION

The finding of guilt to the Specification of Charge I, sexual abuse of a child, is set aside and that charge and its specification are DISMISSED. The finding as to the Specification of Charge II, indecent exposure, is AFFIRMED. The sentence is set aside. In accordance with R.C.M. 810, a sentence rehearing is authorized. All rights, privileges, and property of which appellant has been deprived by virtue of that portion of the findings and sentence set aside by our decision, are ordered restored. See UCMJ arts. 58b(c) and 75(a).

Senior Judge HAIGHT and Judge PENLAND concur.

United States v. Feliciano

United States Army Court of Criminal Appeals

August 22, 2016, Decided

ARMY 20140766

Reporter

2016 CCA LEXIS 512 *

UNITED STATES, Appellee v. Private E-2 JEFFRY A. FELICIANO, JR., United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review granted by, in part United States v. Feliciano, 76 M.J. 37, 2016 CAAF LEXIS 1042 (C.A.A.F., Dec. 5, 2016)

Motion denied by United States v. Feliciano, 76 M.J. 131, 2017 CAAF LEXIS 178 (C.A.A.F., Feb. 16, 2017)

Affirmed by United States v. Feliciano, 2017 CAAF LEXIS 482 (C.A.A.F., May 17, 2017)

Prior History: [*1] Headquarters, I Corps. Andrew J. Glass, Military Judge (arraignment), Samuel A. Schubert, Military Judge (trial), Colonel Randall J. Bagwell, Staff Judge Advocate (pre-trial), Lieutenant Colonel Christopher A. Kennebeck, Acting Staff Judge Advocate (post-trial).

Core Terms

military, sentencing, specification, unsworn statement, instructions, witnesses, credibility, sex offender registration, attempted sexual assault, court-martial, offenses, deliberations, convicted, offender, pulled, sex

Case Summary

Overview

HOLDINGS: [1]-The court discussed three issues in this appeal. First, it addressed the servicemember's assigned errors that the evidence was legally and factually insufficient, and after reviewing the record, it affirmed the findings as factually and legally sufficient in all but one regard; [2]-Next, it determined that the servicemember's two convictions for attempted sexual assault were unreasonably multiplied when there was only a single attempt. Accordingly, it conditionally dismissed one of the specifications; [3]-Finally, the court discussed the military judge's instructions to the panel on sex offender registration. As the military judge's actions were entirely in accord with Talkington, there was no error, and the servicemember was not entitled to any relief.

Outcome

The finding of guilty of Specification 1 Charge I was conditionally dismissed. The court affirmed only so much of the finding of guilty of Specification 2 of Charge I as the court described. The remaining findings of guilty were affirmed. Reassessing the sentence, the court affirmed the sentence as approved by the convening authority.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts
 Martial > Evidence > Weight & Sufficiency of Evidence

HN1[] Judicial Review, Standards of Review

In accordance with Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. § 866(c), the court of criminal appeals reviews issues of legal and factual sufficiency de novo. The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. In resolving questions of legal sufficiency, the court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. 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 itself convinced of the accused's guilt beyond a reasonable doubt.

Military & Veterans Law > ... > Courts
 Martial > Evidence > Weight & Sufficiency of Evidence

HN2[] Evidence, Weight & Sufficiency of Evidence

In Davis, the court noted that the degree to which it recognizes or gives deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witness is at issue. At least as far back as 1990, the court discussed the degree of deference given to a trial court's ability to see the witnesses, inartfully stating that the court hesitates to second-guess a trial court's findings that depend on credibility determinations. Put differently, the court is required to make credibility determinations on appeal, but those determinations are made with the "admonition" that it recognizes the trial court's superior position in making those determinations. Thus, while the court gives no deference to the factual sufficiency decisions of the trial court, its assessment of the evidence must be sifted through a filter that recognizes its inferior fact-finding viewpoint.

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Registration

Military & Veterans Law > Military Justice > Courts
 Martial > Sentences

HN3[] Sex Offenders, Registration

In Talkington, the U.S. Court of Appeals for the Armed Forces decided that sex offender registration is: 1) a collateral effect of findings not sentencing; and 2) is a consequence that is separate and distinct from the court-martial process. The Talkington court then found no error in the military judge having told the panel that sex offender registration "should not be a part of your deliberations." The court in Talkington was fully aware of the dilemma this caused, stating that there is a tension between the scope of pre-sentencing unsworn statements and the military judge's obligation to provide proper instructions. However, the Court did not address the tension because it was not raised.

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Registration

Military & Veterans Law > Military Justice > Courts
 Martial > Sentences

HN4[] Sex Offenders, Registration

In the court's view, the "tension" described in Talkington is best resolved by allowing the military judge to limit unsworn statements to the matters allowed under the rules. Such a resolution is per se not prejudicial, is in accord with the rules for court-martial, and properly reflects the military judge's role as the presiding officer. The status quo, where the military judge is prohibited from enforcing the rules for courts-martial, is at least problematic. Additionally, such an interpretation prevents the prejudice to an accused that may arise when a panel is told to give no weight to portions of an accused's unsworn statement.

Counsel: For Appellant: Lieutenant Colonel Charles D. Lozano, JA; Major Christopher D. Coleman, JA; Captain Jennifer K. Beerman, JA (on brief).

For Appellee: Colonel Mark H. Sydenham, JA; Major Daniel D. Derner, JA; Captain Steve T. Nam, JA (on brief).

Judges: Before CAMPANELLA, PENLAND, and WOLFE, Appellate Military Judges. Senior Judge CAMPANELLA and Judge PENLAND concur.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION

WOLFE, Judge:

We discuss three issues in this appeal.¹ First, we address appellant's assigned errors that the evidence is legally and factually insufficient. After reviewing the record, we find the evidence both legally and factually sufficient. Next, we determine that appellant's two convictions for attempted sexual assault were unreasonably multiplied when there was only a single attempt. Accordingly, we conditionally dismiss one of the specifications. Finally, we discuss the military judge's instructions to the panel on sex offender registration. As we [*2] find the military judge did not commit error, we order no relief.

At a general court-martial, appellant pleaded guilty to one specification of disrespect towards a non-commissioned officer, one specification of disobeying a non-commissioned officer, two specifications of wrongfully using marijuana, and one specification of being disorderly, in violation of Articles 91, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 891, 912a, 934 (2012) [hereinafter UCMJ]. Contrary to his pleas, an officer and enlisted panel convicted appellant

of two specifications of attempted sexual assault in violation of Article 120, UCMJ. The court-martial sentenced appellant to be discharged from the Army with a bad-conduct discharge, to be confined for one year, to forfeit all pay and allowances, and to be reduced to the grade of E-1. The convening authority approved the sentence as adjudged.

BACKGROUND

On 22 January 2011, appellant, Specialist (SPC) Schwartz and Private (PV2) KF went out drinking. As the night out [*3] concluded, SPC Schwartz drove the trio back to the barracks. En route, they were pulled over by the police. Specialist Schwartz barely passed a breathalyzer test. The officer released them after determining that SPC Schwartz was the *most* sober individual. They then drove back to the barracks, stopping to buy more alcohol. When they returned to the barracks, appellant and PV2 KF continued drinking. Eventually, all three went to bed in appellant's bed. Specialist Schwartz, however, eventually left the bed to sleep in a nearby chair. Specialist Schwartz awoke a short time later to see appellant on top of PV2 KF. Appellant was holding himself up with one hand while "starting to pull his britches down" with the other. Specialist Schwartz testified that PV2 KF's "britches" were around her knees. Later he answered the question, "where were her pants?" by saying "By her knees." He also testified that she was saying "no, no, no" and that she was in "a state of unconsciousness" and was "passed out." SPC Schwartz confronted appellant and told appellant that "what he was doing was rape" and "that if he continued along they would definitely get him for rape. . . ." Appellant responded by saying [*4] "You know what? You're right" and got off of PV2 KF.

Private KF was not called by the government. She testified briefly for the defense. Appellant did not testify.

LAW AND ANALYSIS

A. Factual and Legal Sufficiency

HN1 [↑] In accordance with Article 66(c), UCMJ, we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is

¹ Appellant also personally raised several issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Except for appellant's claim of unreasonable multiplication of charges, the matters raised by appellant warrant neither discussion nor relief.

"whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (internal citations omitted); see also *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). In resolving questions of legal sufficiency, we are "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, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325.

Appellant's claim that the evidence is legally and factually insufficient boils down to questioning the credibility of SPC Schwartz. By the time of trial, SPC Schwartz had been chaptered out of the Army for using marijuana. The [*5] defense called five witnesses who said SPC Schwartz had a reputation for being untruthful. Additionally, the defense elicited from SPC Schwartz that he was a reluctant witness and that he was testifying, at least in part, in order to get the per diem accorded to travelling witnesses. The government responded that none of the reputational witnesses were aware of SPC Schwartz ever lying to them, and that he was entirely honest when directly confronted.

The following exchange between the defense counsel and SPC Schwartz demonstrates his bluntness while testifying:

Q: And you've already testified that you're not employed at all so you're not getting any money from an employer? A: No, sir.

Q: Now, you are getting per diem for participating in this trial, aren't you?

A; Yes, sir.

Q: So they're paying you a few hundred dollars to come out here and be present?

A: I guess. I haven't been told anything really about any money.

Q: And outside in this waiting room just a few minutes ago you said "I don't care about this. I'm just doing this for the money?"

A: I don't care about this. Even when [appellant and PV2 KF] were in my life, they were menial [sic] people to me.

Q: And you're just doing this for [*6] the money?

A: I'm doing this to tell the truth. Also for the money.

Q: Get a few hundred extra dollars?

A: Oh, yeah. Everybody can use some money.

A short while later, the trial counsel attempted to rehabilitate SPC Schwartz and give him an opportunity to explain why he was testifying. The trial counsel was only partially successful:

Q: Mr. Schwartz, why are you testifying today?

A: Well, I told that girl back in 2011 that I would do whatever she decided. I mean, it took quite a while for her to decide what she was going to do. And I feel that it's right to testify for her. But at the same time, I do need the money. I am having a baby and I am unemployed. So yes, I do need the money.

Certainly, appellant's view that SPC Schwartz's testimony presents clear evidence of bias is a reasonable one. However, on the other hand, SPC Schwartz's lack of defensiveness may also be viewed as a display of unusual candor. Specialist Schwartz did not shy away from the allegation of bias.

In *United States v. Crews* we discussed the relative disadvantage of an appellate court in attempting to assess credibility from a cold transcript:

The deference given to the trial court's ability to see and hear the witnesses [*7] and evidence—or "recogni[tion]" as phrased in Article 66, UCMJ—reflects an appreciation that much is lost when the testimony of live witnesses is converted into the plain text of a trial transcript. While court-reporter notes may sometimes reflect a witness's gesture, laugh, or tearful response, they do not attempt to reflect the pauses, intonation, defensiveness, surprise, calm reflection, or deception that is often apparent to those present at the court-martial. A panel hears not only a witness's answer, but may also observe the witness as he or she responds. For instance, a transcript may state "I am showing the witness prosecution exhibit 13 for identification" but will leave unstated the witness's demeanor—whether surprise, recognition, or dread, when reviewing or confronted with evidence.

To say that an appellate court is at a relative disadvantage in determining questions of fact as compared to a trial court is to state the obvious.

United States v. Crews, ARMY 20130766, 2016 CCA LEXIS 127, at *11-12 (Army. Ct. Crim. App. 29 Feb. 2016). Similarly, HN2 [↑] in *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015) (en banc), we noted that "the degree to which we 'recognize' or

give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witness [*8] is at issue." At least as far back as 1990, we discussed the degree of deference given to a trial court's ability to see the witnesses. *United States v. Johnson*, 30 M.J. 930, 934 (A.C.M.R. 1990) (inartfully stating that we "hesitate to second-guess" a trial court's findings that depend on credibility determinations).

Put differently, we are required to make credibility determinations on appeal, but those determinations are made with the "admonition" that we recognize the trial court's superior position in making those determinations. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Thus, while we give no deference to the factual sufficiency decisions of the trial court, *Id.*, our assessment of the evidence must be sifted through a filter that recognizes our inferior fact-finding viewpoint.

With this recognition, we assess SPC Schwartz to be credible. Accordingly we affirm the findings as factually and legally sufficient in all but one regard. As alleged, appellant was charged with, and found guilty of, attempted sexual assault by pulling down PV2 KF's pants *and* underwear. The record is devoid of any evidence, regardless of credibility, regarding whether appellant pulled down PV2 KF's underwear and that part of the specification is therefore legally insufficient. Accordingly, we will provide [*9] relief in our decretal paragraph.

B. Unreasonable Multiplication of Charges

Appellant was convicted of attempted sexual assault under the theory that PV2 KF was incapacitated and under the theory that appellant was attempting to commit a sexual assault by bodily harm. At trial, while appellant successfully objected to the two offenses as being unreasonably multiplied for sentencing, he never objected to the offenses as being unreasonably multiplied for findings. Additionally, while the two offenses appeared to have been charged in the alternative, (to address SPC Schwartz's perhaps conflicting testimony that PV2 was both unconscious and saying "no"), the government never explicitly stated so. Accordingly, this case falls outside our superior court's decision in *United States v. Elespuru*, 73 M.J. 326, 329-30 (C.A.A.F. 2014)(dismissing a specification where the government states it was charged in the alternative.).

Therefore, appellant has forfeited any error. Additionally, the detailed motion practice on merging the specifications for sentencing show that appellant was at the threshold—if not crossing it—of waiving the error. In short, there was no error by the military judge, plain or otherwise. Nonetheless, as an exercise of our discretionary authority [*10] under Article 66(c) we will notice the issue and provide relief.

We find the *Quiroz* factors weigh in favor of dismissing one specification. *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001). Specifically, we give great weight to our determination that a conviction for two specifications of attempted sexual assault unreasonably exaggerated appellant's criminality.

Accordingly, we conditionally dismiss Specification 1 of Charge I, which alleged an attempted sexual assault while PV2 KF was substantially incapable of apprising the nature of the sexual act. *See United States v. Britton*, 47 M.J. 195, 203 (C.A.A.F. 1997)(J. Effron concurring); *United States v. Hines*, 75 MJ 734 , 2016 CCA LEXIS 439, *7-8 fn4 (Army. Ct. Crim. App. 27 Jul. 2016); *United States v. Woods*, 21 M.J. 856, 876 (A.C.M.R. 1986). Our dismissal is conditional on Specification 2 of Charge I surviving the "final judgment" as to the legality of the proceedings. *See* Article 71(c)(1) (defining final judgment as to the legality of the proceedings).

C. Sentencing Instructions on Sex Offender Registration

At the presentencing proceedings, appellant introduced two unsworn statements. The first unsworn statement consisted of training certificates and family photos.² The second unsworn statement was read by appellant's counsel and consisted entirely of the following:

"I am Jeffrey A. Feliciano, Junior. I am a registered sex offender." This is the panel's findings [*11] on Charge I and that is a phrase that Private Feliciano will now say the[] rest of his life. He will not be permitted to pick [his child] up from school, or attend school sporting events. He is, for the rest of his life, a sex offender.

The military judge then gave the panel sentencing


² Government counsel did not object to the use of photos as an unsworn statement or the unsworn statements of *others* (as contained in various training certificates) being introduced as the unsworn statement of *the accused*.

instructions. Over defense objection, the instructions included the following:

The accused's unsworn statement included the mention that the accused will have to register as a sex offender. An unsworn statement is a proper means to bring information to your attention, and you must give it appropriate consideration. Your deliberations should focus on an appropriate sentence for the accused for the offenses of which the accused stands convicted. Under DOD instructions, when convicted of certain offenses, including an offense here, the accused may have to register as a sex offender with appropriate authorities in the jurisdiction in which he resides, works, or goes to school. Such registration [*12] is required in all 50 states; though the requirements may differ between jurisdictions. Thus, specific requirements are not necessarily predictable. It is not your duty to attempt to predict sex offender registration requirements, or the consequences thereof.

While the accused is permitted to address these matters in an unsworn statement, these possible collateral consequences should not be part of your deliberations in arriving at a sentence. Your duty is to adjudge an appropriate sentence for this accused based on the offenses for which he has been found guilty that you regard as fair and just when it is imposed and not one whose fairness depends upon possible requirements of sex offender registration, and the consequences thereof, at certain locations in the future.

In short, the military judge permitted the accused in his unsworn statement to raise the issue of sex offender registration, and then instructed the panel not to consider the information when deliberating on a sentence. Given the brevity of appellant's unsworn statement, the only portion of appellant's statement that the panel was instructed to consider during deliberations was "I am Jeffrey A. Feliciano, Junior." Nonetheless, [*13] this instruction was not error and was consistent with our superior court's decision in *United States v. Talkington*, 73 M.J. 212, 218 (C.A.A.F. 2014).

HN3  In *Talkington*, our superior court decided that sex offender registration is: 1) a collateral effect of findings not sentencing; and 2) "is a consequence . . . that is separate and distinct from the court-martial process." *Id.* at 217 (internal citations and quotations

omitted). The *Talkington* court then found no error in the military judge having told the panel that sex offender registration "should not be a part of your deliberations . . ." *Id.* at 214, 218.

The court in *Talkington* was fully aware of the dilemma this caused. "[T]here is a 'tension between the scope of pre-sentencing unsworn statements and the military judge's obligation to provide proper instructions.'" *Id.* at 216 (internal citations omitted). However, the court did not address the tension because it was not raised. *Id.* This case presents two concerns about the current state of the law.

First, in cases such as this one, the net effect of the military judge's instructions is to tell the panel to ignore the accused's unsworn statement. At this stage of trial a panel will often be familiar with curative instructions and how they come to pass (i.e. someone made a mistake). [*14] When the military judge tells the panel they should not consider the accused's statements about sex-offender registration it resembles a curative instruction. The danger is that a panel infers from the tailored instruction that the accused was trying to subvert the sentencing rules. That is, by telling the panel to ignore what the accused just stated, the panel may be left with the impression that the accused's statement was impermissible.³ Moreover, a panel at sentencing which has just rejected an accused's theory of the case may be predisposed to adopt such a viewpoint. Here, to the extent that appellant may be seen as having invited this risk, he was informed of the military judge's instructions only after he made the unsworn statement.


Second, while correct, it is unusual for a military judge to allow inadmissible information to come in front of the panel only to then tell the panel to ignore it. The alternative—prohibiting the information from coming in the first instance—would appear to be preferable.⁴ As

³The panel was instructed that the accused's statements "were permissible." However, in the context of an entire trial, where matters are admitted based on rules of evidence, the members may find it perplexing that the accused is permitted to raise matters that the military judge then instructs them to disregard. And, even if the members can set aside this dissonance, they may still be left with the impression that the accused was using a technicality [*15] to get impermissible information before them. There is nothing in the trial experience that would explain to panel members why it is not error to present information that they are not supposed to consider.

⁴Consider the following: Were a military judge to prevent an

the court discussed in *Talkington*, this is the turbulence caused from the convergence of two unrelated lines of cases. *Id.* at 213, 215. ("This Court has explained that while the right of allocution includes the right to present evidence that is not relevant as extenuation, mitigation, or rebuttal, the military judge may 'put the information in proper context by effectively advising the members to ignore it.'").

As *Talkington* acknowledges, this is a problem created entirely by case law, and is contrary to Rule for Courts-Martial [hereinafter R.C.M.] 1001(c)(2)(A), which limits the accused's unsworn statement to matters in extenuation, mitigation, or in rebuttal. See also Military Rules of Evidence [hereinafter Mil. R. Evid.] 1101 (rules of evidence applicable to sentencing); 402 (irrelevant evidence is inadmissible). It would also appear to be tautological that there is little to be gained by allowing the introduction of inadmissible information. The military judge is the presiding officer at a court-martial. R.C.M. 103(15); Article 26, UCMJ. The current state of the law would appear to elevate the right of the accused to admit irrelevant information over the military judge's authority to exclude that same information under the rules. In a case where the accused is only informed of the military judge's instructions after having made the statement, this may be to the detriment of the accused.

HN4 In our view, the "tension" described in *Talkington* is best resolved by allowing the military judge to limit unsworn statements to the matters allowed under the rules. Such a resolution **[*17]** is per se not prejudicial, is in accord with the rules for court-martial, and properly reflects the military judge's role as the presiding officer. The status quo, where the military judge is prohibited from enforcing the rules for courts-martial, is at least problematic. Additionally, such an interpretation prevents the prejudice to an accused that may arise when a panel is told to give no weight to portions of an accused's unsworn statement.

Nonetheless, the resolution of this issue here is entirely determined by our superior court's decision in *Talkington*. As the military judge's actions were entirely in accord with *Talkington*, there is no error, and appellant is not entitled to any relief.

accused from mentioning sex offender registration during an unsworn statement, such an action will almost certainly be harmless error. Since the panel may be instructed to ignore the information during deliberations, there cannot be prejudice from excluding in **[*16]** the first instance what the panel would be told to ignore in the second.

CONCLUSION

The finding of guilty of Specification 1 Charge I is *conditionally* DISMISSED. This court AFFIRMS only so much of the finding of guilty of Specification 2 of Charge I as finds that:

[appellant] did, at or near Joint Base Lewis-McChord, Washington, on or about 23 January 2011, attempt to commit the offense of aggravated sexual assault, to wit: penetrating Private (E-2) [KF]'s vulva with his penis, by causing bodily harm to her, to wit: pulling down the pants of the said Private [KF] with **[*18]** the specific intent to engage in a sexual act with Private [KF], and that the accused's actions would have resulted in the commission of the offense but for the intervention of Specialist (E-4) R.S.

The remaining findings of guilty are AFFIRMED.

Applying the factors set out by our superior court in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013), we are confident that reassessment is appropriate. There is no change to the penalty landscape because the military judge had already merged the two specifications of Charge I for sentencing. Reassessing the sentence on the basis of the noted error, the remaining findings of guilty, and the entire record, we AFFIRM the sentence as approved by the convening authority. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by our decision, are ordered restored. See UCMJ arts. 58b(c) and 75(a).

Senior Judge CAMPANELLA and Judge PENLAND concur.

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United States v. Gaddy

United States Army Court of Criminal Appeals

March 20, 2017, Decided

ARMY 20150227

Reporter

2017 CCA LEXIS 179 *

UNITED STATES, Appellee v. Private First Class
TERRANCE L. GADDY United States Army, Appellant

Military & Veterans Law > Military
Justice > Defenses > Ignorance & Mistake

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by United States
v. Gaddy, 2017 CAAF LEXIS 667 (C.A.A.F., July 10,
2017)

Prior History: [*1] Headquarters, 21st Theater
Sustainment Command David H. Robertson, Military
Judge. Colonel Jonathan A. Kent, Staff Judge Advocate.

Core Terms

sexual, military, assault, dancing, propensity evidence,
sexual behavior, propensity, offenses, rape

Case Summary

Overview

HOLDINGS: [1]-Evidence that a servicemember
pleaded guilty to charged sexual offenses was properly
admitted to show propensity to commit a sexual assault
to which the servicemember pleaded not guilty; [2]-Any
error in excluding evidence that a victim of a sexual
assault engaged in sexual dancing with the
servicemember was harmless since any showing of
mistake concerning consent by the victim was weak and
was not highly probative of whether the victim and the
servicemember agreed to sexual intercourse.

Outcome

Findings and sentence affirmed.

LexisNexis® Headnotes

HN1[] Defenses, Ignorance & Mistake

To place a mistake of fact as to consent defense at
issue, there must be some evidence appellant had a
subjective belief the victim was consenting to sexual
conduct and such a belief was reasonable.

Military & Veterans
Law > ... > Evidence > Admissibility of
Evidence > Sex Offenses

HN2[] Admissibility of Evidence, Sex Offenses

Mil. R. Evid. 412(a)(1), Manual Courts-Martial, prohibits
evidence that any alleged victim engaged in other
sexual behavior. When conduct is inexorably intertwined
with the alleged offense itself, it is not other sexual
behavior, but rather becomes part of the res gestae of
the offense. That is, the testimony was admissible as
part of the same transaction as the assault.

Counsel: For Appellant: Lieutenant Colonel Charles
Lozano, JA; Major Andres Vazquez, Jr., JA (on brief).

For Appellee: Colonel Mark H. Sydenham, JA; Major
Cormac M. Smith, JA; Captain Cassandra M. Respos, JA
(on brief).

Judges: Before MULLIGAN, FEBBO, and WOLFE,
Appellate Military Judges.

Opinion

SUMMARY DISPOSITION

Per Curiam:

Accused of multiple instances of sexual crimes against four different victims, appellant entered mixed pleas.¹ He pleaded guilty to seven specifications of sexual assault and one specification of indecent exposure. Contrary to his pleas, the military judge convicted appellant of rape.² On appeal we address two issues.

First, we decide whether our superior court's decision in *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016), prohibits a fact-finder from considering propensity evidence stemming from charged offenses to which the accused pleaded guilty. We determine that *Hills* does not prohibit this use of propensity evidence.

Second, we address appellant's claim that the military judge erred when he excluded, pursuant to Military Rule of Evidence [hereinafter Mil. R. Evid.] 412, evidence that appellant and the victim of [*2] the rape offense were dancing provocatively immediately prior to the assault. We agree with appellant that the military judge erred, but find the error to be harmless.

LAW AND DISCUSSION

A. *United States v. Hills* and Guilty Pleas to Charged Offenses

We first address an issue raised personally by appellant.³ See *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Appellant, asserts that the military judge erred when he considered propensity evidence stemming from charged offenses in determining whether he was guilty of rape.

Prior to trial, the government filed a motion under Mil. R. Evid. 413 to admit appellant's propensity to commit sexual misconduct. The motion stated:

Although MRE 413 is most commonly applied to the

¹The sexual assault and rape specifications each alleged a violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2012) [hereinafter UCMJ]. The indecent exposure specification alleged a violation of Article 120c, UCMJ.

²The military judge sentenced appellant to a dishonorable discharge and confinement for fourteen years. Pursuant to a pretrial agreement, the convening authority approved the punitive discharge and eight years of confinement.

³The other matters personally raised by appellant merit neither discussion nor relief.

introduction of uncharged sexual misconduct to show a propensity for charged sexual misconduct, the Rule also applies where all alleged sexual misconduct has been charged. 'The Government may not introduce similarities between a charged offense and prior conduct, *whether charged or uncharged*, to show modus operandi or propensity without using a specific exception within our rules of evidence, such as MRE 404 or 413.' *United States v. Burton*, 67 M.J. 150 152 (C.A.A.F. 2008) (emphasis added).

Relying on our superior court's decision in *Burton*, the military judge granted the government's motion. At trial, during the [*3] closing argument, the trial counsel specifically argued appellant's predisposition to sexually assault women:

The law says, you can look at the fact that he sexually assaulted these three other Soldiers and use that when deciding whether or not he's raped [BN]. You can consider the crime against [R], the crimes against [G] and the crime against [K] as propensity evidence. In fact, as this court is well aware, you may consider the evidence of the accused's other sexual offenses for their tendency to show propensity, predisposition, as well as its tendency to show his common plan: new Soldiers to the unit, people he's just met, and design; that he intended to rape Private [BN] and, as evidence of his motive to commit these offenses.

We find no error in either the trial counsel's argument or the military judge's determination that propensity evidence was admissible in this case. In *Hills*, the Court of Appeals for the Armed Forces (CAAF) specifically exempted from their decision cases where "an accused has pleaded guilty or been found guilty" and that such evidence "can be admitted and considered under Mil. R. Evid. 413 to show propensity to commit the sexual assaults to which he pleaded not guilty. . . [*4] ." 75 M.J. at 354 (citing *United States v. Wright*, 53 M.J. 476, 479 (C.A.A.F. 2000)). Thus, we find that *Hills* did not prohibit the propensity evidence admitted in this case.

B. *The Military Rule of Evidence 412 Ruling*

Before trial, appellant filed a motion to admit evidence pursuant to Mil. R. Evid. 412. Specifically, appellant wanted to introduce evidence that, in the moments *immediately preceding the alleged assault*, appellant and Private BN had engaged in highly sexualized dancing that "simulated sex." At the closed Mil. R. Evid.

412 hearing, the defense called two witnesses to testify about what they had seen.⁴ The military judge ruled that the "defense is prohibited from soliciting testimony about [PFC BN] dancing with the accused in order to show her consent to sexual activity or that the accused had a mistaken belief that she was consenting to sexual activity." The military judge did not otherwise explain his ruling.

On appeal, appellant asserts that evidence of the highly sexualized dancing was constitutionally necessary to show his mistake of fact as to consent. This argument was not well developed at trial. *HN1*^[↑] To place a mistake of fact as to consent defense at issue, there must be some evidence appellant had a subjective belief the victim was consenting and such a belief was reasonable. An important purpose of [*5] the requirement for Mil. R. Evid. 412 motions practice, to include closed hearings, is to allow the offering party the opportunity to *fully* explain their theory of admissibility.

Nonetheless, we find the military judge's decision to exclude evidence of sexualized dancing to have been error because we find this evidence to fall outside of Mil. R. Evid. 412. *HN2*^[↑] Mil. R. Evid. 412(a)(1) prohibits evidence that "any alleged victim engaged in other sexual behavior." When conduct is inexorably intertwined with the alleged offense itself, it is not "other sexual behavior," but rather becomes part of the *res gestae* of the offense. That is, the testimony "was admissible as part of the same transaction as the assault." *United States v. Peel*, 29 M.J. 235, 239 (CAAF 1989).

Here the defense wanted to introduce evidence that the victim and appellant were "grinding" on each other in the moments before (in the defense theory) they engaged in consensual sexual intercourse. After the military judge's ruling, the defense had to explain the victim and appellant had engaged in consensual sexual intercourse without being able to explain what, in the defense theory, had led up to this encounter. In other words, deprived of this evidence, the defense case was forced to start mid-sentence. The defense was unable to

position [*6] their evidence to comport with normal human experience. Accordingly, we do not see evidence of sexual behavior that is part of the *res gestae* of the offense to be "other sexual behavior" under Mil. R. Evid. 412. This rule does not exclude evidence of the offense itself, to include the appellant's version of what transpired during the transaction.

There are, of course, some caveats to our reasoning. First, our interpretation of Mil. R. Evid. 412(a)(1) is limited to interpreting what is meant by "other sexual behavior." Rule 412(a)(2) continues to prohibit evidence of a victim's sexual predisposition. Second, to say that evidence falls outside of Mil. R. Evid. 412 is not to say it is *per se* admissible. Other rules, to include Mil. R. Evid. 403, still operate to ensure overly prejudicial evidence is excluded from a court-martial. A military judge could tailor the scope of the testimony to prevent an overly prejudicial presentation.

Having found error, we next turn to whether appellant was prejudiced by the error. We find the error to have been harmless. First, any evidence of consent (or mistake of fact as to consent) stemming from dancing is weak. That someone may have agreed to dance in a proactive manner is not highly probative as to whether they agreed to sexual intercourse [*7] or whether an accused actually and reasonably believed he had consent. Second, we find the evidence of the assault given by the victim to be compelling, especially combined with her immediate reports of the assault. Finally, we consider appellant's separate plea to seven specifications of sexually assaulting three other soldiers. Appellant agreed as part of his pretrial agreement that the stipulation of fact he signed would be admissible during the merits portion of his trial. The stipulation also stated that the facts contained therein were admissible "at trial" even if "otherwise inadmissible." Appellant's sexual assault of the three other soldiers was factually similar in several aspects. When we consider all the evidence, to include the inference that appellant is predisposed to commit this offense, we find any evidentiary error to be harmless beyond a reasonable doubt. See *United States v. Roberts*, 69 M.J. 23, 30 (C.A.A.F. 2010).

CONCLUSION

The findings of guilty and sentence are AFFIRMED.

⁴ Not surprisingly, the government not only disagreed that the evidence was admissible, but also disagreed that the sexualized dancing had taken place. At trial, for example, the government elicited that appellant had made a bet with one of the witnesses that he could have sex with the victim whom he had just met. Our job on appeal does not require us to resolve this factual dispute for purposes of evaluating the military judge's Mil. R. Evid. 412 ruling.

United States v. Lauture

United States Army Court of Criminal Appeals

June 24, 1997, Decided

ARMY 9501530

Reporter

1997 CCA LEXIS 194 *; 46 M.J. 794

UNITED STATES, Appellee v. Sergeant ALIX
LAUTURE United States Army, Appellant

Prior History: [*1] U.S. Army Chemical and Military
Police Centers and Fort McClellan. L. R. Dean, Military
Judge.

Disposition: The findings of guilty and the sentence
affirmed.

Counsel: For Appellant: Captain Mark A. Bridges, JA
(argued); Major J. Frank Burnette, JA (on brief); Major
Leslie A. Nepper, JA.

For Appellee: Captain Robert F. Resnick, JA (argued);
Colonel John M. Smith, JA; Lieutenant Colonel Eva M.
Novak, JA; Captain Joanne P. Tetreault, JA (on brief).

Judges: Before COOKE, TOOMEY, and RUSSELL,
Appellate Military Judges. Senior Judge TOOMEY and
Judge RUSSELL ¹⁰ concur.

Opinion by: COOKE

Opinion

OPINION OF THE COURT

COOKE, Chief Judge:

In a contested trial before a military judge sitting alone
as a general court-martial, appellant was found not
guilty of rape, but guilty of the lesser included offense of
indecent assault, and guilty of adultery, in violation of
Article 134, Uniform Code of Military Justice, [10 U.S.C.
§ 934 \(1988\)](#) [hereinafter UCMJ]. The convening
authority approved the adjudged sentence of a bad-

conduct discharge, confinement for two years, forfeiture
of all pay and allowances, and reduction [*2] to the
grade of E1. The case is before us for review under
Article 66, UCMJ.

Appellant contends that the military judge erred by
excluding evidence of a previous act of adultery by the
victim. Specifically, appellant contends that, notwith-
standing the general prohibition in Military Rule of
Evidence 412 [hereinafter Mil. R. Evid.] against
admitting evidence of other sexual behavior by the
alleged victim of a sexual offense, the evidence in this
case was constitutionally required. Appellant also
contends that the evidence is factually insufficient to
support the finding of guilty of indecent assault, and that
the sentence is inappropriately severe. We disagree and
affirm. Appellant's first assignment of error warrants
discussion.

I. FACTS

At trial, defense counsel sought to introduce evidence of
a previous act of adultery by the victim, Specialist (SPC)
F. Defense counsel proffered evidence that SPC F had
committed adultery approximately two years earlier and
that she had "gone through a process in the Mormon
church whereby she has been 'cleansed' from this
incident and it [has been] treated by her faith as if it
never happened." ¹

[*3] Defense counsel advanced two reasons for

¹ Defense counsel raised this issue when SPC F was called to
testify as the first prosecution witness on the merits, by asking
that SPC F be advised of her rights against self-incrimination
under Article 31, UCMJ. Defense counsel indicated that he
intended to question SPC F about the prior act of adultery.
The defense had not provided prior notice of its intent to
inquire into this matter. The defense counsel became aware of
the earlier act of adultery two days before trial, when the trial
counsel notified him of it. Despite defense counsel's failure to
provide timely notice of his intent to offer this evidence, the
military judge considered the merits of the issue.

¹⁰ Judge James S. Russell took final action in this case prior to
his reassignment.

admissibility. First, he submitted that it supported a mistake of fact defense because appellant was aware of this prior act of adultery. Therefore, when SPC F resisted his invitations to enter a relationship by saying, among other things, "I'm married," appellant had reason to believe that this did not completely foreclose the possibility of acceptance of his advances. Second, defense counsel argued that the prior incident gave SPC F a motive to lie--apparently contending that her prior adultery and the subsequent "cleansing" process would make it difficult for her to admit, to her husband and to her church, another act of adultery.

Trial counsel argued that such evidence was irrelevant and inadmissible. He further contended that, if anything, the "cleansing" process would most likely "provide[] her a motive not to come forward and say anything at all about this." He suggested that this evidence might be more beneficial to the government than the defense. Defense counsel did not respond to this characterization.

The military judge excluded the evidence of the prior adultery. He found that the defense failed to show sufficient relevance [*4] or probative value. The judge informed the defense, however, that he would permit inquiry into the effect of SPC F's religious beliefs on her willingness to admit she consented to appellant's advances.

At trial, SPC F testified that she had known appellant for about a year. Appellant frequently flirted with her, asking for hugs and making other suggestive comments. She consistently rejected these suggestions, although not forcefully or bluntly; in fact, she often smiled or joked with appellant on these occasions. Occasionally she mentioned that she was married when she rejected appellant's advances. Once, when she was very happy about receiving an award, she responded to appellant's request and hugged him. This was the only occasion in which she granted one of appellant's frequent requests for a hug. She did not report appellant's comments or behavior toward her to anyone in a position of authority.

On a Saturday, SPC F was working alone in a presumably secured medical facility. She went to a break room to have a snack and watch television. Appellant, who was on duty in another medical section, entered the secured facility and the break room. The appellant and SPC F had exchanged [*5] pleasantries earlier in the day. They exchanged conversation and SPC F got up to go to the women's restroom to clean her uniform, because she spilled something on it. As

she got up to go, appellant said, "Don't I get a hug?" She replied, "No." Specialist F went into the women's restroom; as she was cleaning her uniform at a sink, appellant entered the women's restroom. Specialist F testified that this made her uncomfortable and that she said, "How . . . does it feel to be a man in a woman's bathroom?" Specialist F threw a paper towel away, and when she turned, appellant was standing within inches of her. Appellant pushed her against the wall and pinned her with his body. Appellant reached between her legs with one hand and with the other, unzipped SPC F's blouse. He fondled and kissed her breast and then effected intercourse with her. Specialist F said the she was "frozen" during this time. After she felt appellant penetrate her, she pushed him away and told him she did not want this to happen and to stop. Specialist F proceeded from the women's restroom, telling appellant not to touch her. She called a friend and reported that she had been raped.

The prosecution introduced evidence [*6] which reflected that SPC F had a tendency to "freeze" in stressful situations, and that her reaction was consistent with that of rape victims in other cases.

Appellant did not testify, but the defense endeavored to show, primarily through cross-examination of SPC F, that she did not manifest her lack of consent to the encounter with appellant, and that appellant reasonably believed that SPC F consented.² The defense did not attack SPC F's credibility; specifically, it did not inquire at all into SPC F's religious experience or beliefs, even though the military judge's earlier ruling allowed such inquiry. As noted above, the military judge found appellant not guilty of rape, but guilty of indecent assault and adultery.

[*7] II. LAW

Military Rule of Evidence 412 provides that, with certain exceptions, evidence of other sexual behavior by the alleged victim of a sexual offense is not admissible.

² At trial, the defense never expressly contended that SPC F actually consented to the encounter with appellant. Instead, the defense focused on her failure to manifest lack of consent--a subtle distinction but, for reasons discussed below, an important one. It is noteworthy that in defense counsel's opening statement--made before the military judge excluded the evidence at issue here--the defense counsel emphasized the failure to manifest lack of consent and mistake of fact, and not whether SPC F consented in a subjective sense.

³ [*8] Several reasons underlie this exclusion. First, such evidence is often not relevant. ⁴

In particular, [Rule 412](#) rejects the assumption, implicit in earlier rules, that simply because a person may have consented to sexual relations with other people, that person is more likely to have consented to sexual relations with an accused in a particular case. Second, Mil. R. Evid. 412 is intended to prevent unnecessary confusion or obfuscation of issues by excluding evidence "with great potential for distraction." Mil. R. Evid. 412 analysis at A22-35. Evidence of the victim's unchaste history, even though remotely relevant, may be misused by the fact-finder to conclude, for example, that whether or not the victim consented is not important because the victim "deserved it" or "asked for it." ⁵ Finally, Mil. R. Evid. 412 is also designed, much

like certain privileges, to promote goals external to the truth finding process at trial. It is intended "to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details" and to "encourage[] victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders." Notes of Advisory Committee on proposed 1994 amendment, [Fed. R. Evid. 412](#), 28 U.S.C.S. Appx 412 at 87.

Notwithstanding the general rule of inadmissibility, however, Mil. R. Evid. 412 does not foreclose all inquiry into other sexual behavior of the victim. The rule contains three important exceptions [*10] to the principle of exclusion. The third of these, "evidence the exclusion of which would violate the constitutional rights of the defendant," concerns us here. Mil. R. Evid. 412 (b)(1)(C). ⁶

³ Military Rule of Evidence 412 was substantially amended, pursuant to a change in the corresponding [Federal Rule of Evidence 412](#) and the operation of Mil. R. Evid. 1102. The effective date of the new Mil. R. Evid. 412 was May 29, 1995, about four months before trial in this case. It is not clear in the record of trial whether the parties were applying what was, at the time of trial, a relatively new change. Normally we would presume that they were; however, certain references made by defense counsel suggest that he, at least, was referring to the old rule. This does not affect our decision in this case, because the changes did not substantially affect the provisions, or their underlying purposes, at issue here. See Notes of Advisory Committee on proposed 1994 amendment, 28 U.S.C.S. Appx [Rule 412](#) at 87 (Law. Co-op. 1995). For the same reason, judicial decisions applying the earlier version of [Rule 412](#) remain applicable.

⁴ Arguably Mil. R. Evid. 401 and 402, the basic rules of relevance, should suffice to address relevance. Mil. R. Evid. 412 and its counterpart, [Fed R Evid 412](#), were deemed necessary because of prior practice. STEPHEN SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 560-61 (6th ed. 1994). Historically, a victim of an alleged sexual offense was subject to extensive cross-examination on virtually his or her entire sexual history. See Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 153b [hereinafter MCM, 1969]; STEPHEN SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL, 520 (3d. ed. 1991). It is now recognized, and Mil. R. Evid. 412 reflects, that in many cases evidence of other sexual behavior of the victim is not relevant to whether that person was raped or sexually assaulted by an accused.

⁵ A limiting instruction can often prevent such misuse. See, e.g., [United States v Dorsey, 16 M J 1, 8 \(C M A 1983\)](#). Therefore, this justification, alone, would not ordinarily justify

A criminal defendant generally has the right, under the [Fifth](#) and [Sixth Amendments to the Constitution](#), to introduce relevant, probative evidence in his defense. See [Rock v. Arkansas, 483 U.S. 44, 97 L. Ed. 2d 37, 107 S. Ct. 2704 \(1987\)](#); [Crane v. Kentucky, 476 U.S. 683, 90 L. Ed. 2d 636, 106 S. Ct. 2142 \(1986\)](#); [Delaware v. Van Arsdall, 475 U.S. 673, 89 L. Ed. 2d 674, 106 S. Ct. 1431 \(1986\)](#); [Chambers v. Mississippi, 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 \(1973\)](#); [Washington v. Texas, \[*11\] 388 U.S. 14, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 \(1967\)](#). This includes the right to cross examine witnesses fully. [Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 \(1974\)](#). "The exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." [Davis, 415 U.S. at 316-17](#). See also [Van Arsdall, 475 U.S. 673, 89 L. Ed. 2d 674, 106 S. Ct. 1431](#); [Chambers, 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038](#); [United States v. Scheffer, 44 M.J. 442 \(1996\)](#), cert. granted, ___ U.S. ___ (May 19, 1997); [United States v. Woolheater, 40 M.J. 170 \(C.M.A. 1994\)](#).

These rights are not absolute, however. "We have never questioned the power of States to exclude evidence through the application of evidentiary rules that

exclusion of relevant evidence.

⁶ The second major subsection of Mil. R. Evid. 412, which should be "(b)" is printed "(B)" in MCM, 1995. This is an incorrect transcription from [Fed R Evid 412](#), from which it is derived. We refer to it as subsection (b).

themselves serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted." [Crane, 476 U.S. at 690](#). "The right to confront and cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." [Chambers, 410 U.S. at 295](#). "Trial judges retain wide latitude insofar as the [Confrontation Clause](#) is concerned to impose reasonable limits on such cross-examination based on concerns about, among [*12] other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." [Van Arsdall, 475 U.S. at 679](#). See also [Montana v. Egelhoff, 135 L. Ed. 2d 361, 116 S. Ct. 2013 \(1996\)](#); [Davis, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105](#); [Washington v. Texas, 388 U.S. at 23, n.21](#); [United States v. Burks, 36 M.J. 447 \(C.M.A.\), cert. denied, 510 U.S. 866, 126 L. Ed. 2d 146, 114 S. Ct. 187 \(1993\)](#).

To be constitutionally required, evidence must be relevant. [United States v. Sanchez, 44 M.J. 174 \(1996\)](#); [United States v. Knox, 41 M.J. 28 \(C.M.A. 1994\)](#), cert. denied, 513 U.S. 1153, 130 L. Ed. 2d 1072, 115 S. Ct. 1106 (1995); [United States v. Greaves, 40 M.J. 432 \(C.M.A. 1994\)](#); [United States v. Elvine, 16 M.J. 14 \(C.M.A. 1983\)](#). Even if evidence meets the threshold for relevance, it may be excluded unless its importance outweighs the policies which support exclusion. [Van Arsdall, 475 U.S. 673, 89 L. Ed. 2d 674, 106 S. Ct. 1431](#); [Davis, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105](#); [Chambers, 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038](#). This weighing has been described in a variety of ways. For example, evidence has been found to be constitutionally required where it: had a "strong potential to demonstrate the falsity" of a witness' testimony, [Olden v. Kentucky, 488 U.S. 227, 232, 102 L. Ed. 2d 513, 109 S. Ct. 480 \(1988\)](#); [*13] included facts "central to assessing" the reliability of a witness, [Van Arsdall, 475 U.S. at 677](#); carried a "real possibility" of "serious damage" to the prosecution case, [Davis, 415 U.S. at 319](#); was "critical" to the defense, [Chambers, 410 U.S. at 302](#); was "very material," [United States v. Jensen, 25 M.J. 284, 286 \(C.M.A. 1987\)](#); or was "relevant, material, and favorable" to the defense, [United States v. Dorsey, 16 M.J. 1 \(C.M.A. 1983\)](#).⁷ Exclusion of evidence has

been upheld where it was: "not necessary, critical, or vital," [Sanchez, 44 M.J. at 180](#); "not relevant, material, or favorable," [Knox, 41 M.J. at 31](#); or "too speculative and thus not relevant," [United States v. Pagel, 45 M.J. 64, 70 \(1996\)](#).

[*14] As this plethora of standards suggests, whether evidence is constitutionally required under Mil. R. Evid. 412 is determined on a "case-by-case basis." [United States v. Buenaventura, 45 M.J. 72, 79 \(1996\)](#). Nevertheless, appellate decisions are consistent with the principles and purposes which underlie Mil. R. Evid. 412. Sexual behavior by the victim with others is not ordinarily admissible simply to show consent. The fact that the victim may have consented to or voluntarily engaged in other behavior of a sexual nature, standing alone, adds nothing to the likelihood that the victim consented to sexual activities with an accused. See [Greaves, 40 M.J. 432](#). See also [United States v. Hicks, 24 M.J. 3 \(C.M.A.\), cert. denied, 484 U.S. 827, 98 L. Ed. 2d 55, 108 S. Ct. 95 \(1987\)](#); [Elvine, 16 M.J. 14](#). Similarly, such evidence often will not support a defense of mistake of fact as to consent, because, absent unusual circumstances, it does not render the "mistake" reasonable. [Greaves, 40 M.J. 432](#). But see [United States v. Jensen, 25 M.J. 284 \(C.M.A. 1987\)](#) (holding evidence of prior consensual sex between victim and co-defendant was admissible).

On the other hand, evidence of other sexual behavior by [*15] the victim may be admissible when it demonstrates a motive by the victim to fabricate (such as the desire to protect a relationship with another). See [Olden, 488 U.S. 227, 102 L. Ed. 2d 513, 109 S. Ct. 480](#); [Williams, 37 M.J. 352](#); [Dorsey, 16 M.J. 1](#). See also [Sanchez, 44 M.J. 174](#). It may also be admissible to show a pattern or to corroborate an accused's version of events or, in the case of young victims, to show other sources of sexual knowledge. [Buenaventura, 45 M.J. 72](#); [United States v. Gray, 40 M.J. 77, 80 \(C.M.A. 1994\)](#). See also [United States v. Hurst, 29 M.J. 477 \(C.M.A. 1990\)](#).

Simply stating a valid purpose or theory of relevance is not sufficient to make evidence admissible, however. The proponent must demonstrate that the proffered evidence rationally supports the theory, and that the theory is significant to the outcome of the case. [Pagel, 45 M.J. at 69-70](#); [Sanchez, 44 M.J. 174](#); [Knox, 41 M.J. 28](#). See also [United States v. Shaffer, 46 M.J. 94 \(1997\)](#). Thus, the proponent must show, first, that the

⁷Although subsequent decisions have referred to the "relevant, material, and favorable" test first described in [Dorsey](#), it has been criticized. See, e.g., [United States v. Williams, 37 M.J. 352, 361-62 \(C.M.A. 1993\)](#) (Gierke, J., concurring, and Crawford, J., joined by Cox, J., concurring in

the result).

logical link between the proffered evidence and the conclusion the proponent wants the factfinder to draw is more than remote or speculative. Second, the proponent must show [*16] that this conclusion could affect a significant issue in the case.

We review the military judge's decision for an abuse of discretion. Buenaventura, 45 M.J. 72. In reviewing whether appellant's right to cross-examine the witness has been denied, we focus "on the particular witness, not on the outcome of the entire trial." Van Arsdall, 475 U.S. at 680.

Even if we find that the evidence should have been admitted, however, we may affirm if we are convinced the error was harmless beyond a reasonable doubt. Van Arsdall, 475 U.S. 673, 89 L. Ed. 2d 674, 106 S. Ct. 1431; United States v. Colon-Anqueira, 16 M.J. 20 (C.M.A. 1983). The factors we examine are: "The importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." Van Arsdall, 475 M.J. at 684. See also Olden, 488 U.S. 227, 102 L. Ed. 2d 513, 109 S. Ct. 480; Colon-Anqueira, 16 M.J. 20.

III. DISCUSSION

We find that the military judge did not abuse his discretion in excluding the evidence of the [*17] prior act of adultery by the victim in this case. Furthermore, we are satisfied that even if such exclusion was error, it was harmless beyond a reasonable doubt.

We have little difficulty resolving appellant's claim that his knowledge of SPC F's prior act of adultery supports his claim of mistake of fact. Consent to engage in sexual activity with one person does not, without more, give rise to a reasonable claim that consent is more likely with another. Specialist F's single act of adultery, over two years prior to the offenses here, gave rise to no reasonable inference that she would or did consent to sexual relations with appellant, and, therefore, provided no reasonable basis for any mistaken belief appellant may have harbored to the contrary. The fact that SPC F occasionally rejected appellant's advances with the explanation that she was married did not change this. Thus, for this purpose, the proffered evidence did not meet the minimum threshold of relevance.

A somewhat closer issue is presented on the question of motive to fabricate. A victim's sexual history may be relevant to establishing a motive to fabricate as to consent. Olden, 488 U.S. 227, 102 L. Ed. 2d 513, 109 S. Ct. 480; Williams, 37 M.J. 352. [*18] We can appreciate that a person who has betrayed her vows to her husband and the tenets of her church by committing adultery might be somewhat more inclined than otherwise to lie about a subsequent sexual act with another in order to avoid having to face again her husband and church with similar facts. Therefore, we conclude that defense counsel's proffer met the minimum standard of relevance under Mil. R. Evid. 401.

Nevertheless, we find that the military judge did not abuse his discretion in excluding this evidence. The assertion that the prior incident gave the victim a motive to lie was speculative and remote. Defense counsel did not proffer any additional circumstances surrounding the prior incident or the process and status of SPC F's reconciliation with her husband or the church, or other evidence, which might have added support to the inference that SPC F felt guilt which would give her a motive to lie. Furthermore, this evidence, on its face, had an even greater tendency to bolster SPC F's credibility. The defense counsel did not respond to trial counsel's apt observation that SPC F's prior experience would have rendered it more likely that SPC F would have made no report, [*19] rather than a false one, if she had voluntarily engaged in sexual relations with appellant.

Moreover, in the facts of this case, this evidence relating to SPC F's truthfulness was not significant to the defense theory of the case. The defense did not contend that SPC F actually consented to appellant's assault, and it did not attack her description of the acts involved. Rather, the defense attempted to show, using SPC F's description, that her lack of consent was not manifested and that, therefore, appellant was reasonably mistaken concerning her willingness to participate. Although evidence relating to lack of consent was not irrelevant, in this case, given the defense theory, lack of actual consent was not a significant issue.

Thus, this marginal showing of relevance was insufficient to overcome the policies of protecting privacy and preventing prejudice inherent in Mil. R. Evid. 412.

Even if the evidence of the prior adultery was erroneously excluded, we are convinced this error was

harmless beyond a reasonable doubt. Even though SPC F was the key prosecution witness, the defense did not challenge or contradict her testimony on the points this evidence might have affected. Neither [*20] did the defense pursue other avenues of cross-examination fully available to it, including inquiry into SPC F's religious beliefs or the effect consensual sexual relations with appellant might have had on her marriage. Indeed, the defense largely relied on her description of the events in its (partially successful) effort to show mistake of fact.⁸ Even if this evidence should have been admitted, the totality of the evidence that SPC F did not consent to the assault, and that appellant could not have reasonably believed she did, is overwhelming.⁹ The evidence establishes that, immediately after SPC F denied appellant's request for a hug, she went into the women's restroom--a place almost universally viewed as a sanctuary from males, and certainly not one to which appellant could reasonably have considered himself welcome based on anything that had happened to that point. Nevertheless, appellant entered and, without invitation or inducement from SPC F, approached her, pushed her against the wall, placed one hand between her legs, and with the other, bared and fondled her

breast. These facts are uncontroverted. Specialist F had no reasonable opportunity to consent or to manifest lack [*21] of consent before appellant indecently assaulted her. It defies credibility to suggest that she consented to these acts and lied about it later, or that appellant reasonably thought she was consenting.

[*22] The findings of guilty and the sentence are affirmed.

Senior Judge TOOMEY and Judge RUSSELL¹⁰ concur.

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⁸The manner in which this issue was raised also merits mention. The defense counsel initially raised the matter of the adultery not in a direct attempt to admit it, but rather to try to preclude the victim's testimony altogether, through her invocation of Article 31, UCMJ, rights. Once this long shot fell predictably wide of its target, the defense counsel did not pursue the avenues left open to him to attack SPC F's credibility.

⁹We are not unmindful that the military judge acquitted appellant of rape. Although this does not directly affect our analysis of the sufficiency of the evidence on the assault offense, [*United States v. Watson*, 31 M J 49 \(C M A 1990\)](#), such related findings may have a bearing on harmless error analysis. [*Olden v. Kentucky*, 488 U S 227, 233, 102 L Ed 2d 513, 109 S Ct 480 \(1988\)](#). In this regard, we can reconcile the judge's findings by noting that it would not be inconsistent to conclude that the assault occurred before the victim could manifest any lack of consent and therefore without the victim's consent or a reasonable claim of mistake of fact as to same. However, the victim's failure to manifest her lack of consent orally or by physical resistance during the assault may have led the military judge to doubt whether the appellant was mistaken as to her consent when intercourse occurred. We express no opinion whether we agree with this theory; we note it only to demonstrate that this case is unlike *Olden*, where the jury's verdicts on multiple offenses "cannot be squared with the state's theory of the alleged crime." [*Olden*, 488 U S at 233](#).

¹⁰ Judge James S. Russell took final action in this case prior to his reassignment.



Positive

As of: August 10, 2021 3:04 PM Z

United States v. Lopez

United States Army Court of Criminal Appeals

July 30, 2013, Decided

ARMY 20100457

Reporter

2013 CCA LEXIS 603 *; 2013 WL 4040357

UNITED STATES, Appellee v. Private First Class
DAVID A. LOPEZ, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by [United States v. Lopez, 2015 CAAF LEXIS 541 \(C.A.A.F., June 8, 2015\)](#)

Prior History: [*1] Headquarters, Fort Bliss. Michael J. Hargis, Military Judge. Colonel Michael J. Benjamin, Staff Judge Advocate.

Case Summary

Overview

HOLDINGS: [1]-Because proffered evidence regarding Victim 1's sexual comment and contact on the bus was relevant, material, and more probative than any danger to unfair prejudice, the military judge (MJ) erred by excluding it under Mil. R. Evid. 412, Manual Courts-Martial; [2]-The MJ's error in excluding evidence concerning the sexual comment and sexual contact on the bus was not harmless beyond a reasonable doubt; [3]-Because the proffered evidence regarding Victim 2's sexual activity with PVT RR on the hotel bed was more probative than any danger of unfair prejudice, the MJ erred in excluding this evidence; [4]-The MJ's error, ruling evidence concerning the sexual activity between PVT RR and Victim 2 was inadmissible, was not harmless beyond a reasonable doubt; [5]-The MJ's decision to exclude testimony of an alternate source of Victim 2's vaginal injury was prejudicial error.

Outcome

The findings of guilty and the sentence were set aside.

Counsel: For Appellant: Mr. William E. Cassara, Esquire; Captain Jack D. Einhorn, JA (argued); Lieutenant Colonel Peter Kageilery, Jr., JA; Captain

Jack D. Einhorn, JA (on brief); Mr. William E. Cassara, Esquire; Captain Jack D. Einhorn, JA (on supplemental brief & reply brief); Major Jacob D. Bashore, JA; Captain A. Jason Nef, JA.

For Appellee: Captain Sean P. Fitzgibbon, JA (argued); Major Robert A. Rodrigues, JA; Major Katherine S. Gowel, JA; Captain T. Campbell Warner, JA (on brief); Major Daniel D. Maurer, JA.

Judges: Before KERN, ALDYKIEWICZ, and MARTIN, Appellate Military Judges. Judge ALDYKIEWICZ and Judge MARTIN concur.

Opinion by: KERN

Opinion

MEMORANDUM OPINION

KERN, Senior Judge:

A general court-martial composed of officer and enlisted members convicted appellant, contrary to his pleas, of two specifications of aggravated sexual assault of a substantially incapacitated victim in violation of Article 120(c)(2), Uniform Code of Military Justice, [10 U.S.C. § 920\(c\)\(2\) \(2006 & Supp. II 2008\)](#), amended by [10 U.S.C. § 920 \(2012\)](#) [hereinafter UCMJ]. The panel sentenced appellant to a dishonorable discharge, confinement [*2] for seven years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved six years and six months of confinement and the remainder of the adjudged sentence. Appellant's case is now before this court for review under [Article 66, UCMJ](#).

Appellant raises four assignments of error, two of which merit discussion and relief.¹ Each of these two

¹ Appellant's other assignments of error are rendered moot by

assignments of error relate to the military judge's denial of defense motions to admit evidence of other sexual conduct by the victims of appellant's two aggravated sexual assaults. See Military Rule of Evidence [hereinafter Mil. R. Evid.] 412. Each of appellant's two sexual assaults involves a different victim and arises out of separate incidents. As to each incident, we conclude the military judge abused his discretion by separately excluding different pieces of constitutionally required evidence necessary to a fair resolution of the issues. Accordingly, each of appellant's convictions must be set aside.

BACKGROUND

Appellant and the two victims in this case [hereinafter Victim 1 and Victim 2] were soldiers attending Advanced Individual Training (AIT) at Fort Bliss, Texas.

VICTIM 1

On the weekend of 12 April 2009, Victim 1 was on pass and she and two other female AIT students, Private (PVT) JS and Private First Class (PFC) JR, rented a room at a local hotel. There, Victim 1 and her roommates went to a happy hour at the hotel bar and consumed alcohol. After the happy hour, they went back to their room to continue the party and were joined by about fifteen other AIT students including appellant and two other male AIT students, PVT RR and PVT EJ. During the party in the room, Victim 1 and appellant went into the bathroom where they engaged in sexual activity. After exiting the bathroom, the two re-joined the

the relief granted from our consideration of the following assignments of error:

I.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED [*3] THE DEFENSE MOTION TO ADMIT EVIDENCE REGARDING [VICTIM 1'S] POST-OFFENSE SEXUAL BEHAVIOR TOWARDS PFC LOPEZ.

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED THE DEFENSE MOTION TO ADMIT EVIDENCE REGARDING [VICTIM 2'S] SEXUAL ACTIVITY WITH [PVT RR] IN THE PRESENCE OF PFC LOPEZ IN THE HOURS LEADING UP TO THE SEXUAL ASSAULT.

party in the room and Victim 1 danced with others and then [*4] went to bed. Victim 1 testified that she later awoke from her sleep with feelings of pain and discovered appellant having nonconsensual sex with her. One of Victim 1's roommates, PFC JR, was passed out drunk in the other bed in the room, and she testified that she saw a male on top of Victim 1, having sex with her. Private First Class JR further testified that Victim 1 was not moving or making noise.

At appellant's court-martial, the defense moved pursuant to Mil. R. Evid. 412 to admit evidence that, in the week following the alleged sexual assault, Victim 1 made a sexual comment about appellant and engaged in consensual sexual contact with him while riding on a bus. It was proffered that while on the bus, Victim 1 told appellant "don't worry, you don't have a small dick, you have a big dick" or words to that effect and then Victim 1 touched appellant's penis. The military judge denied the defense motion. Relying on the defense's proffer alone, and without taking evidence regarding the foregoing sexual behavior, the military judge ruled that although the proffered evidence was relevant to the defense's articulated theory of consent, it was not admissible. The military judge determined [*5] that "even though it does have probative value, it does appear to me that that probative value does not outweigh the danger of unfair prejudice to the alleged victim's privacy in this particular case. So I will exclude it under [Mil. R. Evid.] 412."

VICTIM 2

The second charged sexual assault occurred on the weekend of 18 April 2009. Victim 2 was on pass, and she and another female AIT student, PFC TK, rented a room at a local hotel. After going to the local mall, they went back to the hotel. There they began drinking alcohol and then went to the hotel swimming pool and hot tub, where appellant and two other male AIT students, PVT RR and PVT EJ joined them. Victim 2 says she became intoxicated, did not feel well, and went up to her hotel room. She was subsequently joined in the room by PFC TK and the three male AIT students, including appellant. In the hotel room, PFC TK was on one bed kissing PVT EJ, while at the same time, appellant and the other male AIT student, PVT RR, both began engaging in sexual activity with Victim 2 on a second bed. During a motions hearing it was proffered that the sexual activity between appellant and Victim 2 included kissing and appellant digitally penetrating [*6] Victim 2's vagina. It was also proffered that the sexual activity between PVT RR and Victim 2 consisted of kissing and PVT RR getting on top of Victim 2 and

ejaculating on her stomach.² At some point, PFC TK and the other two male AIT students, including PVT RR, left the hotel room, leaving Victim 2 alone in the room with appellant. Victim 2 testified that she fell asleep but later awoke from her sleep with feelings of pain and discovered appellant having nonconsensual sex with her.

At a pretrial motions hearing, the defense moved to admit evidence of PVT RR's sexual activity with Victim 2 and details of appellant's sexual activity with Victim 2 on the bed in the hotel room earlier in the evening.³ The defense offered two theories of admissibility for the sexual activity between PVT RR and Victim 2. The first theory attacked the allegation of Victim 2's incapacitation. The defense was [*7] aware that the government was going to introduce evidence of alcohol consumption by Victim 2 as a source of her incapacitation. Therefore, the defense wanted to put in evidence that Victim 2 had the capacity to have consensual sexual activity with PVT RR an hour or two before the alleged sexual assault and that she had no further alcohol between that sexual activity and the alleged sexual assault. The defense could then argue that because there was no further alcohol consumption after the consensual sexual activity, Victim 2 was not incapacitated at the time of the alleged sexual assault. The defense's second theory arose from a proffer by defense that there was evidence that Victim 2 told a potential witness to lie to law enforcement about her sexual activity with PVT RR. The defense's theory was that Victim 2 told her friend to lie because she had a boyfriend and wanted to conceal her consensual sexual conduct with PVT RR, and similarly, she fabricated her allegation against appellant to conceal their consensual sexual conduct from her boyfriend.

During the pretrial motions hearing, the military judge ruled that the prior sexual activity between appellant and Victim 2 was admissible, but Victim 2's sexual activity with PVT RR was inadmissible pursuant to Mil. R. Evid.

² After a Sexual Assault Nurse Examiner [hereinafter SANE Nurse] testified during the Government's case on the merits that Victim 2 had a tear on her labia, the defense proffered that PVT RR would also testify that "he was inserting his finger in her vagina and rubbing her vaginal area with his finger."

³ Although the defense's written motion requested admission of only the sexual activity between appellant and Victim 2, the defense clarified [*8] during the motions hearing that they also wanted to admit Victim's 2's simultaneous sexual conduct with PVT RR.

403 and Mil. R. Evid. 412. Without taking evidence, despite the defense's willingness to present evidence, the military judge ruled that, under both of the proffered theories, the probative value of the sexual conduct between PVT RR and Victim 2 did not outweigh the prejudice to Victim 2's privacy. Additionally, in response to testimony during the Government's case on the merits from a SANE Nurse that Victim 2 had a tear in her labia, the defense moved to admit testimony from PVT RR that he digitally penetrated Victim 2 and was a possible alternate source of the injury. The military judge also ruled that this testimony was inadmissible.

LAW

"[E]vidence offered by the accused to prove the alleged victim's sexual predispositions, or that she engaged in other sexual behavior, is inadmissible, except in limited contexts. [Mil. R. Evid.] 412(a)-(b). The rule [*9] is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to [sexual offense prosecutions]." United States v. Ellerbrock, 70 M.J. 314, 317-18 (C.A.A.F. 2011) (quoting United States v. Gaddis, 70 M.J. 248, 252 (C.A.A.F. 2011)) (second alteration in original) (internal quotation marks omitted). However, Mil. R. Evid. 412(b) provides several exceptions to this general rule of inadmissibility:

(b) Exceptions.

(1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

- (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
- (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
- (C) evidence the exclusion of which would violate the constitutional rights of the accused.

The rule further prescribes the following test for determining the admissibility of such evidence:

If the military judge determines [*10] . . . that the evidence the accused seeks to offer is relevant for a purpose under subsection (b) and that the probative value of such evidence outweighs the

danger of unfair prejudice to the alleged victim's privacy, such evidence shall be admissible under this rule. . . .

Mil. R. Evid. 412(c)(3). See also [United States v. Banker](#), 60 M.J. 216 (C.A.A.F. 2004). However, this balancing procedure is no longer viable following our superior court's decisions in [Gaddis](#) and [Ellerbrock](#).

In *Gaddis*, the Court of Appeals for the Armed Forces (CAAF) held that the Mil. R. Evid. 412(c)(3) balancing procedure is "[a]t best a nullity," and at worst unconstitutional, insofar as it limits introduction of constitutionally required evidence based on the danger of unfair prejudice to the victim's privacy. [Gaddis](#), 70 M.J. at 256. In *Ellerbrock*, CAAF clarified that a court must determine whether evidence is constitutionally required, and thus admissible as an exception to Mil. R. Evid. 412, by instead deciding whether the evidence is "relevant, material, and [whether] the probative value of the evidence outweighs the dangers of unfair prejudice." [Ellerbrock](#), 70 M.J. at 318.

Relevant evidence is any evidence [*11] that has "any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence." [Mil. R. Evid.] 401. The evidence must also be material, which is a multi-factored test looking at "'the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to th[at] issue.'" [Banker](#), 60 M.J. at 222 (quoting [United States v. Colon-Anqueira](#), 16 M.J. 20, 26 (C.M.A. 1983)). Finally, if evidence is material and relevant, then it must be admitted when the accused can show that the evidence is more probative than the dangers of unfair prejudice. See [Mil. R. Evid.] 412(c)(3). Those dangers include concerns about "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." [Delaware v. Van Arsdall](#), 475 U.S. [673,] 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 [(1986)].

[Ellerbrock](#), 70 M.J. at 318-19.

"We review a military judge's ruling on whether to exclude evidence pursuant to [Mil. R. Evid.] 412 for an abuse of discretion. [United States v. Roberts](#), 69 M.J. 23, 26 (C.A.A.F. 2010). [*12] Findings of fact are reviewed under a clearly erroneous standard and

conclusions of law are reviewed de novo." [Id.](#) at 317.

If a military judge abuses his discretion by excluding evidence pursuant to Mil. R. Evid. 412, we must then determine whether the military judge's error was harmless beyond a reasonable doubt. [Id.](#) at 320 (citing [United States v. Moran](#), 65 M.J. 178, 187 (C.A.A.F. 2007)). In assessing harmlessness, we apply the five *Van Arsdall* factors: (1) the importance of the testimony; (2) whether the testimony was cumulative; (3) the presence or absence of corroborating or contradictory evidence on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution's case. *Id.* (citing [Van Arsdall](#), 475 U.S. at 684).

DISCUSSION

Appellant's case was tried prior to our superior court's *Gaddis* and *Ellerbrock* decisions. Consequently, the military judge used a *pre-Gaddis* and *pre-Ellerbrock* view that overly emphasized the privacy of the victim. In applying the correct test, we conclude that it was error to exclude, pursuant to Mil. R. Evid. 412 and 403, the defense's proffered evidence as to the sexual behavior of each victim. Furthermore, [*13] we find this error was not harmless beyond a reasonable doubt.

VICTIM 1

The military judge denied the defense's motion to admit evidence pertaining to Victim 1's sexual comment to appellant, and consensual sexual contact with appellant, both of which occurred on a bus ride to a military training event during the week following appellant's alleged sexual assault of her. As mentioned above, the military judge applied a *pre-Gaddis* and *pre-Ellerbrock* analysis. We will now apply the proper analysis as set out in [Ellerbrock](#).

Based on the record before us, we adopt the military judge's determination that the proffered sexual behavior on the bus was relevant.⁴ We further find this sexual

⁴We note that although the defense has the burden to prove relevancy, the military judge's ruling was made without taking any evidence and based only upon the defense's written proffer in their motion. We also note that during appellant's testimony on other Mil. R. Evid. 412 issues, the defense appeared ready to have appellant testify about the sexual comment and contact on the bus, but the judge reasserted his earlier ruling that those were inadmissible. Despite a seemingly inadequate record to determine relevancy, under

behavior "material" as it goes directly to the defense theory of consent, especially considering that there was admissible evidence that: (1) Victim 1 had made numerous comments about her desire to have sex with appellant, and (2) Victim 1 engaged in sexual activity with appellant in the bathroom on the evening of the alleged sexual assault. In addition, we also conclude that the probative value of the proffered evidence outweighs dangers of unfair prejudice, particularly as these alleged acts occurred in an [*14] open setting (on a bus) countering any privacy concerns. In addition, the parties who supposedly witnessed the events were students in a training school, have since completed that school, and are no longer assigned to the same unit, thereby reducing the chances of embarrassment or harassment as a result of such testimony. Therefore, because the proffered evidence regarding Victim 1's sexual comment and contact on the bus was relevant, material, and more probative than any danger to unfair prejudice, we hold that the military judge erred by excluding this evidence.

Moving to a prejudice analysis, we note that the undeveloped record leaves us somewhat handicapped in our application of the *Van Arsdall* factors. Although the moving party would typically bear the responsibility for a lack of evidence regarding the motion, in this case the military judge's decision leaves us at a disadvantage. From the record before us, we are unable to ascertain exactly how the defense intended to admit evidence of the sexual behavior on the bus, for example, through cross-examination of Victim 1, through appellant, or through a third party. At a minimum, it appears appellant would have testified about what occurred on the bus; however, the military judge prevented this testimony by reasserting, in response to an inquiry by defense counsel, that he had already ruled any such testimony was inadmissible under Mil. R. Evid. 412. Therefore, for our analysis we will presume, based on the military judge's relevancy determination, that there is evidence [*16] from some source regarding Victim 1 making a sexual comment and having sexual contact with appellant on a bus in the days following her alleged sexual assault.

Because of the uncontested nature of the proffered

the circumstances of this case, we decline to hold this against appellant, and we adopt the military judge's [*15] conclusion with regards to relevancy. We also note that this adoption of the military judge's ruling is for purposes of this decision alone and does not foreclose any subsequent relevancy decision based on additional evidence.

testimony, we find that the improperly excluded evidence impacts directly upon the defense of consent and that such evidence would favor the defense for all of the first four *Van Arsdall* factors: (1) the importance of the testimony; (2) whether the testimony was cumulative; (3) the presence or absence of corroborating or contradictory evidence on material points; and (4) the extent of cross-examination otherwise permitted. See [Van Arsdall, 475 U.S. at 684](#). Moreover, we find the fifth factor also favors the defense as the prosecution's case was not strong with regards to this specification. In particular, there was contradictory evidence concerning Victim 1's level of intoxication, there was no immediate official reporting, there was evidence of Victim 1's character for untruthfulness, and there was evidence of prior sexual discussions and sexual contact between Victim 1 and appellant. Thus, on the record before us, we hold that the military judge's error in excluding evidence [*17] concerning the sexual comment and sexual contact on the bus was not harmless beyond a reasonable doubt.

VICTIM 2

The military judge also excluded evidence of Victim 2's sexual activity with PVT RR, which took place earlier in the evening on the same night as the sexual assault. Again, we find the military judge's Mil. R. Evid. 412 analysis was erroneous in light of [Gaddis](#) and [Ellerbrock](#), and we will properly evaluate appellant's claims below.

Similar to our evaluation of the evidence regarding Victim 1, we are also in the position that no evidence was taken, which we again at least partially lay at the feet of the military judge and will not hold against appellant.⁵ Therefore, we again base our decision on the record before us, which consists of proffers from the defense counsel during the motion hearing and includes an uncontested description of Victim 2 engaging in consensual sexual activity with PVT RR as close in time as one hour before the sexual assault in which the victim was allegedly incapacitated. In addition, there is proffered evidence that Victim 2 has a boyfriend, and

⁵ As we noted previously, the defense has the burden to prove relevancy, but the military judge's ruling was made without taking any evidence and based only upon the defense's proffers during the motions hearing. We also note that during the motions hearing, the defense indicated a willingness to present evidence, but the military judge made his ruling and indicated it was not because of a lack of evidence. We also note that our current decision does not foreclose a different decision based on additional evidence.

she told a potential witness to lie to civilian authorities about her consensual sexual activity with PVT [*18] RR.

Under our review of this proffered evidence, we find Victim 2's consensual sexual activity with PVT RR relevant to whether Victim 2 was incapacitated later in the evening. We also find the sexual activity relevant to her credibility in the context that it was something she was willing to tell someone to lie about to authorities. We further find this sexual activity "material," as both Victim 2's incapacitation and her credibility were in dispute. Additionally, we conclude that the probative value of the proffered evidence outweighs dangers of unfair prejudice, particularly as these acts, like those of Victim 1, allegedly occurred in an open setting countering any privacy [*19] concerns. In addition, all parties and witnesses to the events appear to be students in a training school and have since completed that school, thereby reducing the chances of embarrassment or harassment as a result of such testimony. Therefore, because the proffered evidence regarding Victim 2's sexual activity with PVT RR on the hotel bed is more probative than any danger of unfair prejudice, we hold that the military judge erred in excluding this evidence.

Analyzing this evidence for prejudice, we again note that the undeveloped record leaves us somewhat handicapped in our application of the Van Arsdall factors to the proposed testimony. Although the moving party would typically bear the responsibility for a lack of evidence regarding the motion, the military judge's decision in this instance leaves us at a disadvantage again. From the record before us, we are uncertain as to how the defense intended to bring forth the evidence of the sexual activity between Victim 2 and PVT RR on the bed, for example, through cross-examination of Victim 2, through testimony of the appellant, or through testimony of PVT RR or the other individuals in the room. Because the military judge declined [*20] to receive evidence on this matter, our analysis will be based on the proffers made by defense counsel during the motions hearing as set out in the background section of this opinion.

We find the proffered evidence, which is uncontested, goes directly to the defense's theories that Victim 2 was not incapacitated, that her allegation against appellant was fabricated, and that such evidence favors the

defense for all of the first four Van Arsdall factors.⁶ Moreover, we find the fifth factor also favors the defense as the prosecution's case was not strong with regard to this specification. In particular, there was contradictory evidence concerning Victim 2's capacity, near in time to the alleged sexual assault, and her credibility was put into question. Thus, on the record before us, we hold that the military judge's error, ruling the evidence concerning the sexual activity between PVT RR and Victim 2 was inadmissible, was not harmless beyond a reasonable doubt.

In addition to the prejudicial error noted above regarding the Mil. R. Evid. 412 issues litigated at the pretrial motions hearing, we also find prejudicial error in a later ruling by the military judge. This later ruling excluded testimony about Victim 2's sexual activity with PVT RR under an additional defense theory that PVT RR was an alternate source of sexual injury to Victim 2. During the government case on the merits, the prosecution called a SANE [*22] Nurse as a witness. This witness testified that she conducted an exam of Victim 2 the morning following the alleged sexual assault which found redness in Victim 2's vagina and a tear on her labia. The witness characterized the findings as an injury and further testified that her findings were indicative of sexual activity having occurred, but she could not determine if it was consensual or not and that her findings were consistent with either a sexual assault or consensual intercourse.

In response to the SANE Nurse's testimony, the defense requested the judge allow testimony from PVT RR as an alternate source of the injury. The defense proffered that PVT RR would testify that he inserted his finger into Victim 2's vagina and rubbed her vaginal area with his

⁶ Although the military judge allowed the defense to call a witness to testify that Victim 2 asked her to lie to authorities, the military judge precluded the defense from bringing out that sexual activity between Victim 2 and PVT [*21] RR was the substance of the lie. When a panel member submitted a question concerning the underlying subject of the lie, the military judge asked the question in a manner to shield Victim 2, eliciting a response from the witness on the stand that the lie did not involve anything that happened between Victim 2 and appellant. We find that this questioning by the military judge may have given a false impression to the panel that the lie had nothing to do with the case. This unfairly prejudiced the defense because it minimized the impact of the lie on Victim 2's credibility and undercut the defense theory that Victim 2 fabricated her allegation against appellant to conceal her consensual sexual activity with appellant from her boyfriend.

finger. The military judge denied the defense's request. Prior to making his ruling, the military judge inquired of the defense and received a response that their theory was consent. The military judge then reasoned that because the government only offered the SANE Nurse testimony to prove sexual intercourse occurred, and since the defense theory was consent, then the source of injury did not matter. We disagree. We find that evidence [*23] of sexual injury leaves such a strong impression of nonconsensual sex and that testimony concerning an alternate source of that injury is highly relevant. Moreover, such evidence is a specific exception under Mil. R. Evid. 412(b)(1)(A). Thus, despite the SANE Nurse's testimony that the injury was consistent with both a sexual assault and consensual sexual activity, we cannot disregard the possibility that the panel inferred that the injury was more indicative of a nonconsensual sexual assault, particularly since Victim 2 testified she was awakened by the "pain" of sexual intercourse with appellant. Therefore, we find the military judge's decision to exclude testimony of an alternate source of Victim 2's vaginal injury was prejudicial error. Finally, we conclude that this error and the error identified above, each standing alone, would require the corrective action we take below.

CONCLUSION

On consideration of the entire record and based upon the military judge's erroneous exclusion of evidence pursuant to Mil. R. Evid. 412, the findings of guilty and the sentence are set aside. A rehearing may be ordered by the same or a different convening authority.

Judge ALDYKIEWICZ and Judge MARTIN
[*24] concur.

United States v. Mellette

United States Navy-Marine Corps Court of Criminal Appeals

May 14, 2021, Decided

No. 201900305

Reporter

2021 CCA LEXIS 234 *; __ M.J. __; 2021 WL 1940433

UNITED STATES, Appellee v. Wendell E. MELLETTE, Jr., Electrician's Mate (Nuclear) First Class (E-6), U.S. Navy, Appellant

Subsequent History: Petition for review filed by United States v. Mellette, 2021 CAAF LEXIS 664 (C.A.A.F., July 13, 2021)

Motion granted by United States v. Mellette, 2021 CAAF LEXIS 679 (C.A.A.F., July 14, 2021)

Motion granted by United States v. Mellette, 2021 CAAF LEXIS 707 (C.A.A.F., July 30, 2021)

Prior History: [*1] Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Warren A. Record. Sentence adjudged 16 August 2019 by a general court-martial convened at Naval Air Station Jacksonville, Florida, consisting of officer and enlisted members. Sentence in the Entry of Judgment: confinement for five years and a dishonorable discharge.

Core Terms

sentence, military, sexual, patient, profile, diagnoses, grooming, in camera, circumstances, occasions, touching, records, psychotherapist-patient, psychotherapist, specification, cumulative, disclosure, diagnosis, sex, request information, emails, expert testimony, sexual contact, recommendation, credibility, privileged, beyond a reasonable doubt, mental health, communications, corroborated

Case Summary

Overview

HOLDINGS: [1]-The words "on divers occasions" was set aside from the specification for sexual abuse of a child because the service member was prejudiced as to any post-deployment sexual abuse where the expert's

testimony was material to the post-deployment sexual abuse the victim testified about, because it corroborated the escalating nature of the sexual contact, which in turn supported the victim's credibility on the issue of whether she was still 15 years old at the time; [2]-Remainder of the specification was legally and factually sufficient where the service member touched the victim's back, thighs, and buttocks for sexual gratification on at least one occasion prior to his deployment. This was supported by not only the victim's testimony, but also by the provocative emails the victim sent to the service member on his submarine.

Outcome

Words "hips," and "on divers occasions" set aside from specification. Findings as to specification's remaining language and that portion of sentence affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Preliminary Proceedings > Discovery & Inspection > In Camera Inspections

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > ... > Courts Martial > Motions > Suppression

HN1  **Discovery & Inspection, In Camera Inspections**

An appellate court reviews the denial of a pretrial motion for in camera review for an abuse of discretion. A military judge abuses his discretion when he (1) predicates his ruling on findings of fact that are not supported by the evidence of record; (2) uses incorrect legal principles; (3) applies correct legal principles to the facts in a way that is clearly unreasonable, or (4) fails to consider important facts. An appellate court reviews a military judge's conclusions of law de novo.

Military & Veterans Law > ... > Courts
 Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military
 Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > ... > Courts
 Martial > Posttrial Procedure > Judge Advocate Review

Military & Veterans Law > ... > Trial
 Procedures > Witnesses > Examination of Witnesses

Military & Veterans Law > Military
 Justice > Disclosure & Discovery > Depositions & Interrogatories

HN2[] Sentences, Deliberations, Instructions & Voting

Generally, the parties to a court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Unif. Code Mil. Justice 46(a). The rules prescribed by the President provide that each party is entitled to the production of evidence which is relevant and necessary. R.C.M. 703(f)(1), Manual Courts-Martial is relevant if it has any tendency to make a fact of consequence in determining the action more or less probable than it would be without the evidence. R.C.M. 401, Manual Courts-Martial. Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. R.C.M. 703(f), Manual Courts-Martial Evidence.

Military & Veterans Law > ... > Courts

Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military
 Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > Military
 Justice > Disclosure & Discovery > Disclosure by Government

HN3[] Sentences, Deliberations, Instructions & Voting

Relevant and necessary evidence can be excepted from production or disclosure by a proper claim of privilege. R.C.M. 501, Manual Courts-Martial.

Military & Veterans Law > ... > Courts
 Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans
 Law > ... > Evidence > Privileged
 Communications > Psychotherapist-Patient
 Privilege

Military & Veterans Law > Military
 Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > Military
 Justice > Defenses > Ignorance & Mistake

Military & Veterans Law > ... > Courts
 Martial > Motions > Motions for Mistrial

HN4[] Sentences, Deliberations, Instructions & Voting

R.C.M. 513, Manual Courts-Martial provides that communications are confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication. R.C.M. 513(b)(4), Manual Courts-Martial.

Military & Veterans Law > ... > Courts
 Martial > Sentences > Deliberations, Instructions &

Voting

Military & Veterans Law > Military
Justice > Disclosure & Discovery > Discovery by
Defense


Military & Veterans
Law > ... > Evidence > Privileged
Communications > Psychotherapist-Patient
Privilege

Military & Veterans Law > Military
Justice > Disclosure & Discovery > Disclosure by
Government

Military & Veterans Law > ... > Courts
Martial > Evidence > Preliminary Questions

HN5 **Sentences, Deliberations, Instructions & Voting**

Before ordering privileged material produced even for in camera review, the military judge must find the moving party has demonstrated four things by a preponderance of the evidence: (A) a specific, credible factual basis demonstrating a reasonable likelihood that the records or communications would contain or lead to the discovery of evidence admissible under an exception to the privilege;(B) that the requested information meets one of the enumerated exceptions under R.C.M. 513(d), Manual Courts-Martial;(C) that the information sought is not merely cumulative of other information available; and(D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources. R.C.M. 513(e)(3), Manual Courts-Martial. If the military judge determines each of the above factors is met except for one of the rule's enumerated exceptions, the military judge must then determine whether in camera review is constitutionally required, and if so, take further action as necessary.

HN6  Construction of a statute is a question of law an appellate court reviews de novo. Where a privilege is codified in the evidentiary rules, ordinary principles of statutory construction control, with the caveat that privileges should be construed narrowly, as they run contrary to a court's truth-seeking function. When the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.

Military & Veterans
Law > ... > Evidence > Privileged
Communications > Attorney-Client Privilege

Military & Veterans
Law > ... > Evidence > Privileged
Communications > Psychotherapist-Patient
Privilege

HN7 **Privileged Communications, Attorney-Client Privilege**

The psychotherapist-patient privilege protects against the disclosure of confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition. R.C.M. 513(a), Manual Courts-Martial. Under a plain reading of this language, the privilege protects communications between the patient and the psychotherapist—meaning communication from the patient to the psychotherapist and communication from the psychotherapist to the patient—that are made for the purpose of facilitating diagnosis and treatment of the patient's condition. In other words, the protection covers not only the patient's description of her symptoms, but also the psychotherapist's rendering of a diagnosis and treatment plan, based on those symptoms, back to the patient. This language is very similar to the language used in the attorney-client privilege, which protects confidential communications between the client and the lawyer that are made for the purpose of facilitating the rendition of professional legal services to the client. R.C.M. 502, Manual Courts-Martial. "Professional legal services" include, at a minimum, providing legal advice.

Military & Veterans Law > Military
Justice > Disclosure & Discovery > Discovery by
Defense

Military & Veterans
Law > ... > Evidence > Privileged
Communications > Psychotherapist-Patient
Privilege

Military & Veterans Law > Military
Justice > Defenses > Ignorance & Mistake

HN8 **Disclosure & Discovery, Discovery by Defense**

Communications from the psychotherapist to a pharmacist to fill prescriptions are in furtherance of the rendition of professional services to the patient, and are therefore protected from further disclosure. R.C.M. 513(b)(4), Manual Courts-Martial.

Military & Veterans Law > Military
Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > ... > Courts
Martial > Posttrial Procedure > Waivers & Withdrawals of Appeals

Military & Veterans Law > Military
Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans
Law > ... > Evidence > Privileged
Communications > Psychotherapist-Patient
Privilege

HN9 **Disclosure & Discovery, Disclosure by Government**

A privilege is waived where the holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege. R.C.M. 510(a), Manual Courts-Martial. Whether a waiver is valid turns on whether the disclosure was voluntary, not whether the privilege holder knew the information disclosed was privileged or intended to waive the privilege by disclosing it.

Criminal Law & Procedure > Preliminary
Proceedings > Discovery & Inspection > In Camera
Inspections

Military & Veterans Law > Military
Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans
Law > ... > Evidence > Privileged
Communications > Psychotherapist-Patient
Privilege

Military & Veterans Law > Military
Justice > Disclosure & Discovery > Discovery by
Defense

Military & Veterans Law > ... > Courts
Martial > Posttrial Procedure > Record

HN10 **Discovery & Inspection, In Camera Inspections**

R.C.M. 513, Manual Courts-Martial not only authorizes the military judge to conduct an in camera review of the records in which information subject to production is contained, but also specifically requires that any production or disclosure permitted by the military judge must be narrowly tailored to only the specific records or communications, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions to the privilege and are included in the stated purpose for which the records or communications are sought. R.C.M. 513(e)(4), Manual Courts-Martial. The purpose of in camera review is to allow the trial judge to review the records and separate out the information that should be produced or disclosed from the information that should remain protected.

Constitutional Law > ... > Fundamental
Rights > Procedural Due Process > Scope of
Protection

HN11 **Procedural Due Process, Scope of Protection**

There are several key areas where courts have overridden privileges in order to protect against the infringement of an accused's weighty interests of due process and confrontation: (1) recantation or other contradictory conduct by the alleged victim; (2) evidence of behavioral, mental, or emotional difficulties of the alleged victim; and (3) the alleged victim's inability to accurately perceive, remember, and relate events. The second and third areas, in particular, go to the very essence of witness credibility and reliability—potential defects in capacity to understand, interpret, and relate events.

Criminal Law & Procedure > ... > Standards of
Review > Harmless & Invited Error > Constitutional
Rights

Criminal Law &
Procedure > Trials > Witnesses > Impeachment

HN12 **Harmless & Invited Error, Constitutional Rights**

Where an error includes a constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, the appellate court must find the error harmless beyond a reasonable doubt. For such a review, the appellate court weighs factors including: the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. A constitutional error is harmless when it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. To say that an error did not contribute to the ensuing verdict means to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Witnesses

HN13 **Standards of Review, Abuse of Discretion**

An appellate court reviews a trial court's decision to admit expert testimony for abuse of discretion. The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.

Military & Veterans Law > ... > Trial
Procedures > Witnesses > Expert Testimony

HN14 **Witnesses, Expert Testimony**

A witness qualified as an expert may testify in the form of an opinion or otherwise if:(a) the expert's scientific,

technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;(b) the testimony is based on sufficient facts or data;(c) the testimony is the product of reliable principles and methods; and(d) the expert has reliably applied the principles and methods to the facts of the case. R.C.M. 702, Manual Courts-Martial. Under this rule expert testimony about certain aspects of victim behavior is generally admissible. Experts may, for example, testify as to what symptoms are found among children who have suffered sexual abuse and whether the child-witness has exhibited these symptoms, or discuss various patterns of consistency in the stories of child abuse victims and compare those patterns with patterns in the victim's story, so long as they do not opine as to whether the witness is telling the truth about an allegation.

Criminal Law &
Procedure > Trials > Witnesses > Credibility

Military & Veterans
Law > ... > Evidence > Admissibility of
Evidence > Character, Custom & Habit Evidence

HN15 **Witnesses, Credibility**

Generally, use of any characteristic profile as evidence of guilt or innocence in criminal trials is improper. Profile evidence is evidence that presents a characteristic profile of an offender, such as a pedophile or child abuser, and then places the accused's personal characteristics within that profile as proof of guilt. Thus, the focus is upon using a profile as evidence of the accused's guilt or innocence, and not upon using a characteristic profile to support or attack a witness's or victim's credibility or truthfulness.

Military & Veterans
Law > ... > Evidence > Admissibility of
Evidence > Character, Custom & Habit Evidence

Military & Veterans Law > ... > Courts
Martial > Sentences > Presentencing Proceedings

Military & Veterans Law > Military
Justice > Disclosure & Discovery > Disclosure by
Government

HN16 **Admissibility of Evidence, Character,**

Custom & Habit Evidence

The ban on profile evidence exists because this process treads too closely to offering character evidence of an accused in order to prove that the accused acted in conformity with that evidence on a certain occasion and committed the criminal activity in question. The prohibition thus is rooted in R.C.M. 404(a)(1), Manual Courts-Martial that precludes the prosecution from introducing character evidence of an accused who has not put his character at issue. As the system of justice is a trial on the facts, not a litmus paper test for conformity with any set of characteristics, factors, or circumstances, profile evidence can be admitted only in narrow and limited circumstances, to include as purely background material to explain sanity issues, as an investigative tool to establish reasonable suspicion, or in rebuttal when a party opens the door by introducing potentially misleading testimony.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Evidence

HN17 **Harmless & Invited Error, Evidence**

For non-constitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings. In conducting this analysis, courts weigh (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.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Depositions & Interrogatories

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN18 **Disclosure & Discovery, Depositions & Interrogatories**

An appellate court reviews questions of whether the evidence is legally and factually insufficient de novo. Unif. Code Mil. Justice 66(c).

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of

Evidence

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN19 **Substantial Evidence, Sufficiency of Evidence**

To determine legal sufficiency, an appellate court asks 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. In conducting this analysis, we must draw every reasonable inference from the evidence of record in favor of the prosecution.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN20 **Trial Procedures, Burdens of Proof**

In evaluating factual sufficiency, an appellate court determines whether, after weighing the evidence in the record of trial and making allowances for not having observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. In conducting this unique appellate function, the an appellate court takes a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt. Proof beyond a reasonable doubt, however, does not mean the evidence must be free from conflict.

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Military & Veterans Law > Military Offenses > Assault

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Military & Veterans Law > ... > Courts Martial > Trial

Procedures > Burdens of Proof

Military & Veterans Law > Military Offenses > Rape
& Sexual Assault of a Child

Where there was no objection at trial, an appellate court reviews for plain error, which occurs when there is an error, it is clear or obvious, and it results in material prejudice to a substantial right.

HN21 **Burdens of Proof, Prosecution**

In order to prove the offense of sexual abuse of a child as charged, the Government is required to prove beyond a reasonable doubt that (1) Appellant committed sexual contact upon the victim by intentionally touching, directly or through the clothing, her buttocks, thighs, hips, and back with his hand; (2) he did so with the intent to gratify his sexual desire; and (3) at the time the victim had not attained the age of 16 years. Manual Courts-Martial pt. IV, para. 45.b.b.(4)(a).

Criminal Law & Procedure > Appeals > Remand & Remittitur

Military & Veterans Law > ... > Courts
Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Courts
Martial > Sentences > Presentencing Proceedings

HN22 **Appeals, Remand & Remittitur**

In determining whether an appellate court can reassess the sentence at the appellate level or whether it must remand for the trial court to do so, the appellate court determines: (1) whether there have been dramatic changes in the penalty landscape or exposure; (2) whether sentencing was by members or a military judge alone; (3) whether the nature of the remaining offenses captures the gravamen of the criminal conduct included within the original offenses and whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses; and (4) whether the remaining offenses are of the type with which appellate judges should have the experience and familiarity to reliably determine what sentence would have been imposed at trial.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

HN23 **Plain Error, Definition of Plain Error**

Criminal Law &
Procedure > Sentencing > Imposition of Sentence > Victim Statements

Military & Veterans Law > ... > Courts
Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Courts
Martial > Sentences > Presentencing Proceedings

Military & Veterans Law > ... > Courts
Martial > Posttrial Procedure > Judge Advocate Review

HN24 **Imposition of Sentence, Victim Statements**

A crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at the presentencing hearing relating to that offense. R.C.M. 1001(c)(1), Manual Courts-Martial. This right includes the right to make an unsworn statement including victim impact and matters in mitigation. R.C.M. 1001(c)(3), (5). Victim impact includes any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty. R.C.M. 1001(c)(2)(B). However, the victim's statement may not include a recommendation of a specific sentence. R.C.M. 1001(c)(3).

Military & Veterans Law > ... > Courts
Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Courts
Martial > Sentences > Presentencing Proceedings

HN25 **Sentences, Deliberations, Instructions & Voting**

R.C.M. 1001(c), Manual Courts-Martial is designed to enable crime victims to tell the sentencing authority what impact the accused's misconduct has had on them, not what to do about it.

Military & Veterans Law > ... > Courts
 Martial > Evidence > Evidentiary Rulings

HN26 Evidence, Evidentiary Rulings

If an error occurs in the admission of evidence at sentencing, the test for prejudice is whether the error substantially influenced the adjudged sentence. We determine this by considering four factors: (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.

Criminal Law & Procedure > Appeals > Reversible Error > Cumulative Errors

Military & Veterans
 Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

Criminal Law & Procedure > Trials > Jury Instructions > Curative Instructions

HN27 Reversible Error, Cumulative Errors

It is well established that an appellate court can order a rehearing based on the accumulation of errors not reversible individually. Courts are far less likely to find cumulative error where evidentiary errors are followed by curative instructions or when a record contains overwhelming evidence of a defendant's guilt.

Counsel: For Appellant: Lieutenant Gregory R. Hargis, JAGC, USN, Lieutenant Michael W. Wester, JAGC, USN.

For Appellee: Lieutenant Commander Jeffrey S. Marden, JAGC, USN, Major Kerry E. Friedewald, USMC.

Judges: Before GASTON, STEWART, and HOUTZ, Appellate Military Judges. Senior Judge GASTON delivered the opinion of the Court, in which Judges STEWART and HOUTZ joined.

Opinion by: GASTON

Opinion

PUBLISHED OPINION OF THE COURT

GASTON, Senior Judge:

Appellant was convicted, contrary to his plea, of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920b (2012), for committing sexual contact upon his 15-year-old sister-in-law.

He asserts six assignments of error [AOEs], which we renumber as follows: (1) the military judge abused his discretion by denying a Defense motion for in camera review and production of the victim's mental health diagnoses, treatment, and prescribed medications; (2) the military [*2] judge abused his discretion by allowing the Government to admit expert testimony that Appellant fit the profile of a perpetrator who grooms children for sex; (3) the evidence is legally and factually insufficient to support his conviction; (4) the military judge committed plain error by allowing the victim to recommend a specific sentence in her unsworn victim impact statement; (5) the record of trial is incomplete because the military judge failed to attach four enclosures of a Defense motion;¹ and (6) the findings and sentence should be set aside under the cumulative error doctrine.

We find merit in Appellant's first, second, and fourth AOEs, order some of the language stricken from the specification, affirm the finding as to the remaining language, and reassess the sentence.

I. BACKGROUND

In August 2013, Stacy,² the 15-year-old sister of Appellant's then-wife, Ms. Mitchell, underwent a week of inpatient mental health treatment for ongoing depression and anxiety, which had resulted in her cutting herself. Upon discharge, she was prescribed Prozac, continued receiving professional counseling for about a year, and remained on Prozac and other medications, the side effects of which included [*3] causing her nightmares.

¹ As we have granted the Government's motion to attach the missing enclosures to the record, we find this AOE to be without merit. See *United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987).

² All names in this opinion, other than those of Appellant, the judges, and counsel, are pseudonyms.

A couple of months after Stacy's discharge from the mental health facility, Appellant started taking on a more big-brotherly role toward her, having one-on-one conversations with her, and taking her on rides in his truck to get ice cream or run errands. During these rides Appellant began placing his hand on Stacy's thigh and her upper back between her shoulders, and on one occasion slid his hand down and undid her bra through her shirt. On an occasion in the home where they both lived with Ms. Mitchell and Stacy's parents, he asked Stacy to walk over to look at something on his computer or phone and then touched her back, thigh, and buttocks.

When Appellant deployed on his submarine from February to April 2014, Stacy sent him provocative emails telling him things like "when you were touching me, I wanted more"³ and asking him what he would think if she told him she wanted "to f[***]" him.⁴ Stacy's emails were intercepted by the submarine's email monitoring system, and Appellant was confronted about them by his chain of command. Appellant explained that the emails were from his wife's little sister, that she was infatuated with him, and that the comments related [*4] to him innocently placing his hand on her shoulder. His command had him email Stacy instructing her to stop emailing him, and he also sent an email to Ms. Mitchell informing her about the situation.

Nevertheless, Appellant told a friend and colleague aboard the submarine that he was contemplating doing what Stacy's email suggested—i.e., having sex with her—and at some point after he returned from deployment, he resumed his one-on-one interactions with Stacy, which became more overtly sexual. He kissed her; touched her thighs, buttocks, and vaginal area; commented on her buttocks and the size of her breasts; and asked, coarsely, whether she was aroused. Eventually, he began having vaginal intercourse with her, and did so on a number of occasions.

In mid-February 2015, Ms. Mitchell caught Appellant kissing Stacy. When confronted, Appellant denied they were having sex. Around this time, the local Department of Children and Family Services [DCF] sent someone to Stacy's house to investigate a report of an inappropriate relationship made by Stacy's boyfriend, whom Stacy had told, along with her two closest female friends, about her relationship with Appellant. When questioned

by DCF, Stacy [*5] denied anything had happened between her and Appellant.

Appellant and Ms. Mitchell separated soon after his relationship with Stacy came to light, and they divorced in 2016. Custody of their daughter, Christine, was awarded to Ms. Mitchell with visitation rights to Appellant. In 2018, Appellant successfully petitioned for a modification of the custody arrangement to enable Christine to visit him in Guam, where he was then stationed. When Ms. Mitchell subsequently refused to allow Christine to be picked up for a scheduled visitation per the custody arrangement, Appellant filed for Ms. Mitchell to be held in contempt of court.

In response, Ms. Mitchell went with her (and Stacy's) mother to Appellant's commanding officer and reported Appellant's inappropriate relationship with Stacy from several years before. Stacy's mother spoke to Stacy about what had happened between her and Appellant and helped Stacy reconstruct the timeline of events. At her mother's urging, Stacy agreed to be interviewed by the Naval Criminal Investigative Service [NCIS] in June 2018. During the interview, Stacy told NCIS that Appellant had committed the sexual conduct with her when she was still 15 years old, but [*6] admitted she had "always been horrible with remembering times and dates."⁵ She said she did not report what happened sooner because Appellant had told her not to and she was scared of him. Stacy later gave a civil deposition in April 2019 in connection with Appellant and Ms. Mitchell's custody dispute over Christine. When asked during the deposition about her sexual interactions with Appellant, Stacy stated that she was not sure of the dates or specific timeframes, but that the touching occurred prior to the sexual intercourse.

The timing of the sexual conduct in relation to Stacy's 16th birthday in mid-July 2014 was a central issue at Appellant's court-martial, as both the offenses charged against him—sexual abuse of a child and sexual assault of a child—required the Government to prove beyond a reasonable doubt that Stacy was under the age of 16 years at the time of the offense. Appellant's friend from the submarine testified that Appellant admitted having sexual intercourse with Stacy, but believed this disclosure did not occur until late-July or August 2014. Appellant admitted during a recorded telephone conversation with Stacy's father that he had sex with Stacy multiple times, [*7] but maintained it did not happen until after her 16th birthday. Stacy testified she

³ Pros. Ex. 9.

⁴ Pros. Ex. 6.

⁵ App. Ex. XXXII at 29.

had trouble remembering dates and times, and could "remember things from a couple of weeks ago but not a couple of years ago," but she was "very sure" or "100 percent sure" that Appellant touched her in a sexual way and started having sexual intercourse with her when she was 15 years old.⁶ She testified she was sure of this because the first time Appellant had sexual intercourse with her was when Ms. Mitchell was still pregnant with Christine, who was born in June 2014, a month prior to Stacy's 16th birthday.

The members convicted Appellant of sexual abuse of a child by touching Stacy on "divers," or multiple, occasions with an intent to gratify his sexual desire, but acquitted him of sexual assault of a child by having vaginal sex with her.

II. DISCUSSION

A. In Camera Review and Production of Mental Health Records

Appellant asserts the military judge erred in denying his pretrial motion for in camera review and production of Stacy's mental health diagnoses, treatment, and prescribed medications. **HN1**[↑] We review the denial of such a motion for an abuse of discretion. *United States v. Chisum*, 77 M.J. 176, 179 (C.A.A.F. 2018). A military judge abuses his discretion when **[*8]** he (1) predicates his ruling on findings of fact that are not supported by the evidence of record; (2) uses incorrect legal principles; (3) applies correct legal principles to the facts in a way that is clearly unreasonable, or (4) fails to consider important facts. *United States v. Comisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (citations omitted). We review a military judge's conclusions of law de novo. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).

HN2[↑] Generally, the parties to a court-martial "shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." UCMJ art. 46(a). The rules prescribed by the President provide that "[e]ach party is entitled to the production of evidence which is relevant and necessary." Rule for Courts-Martial [RCM] 703(f)(1). Evidence is relevant if it has any tendency to make a fact of consequence in determining the action more or less probable than it would be without the evidence.

Military Rule of Evidence [MRE] 401. "Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." RCM 703(f), Discussion.

HN3[↑] Relevant and necessary evidence can be excepted from production or disclosure by a proper claim of privilege. MRE 501. The privilege at issue here—the psychotherapist-patient privilege—provides: **[*9]**

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the [UCMJ], if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

MRE 513(a). **HN4**[↑] The rule provides that communications are confidential if "not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication." MRE 513(b)(4).

HN5[↑] Before ordering such privileged material produced even for in camera review, the military judge must find the moving party has demonstrated four things by a preponderance of the evidence:

- (A) a specific, credible factual basis demonstrating a reasonable likelihood that the records or communications would contain or lead to the discovery of evidence admissible under an exception to the privilege;
- (B) that the requested information meets one of the enumerated exceptions under subsection (d) of [MRE 513];
- (C) that the information sought is not merely **[*10]** cumulative of other information available; and
- (D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

MRE 513(e)(3). If the military judge determines each of the above factors is met except for one of the rule's enumerated exceptions, the military judge must then determine whether in camera review is constitutionally required, and if so, take further action as necessary. *J.M. v. Payton-O'Brien*, 76 M.J. 782, 789-90 (N-M. Ct. Crim. App. 2017).

⁶ R. at 460, 481.

Here, after openly discussing with family members and NCIS and during her civil deposition her mental health diagnoses and treatment, including her recollection of her prescribed medications, Stacy asserted her psychotherapist-patient privilege to prevent Appellant's trial defense counsel from accessing this information in her mental health records. The Defense then moved for in camera review and production of the information, arguing that (1) the requested information was not privileged because the confidential communication that the psychotherapist-patient privilege protects does not include diagnosis and treatment information;⁷ (2) Stacy waived any privilege by repeatedly discussing her mental health issues with various third parties; and (3) even if not [*11] waived, the privilege should yield to in camera review and production of the requested information as constitutionally required. A Defense expert opined that based on the information and symptoms Stacy had already revealed, Stacy could have Borderline Personality Disorder, which could further manifest in attention-seeking and manipulative behaviors, particularly when associated with fear of abandonment. The Defense argued that information about Stacy's diagnoses and treatment was relevant to the issues of suggestion, memory, and truthfulness, which all impacted her credibility as the only Government eyewitness to the charged offenses. It argued her medication list was important to assessing any additional side effects or adverse interactions among her medications, as it related to memory issues associated with Stacy's allegations of misconduct several years before.

The military judge denied the Defense motion. He concluded that the records containing the information were privileged, that the Defense had not shown the requested information was "reasonably segregable [sic]"⁸ from the privileged communications, and that waiver applied only to the information Stacy had already disclosed. [*12] He concluded that the Defense had failed to meet its burden of demonstrating that in camera review or production of the requested information was required. He found that by her own admission Stacy had been diagnosed with depression, anxiety, and self-harm, and that the Defense offered only mere speculation of other diagnoses. He found that the information sought was cumulative because

Appellant already knew of Stacy's diagnoses and treatment from her previous disclosures. Finally, he concluded the Defense had failed to show why the requested information was relevant and necessary under RCM 703, as opposed to a mere "fishing expedition."⁹

1. What information is covered by the psychotherapist-patient privilege

As an initial matter, we must determine whether the mental health information requested by the Defense—i.e., diagnoses and treatment, including prescribed medications—is protected from disclosure by the psychotherapist-patient privilege. Both parties argue the military judge erred in concluding such information was privileged. We disagree.

HN6 [↑] "[C]onstruction of a statute is a question of law we review de novo." *United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018) (citation omitted). Where a privilege is codified in the evidentiary rules, ordinary [*13] principles of statutory construction control, with the caveat that "privileges should be construed narrowly, as they run contrary to a court's truth-seeking function." *United States v. Custis*, 65 M.J. 366, 369 (C.A.A.F. 2007) (quoting *Trammel v. United States*, 445 U.S. 40, 50-51, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980)). "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Custis*, 65 M.J. at 370 (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000)).

HN7 [↑] The psychotherapist-patient privilege protects against the disclosure of "confidential communication made *between the patient and a psychotherapist* or an assistant to the psychotherapist . . . if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition." MRE 513(a) (emphasis added). Under a plain reading of this language, the privilege protects communications "between" the patient and the psychotherapist—meaning communication from the patient to the psychotherapist and communication from the psychotherapist to the patient—that are made for the purpose of facilitating diagnosis and treatment of the patient's condition. In other words, the protection covers not only the patient's description of her symptoms, but

⁷The Defense clarified it was seeking the diagnosis and treatment plan, "not . . . specific notes from any counseling session." R. at 53.

⁸R. at 70.

⁹App. Ex. V at 7.

also the psychotherapist's rendering of a diagnosis [*14] and treatment plan, based on those symptoms, back to the patient.


This language is very similar to the language used in the attorney-client privilege, which protects confidential communications "between" the client and the lawyer that are "made for the purpose of facilitating the rendition of professional legal services to the client." MRE 502.¹⁰ "Professional legal services" include, at a minimum, providing legal advice. It is beyond cavil that the attorney-client privilege covers not only the description of the issue from the client to the attorney, but also the diagnosis—i.e., the legal advice—from the attorney to the client. For this reason, we disagree with our sister court's view that the psychotherapist-patient privilege "extends to statements and records that reveal the substance of conversations that may have been for the 'purpose of facilitating diagnosis or treatment,' but not to the diagnosis or treatment itself." *United States v. Rodriguez*, No. 20180138, 2019 CCA LEXIS 387, at *8 (A. Ct. Crim. App. Oct. 1, 2019) (unpublished), *pet. for rev. denied*, 79 M.J. 430 (C.A.A.F. 2020) (citing *H.V. v. Kitchen*, 75 M.J. 717, 721 (C. G. Ct. Crim. App. 2016) (Bruce, J., dissenting)). Interpreting the psychotherapist-patient privilege in this manner not only ignores its use of the word "between" as a protection for two-way communications, but would be akin to finding the attorney-client [*15] privilege protects the client's statements made for the purpose of facilitating the provision of legal advice, but not the legal advice itself. Thus, we reject this interpretation because it both ignores the plain language of the rule and leads to absurd results.

Although we should construe privileges narrowly, such an overly narrow interpretation of what the psychotherapist-patient privilege covers would also undermine the purpose of the privilege. The psychotherapist-patient privilege came into existence as a result of the Supreme Court's decision in *Jaffee v. Redmond*, which recognized the societal interest in a mentally healthy populace and found that "confidentiality is a *sine qua non* for successful psychiatric treatment." 518 U.S. 1, 10, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996). The Court further recognized that the patient's expectation in this regard is vitally important, since the

"promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court." *Id.* at 13. Consequently, we have previously found that in codifying the privilege in MRE 513 in the wake of *Jaffee*, "[t]he policy decision of Congress and the President is clear: the psychotherapist-patient privilege should be protected [*16] to the greatest extent possible." *Payton-O'Brien*, 76 M.J. at 787.¹¹ To interpret the privilege as covering only the patient's description of her symptoms, but not the psychotherapist's diagnosis and treatment of her condition, would deter patients from seeking mental health treatment in precisely the way *Jaffee* sought to avoid.

For the same reason we hold that, insofar as it pertains to mental health treatment, the prescription of medication is also covered by the privilege. The Coast Guard Court of Criminal Appeals held as much in *H.V. v. Kitchen*, pointing out that "diagnoses and the nature of treatment necessarily reflect, in part, the patient's confidential communications to the psychotherapist" 75 M.J. at 719. We agree. Revealing what psychiatric medication a patient has been prescribed to treat a diagnosed condition would in many circumstances suggest, if not reveal, the diagnosis itself.¹² Thus, we find that as a form of mental health treatment, the prescription of medication falls within the same concern, noted in *Kitchen*, that "[t]he privilege would essentially be gutted if a psychotherapist could be ordered [*17] to testify about a person's diagnosis or treatment, over the person's objection, so long as the psychotherapist

¹¹ See also Dep't of Def. Instr. 6490.08, *Command Notification Requirements to Dispel Stigma in Providing Mental Health Care to [Servicemembers]*, para. 3 (Aug. 17, 2011) (requiring that, "to dispel the stigma of seeking mental health care," Department of Defense healthcare providers "shall follow a presumption that they are not to notify a [servicemember's] commander when the [servicemember] obtains mental health care," and where notification is required, "shall provide the minimum amount of information to the commander concerned as required to satisfy the purposes of the disclosure").


¹² We also find unpersuasive the *Rodriguez* court's position that mental health prescriptions cannot involve "confidential communications" because they are "intended to be disclosed to a non-psychotherapist third party—the pharmacist who fills it." *Rodriguez*, 2019 CCA LEXIS 387, at *9. **HN8**  Drawing from the language of the rule, we find that communications from the psychotherapist to a pharmacist to fill prescriptions are "in furtherance of the rendition of professional services to the patient," and are therefore protected from further disclosure. MRE 513(b)(4).

¹⁰ By contrast, the language in the privilege covering communications to clergy protects only "confidential communication by the person to a clergyman." MRE 503 (emphasis added).

refrained from expressly describing or referring to the content of any confidential communications." *Kitchen*, 75 M.J. at 719 (quoting *Stark v. Hartt Transportation Systems, Inc.*, 937 F. Supp. 2d 88, 91-92 (D. Me. 2013)).

2. Waiver of the privilege


While we find the military judge correctly construed what information is covered by the psychotherapist-patient privilege, we hold that he erred in summarily rejecting the Defense argument that Stacy waived the privilege by discussing her mental health diagnoses and treatment, including her prescribed medications, with her family, with NCIS, and during her civil deposition.

HN9 A privilege is waived where the holder of the privilege "voluntarily discloses or consents to disclosure of *any significant part* of the matter or communication *under such circumstances that it would be inappropriate to allow the claim of privilege.*" MRE 510(a) (emphasis added). This language is plainly broader than the military judge's interpretation that "even if the privilege were waived, it would be only as to those matters already disclosed."¹³ We also note that "whether a waiver is valid turns on whether the disclosure was voluntary," not whether the privilege holder **[*18]** knew the information disclosed was privileged or intended to waive the privilege by disclosing it. *United States v. Jasper*, 72 M.J. 276, 280-81 (C.A.A.F. 2013) (citations omitted).

Here, Stacy openly discussed her mental health matters with multiple people on multiple occasions. The inpatient and follow-up treatment she received occurred immediately prior to and during the timeframe of the charged offenses, the reporting of which was delayed for a number of years and eventually occurred in response to a child-custody dispute over Stacy's niece. Irrespective of whether Stacy knew the information was privileged or intended to waive the privilege by discussing it, we find based on the record before us that her disclosures were voluntary, involved a significant part of the matters at issue, and occurred under such circumstances that it would be inappropriate to allow the claim of privilege.¹⁴ Hence, in this regard, we concur

with the parties in concluding the military judge erred in finding the information requested by the Defense was privileged.

We further find error in the military judge's conclusion that the requested information was not subject to production under RCM 703(f). Here, the Defense sought to confirm Stacy's stated diagnoses and ascertain whether **[*19]** there were any other related diagnoses that could impact her credibility. The Defense also sought to review the list of Stacy's prescribed medications, not all of which she could remember the names of, to assess their interactive side effects and potential for adverse effect on memory in a case involving a delay in reporting for several years, allegations that Stacy had previously denied, and a report made under circumstances--revolving around the custody battle over Christine--giving rise to a strong motive to fabricate at least their timeframe, if not their substance. Under these circumstances we find clearly unreasonable the military judge's conclusion that the requested information was not relevant and necessary.

The military judge expressed concern that the requested information—diagnoses and treatment, including prescribed medications—was not reasonably separable from other information subject to privilege. **HN10** But this situation is contemplated by the rule, which not only authorizes the military judge to conduct an in camera review of the records in which information subject to production is contained, but also specifically requires that

[a]ny production or disclosure permitted by **[*20]** the military judge must be narrowly tailored to only the specific records or communications, *or portions of such records or communications*, that meet the requirements for one of the enumerated exceptions to the privilege . . . and are included in the stated purpose for which the records or communications are sought

MRE 513(e)(4) (emphasis added). The purpose of in camera review is to allow the trial judge to review the records and separate out the information that should be produced or disclosed from the information that should remain protected. Accordingly, we hold the military judge erred in not following the procedures we have previously outlined either to conduct the in camera review or to take further action as necessary. See *Payton-O'Brien*, 76 M.J. at 789-90.

shield into a sword—a circumstance the waiver rule's broader language seeks to avoid.

¹³ App. Ex. V at 7.

¹⁴ To conclude otherwise would allow a privilege holder to delimit discoverable evidence to establish advantageous facts and then invoke the privilege to deny the evaluation of their context, relevance, or truth—thus turning the privilege from a

3. *In camera* review and production under MRE 513(e)(3)

Even assuming *arguendo* that Stacy's discussions of her mental health matters did not waive her privilege, we find the military judge abused his discretion in concluding the Defense had not shown, at the very least, that an *in camera* review of the pertinent mental health records was constitutionally required. **HN11**¹⁵ We have previously identified several key areas where courts have overridden privileges in order to protect against [*21] the infringement of an accused's weighty interests of due process and confrontation: "(1) recantation or other contradictory conduct by the alleged victim; (2) evidence of behavioral, mental, or emotional difficulties of the alleged victim; and (3) the alleged victim's inability to accurately perceive, remember, and relate events." *Payton-O'Brien*, 76 M.J. at 789. As we explained, "[t]he second and third areas, in particular, . . . go to the very essence of witness credibility and reliability—potential defects in capacity to understand, interpret, and relate events. Additionally, these areas intersect with the medical community's ability to interpret that credibility." *Id.* at 789 n.28.¹⁵

This case involves all of these key areas of concern. After telling friends about her sexual relationship with Appellant, Stacy denied to local DCF authorities that anything inappropriate had happened between them. There is substantial evidence of Stacy's behavioral, mental, and emotional difficulties, which necessitated not only inpatient treatment but continued follow-on care, the timing of which was pertinent to both the timeframe and the substance of the charged offenses. And Stacy repeatedly stated in both formal and informal settings [*22] that she was unable to remember the precise timeframe of the events in question, which was the crucial issue in the trial.

The information requested by the Defense not only bore on these issues, but under the circumstances of this case was (1) reasonably likely to yield admissible information, (2) was not cumulative, and (3) was not available through other non-privileged sources. The

military judge found these latter three requirements were not satisfied based largely on the view that Appellant already knew of Stacy's diagnoses and treatment from her own disclosures. However, Stacy admitted she was unable to recall all of her medications, and as the military judge recognized with respect to the information she did disclose, "she might have told the truth and she might not have told the truth."¹⁶ Given the centrality of Stacy's testimony to the substantially delayed allegations, the circumstances under which they were reported, and the plethora of issues posed by her mental health diagnoses and treatment, we conclude the military judge's application of the factors under MRE 513(e) to the facts of this case constituted an abuse of discretion.

4. *Prejudice*

Having found error in the denial of the Defense [*23] motion, we must determine whether the error materially prejudiced Appellant's substantial rights. *Chisum*, 77 M.J. at 179. **HN12**¹⁷ Where an error includes a "constitutionally improper denial of a defendant's opportunity to impeach a witness for bias," we must find the error harmless beyond a reasonable doubt. *Id.* For such a review, we weigh factors including:

the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id. (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)). "A constitutional error is harmless when it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 179 (quoting *Mitchell v. Esparza*, 540 U.S. 12, 17-18, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003)). "To say that an error did not 'contribute' to the ensuing verdict" means "to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Id.* at 179 (quoting *Yates v. Evatt*, 500 U.S. 391, 403, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991)).

As we noted in *Payton-O'Brien*, "[i]n these scenarios, serious concerns may be raised regarding witness

¹⁵ See also *United States v. Reece*, 25 M.J. 93, 95 (C.M.A. 1987) (stating that "[s]ome forms of emotional or mental defects have been held to 'have high probative value on the issue of credibility . . . a conservative list of [which] would have to include . . . most or all of the neuroses, . . . alcoholism, drug addiction, and psychopathic personality.'" (quoting *United States v. Lindstrom*, 698 F.2d 1154, 1160 (11th Cir.1983)).

¹⁶ R. at 70.

credibility—which is of paramount [*24] importance—and may very well be case dispositive." *Payton-O'Brien*, 76 M.J. at 789. Moreover, "[w]e cannot discount the possibility that the information contained in [Stacy's records] may have had an impact on the [D]efense's trial strategy." *United States v. Reece*, 25 M.J. 93, 95 (C.M.A. 1987).


In this case, there was little dispute that a sexual relationship occurred between Appellant and his teenage sister-in-law, as Appellant admitted having vaginal intercourse with her on multiple occasions. The principal issue at trial was whether the charged acts occurred before or after Stacy's 16th birthday in mid-July 2014. Stacy testified that the touching offenses happened on multiple occasions and preceded the vaginal intercourse. Her testimony on the timing of the conduct was subject to vigorous cross-examination, which thoroughly revealed the inconsistency of her prior denials and other statements, the years-long delay of her report, her faulty memory and the contaminating influence on it by other family members, and a strong ulterior motive to slant her testimony in favor of aiding her sister's ongoing child-custody dispute against Appellant. While the members acquitted Appellant of sexual assault of a child, they convicted him of sexual abuse of a child "on divers [*25] occasions," which indicates they found multiple instances of sexual contact were proven beyond a reasonable doubt.

We find strong corroboration for Stacy's testimony that the sexual contact began prior to Appellant's submarine deployment from February to April 2014—namely, the provocative emails she sent to Appellant, telling him things like "when you were touching me, I wanted more."¹⁷ That sexual contact occurred prior to Appellant's deployment was also corroborated by the family's awareness of Appellant's one-on-one interactions with Stacy and, at least to some extent, by Appellant's admissions to third parties.¹⁸ Thus, the evidence before the members that sexual contact occurred on at least one occasion before Stacy's 16th birthday was both corroborated and strong. With respect to this pre-deployment sexual contact, after weighing all of the factors, we conclude that the error is "unimportant


in relation to everything else the jury considered on the issue in question, as revealed in the record," and find it harmless beyond a reasonable doubt. *Chisum*, 77 M.J. at 179.

By contrast, for the alleged sexual contact after Appellant's deployment, there was little corroboration for Stacy's testimony that it occurred [*26] prior to her 16th birthday. As the proof for this contact rested exclusively on Stacy's testimony, we find the error may have contributed to the finding in this regard. Consequently, we find that the words, "on divers occasions," must be stricken from the specification of which Appellant was convicted, which we accomplish in our decretal paragraph below.

B. Admission of Profile Testimony Regarding "Grooming"

Appellant asserts the military judge erred in admitting testimony from the Government's forensic psychologist that Appellant fit the profile of a perpetrator who grooms children for sex. **HN13** We review a trial court's decision to admit expert testimony for abuse of discretion. *United States v. Hays*, 62 M.J. 158, 165 (C.A.A.F. 2005). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (citation and internal quotation marks omitted).

1. The limits of opinion testimony

HN14 A witness qualified as an expert may testify in the form of an opinion or otherwise if:


- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact [*27] in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.


MRE 702. Under this rule expert testimony about certain aspects of victim behavior is generally admissible. Experts may, for example, testify "as to what symptoms are found among children who have suffered sexual

¹⁷ Pros. Ex. 9.

¹⁸ In addition to admitting his sexual desire for Stacy to a friend aboard the submarine, Appellant emailed Ms. Mitchell that the statement Stacy emailed him, "'when you were touching me, I wanted more,' could have been simply put as 'I liked the back message [sic].'" Pros. Ex. 9.

abuse and whether the child-witness has exhibited these symptoms," or discuss "various patterns of consistency in the stories of child abuse victims and compar[e] those patterns with patterns in . . . [the victim's] story," so long as they do not opine as to whether the witness is telling the truth about an allegation. *United States v. Harrison*, 31 M.J. 330, 332 (C.M.A. 1990) (citations and internal quotation marks omitted).

HN15  By contrast, "[g]enerally, use of any characteristic 'profile' as evidence of guilt or innocence in criminal trials is improper." *United States v. Banks*, 36 M.J. 150, 161 (C.M.A. 1992). "Profile evidence is evidence that presents a 'characteristic profile' of an offender, such as a pedophile or child abuser, and then places the accused's personal characteristics within that profile as proof of guilt." *United States v. Traum*, 60 M.J. 226, 234 (C.A.A.F. 2004) (citations omitted). Thus, "the focus is upon using **[*28]** a profile as evidence of the accused's guilt or innocence, and not upon using a characteristic profile to support or attack a witness's or victim's credibility or truthfulness." *United States v. Brooks*, 64 M.J. 325, 329 (C.A.A.F. 2007) (emphasis in original).

HN16  "[T]he ban on profile evidence exists because this process treads too closely to offering character evidence of an accused in order to prove that the accused acted in conformity with that evidence on a certain occasion and committed the criminal activity in question." *Traum*, 60 M.J. at 235. The prohibition thus "is rooted in MRE 404(a)(1) that precludes the prosecution from introducing character evidence of an accused who has not put his character at issue." *Banks*, 36 M.J. at 161. As "[o]ur system of justice is a trial on the facts, not a litmus paper test for conformity with any set of characteristics, factors, or circumstances," profile evidence can be admitted "only in narrow and limited circumstances," to include "as purely background material to explain sanity issues[,] . . . as an investigative tool to establish reasonable suspicion[,] . . . [or] in rebuttal when a party 'opens the door' by introducing potentially misleading testimony." *Id.* (citations omitted).

Here, the Defense objected to the Government's intent to elicit testimony **[*29]** from its expert about "grooming behavior," which the expert defined as the "behaviors of a perpetrator of child sexual abuse to solicit the access to and compliance of the targeted victim, as well as the manipulation in favor with the gatekeepers to that

child."¹⁹ The expert opined that Appellant's one-on-one interactions with Stacy—spending "private time," sexually escalating touching, intimate conversation—were consistent with grooming behavior. The Government argued admission of the opinion testimony was proper under MRE 404(b) to prove Appellant's motive, intent, and scheme to have sex with Stacy.²⁰ The Defense argued that allowing such profile testimony invaded the fact-finding province of the members and was tantamount to impermissibly opining that Appellant "fit[] the profile of an offender."²¹

The military judge overruled the Defense objection, concluding the expert's testimony did not amount to profile evidence. Citing principally *United States v. Brooks*, 64 M.J. 325 (C.A.A.F. 2007), *United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005), and *United States v. Huberty*, 53 M.J. 369 (C.A.A.F. 2000), he found it was permissible for the expert to testify that the evidence of Appellant's behavior was consistent with grooming behavior, so long as the expert did not opine that Appellant had in fact groomed Stacy, that he was a child sex abuser, or that **[*30]** child sex abuse occurred. He found such limited testimony regarding grooming was relevant and admissible as non-profile evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), *United States v. Houser*, 36 M.J. 392 (C.M.A. 1993), and MRE 403.

The military judge then allowed the Government to elicit the following testimony from the expert about "grooming" in its case-in-chief:

- That "instead of focusing on the victim's side of behaviors, it has to do with the offender's side of behaviors."²²
- That "common patterns of grooming behavior" include cultivating a special relationship with the targeted victim, sharing special time together, giving gifts, lowering the child's inhibitions through innocuous or "quasi-sexual" touches, and then "escalating towards more progressively sexually

¹⁹ R. at 723.

²⁰ As the Government had previously announced, its intention was to use evidence of Appellant's earlier acts with Stacy "to show a pattern of grooming behavior . . . leading up to . . . the penetrative act." R. at 22.

²¹ R. at 730.

²² R. at 773.

explicit conduct."²³

- That the evidence adduced at the court-martial revealed "behaviors that are consistent with common patterns of grooming," to include Appellant's relationship with Stacy, his role as "big brother" to her, the time he spent alone with her, taking car rides, going for ice cream, and his progression to more sexualized touching and actions.

The Government then drew from the expert's testimony in its closing argument, arguing that in connection with the charged offenses Appellant had been grooming [*31] Stacy.²⁴

The Government expert's testimony was thus elicited and used in precisely the way the rule against profile testimony forbids. This was not an instance where, as in *Huberty*, expert testimony about grooming was used to explain the victim's behavior or to rebut issues in this area raised by a Defense expert. See *Huberty*, 53 M.J. at 373. Nor was it used as a means of explaining Stacy's complicity in the secret relationship with Appellant, thus supporting her credibility with respect to her delayed allegations. Rather, the testimony was "admitted for the purpose of showing that Appellant fit the 'profile' of a sex abuser." *Id.* at 373. It was elicited and used to show that Appellant's actions were consistent with patterns of grooming behavior exhibited by child sex abusers, in order to support the conclusion that he was guilty of the charged offense of child sexual abuse. The admission of this testimony was therefore erroneous.

2. Prejudice

Having found error, we test for prejudice. **HN17**^(u) For non-constitutional evidentiary errors, the test for prejudice "is whether the error had a substantial influence on the findings." *United States v. Kohlbeck*, 78 M.J. 326, 334 (C.A.A.F. 2019) (internal quotation marks and citation omitted). In conducting this analysis, we weigh "(1) the strength [*32] of the Government's case, (2) the strength of the [D]efense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Id.* (quoting *United States v. Norman*, 74 M.J. 144, 150 (C.A.A.F. 2015)).

Here, given Appellant's admissions that multiple sexual

encounters with Stacy occurred, the Government's case was strong except for the timing of the offenses, which Appellant maintained occurred after Stacy turned 16. Even in regard to the timing of the offenses, as discussed above, there was strong corroborating evidence that at least one instance of sexual abuse occurred prior to the Appellant's deployment in February 2014 and, therefore, prior to Stacy's 16th birthday in mid-July 2014. The Defense case on the pre-deployment contact was weak by comparison, as it was focused principally on the timing issue, where the Government's case was weakest. In light of the evidence admitted, we find the expert testimony in question was not material to the timing issue for the strong, corroborated claim of pre-deployment sexual abuse. We therefore conclude the error in its admission did not have a substantial influence on the findings with respect to that instance, among the "divers occasions" charged.

On the other [*33] hand, we conclude the expert's testimony was material to the post-deployment sexual abuse Stacy testified about, because it corroborated the escalating nature of the sexual contact, which in turn supported Stacy's credibility on the issue of whether she was still 15 years old at the time. We find the quality of the testimony particularly important in this regard, as it came from an expert and thus lent the imprimatur of a scientific foundation to the Government's case. Accordingly, we conclude that Appellant was prejudiced as to any post-deployment sexual abuse and conclude that must be remedied by striking the words, "on divers occasions," from the specification, which we accomplish in our decretal paragraph.

C. Legal and Factual Sufficiency


Appellant asserts the evidence is legally and factually insufficient to support his conviction. **HN18**^(u) We review such questions de novo. UCMJ art. 66(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).


HN19^(u) To determine legal sufficiency, we ask 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, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). In conducting this analysis, we must "draw every reasonable inference from the evidence [*34] of record in favor of the prosecution." *United States v. Gutierrez*,

²³ R. at 775.

²⁴ R. at 870-71, 878.


74 M.J. 61, 65 (C.A.A.F. 2015) (citation and internal quotation marks omitted).

HN20 In evaluating factual sufficiency, we determine whether, after weighing the evidence in the record of trial and making allowances for not having observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325 (C.M.A. 1987). In conducting this unique appellate function, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399. Proof beyond a "[r]easonable doubt, however, does not mean the evidence must be free from conflict." *United States v. Rankin*, 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006).

HN21 In order to prove the offense of sexual abuse of a child as charged, the Government was required to prove beyond a reasonable doubt that (1) Appellant committed sexual contact upon Stacy by intentionally touching, directly or through the clothing, her buttocks, thighs, hips, and back with his hand; (2) he did so with the intent to gratify his sexual desire; and (3) at the time Stacy had not attained the age of 16 years. *Manual for Courts-Martial, United [*35] States* (2016 ed.), pt. IV, para. 45.b.b.(4)(a).


The Government concedes the proof was lacking for the word, "hips," which is not supported by the evidence. After also removing the words, "on divers occasions," which we have concluded must be dismissed due to legal error, we find the remainder of the specification legally and factually sufficient. As discussed above, that Appellant touched Stacy's back, thighs, and buttocks for sexual gratification on at least one occasion prior to his deployment in February 2014 (well before her 16th birthday) was supported by not only Stacy's testimony, but also by the provocative emails Stacy sent to Appellant on his submarine, the family's knowledge of their one-on-one interactions, and Appellant's admissions to third parties. Considering the evidence in the light most favorable to the Prosecution, we conclude a reasonable fact-finder could have found all the essential elements of this offense beyond a reasonable doubt. The evidence is thus legally sufficient to support the conviction. Regarding factual sufficiency, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we, too, are convinced of Appellant's **[*36]** guilt beyond a reasonable doubt.

D. Sentence Reassessment

Having set aside some of the language from the specification of which Appellant was convicted, we must determine whether we can reassess the sentence at the appellate level or whether we must remand for the trial court to do so. **HN22** We do so by determining: (1) whether there have been dramatic changes in the penalty landscape or exposure; (2) whether sentencing was by members or a military judge alone; (3) whether the nature of the remaining offenses captures the gravamen of the criminal conduct included within the original offenses and whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses; and (4) whether the remaining offenses are of the type with which appellate judges should have the experience and familiarity to reliably determine what sentence would have been imposed at trial. *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013).

Here, we determine that we can reassess the sentence. As Appellant remains convicted of one specification of sexual abuse of a child under Article 120b, there has been no change in the penalty landscape or exposure. However, excepting the words, "hips" and "on divers occasions," **[*37]** from the specification, while not changing the gravamen of his criminal conduct, does significantly alter the circumstances of the offenses relevant to sentencing, as it narrows the finding of criminal conduct to a single occasion. While Appellant was sentenced by members, the specification as modified deals with an offense of the type with which appellate judges have experience to reliably determine what sentence would have been imposed at trial. Under these circumstances, and excluding from our consideration the evidence we have found was erroneously admitted, we are confident that the sentence the members would have imposed for the specification as excepted would have been no less than three years' confinement and a dishonorable discharge. We affirm this reassessed sentence in our decretal paragraph.

E. Sentence Recommendation in Unsworn Victim Impact Statement

Appellant asserts the military judge erred in allowing Stacy to recommend a specific sentence. **HN23** Because there was no objection at trial, we review for plain error, which occurs when there is an error, it is

clear or obvious, and it results in material prejudice to a substantial right. *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998).

HN24 [↑] "[A] crime victim of an offense of which [*38] the accused has been found guilty has the right to be reasonably heard at the presentencing hearing relating to that offense." RCM 1001(c)(1). This right includes the right to make an unsworn statement including victim impact and matters in mitigation. RCM 1001(c)(3), (5). "[V]ictim impact" includes "any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty." RCM 1001(c)(2)(B). However, the victim's statement "may not include a recommendation of a specific sentence." RCM 1001(c)(3).

During the presentencing hearing, Stacy made an unsworn victim impact statement in which she described the prolonged period Appellant's behavior had impacted her mental health and her relationship with her family. She concluded by stating, without objection from the Defense:

I ask that as you come to your decision you keep this in mind: I suffered in silence for five years before circumstances made me tell the truth of what he had done to me. *I think that he needs a significant amount of jail time* to think about the pain he has put me through.²⁵

The trial counsel then argued for a sentence that included five years' confinement. After deliberating an hour and a [*39] half, the members awarded a sentence that included five years' confinement.

We hold it was error for the military judge to allow Stacy to state, "I think [Appellant] needs a significant amount of jail time," because it constitutes a recommendation of a specific sentence. Our superior court held it improper to admit presentencing testimony opining that an accused has "[n]o potential for continued service," which it found was tantamount to saying "[g]ive the accused a punitive discharge." *United States v. Ohrt*, 28 M.J. 301, 305 (C.M.A. 1989). Similarly, opining that an accused "needs" a certain form of punishment is tantamount to recommending that the sentence include that form of punishment. **HN25** [↑] To allow a victim to make such a recommendation is not in keeping with the framework for victim impact statements established under RCM

1001(c), which is designed to enable crime victims to tell the sentencing authority what impact the accused's misconduct has had on them, not what to do about it. Here, Stacy was allowed to tell the sentencing authority that from her perspective Appellant needed not just confinement, but a "significant amount" of it. Allowing her to make such a recommendation was clear, obvious error.

HN26 [↑] If an error occurs in the admission of evidence [*40] at sentencing, the test for prejudice is "whether the error substantially influenced the adjudged sentence." *United States v. Hamilton*, 78 M.J. 335, 343 (C.A.A.F. 2019) (citation omitted). We determine this by considering four factors: "(1) the strength of the Government's case; (2) the strength of the [D]efense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." *Id.* (citation omitted).

Appellant asserts the members sentenced him to five years' confinement because Stacy's impact statement recommended significant jail time after stating she had suffered for five years because of what Appellant had done to her. We disagree. The trial counsel specifically asked for five years' confinement during the Government's sentencing argument. Based on the comparative strengths of the parties' sentencing cases, we do not find the unsworn impact statement to be so material or of such quality as to find that it substantially influenced the adjudged sentence. Even assuming it did, we conclude our reassessment of the sentence in light of the language we set aside in the specification has purged the sentence of any possibility of such influence.

F. Cumulative Error

HN27 [↑] Finally, we address cumulative error. "It is [*41] well established that an appellate court can order a rehearing based on the accumulation of errors not reversible individually." *United States v. Flores*, 69 M.J. 366, 373 (C.A.A.F. 2011). "Courts are far less likely to find cumulative error where evidentiary errors are followed by curative instructions or when a record contains overwhelming evidence of a defendant's guilt." *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996). As we have found three errors that were not cured at trial, we ask whether we can say "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error . . .

²⁵ R. at 976 (emphasis added).

.*" Banks*, 36 M.J. at 171 (quoting *United States v. Yerger*, 1 C.M.A. 288, 3 C.M.R. 22, 24 (C.M.A. 1952)) (internal quotation marks omitted).

Under the circumstances of this case, we conclude that the errors, taken together with our remedial actions, did not undermine the fairness or integrity of Appellant's trial such that we must set aside his conviction or sentence in toto. First, in striking the words "on divers occasions" from the specification, we have cleansed the finding of any prejudicial error associated with the MRE 513 issue or the profile testimony. As to the specification's remaining language, we find that as discussed above the record contains overwhelming evidence of Appellant's guilt. Hence, [*42] we hold that, "[a]s to the errors we found, we do not believe there is a reasonable probability that, taken cumulatively, those errors might have contributed to the conviction." *Flores*, 69 M.J. at 373. Second, in reassessing the sentence, we have cleansed it of any error associated with either the profile testimony or the victim impact statement. Accordingly, we can say with certainty that the cumulative effect of these errors has not affected the outcome of this case.

III. CONCLUSION

We **SET ASIDE** and **DISMISS** the words, "hips," and "on divers occasions," from the specification. The findings as to the specification's remaining language and that portion of the sentence extending to a dishonorable discharge and three years' confinement are **AFFIRMED**.

Judges STEWART and HOUTZ concur.

End of Document

United States v. Owens

United States Air Force Court of Criminal Appeals

December 16, 2016, Decided

ACM 38834

Reporter

2016 CCA LEXIS 757 *

UNITED STATES v. Staff Sergeant DORIAN K.
OWENS, United States Air Force

Notice: NOT FOR PUBLICATION

Subsequent History: Review granted by, in part United States v. Owens, 76 M.J. 168, 2017 CAAF LEXIS 261 (C.A.A.F., Mar. 8, 2017)

Prior History: [*1] Sentence adjudged 3 March 2015 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: L. Martin Powell (arraignment) and Matthew P. Stoffel. Approved Sentence: Dishonorable discharge, confinement for 35 years, and reduction to E-1.

United States v. USAF Court of Crim. Appeals, 75 M.J. 234, 2016 CAAF LEXIS 157 (C.A.A.F., Feb. 11, 2016)

Core Terms

military, sentence, assault, reassess, records, sexual assault, pretext, conversation, sexual, exculpatory, convinced, trial defense counsel, cellular phone, offenses, beyond a reasonable doubt, communications, reasonable doubt, discovery, phone, text message, nondisclosure, confinement, misconduct, convicted, civilian, camera, lesser, media, door, rape

Counsel: Appellate Counsel for Appellant: Major Michael A. Schrama.

Appellate Counsel for the United States: Major Clayton H. O'Connor; Major Mary Ellen Payne; Major J. Ronald Steelman III; and Gerald R. Bruce, Esquire.

Judges: Before DUBRISKE, HARDING, and C. BROWN, Appellate Military Judges.

Opinion by: DUBRISKE

Opinion

OPINION OF THE COURT

DUBRISKE, Senior Judge:

Contrary to his pleas, Appellant was convicted by a panel of officer members of rape, sexual assault, and abusive sexual contact, in violation of Article 120, UCMJ, 10 U.S.C. § 920. Appellant was acquitted of one specification of attempted abusive sexual contact under Article 80, UCMJ, 10 U.S.C. § 880. Appellant was also found not guilty of two specifications of sexual assault. These respective specifications were charged in the alternative to the rape and sexual assault offenses that Appellant was convicted of at trial.

Appellant was sentenced to a dishonorable discharge, 35 years of confinement, total forfeiture of pay and allowances, and reduction to [*2] E-1. The convening authority approved the sentence as adjudged, with the exception of total forfeiture of pay and allowances. Mandatory forfeitures of pay were waived to the maximum extent for the benefit of Appellant's spouse and children.

Appellant raises seven allegations of error on appeal: (1) the evidence supporting his convictions was legally and factually insufficient; (2) the military judge erred in failing to release mental health records for one of the victims under Military Rule of Evidence (Mil. R. Evid.) 513; (3) the military judge erred in prohibiting the Defense from presenting a pretext communication between one of the victims and Appellant for purposes of impeachment; (4) the military judge erred in denying Appellant's motion to dismiss due to the Government's failure to preserve evidence; (5) the trial counsel engaged in improper argument; (6) the military judge erred in instructing the panel on reasonable doubt; and (7) his sentence was inappropriately severe. As noted within the opinion, three of these assignments of error are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

We find one of Appellant's factual sufficiency claims merits relief. Given our determination, we modify the findings [*3] and reassess the sentence below. We affirm the remainder of the findings.

Background

The sexual assault offenses charged in this case surrounded Appellant's misconduct with three different women from January 2014 until September 2014. The victims did not know each other before the investigation of Appellant by the Air Force Office of Special Investigations (AFOSI).

Staff Sergeant (SSgt) LF was the first individual to report Appellant had sexually assaulted her. Appellant and SSgt LF knew each other through mutual friends and associated social events. On 18 January 2014, SSgt LF, Appellant, and others attended a party at the on-base home of a mutual friend. At some point during the party, Appellant took SSgt LF's cellular phone, promising to give it back to her if she listened to Appellant's relationship advice. SSgt LF complied with Appellant's request, but he did not return her cellular phone as promised. After all of the other guests left the party, SSgt LF left without her cellular phone.

As she was walking to her car, SSgt LF was met by Appellant, who lived across the street from the party. Appellant eventually entered SSgt LF's car and asked her to drive to a nearby cul-de-sac so [*4] they could continue their conversation from the party. Appellant promised to return SSgt LF's cellular phone if she complied with his request.

After driving to the cul-de-sac and parking her car, SSgt LF requested Appellant return her cellular phone as promised. Appellant again refused, advising SSgt LF he was not done talking with her. Appellant then informed SSgt LF of his romantic feelings for her and began touching and kissing her without her consent, which was the basis for the abusive sexual contact charge. SSgt LF reported Appellant's misconduct the next day to her chain of command, which resulted in an AFOSI investigation and preferral of charges against Appellant.

Appellant submitted a request for discharge in lieu of trial by court-martial based on the offenses alleged by SSgt LF. This request was initially approved, but later withdrawn by the convening authority when a local civilian, SR, reported Appellant had sexually assaulted her.

SR informed local authorities she became sick at a local bar during an evening out with friends at the end of September 2014. After vomiting in the restroom, SR went to the parking lot of the establishment and fell asleep or passed out in her [*5] vehicle when she was unsuccessful in contacting a friend to give her a ride home. At some point, Appellant opened the door of the vehicle and asked SR, "What's a gorgeous girl like you doing passed out in a truck?" Appellant eventually shut the door and walked away, but came back later and sat down in the passenger's seat of SR's vehicle. SR felt sick again at this point and vomited outside of her vehicle door while Appellant held her hair.

Appellant, whom SR had never met before, then offered to give SR a ride home. SR agreed as she needed to get home at some point to care for her 11 year-old daughter. Appellant removed SR's keys from her vehicle, grabbed her purse, and assisted her in getting into Appellant's vehicle for the ride home. SR reported she was dizzy and physically unstable during this time, which was later confirmed by security camera footage.

After arriving at SR's apartment complex, Appellant insisted he would walk SR to her front door. SR reported she became sick again immediately after opening her apartment door and went directly to her bathroom to throw up. Appellant entered the apartment at the same time and held SR's hair as she vomited in the bathroom. SR then went [*6] to her bedroom to lay down. Appellant also entered the bedroom and eventually started to remove SR's clothing without her consent. SR then passed out, but later awoke to Appellant having sexual intercourse with her. SR reported the incident to a friend shortly after Appellant left her apartment.

Although SR did not know Appellant prior to the assault and could not provide his name to civilian law enforcement authorities, Appellant was eventually identified through security camera footage of the bar parking lot. Appellant's subsequent arrest for the assault of SR garnered local media attention. Based on one media article, a third victim, JS, informed local authorities that Appellant had sexually assaulted her approximately two weeks prior to the assault of SR.

JS reported she met Appellant through social media and eventually agreed to meet him for a date. After visiting a few bars for drinks, JS decided to end the date and drive home. Prior to departing the last bar, however, Appellant informed JS he wanted to take her home and have sex with her. JS specifically told Appellant she was not interested in a sexual relationship.

Appellant insisted that he ensure JS arrived home safely, so [*7] he followed her home in his vehicle. Appellant walked JS to the door of her apartment and asked if he could come inside. JS acquiesced as she did not believe Appellant was dangerous.

Appellant and JS then sat down on a couch and started kissing each other. When Appellant attempted to remove her shirt, JS excused herself and went to the bathroom to secure her shirt and bra. When JS returned, Appellant again tried removing JS's clothing, eventually removing her pants even though JS struggled to keep them on. JS attempted to prevent Appellant from having sexual intercourse with her by blocking her vaginal area with her hands. However, Appellant moved her hands and eventually engaged in sexual intercourse with JS without her consent.

Additional facts necessary to resolve the assignments of error are provided below.

Sufficiency of the Evidence

Referencing the same arguments made during clemency, Appellant claims that the evidence produced at trial was factually and legally insufficient to support his convictions. *Grostefon*, 12 M.J. at 431.

We review issues of factual and legal sufficiency de novo. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) [*8].

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, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); see also *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have

found all the essential elements beyond a reasonable doubt." *Turner*, 25 M.J. at 324; see also *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). The term reasonable doubt does not mean that the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). "[I]n resolving questions of legal sufficiency, we are 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).

We are convinced the offenses involving SSgt LF and SR are factually and legally sufficient. Regarding SSgt LF, her testimony covered all of the requisite [*9] elements for the offense of abusive sexual contact. Her testimony also causes us to determine, after weighing all of the evidence in the record and making allowances for not having personally observed the witnesses, that Appellant is, in fact, guilty of the offense as alleged by SSgt LF. While the Defense did attack SSgt LF's motive, trustworthiness, and lack of consistent reporting, this attack was sufficiently offset by evidence documenting SSgt LF's character for truthfulness and her contemporaneous report of the abuse.

Likewise, the evidence produced at trial is sufficient for us to uphold Appellant's conviction for sexual assault of SR under the theory she was incapable of consenting to the sexual activity due to impairment by an intoxicant. SR's testimony regarding her physical and mental impairments were corroborated by security camera footage taken shortly before the charged incident. Moreover, the facts surrounding SR's immediate reporting of the assault to a friend solidifies our belief as to factual and legal sufficiency. While Appellant also attacks SR's inability to remember whether Appellant engaged in a penetrative act on the evening in question, the forensic evidence [*10] admitted by the prosecution convinces us Appellant committed the requisite sexual act while SR was incapable of consenting.

We are not, however, convinced the evidence admitted by the prosecution at trial is sufficient to support Appellant's conviction for rape of JS. To sustain a conviction for rape, the prosecution was required to prove: (1) that Appellant engaged in a sexual act with JS by penetrating her vulva with his penis; and (2) that he did so by using unlawful force. *Manual for Courts-Martial (MCM)*, *United States*, ¶ 45.a.(a)(1) (2012 ed.). Force is statutorily defined as the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person. Article 120(g)(5)(B), UCMJ. Unlawful force is simply an act of force done without

legal justification or excuse. Article 120(g)(6), UCMJ. While we are convinced that JS did not consent to the sexual act and clearly and repeatedly expressed this to Appellant, we do not find testimony or other evidence that convinces us beyond a reasonable doubt that Appellant used physical strength sufficient to *overcome, restrain, or injure* JS.

Although we have determined the evidence is factually insufficient to sustain [*11] the charged offense, we may nonetheless affirm so much of the finding that includes a lesser included offense. Article 59(b), UCMJ, 10 U.S.C. § 859(b). Here, we are convinced beyond a reasonable doubt that Appellant committed a non-consensual sexual act with JS through bodily harm as originally charged by the Government in the alternative. Accordingly, we affirm Appellant's conviction to the offense of sexual assault. *See United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010).

Failure to Disclose Mental Health Records

The Defense moved at trial for the military judge to order the production of records for two of the victims who previously received mental health treatment. One victim consented to the military judge's review of her records in camera. The military judge released portions of this victim's records to the Defense after completing his review. In doing so, the judge noted the court could release additional information depending on how the trial progressed.

The other victim did not consent to an in camera review of her records. After receiving evidence on the Defense's motion, the military judge found an in camera review of the records was appropriate. However, after reviewing the records, the military judge declined to release any records to the [*12] Defense for this victim. The military judge determined there was neither evidence of an exculpatory nature within the records, nor information specifically requested by trial defense counsel in their motion to compel the production of such records.

During sentencing, the three victims each provided an unsworn statement about the personal impact Appellant's conduct had on them. Trial defense counsel did not object to the admission of this evidence during sentencing. However, trial defense counsel requested the military judge reevaluate his earlier Mil. R. Evid. 513 ruling given the information contained in the unsworn statements. The military judge, after taking a recess to review the victim-impact statements, declined to release

any additional mental health records to the Defense in sentencing.

On appeal, Appellant claims the military judge erred in failing to release mental health records for the one victim for whom no records were released to the Defense at trial. Appellant specifically identifies two entries which should have been disclosed. These entries document the victim's counseling sessions after being physically assaulted by a civilian female in August of 2012.¹ The victim initially reported [*13] to her mental health provider that she suffered reduced sleep and nightmares, decreased concentration, decreased appetite, and general anxiety because of this assault. The victim's mental health treatment for this incident was terminated approximately three weeks after the assault given her physical and emotional symptoms had sufficiently dissipated.

In arguing error, Appellant notes the victim's symptoms after this physical assault were sufficiently similar to those she reported after Appellant's sexual assault. As such, Appellant opines testimony from the victim's mental health providers could have contradicted her unsworn statement which attributed the full extent of her physical and emotional troubles to Appellant's misconduct. Appellant also appears to argue this same evidence shows the victim exaggerated Appellant's misconduct over time, and was, therefore, relevant in establishing a motive to misrepresent. It is unclear from Appellant's brief whether this latter attack is focused on the victim's testimony during findings, or instead relates only to the unsworn statement she provided during the sentencing proceedings.

We review a military judge's ruling on a discovery request for [*14] abuse of discretion. *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015). "A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law." *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004). "Our review of discovery/disclosure issues utilizes a two-step analysis: first, we determine whether the information or evidence at issue was subject to disclosure or discovery; second, if there was nondisclosure of such information, we test the effect of that nondisclosure on the appellant's trial." *Id.* at 325.

¹ Appellant's counsel was provided access to these sealed records on appeal pursuant to Rule for Courts-Martial (R.C.M.) 1103A.

In *Roberts*, our superior court clarified the respective tests and burdens articulated in a number of their decisions dealing with materiality of undisclosed, discoverable evidence. They adopted two appellate tests for determining materiality with respect to the erroneous nondisclosure of discoverable evidence; the first test applies to those cases in which the defense either did not make a discovery request or made only a general request for discovery. *Id.* at 326. In those instances, once the appellant demonstrates wrongful nondisclosure, "the appellant will be entitled to relief only by showing that there is a 'reasonable probability' of a different result at trial had the evidence been disclosed." [*15] *Id.* at 326-27. "The second test is unique to our military practice and reflects the broad nature of discovery rights granted the military accused under Article 46." *Id.* at 327. In those situations, where an appellant demonstrates that the Government failed to disclose discoverable evidence in response to a specific request for information, "the appellant will be entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt." *Id.* "Harmless beyond a reasonable doubt is a high standard, but it is not an impossible standard for the Government to meet." *United States v. Gonzalez*, 62 M.J. 303, 306 (C.A.A.F. 2006).

Contrary to the apparent claim in Appellant's brief, we do not find these mental health entries were relevant and material to Appellant's defense against the charged offense involving this specific victim. We see no basis for Appellant to claim the previous physical assault, or the short-term physical and psychological symptoms resulting from it, were somehow admissible to impeach the victim during trial on the merits. As such, we hold the military judge did not abuse his discretion.

Assuming, *arguendo*, the victim's mental health records were material for sentencing, the relief requested by Appellant is still not warranted [*16] as any nondisclosure was harmless beyond a reasonable doubt. Evidence the victim suffered similar physical and psychological symptoms after a second traumatic event does not in our opinion mitigate Appellant's assaultive conduct towards this victim. In fact, one could argue Appellant's conduct was actually aggravating in nature as it exposed the victim to physical and psychological symptoms that had previously been treated and resolved.

Additionally, we note the Government did not emphasize the victim-impact evidence in their relatively short sentencing argument. The focus instead was on

the frequency and seriousness of Appellant's predatory misconduct. Considering the entire record, including the records withheld by the military judge, we find there is no reasonable probability that, had the evidence been disclosed, the result of Appellant's trial would have been different. See *United States v. Coleman*, 72 M.J. 184, 186 (C.A.A.F. 2013).

Failure to Allow Presentation of Pretext Communication

Pursuant to *Grostefon*, 12 M.J. at 436-37, Appellant next claims the military judge erred in failing to allow his counsel to cross-examine SSgt LF about statements she made during a pretext communication with Appellant. In alleging error, however, Appellant's brief primarily focuses [*17] on his own statements during the communication with SSgt LF, whereby he denied any inappropriate conduct. He appears to claim his statements should have been admitted as they refuted aspects of SSgt LF's testimony at trial and, therefore, undermined her credibility.

After the Government declined to offer Appellant's pretext communication with SSgt LF as an admission of a party opponent under Mil. R. Evid. 801(d)(2), trial defense counsel inquired about the pretext conversation during his cross-examination of an AFOSI agent. After an objection was lodged by the Government, trial defense counsel informed the military judge during an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session that they did not intend at that time to discuss specific statements made by either Appellant or SSgt LF. Instead, trial defense counsel believed the questioning was appropriate to show the thoroughness of AFOSI's investigation. The military judge sustained the Government's objection, finding the mere fact that a pretext conversation was conducted not relevant to a substantive issue before the court.

Later, the Government moved *in limine* to prohibit the Defense from discussing the pretext conversation during SSgt LF's testimony. In addition to their [*18] initial position, the Defense now claimed SSgt LF's statements to Appellant in the pretext conversation were either false or inconsistent with other statements she made during the course of the investigation. As such, trial defense counsel argued their inquiry into these statements was proper impeachment. Conversely, the Government argued SSgt LF should not be held accountable for statements made during a pretext conversation as her communications were being directed by AFOSI.

The military judge agreed with the Government that, in

the context of a pretext conversation, the fact an individual makes a statement that is directed by someone else, like AFOSI, is not probative of their character for truthfulness. The military judge also found this inquiry failed the Mil. R. Evid. 403 balancing test given the likelihood for confusion of the relevant issues before the panel members.

After trial defense counsel raised yet another theory of admissibility, the military judge requested to hear the testimony of SSgt LF in an Article 39(a) session to determine AFOSI's involvement in the crafting of messages sent to Appellant. After hearing SSgt LF's testimony and entertaining additional argument from counsel, the [*19] military judge allowed the Defense to inquire into three specific statements made by SSgt LF to Appellant. These statements were not directly attributable to AFOSI based on their guidance to SSgt LF. The military judge prohibited any additional inquiry into statements made by SSgt LF during the pretext conversation with Appellant.

We review a military judge's ruling on the admissibility of evidence for abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010). A trial judge will typically have a great deal of discretion to determine whether trial testimony is inconsistent with a prior statement. *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007).

The right to cross-examination is broad, and the rules of evidence should be read to allow liberal admission of bias-type evidence. *United States v. Moss*, 63 M.J. 233, 236 (C.A.A.F. 2006) (citing *United States v. Williams*, 40 M.J. 216, 218 (C.M.A. 1994)). However, cross-examination must comply with applicable rules of evidence, and a trial judge may set reasonable limits on cross-examination that intends to attack a witness's credibility based on concerns such as harassment, prejudice, confusion of issues, witness safety, repetitiveness, or marginal relevancy. *United States v. Velez*, 48 M.J. 220, 226 (C.A.A.F. 1998) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)); *United States v. Gonzalez*, 16 M.J. 423, 425 (C.M.A. 1983).

In this case, we do not believe the military judge abused his discretion in limiting trial defense counsel's use of SSgt LF's statements during the pretext conversation [*20] with Appellant.² We agree with the

military judge that statements made by SSgt LF at the behest of AFOSI were not probative of SSgt LF's character for truthfulness. We likewise find the various statements attributable to AFOSI that were repeated by SSgt LF in the course of a pretext conversation do not rise to inconsistent statements subject to Mil. R. Evid. 608(c) and Mil. R. Evid. 613.

Failure to Preserve Evidence

Appellant, also pursuant to *Grostefer*, 12 M.J. at 436-37, next argues the military judge erred in failing to dismiss the charges against him due to the Government's failure to preserve relevant evidence that would have likely possessed exculpatory value for the Defense. As previously noted above, this court employs an abuse of discretion standard when reviewing a military judge's ruling on discovery matters. *Stellato*, 74 M.J. at 480.

Prior to the entry of pleas, the Defense filed a motion to dismiss, alleging the Government failed to secure the cellular phones belonging to the two civilian victims, SR and JS, as well as preserve cellular phone data and records maintained by the victims' respective cellular providers. The Defense alleged this failure violated Article 46, UCMJ, 10 U.S.C. § 846, and Rule for Court-Martial (R.C.M.) 703, as the Government had sufficient opportunity to secure data and records documenting [*21] communications the two victims had with either Appellant or others after the incidents that gave rise to the charges before the court-martial.

To establish a violation of Article 46, UCMJ, for lost or destroyed evidence, an accused must satisfy the test announced in *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). See *United States v. Kern*, 22 M.J. 49, 51 (C.M.A. 1986) (noting the *Trombetta* test satisfies both constitutional and military standards of due process and is applicable to trial by courts-martial). The test articulated in *Trombetta*, and further refined in *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988), provides that the destruction of, or failure to preserve, potentially exculpatory evidence does not entitle an accused to relief on due process grounds unless: (1) the evidence possesses an exculpatory value that was apparent before it was destroyed; (2) it is of such a nature that the accused would be unable to obtain comparable

²We also reject any claim the military judge erred in prohibiting trial defense counsel from admitting Appellant's

statements made during the course of the pretext conversation with SSgt LF.

evidence by other reasonably available means; and (3) the Government acted in bad faith when it lost or destroyed such evidence. *United States v. Terry*, 66 M.J. 514, 517 (A.F. Ct. Crim. App. 2008). If "material exculpatory evidence" is lost, as opposed to merely "potentially useful" evidence, the requirement to demonstrate the Government acted in bad faith does not apply. *Illinois v. Fisher*, 540 U.S. 544, 547-48, 124 S. Ct. 1200, 157 L. Ed. 2d 1060 (2004).

To be entitled to relief under R.C.M. 703, an accused must show: (1) the evidence is relevant [*22] and necessary; (2) the evidence has been destroyed, lost, or otherwise not subject to compulsory process; (3) the evidence is of such central importance to an issue that it is essential to a fair trial; (4) there is no adequate substitute for such evidence; and (5) the accused is not at fault or could not have prevented the unavailability of the evidence. R.C.M. 703(f)(1)-(2).

In support of their motion, the Defense called one civilian detective and three AFOSI agents to discuss the investigative steps they took based on the allegations made by SR and JS. With regard to SR, the detective testified he never attempted to secure SR's phone, as he did not believe he had probable cause to do so given SR had never communicated with Appellant by any electronic means either before or after the assault. SR had communicated with four friends after the assault by voice or text message; these individuals were interviewed by the detective as part of his investigation. The detective did obtain text messages between SR and one friend, but he failed to secure copies of actual conversations with the other three individuals SR contacted after the assault. The civilian detective also noted he issued a preservation letter [*23] to SR's cellular carrier prior to relinquishing jurisdiction of the case to the United States Air Force. However, as the preservation letter was issued more than five days after SR's communications with her friends, the detective was notified by the cellular carrier that it would be unable to produce any relevant text messages for SR.

Once receiving jurisdiction, AFOSI was denied access by SR to her phone and social media account. SR did provide an electronic message documenting one of her discussions with a friend about the assault. Months later, however, SR allowed AFOSI to extract data from two phones, including the phone in her possession on the night of the assault. The extraction yielded little information relevant to SR's allegation against Appellant.

Regarding the investigation of JS's allegations, an AFOSI agent testified that JS provided agents with text messages and social media records documenting discussions with Appellant leading up to and after the assault. JS did not consent to a data extraction from her cellular phone or an examination of her social media account. JS informed AFOSI there were other "meaningless" text message communications with Appellant after the assault [*24] that were no longer stored on her phone. These additional communications were confirmed by Appellant's cellular phone records, which were secured by the Government, although the content of these messages could not be obtained by AFOSI.

The military judge rendered factual findings on this motion, which we adopt for the purposes of our review as they are not clearly erroneous. See *United States v. Robinson*, 58 M.J. 429, 433 (C.A.A.F. 2003). Applying the factual findings to the relevant legal standards, the military judge found SR's phone possessed no exculpatory value given the lack of communication between SR and Appellant. With regard to SR's communications with friends, the military judge determined the Defense was provided with information about SR's statements to these individuals and was therefore afforded the opportunity to confront SR about any inconsistencies in her reporting of the assault by Appellant. Finally, in declining to grant relief for a violation of Article 46, UCMJ, the military judge determined there was no evidence the Government acted in bad faith to suppress exculpatory or apparently exculpatory materials. The military judge also found Appellant was not entitled to relief under R.C.M. 703 as the Defense had failed to show the information [*25] sought was relevant and necessary.

The military judge came to a similar conclusion when examining the investigation of JS's allegations. In addition to finding the Defense failed to show the missing text messages were exculpatory in nature, the military judge noted the records from Appellant's phone gave the Defense information to establish JS's minimization of the contact she had with Appellant after the assault. As these records provided Appellant with comparable evidence to confront JS, the military judge declined to grant relief as requested by Appellant.

Having reviewed the evidence offered in support of the motion at trial, we find no abuse of discretion by the military judge in this case. Appellant failed to meet his burden of establishing the missing evidence was potentially exculpatory. Moreover, examining the

request for relief under R.C.M. 703, we agree with the military judge that Appellant has failed to establish that the sought-after material was relevant and necessary, or that there was no adequate substitute for such evidence available to the Defense at trial.

Improper Findings Argument

Appellant next claims trial counsel's findings argument was improper as it argued Appellant's [*26] propensity to commit sexual acts.³ In asking this court to set aside the findings, Appellant asserts trial counsel's statements were highly prejudicial as they suggested Appellant should be convicted based solely on the number of similar sexual offenses charged at trial showing Appellant was a serial offender. In claiming both error and prejudicial impact, Appellant also faults the military judge for failing to provide a curative instruction in response to trial counsel's argument.

Whether argument is improper is a question of law we review de novo. *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011) (citing *United States v. Pope*, 69 M.J. 328, 334 (C.A.A.F. 2011)). "[T]rial counsel is at liberty to strike hard, but not foul, blows." *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007) (quoting *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000)). Trial counsel is limited to arguing the evidence in the record and the inferences fairly derived from that evidence. See *United States v. Paxton*, 64 M.J. 484, 488 (C.A.A.F. 2007); *United States v. White*, 36 M.J. 306, 308 (C.M.A. 1993). Whether or not the comments are fair must be resolved when viewed within the entire court-martial. *United States v. Gilley*, 56 M.J. 113, 121 (C.A.A.F. 2001).

At the start of trial counsel's findings argument, the following colloquy took place between the parties:

TC: Quite simply, he doesn't take no for an answer. The accused, Staff Sergeant Dorian Owens, doesn't take no for an answer. And it's no coincidence that three different women who don't know each other . . .

DC: Objection, propensity, [*27] Your Honor.

³Although there were initial discussions about the appropriateness of a propensity instruction during findings, the military judge did not instruct the members they could use the three charged offenses to show Appellant's propensity to commit sexual misconduct. See *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016).

MJ: Response?

TC: Sir, it's not arguing a propensity. It's arguing the coincidental facts apparent in the case.

MJ: Overruled.

TC: It's no coincidence that three different women who don't know each other, who have never met, were able to credibly describe the accused's depraved and disgusting conduct. A coincidence, members, is a remarkable concurrence of events with no apparent causal connection. This case is a remarkable concurrence of events. And the accused is the causal connection. The causal connection is Staff Sergeant Dorian Owens. He's guilty. He is guilty members, and that's been proven by the credible accounts of all three women; entirely supported by the objective evidence. Make no mistake, the United States has proven its case beyond a reasonable doubt . . .

We need not address the propriety of trial counsel's argument as noted above because we find Appellant suffered no material prejudice. There were no additional references to coincidences or Appellant's causal connection to the three victims in the remaining 23 pages of counsel's argument. Instead, trial counsel focused on the evidence admitted at trial supporting the individual offenses as alleged by each [*28] victim.

Moreover, contrary to Appellant's claim in his brief, the military judge did provide a curative instruction prior to the Defense beginning their findings argument. The military judge again reminded the panel members that they could only consider evidence before the court—and not evidence of Appellant's criminal disposition—in deciding whether the Government had proven their case beyond a reasonable doubt. For these reasons, we find Appellant did not suffer prejudice from trial counsel's argument.

Reasonable Doubt Instruction

Prior to deliberations, the military judge instructed the members with respect to proof beyond a reasonable doubt:

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of any offense charged, you must

find him guilty. If, on the other hand, you think there is a real possibility that the accused is not guilty, you must give him the benefit of the doubt [*29] and find him not guilty.

Although he did not object to this instruction at trial, Appellant now argues the instruction violates Supreme Court precedent prohibiting a trial judge from "directing the jury to come forward with a [guilty verdict], regardless of how overwhelmingly the evidence may point in that direction." See *United States v. Martin Linen Supply Company*, 430 U.S. 564, 572-73, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977).

We review de novo the military judge's instructions to ensure that they correctly address the issues raised by the evidence. *United States v. Maynulet*, 68 M.J. 374, 376 (C.A.A.F. 2010); *United States v. Thomas*, 11 M.J. 315, 317 (C.M.A. 1981). Where, as here, trial defense counsel made no challenge to the instruction contested on appeal, Appellant forfeits the objection in the absence of plain error.⁴ R.C.M. 920(f). If we find error, we must determine whether the error was harmless beyond a reasonable doubt. *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011).

The language used by the military judge in Appellant's case is—and has been for many years—an accepted reasonable doubt instruction used in Air Force courts-martial. See, e.g., *United States v. Sanchez*, 50 M.J. 506, 509-10 (A.F. Ct. Crim. App. 1999). It was also offered by our superior court as a suggested instruction. See *United States v. Meeks*, 41 M.J. 150, 157 n.2 (C.M.A. 1994) (citing Federal Judicial Center, Pattern Criminal Jury Instruction 17-18 (1987)). Based on this legal landscape, we cannot say that the military judge committed error, plain or otherwise, in his reasonable doubt instruction to the panel [*30] in this case. See *United States v. McClour*, ACM 38704, 2016 CCA LEXIS 82 (A.F. Ct. Crim. App. 11 February 2016) (unpub. op.), rev. granted, 75 M.J. 376 (C.A.A.F. 2016); see also *United States v. Rendon*, 75 M.J. 908 (N.M. Ct. Crim. App. 2016).

Sentence Reassessment

Because we have reduced Appellant's degree of guilt from rape to sexual assault, we must determine whether

we can reassess the sentence, or instead must order a rehearing.

This court has "broad discretion" in deciding to reassess a sentence to cure error, as well as arriving at the reassessed sentence. *United States v. Winckelmann*, 73 M.J. 11, 12 (C.A.A.F. 2013). To reassess the sentence, we must be able to reliably conclude that, in the absence of error, the sentence "would have been at least of a certain magnitude," and the reassessed sentence must be "no greater than that which would have been imposed if the prejudicial error had not been committed." *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). We must be able to determine this to a "degree of certainty." *United States v. Eversole*, 53 M.J. 132, 134 (C.A.A.F. 2000); see also *United States v. Taylor*, 51 M.J. 390, 391 (C.A.A.F. 1999) (holding we must be able to reach this conclusion "with confidence"). "The standard for reassessment is not what would be imposed at a rehearing but what would have been imposed at the original trial absent the error." *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997); see also *United States v. Davis*, 48 M.J. 494, 495 (C.A.A.F. 1998) (holding no higher sentence than that which would have been imposed by the trial forum [*31] may be affirmed). A reassessed sentence "must be purged of prejudicial error and also must be 'appropriate' for the offense[s] involved" based on our sentence approval obligation under Article 66(c), UCMJ. *Sales*, 22 M.J. at 308.

In determining whether to reassess a sentence or order a rehearing, we consider the totality of the circumstances, including the following illustrative, but not dispositive, factors: (1) dramatic changes in the penalty landscape and exposure, (2) the forum, (3) whether the remaining offenses capture the gravamen of the criminal conduct included within the original offenses, (4) whether significant or aggravating circumstances remain admissible and relevant, and (5) whether the remaining offenses are the type with which we, as appellate judges, have the experience and familiarity to reliably determine what sentence would have been imposed at trial by the sentencing authority. *Winckelmann*, 73 M.J. at 15-16.

Examining the entire case and applying the considerations set out in *Winckelmann*, we are able to reliably determine to our satisfaction that Appellant's sentence would have been at least a certain severity based on his conviction of the lesser offense. In so holding, we recognize Appellant's punishment exposure has decreased [*32] from confinement for life without

⁴ Although we recognize that the rule speaks of "waiver," this is, in fact, forfeiture. *United States v. Sousa*, 72 M.J. 643, 651-52 (A.F. Ct. Crim. App. 2013).

the possibility of parole to 67 years of confinement. This reduction is somewhat significant; however, this factor alone would not automatically require a sentence rehearing. See *id.* at 13, 16 (holding that it was not an abuse of discretion to reassess the sentence where the maximum amount of confinement decreased from 115 years to 51 years). We also recognize Appellant's forum choice weighs against reassessment.

However, the remaining factors here weigh heavily in favor of reassessment. This court has extensive experience in dealing with sexual assault cases and, as such, are cognizant of the types of punishment and levels of sentence imposed for offenses similar to those alleged against Appellant. Moreover, our modification of the findings did not substantially change Appellant's culpability in this case as Appellant remains convicted of sexual assault by causing bodily harm. Finally, the lesser included offense consists of the same conduct admitted in support of the greater offense. Thus, all of the aggravating circumstances remain admissible and relevant when evaluating the lesser offense.

In consideration of the factors discussed above, we conclude that we can [*33] reassess the sentence. We are satisfied that, based on the facts and circumstances surrounding the commission of the lesser offense, the panel would have imposed a sentence not less than a dishonorable discharge, confinement for 30 years, and reduction to E-1.

We have also concluded the reassessed sentence is appropriate. We assess sentence appropriateness by considering Appellant, the nature and seriousness of the offenses, Appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (2007). Appellant's sexual misconduct against three different victims over a short period of time convinces us the reassessed sentence is not inappropriately severe.

Conclusion

We find the conviction for rape, as alleged in the specification of the Additional Charge, factually insufficient, and we instead approve the finding of guilt to the lesser included offense of sexual assault as originally charged by the Government in Specification 4 of Charge II. We reassess the sentence to a dishonorable discharge, confinement for 30 years, and reduction to E-1. The findings, as modified, and the

sentence, as reassessed, are correct in law and fact, and no error materially prejudicial to [*34] the substantial rights of Appellant occurred.⁵ Articles 59(a) and 66(c), UCMJ. Accordingly, the findings, as modified, and the sentence, as reassessed, are **AFFIRMED**.

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⁵ Although we find Appellant ultimately did not suffer any prejudice, we note the addendum to the staff judge advocate's recommendation (SJAR) did not specifically advise the convening authority of his mandatory requirement to consider the SJAR and the report of result of trial before taking action. See R.C.M.1107(b)(3)(A); Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 9.20.1.2 (6 June 2013).

United States v. Rodriguez

United States Army Court of Criminal Appeals

October 1, 2019, Decided

ARMY 20180138

Reporter

2019 CCA LEXIS 387 *; 2019 WL 4858233

UNITED STATES, Appellee v. Sergeant LUIS A. RODRIGUEZ JR., United States Army, Appellant.

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by United States v. Rodriguez, 2019 CAAF LEXIS 848 (C.A.A.F., Dec. 3, 2019)

Review denied by United States v. Rodriguez, 2020 CAAF LEXIS 33 (C.A.A.F., Jan. 23, 2020)

Prior History: [*1] Headquarters, 7th Infantry Division. Timothy P. Hayes, Jr., Lanny J. Acosta, Jr., and Michael S. Devine, Military Judges, Colonel Russell N. Parson, Staff Judge Advocate.

Core Terms

military, voir dire, Screenshots, defense counsel, diagnosis, records, privileged, bias, medications, questions, in camera, sexual, rape, mental health records, confidential communication, sexual assault, challenges, ineffective assistance of counsel, communications, prescription, patient, court-martial, prescribed, waived, challenge for cause, medical record, mental health, witnesses, assault, sit

Case Summary

Overview

HOLDINGS: [1]-Screenshots 1 and 2 were not privileged under Mil. R. Evid. 513, Manual Courts-Martial, and the military judge (MJ) erred in concluding they were; [2]-Appellant failed to establish the first prong of Mil. R. Evid. 513(e)(3) (a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege), and therefore, he was not entitled to an in camera review of CPL AK's mental health records. The MJ did not abuse his

discretion in denying the defense motion; [3]-Neither Brady nor the Confrontation Clause entitled appellant to an In-Camera Review of CPL AK's mental health records; [4]-The court did not find appellant's counsel were deficient in their decision not to challenge LTC CF because appellant failed to demonstrate a challenge for cause against LTC CF would have been successful.

Outcome

The findings of guilty and the sentence were affirmed.

LexisNexis® Headnotes

Military & Veterans

Law > ... > Evidence > Privileged

Communications > Psychotherapist-Patient

Privilege

HN1 Privileged Communications, Psychotherapist-Patient Privilege

Mil. R. Evid. 513(a), Manual Courts-Martial, provides that a patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to a psychotherapist, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

Military & Veterans

Law > ... > Evidence > Privileged

Communications > Psychotherapist-Patient

Privilege

HN2[] Privileged Communications, Psychotherapist-Patient Privilege

A list of medical and mental health "problems" does not contain any "confidential communications," though privileged communications may have prompted evaluation for those diagnoses. Likewise, a list of prescription medications does not contain "confidential communications," though privileged communications may have facilitated a psychotherapist's prescription for a particular medication. A prescription, by its very nature, is intended to be disclosed to a non-psychotherapist third party--the pharmacist who fills it--which further informs the court's opinion that the medications prescribed to a person are not privileged "confidential communications."

Military & Veterans
Law > ... > Evidence > Privileged
Communications > Psychotherapist-Patient
Privilege

HN3[] Privileged Communications, Psychotherapist-Patient Privilege

Privileged information cannot be used to establish the factual foundation for an in camera review of mental health records.

Military & Veterans Law > Military
Justice > Disclosure & Discovery

Military & Veterans Law > Military Justice > Judicial
Review > Standards of Review

HN4[] Military Justice, Disclosure & Discovery

A military judge's ruling on a discovery or production request is reviewed for an abuse of discretion. A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law.

Evidence > Burdens of Proof > Allocation

Military & Veterans Law > ... > Courts
Martial > Evidence > Privileged Communications

HN5[] Burdens of Proof, Allocation

Congress codified four prerequisite showings that must be made before a military judge may conduct an in camera review of privileged matters. The movant bears the burden of establishing: (A) a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege; (B) that the requested information meets one of the enumerated exceptions under Mil. R. Evid. 513(d), Manual Courts-Martial; (C) that the information sought is not merely cumulative of other information available; and (D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources. Mil. R. Evid. 513(e)(3), Manual Courts-Martial.

Military & Veterans
Law > ... > Evidence > Privileged
Communications > Psychotherapist-Patient
Privilege

HN6[] Privileged Communications, Psychotherapist-Patient Privilege

Mil. R. Evid. 513, Manual Courts-Martial, is a rule of privilege, not exploration.

Criminal Law & Procedure > ... > Discovery &
Inspection > Brady Materials > Brady Claims

Military & Veterans Law > Military
Justice > Disclosure & Discovery > Disclosure by
Government

HN7[] Brady Materials, Brady Claims

For Brady purposes, information under the control of the "prosecution" is not the same as information under the control of the entire government. Privileged information stored in a hospital's system of records is not within the possession or control of the "prosecution" for Brady purposes. Mental health records located in military or civilian healthcare facilities that have not been made part of the investigation are not "in the possession of prosecution" and therefore cannot be Brady evidence.

Constitutional Law > ... > Fundamental
Rights > Criminal Process > Right to Confrontation

Military & Veterans Law > Military

Justice > Disclosure & Discovery

HN8 **Criminal Process, Right to Confrontation**

An appellant's Sixth Amendment right to confront witnesses against him is a trial right, not a discovery right.

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

HN9 **Courts Martial, Court-Martial Member Panel**

The purpose of voir dire and challenges is, in part, to ferret out facts, to make conclusions about the members' sincerity, and to adjudicate the members' ability to sit as part of a fair and impartial panel.

Evidence > Burdens of Proof > Allocation

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

HN10 **Burdens of Proof, Allocation**

R.C.M. 912(f)(3), Manual Courts-Martial, states, in part that the party making a challenge shall state the grounds for it. The burden of establishing that grounds for a challenge exists is upon the party making the challenge. R.C.M. 912(f)(2)(4) states, in part: membership of enlisted members in the same unit as the accused and any other ground for challenge is waived if the party knew of or could have discovered by the exercise of diligence the ground for challenge and failed to raise it in a timely manner.

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > Military Justice > Judicial Review

HN11 **Courts Martial, Court-Martial Member Panel**

Absent a clear showing of specific prejudice, or where application of waiver would result in a miscarriage of justice, failure to challenge a member at trial constitutes waiver of that issue on appeal. Allowing appellate

defense counsel to label a decision not to challenge court members as ineffective assistance of counsel, would defeat the longstanding waiver rule for challenges.

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > Military Justice > Judicial Review

HN12 **Courts Martial, Court-Martial Member Panel**

When detailed voir dire is conducted by the defense counsel, counsel's subsequent failure to challenge a member is a tactical decision which waives any ground for challenge revealed by voir dire. An appellant cannot strategically decline to assert a challenge during voir dire and then complain of the inaction on appeal in order to revive an issue he previously waived.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN13 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice. The court reviews both deficiency and prejudice de novo. To establish deficient performance, an appellant must show that his counsel's representation amounted to incompetence under prevailing professional norms. In order to establish prejudice, an appellant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Criminal Law & Procedure > ... > Challenges for Cause > Bias & Impartiality > Actual & Implied Bias

Military & Veterans Law > Military Justice > Courts
 Martial > Court-Martial Member Panel

Military & Veterans Law > Military Justice > Judicial
 Review > Standards of Review

HN14 **Bias & Impartiality, Actual & Implied Bias**

A military judge's ruling on a challenge for cause is reviewed for an abuse of discretion. The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law.

Criminal Law & Procedure > ... > Challenges for
 Cause > Bias & Impartiality > Actual & Implied Bias

Military & Veterans Law > Military Justice > Judicial
 Review > Standards of Review

HN15 **Bias & Impartiality, Actual & Implied Bias**

Actual bias is defined as "bias in fact"--the existence of a state of mind that leads to an inference that the person will not act with entire impartiality. The test for actual bias is whether any bias is such that it will not yield to the evidence presented and the judge's instructions. There is implied bias when most people in the same position would be prejudiced. Implied bias is evaluated objectively under the totality of the circumstances and through the eyes of the public, reviewing the perception or appearance of fairness of the military justice system.

Criminal Law & Procedure > ... > Challenges for
 Cause > Bias & Impartiality > Actual & Implied Bias

HN16 **Bias & Impartiality, Actual & Implied Bias**

It is well established that a prior connection to a crime similar to the one being tried before the court-martial is not per se disqualifying to a member's service.

Military & Veterans Law > Military Justice > Courts
 Martial > Court-Martial Member Panel

HN17 **Courts Martial, Court-Martial Member Panel**

The U.S. Court of Appeals for the Armed Forces recognized that military judges are "specially suited" to determine challenges because, unlike a reviewing court that is not physically present, military judges have observed a challenged member's demeanor during voir dire. Similarly, the U.S. Army Court of Criminal Appeals finds a trial defense counsel is best poised to determine whether to challenge panel members, as she observes each member, converses directly with them during individual voir dire, and reads their pretrial questionnaires, which are not part of the appellate record.

Counsel: For Appellant: Captain James J. Berreth, JA; Nathan Freeburg, Esquire (on brief and supplemental brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Virginia Tinsley, JA; Major Meghan Peters, JA (on brief).

Judges: Before ALDYKIEWICZ, MULLIGAN,¹ and SALUSSOLIA, Appellate Military Judges.

Opinion by: ALDYKIEWICZ

Opinion

MEMORANDUM OPINION

ALDYKIEWICZ, Senior Judge:

Appellant was charged with two specifications of violating Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 [UCMJ]: Specification 1 alleged rape; Specification 2 alleged abusive sexual contact. A panel of officers sitting as a general court-martial acquitted appellant of rape but convicted him, contrary to his plea, of abusive sexual contact. The convening authority approved the adjudged sentence of a bad-conduct discharge, two years of confinement, and reduction to the grade of E-1.

Appellant contends that the military judge erred in denying his Military Rule of Evidence (Mil. R. Evid.) 513 motion for an in camera review of his accuser's mental [*2] health records or, in the alternative, failing to abate the proceedings if his accuser did not agree to the production of her records. Appellant also asserts he received ineffective assistance of counsel because his trial defense team failed to challenge Lieutenant Colonel

¹ Senior Judge Mulligan decided this case while on active duty.

(LTC) CF, a member of his panel whose spouse was a victim of a sexual offense. We disagree with both assertions, and while both warrant discussion, neither merits relief.²

BACKGROUND

Between October 2016 and February 2017, appellant was a non-commissioned officer working as a medic in the same unit as Corporal (CPL) AK.³ Eventually they made plans to socialize off duty. On 17 February 2017, appellant drove to CPL AK's barracks, picked her up, and the two of them went to the on-post Shoppette to purchase alcohol before returning to CPL AK's barracks room. At CPL AK's barracks room, they drank and played games.

After a few hours, CPL AK laid down to go to sleep, telling appellant he should go home because she was ready to go to sleep. Instead, appellant turned off the light, climbed into bed with CPL AK, and placed his arm over her body and his hand, over her clothing, on her crotch area. She pushed his hand away and told [*3] him, "No, I did not want to tonight. . . . I'm going to sleep. Go home." Ignoring her express desire that he stop and go home, appellant grabbed her "genitals [over her clothing] a lot more aggressively."

THE PRETRIAL MIL. R. EVID. 513 LITIGATION⁴

² Appellant also contends that the evidence is legally and factually insufficient to sustain his abusive sexual contact conviction. We find no merit in this argument. Similarly, we find those matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A 1982) to be without merit.

³ At the time of the charged offense, 17 February 2017, Corporal AK held the rank of Specialist (SPC). Subsequent thereto she was laterally promoted to Corporal (CPL), the rank she held when she testified in appellant's court-martial. Throughout the opinion, she will be referred to as CPL AK.

⁴ Consistent with Mil. R. Evid. 513(e)(6), the "[pretrial] motions, related papers, and the record of the hearing [were] sealed in accordance with R.C.M. 1103A." Our decision avoids unnecessary disclosure of CPL AK's medical records out of concern for her privacy, which was invaded through a HIPAA violation. This decision avoids disclosure of any specific diagnosis made or medication prescribed not because they are privileged, but because disclosure of either is unnecessary to resolution of the Mil. R. Evid. 513 assignment of error.

Prior to trial, defense counsel moved for the military judge to conduct an in camera review of CPL AK's mental health records. The defense argued that CPL AK might suffer from a condition that impacted her "credibility" and "ability to recount events accurately," and that they were "constitutionally required" pursuant to Mil. R. Evid. 513 and the Confrontation Clause of the Sixth Amendment.

In support of the defense motion, the defense submitted two screenshots of CPL AK's digital medical records and an affidavit from Dr. Keppler, an Army psychiatrist appointed as a defense expert consultant. The defense also called Dr. Keppler to testify at the motions hearing.

The screenshots were provided to the defense anonymously, left at the civilian defense counsel's office in a sealed envelope.⁵ The defense provided copies of the screenshots to the government. Screenshot 1 contains patient notes and references a prescription medication, Rx-1. Screenshot 2 lists medical and mental health diagnoses, labeled "problems." Both reference [*4] a mental health disorder, Condition-A. Corporal AK did not provide a Health Insurance Portability and Accountability Act (HIPAA)⁶ release for her medical records, including the screenshots. At the time of trial, CPL AK continued to assert her Mil. R. Evid. 513 privilege.

An investigation into the unauthorized release and HIPAA violation⁷ narrowed the list of those who

⁵ The envelope's return address stated, in part: "JBLM Concerned Bystander."

⁶ HIPAA is a federal law that protects against the unauthorized disclosure or transmission of all "individually identifiable health information" by a HIPAA covered entity. The term "individually identifiable health information" means any information, including demographic information collected from an individual, that—(A) is created or received by a health care provider, health plan, employer, or health care clearinghouse; and (B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and—(i) identifies the individual; or (ii) with respect to which there is a reasonable basis to believe that the information can be used to identify the individual. 42 USC § 1320d(6) (2018).

⁷ A knowing violation of HIPAA, which includes obtaining "individually identifiable health information relating to an individual" or disclosing "individually identifiable health information to another person" is subject to criminal prosecution, exposing the offender to a fine of \$50,000 to

accessed CPL AK's records during the relevant period, without a medical need to know, to three persons, one of whom was appellant's wife. On four occasions, appellant's wife, herself an active duty medic, without authorization, accessed CPL AK's medical records, including the digital records captured in Screenshots 1 and 2.

During the motions session, the defense argued that an in camera review of CPL AK's mental health records was necessary to address Condition-B, a mental health condition that can impact credibility and ability to recall. However, the defense offered no evidence that CPL AK suffered from Condition-B, and it was not mentioned in Screenshots 1 and 2. Although Screenshots 1 and 2 mentioned *Condition-A*, Dr. Keppler testified that the references to Condition-A could indicate *either the presence or absence* [*5] of the condition, so he could not conclude that CPL AK suffered from Condition-A. Further, while those suffering from Condition-A *could* also suffer from Condition-B, a diagnosis of the former was not evidence of the latter. Although Screenshot 1 mentioned Rx-1, Dr. Keppler testified that the medicine would not be prescribed to someone for Condition-A.

In denying the defense motion, the military judge ruled, "the use of improperly, if not illegally, obtained evidence as a basis to establish a need to disclose evidence under [Mil. R. Evid.] 513 [is] exactly contrary to [the] purpose of the rule. The materials in the possession of the Defense retains [sic] its privileged nature." Having found Screenshots 1 and 2 privileged, the military judge denied the defense's Mil. R. Evid. 513 motion, concluding "[t]he Defense may not use the improperly disclosed materials, regardless of who possesses them, for any purpose."

The military judge went on, however, to rule in the alternative: even considering the "privileged" materials, the defense failed to show "a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege."⁸ See Mil. R. Evid.

\$250,000, imprisonment in the range of one to ten years, or both. See 42 U.S.C. § 1320d(6) (2018).

⁸ The military judge also found the defense failed to meet the requirement of Mil. R. Evid. 513(e)(3)(C)—that the information sought is "not cumulative from information available from other sources." Having found the military judge did not abuse his discretion in denying the defense motion as it fails Mil. R. Evid. 513(e)(3)(A), we need not and do not address the validity of the military judge's ruling as it relates to Mil. R. Evid.

513 (e)(3)(A). Therefore, [*6] the military judge ruled, "no disclosure or in camera review is required."

LAW AND DISCUSSION — DENIAL OF AN IN CAMERA REVIEW

Appellant alleges the military judge erred by failing to conduct an in camera review of CPL AK's mental health records or, in the alternative, abate the proceedings if CPL AK did not agree to the production of her mental health records. We disagree. Contrary to the military judge's conclusion, we find the records proffered by the defense were not privileged. However, we affirm the military judge's denial of the defense motion for the reasons noted below.

A. What constitutes a "Confidential Communication" under Mil. R. Evid. 513?

We take this opportunity to clarify the meaning of "confidential communication" pursuant to Mil. R. Evid. 513. As a threshold matter, the military judge had to determine whether Screenshots 1 and 2 were privileged, as they were the factual foundation offered by the defense counsel in support of their motion.

HN1 [↑] Mil. R. Evid. 513(a) provides:

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to a psychotherapist, in a case arising under the UCMJ, if such communication [*7] was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

Whether a diagnosis or prescribed medication is privileged under Mil. R. Evid. 513 is a question that has not yet been directly addressed by our superior court. However, the Coast Guard addressed this question in *H. V. v. Kitchen*. 75 M.J. 717, 2016 CCA LEXIS 395 (C.G. Ct. Crim App. 2016) (2-1 decision) (Bruce, R., dissenting).

We find Judge Bruce's dissenting opinion in *Kitchen* most illustrative:

A diagnosis, prescribed medications, and other treatments are matters of fact that exist

513(e)(3)(C).

independent of any communications between the patient and the psychotherapist. . . . The facts that there was a diagnosis, that medications were prescribed, or that other treatments were given, exist regardless of whether or to what extent they were discussed with the patient." See *H. V. v. Kitchen*, 75 M.J. 717, 721, 2016 CCA LEXIS 395 (C.G. Ct. Crim App. 2016) (2-1 decision) (Bruce, R., dissenting). A prescription, by its very nature, is intended to be disclosed to a third party (i.e., the pharmacist who fills the prescription).

Kitchen, 75 M.J. at 721. Adopting a plain language approach to the Mil. R. Evid. 513 privilege, Judge Bruce deftly highlighted "the rule protects 'communication' 'made for the purpose of facilitating diagnosis or treatment,' not *including* diagnosis and treatment.'" *Id.* at 721. Had the President [*8] wished to broaden the category of information that would be privileged under Mil. R. Evid. 513, he could have included diagnosis and treatment in the plain language of the rule. As the words "diagnosis" and "treatment" appear in the rule, we cannot conclude that the President merely overlooked the issue of whether a diagnosis or treatment constitutes a "confidential communication." Instead, we concur with the lone dissenting Judge Bruce that the Mil. R. Evid. 513 privilege extends to statements and records that reveal the substance of conversations that may have been for the "purpose of facilitating diagnosis or treatment," but not to the diagnosis or treatment itself.

Screenshots 1 and 2 contain a list of medical and mental health "problems," or diagnoses, and a list of prescription medications. **HN2** [↑] A list of medical and mental health "problems" does not contain any "confidential communications," though privileged communications may have prompted evaluation for those diagnoses. Likewise, a list of prescription medications does not contain "confidential communications," though privileged communications may have *facilitated* a psychotherapist's prescription for a particular medication. A prescription, by its very nature, [*9] is intended to be disclosed to a non-psychotherapist third party—the pharmacist who fills it—which further informs our opinion that the medications prescribed to a person are not privileged "confidential communications."

The fact that Screenshots 1 and 2 were illegally obtained in violation of HIPAA does not expand the psychotherapist-patient privilege created by the President. HIPAA protects against disclosure of a much broader category of medical information than the

confidential communications that are privileged under Mil. R. Evid. 513. The military judge was correct that **HN3** [↑] privileged information could not be used to establish the factual foundation for an in camera review of mental health records. But his ruling conflates the Mil. R. Evid. 513 privilege with HIPAA protection. While the medical records were no doubt protected under HIPAA and should not have been disclosed without CPL AK's consent, we find Screenshots 1 and 2 were not privileged under Mil. R. Evid. 513, and the military judge erred in his conclusion that they were. Because the records in question are not privileged, we consider them, as the military judge did, in our Mil. R. Evid. 513 analysis.⁹

B. The Defense's Burden to Establish Entitlement to an In Camera Review

HN4 [↑] A military judge's [*10] ruling on a discovery or production request is reviewed for an abuse of discretion. *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015). "A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law." *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004).

HN5 [↑] Congress codified four prerequisite showings that must be made before a military judge may conduct an in camera review of privileged matters. As the movant, appellant bore the burden of establishing:

- (A) a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;
- (B) that the requested information meets one of the enumerated exceptions under [Mil. R. Evid. 513(d)];
- (C) that the information sought is not merely cumulative of other information available; and
- (D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

Mil. R. Evid. 513(e)(3).

We agree with the military judge that appellant failed to

⁹ If the military judge had been correct in his determination that Screenshots 1 and 2 were privileged, he should *not* have considered them in his determination of the defense's motion to conduct an in camera review of CPL AK's mental health records.

establish the first prong of Mil. R. Evid. 513(e)(3)¹⁰ and therefore, he was not entitled to an in camera review of CPL AK's mental health records.

The defense argued that CPL AK's records were relevant to CPL AK's "credibility" and [*11] "ability to recount events accurately." The defense tied this assertion to a specified mental health diagnosis, Condition-B. However, the evidence presented, to include the screenshots of CPL AK's medical records, mentioned a potential diagnosis of a different condition, Condition-A. While those that suffer from Condition-A could also suffer from Condition-B, the former is not proof of the latter, according to the defense's own expert.

The defense also attempted to link CPL AK to Condition-B by reference to Rx-1. However, the medication is not prescribed to treat either Condition-A or Condition-B. In short, the defense was on a "proverbial fishing expedition." *United States v. Chisum*, 75 M.J. 943, 948 (A.F. Ct. Crim. App. 2016).

We find the military judge did not abuse his discretion in denying the defense motion. The defense failed to establish "a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege." Mil. R. Evid. 513(e)(3)(A). While we have little doubt that defense counsel in criminal cases would like, as Dr. Keppler put it, to "explore the underlying psychopathology at work in the complainant," HN6[↑] Mil. R. Evid. 513 is a rule of privilege, not exploration.

*C. Neither Brady nor the Confrontation Clause Entitles [*12] Appellant to an In-Camera Review of CPL AK's Mental Health Records*

In addition to arguing the military judge erred in refusing to conduct an in-camera review, appellant argues that the evidence in question was discoverable under

Brady.¹¹ We disagree. HN7[↑] "[F]or *Brady* purposes, information under the control of the 'prosecution' is not the same as information under the control of the entire government." *United States v. Shorts*, 76 M.J. 523, 532 (Army Ct. Crim. App. 2017). Privileged information stored in a hospital's system of records is not within the possession or control of the "prosecution" for *Brady* purposes. "Mental health records located in military or civilian healthcare facilities that have not been made part of the investigation are not 'in the possession of prosecution' and therefore cannot be 'Brady evidence.'" *Lk v. Acosta*, 76 M.J. 611, 616 (Army Ct. Crim. App. 2017).

Finally, appellant argues:

[R]egardless of other evidentiary or relevance burdens, it was error for the military judge to preclude the defense expert from considering the records in forming his opinion. In fact, on its face the military judge's ruling precluded the defense from even conducting further investigation based upon the records, denying the Appellant the effective assistance of counsel. This ruling was simply outside [*13] of the military judge's authority and denied the Appellant his Sixth Amendment confrontation right.

We disagree. The military judge issued a protective order to prevent "unnecessary disclosure of evidence of a patient's records or communications." Though the screenshots are not privileged, their unauthorized disclosure constitutes a criminal violation of HIPAA. The military judge acted within his authority to regulate discovery when he issued the protective order. See generally Rule for Courts-Martial (R.C.M.) 701(g)(2). The order did not abridge appellant's constitutional rights. Appellant's HN8[↑] Sixth Amendment right to confront witnesses against him is a *trial right*, not a discovery right. *Pennsylvania v. Ritchie*, 480 U.S. 39, 52, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). The right to confront witnesses does not include the right to discover information to use in confrontation. *Id.*

Appellant has failed to establish that he was prejudiced by the military judge's order denying his use of the information for any purpose. We find no abuse of

¹⁰ The military judge also found defense failed to meet the third prong of Mil. R. Evid. 513(e)(3), a showing "that the information sought is not merely cumulative of other information available." Mil. R. Evid. 513(e)(3)(C). Having found the military judge did not abuse his discretion in his Mil. R. Evid. 513(e)(3)(A) finding, we need not and do not address the validity of the military judge's ruling as it relates to Mil. R. Evid. 513(e)(3)(C).

¹¹ See generally *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (requiring the government to disclose to the defense certain information (i.e., evidence that is material and favorable to the defense) in the possession of the prosecution).

discretion in the order and, more importantly, we find appellant suffered no material prejudice to a substantial right as a result of said order. See Article 59(a), UCMJ.

LIEUTENANT COLONEL CF'S SERVICE ON THE PANEL

A. Voir Dire

During group voir dire, the military judge posed the 28 standard group voir dire [*14] questions, to include: "Has anyone or any member of your family or anyone close to you personally ever been the victim of an offense similar to the ones charged in this case?" See Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 2-5-1 (10 September 2014). All members except for LTC CF responded in the negative. When asked by the military judge, "do you believe that that experience would influence the performance of your duties as a court member in this case in any way?", LTC CF responded, "No, sir." Following the military judge's questioning of the group, the trial counsel asked 18 additional questions. Finally, trial defense counsel asked the group another 56 questions. The defense counsel's questions covered a range of topics including, *inter alia*: the members' relationships with government counsel, the convening authority and each other; prior experience with and personal views on sexual assault; previous involvement with victim advocates and law enforcement; preexisting notions regarding both suspects' and alleged victims' behavior; and, prior experience sitting on a court-martial panel.

During defense counsel's group voir dire, five of the ten members, including [*15] LTC CF, indicated they previously sat on a panel in a sexual assault case. During individual voir dire, a sixth member explained that he also served as a panel member on a sexual assault case. Considering the members' responses during group voir dire and the answers they provided in written questionnaires, trial defense counsel requested and conducted individual voir dire of all ten members.

During individual voir dire of LTC CF, trial defense counsel asked LTC CF to elaborate on his affirmative response to whether a family member or someone close to him was a victim of an offense similar to those charged. The following colloquy occurred:

Q. Sir, I believe you answered affirmatively whether there'd been a family member or someone close to you that was a victim of a similar offense, is that

correct?

A. That's correct.

Q. I'm sorry to have to delve into this, but could you describe in general what you're speaking, sir.

A. It was my spouse. It was a number of years ago, but there were multiple instances in which she was a victim of, I'll say sexual assault, however you want to characterize it, it still has significant impacts today.

Q. Sir, the crime we're talking about, did that take place [*16] many years ago?

A. Yes. We've been married for 13 years, probably closer to 20 years ago.

Q. Did that offense come to light before you knew your wife?

A. No. It was afterwards.

Q. Were you involved in any way with investigative efforts or anything like that?

A. No.

Q. Was there any law enforcement involved in it or anything of that nature?

A. No.

Q. In the aftermath of an offense like that, I think you've alluded to that there's impacts and things of that nature. Do you believe that would color your ability to sit in a sexual offense case----

A. No.

Q. ----or prevent you--could you describe your thought process on that, sir?

A. I'd make sure to be fair. At least, I believe, I'm fair and will look at the evidence based on the merits. I don't come here with any preconceived notions regarding the case one way or the other.

Q. The perpetrator of that offense against your wife, was that a family member or a stranger?

A. It was an acquaintance of hers.

Counsel then transitioned to LTC CF's experience as a member on a prior sexual assault court-martial. He explained that he had sat on a court-martial panel in a sexual assault case in January of that year. Lieutenant Colonel CF said nothing from the experience [*17] stood out in his memory and he was committed to considering the evidence in the case and following the law provided by the military judge.

The government challenged for cause two of the panel members. The defense did not object and the military judge granted both challenges. The defense did not assert any causal challenges. Both the government and defense exercised their peremptory challenge, which the military judge granted. After the exercise of

challenges, the panel consisted of six members, three of whom had previously served as members in sexual assault cases.

B. Lieutenant Colonel CF's Questions at Trial

During the course of trial, LTC CF submitted six questions that were marked as appellate exhibits. He directed questions at two NCO supervisors of CPL AK, an expert witness testifying in the field of forensic biology, and a medical doctor testifying about sexual assault forensic examinations. Most notably, during deliberation, the panel president requested that the court be called to order so that the military judge could be presented with LTC CF's final question: "May we have a transcript of CPL [AK's] testimony." As the typed transcript of the testimony was not yet available, [*18] LTC CF's question prompted the military judge to replay part of CPL AK's recorded testimony. After the members heard the portion of the recorded testimony requested, they returned to their deliberations.

LAW AND DISCUSSION — THE DEFENSE'S DECISION NOT TO CHALLENGE LIEUTENANT COLONEL CF

Appellant asserts he was denied his Sixth Amendment right to effective assistance of counsel because his defense counsel failed to challenge for cause LTC CF, a member whose wife had been a victim of a sexual offense. Appellant characterizes defense counsel's "failure to challenge LTC F [as] an unreasonable omission [] especially since the challenge would have been granted under the 'liberal grant mandate,'" noting that that "a challenge for cause based on implied bias would have been successful." We disagree and conclude for the reasons below that appellant is entitled to no relief.

First, absent plain error, appellant's decision at trial not to challenge LTC CF as a member of the court waives any issue regarding his participation on the court. Further, appellant has failed to meet his burden to establish he was denied effective assistance of counsel, establishing neither deficiency by defense counsel's decision not [*19] to challenge LTC CF for cause nor prejudice by LTC CF's membership on the court.

A. The Burden to Bring Challenges and Waiver

HN9 [↑] "The purpose of voir dire and challenges is, in

part, to ferret out facts, to make conclusions about the members' sincerity, and to adjudicate the members' ability to sit as part of a fair and impartial panel." *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008).

HN10 [↑] Rule for Courts-Martial 912(f)(3) states, in part: "The party making a challenge shall state the grounds for it. . . . The burden of establishing that grounds for a challenge exists is upon the party making the challenge." *United States v. Napoleon*, 46 M.J. 279, 283 (1997). Rule for Courts-Martial 912(f)(2)(4) states, in part: "[m]embership of enlisted members in the same unit as the accused and any other ground for challenge is waived if the party knew of or could have discovered by the exercise of diligence the ground for challenge and failed to raise it in a timely manner." See also *United States v. Lopez*, 37 M.J. 702, 705 (Army Ct. Crim. App. 1993).

HN11 [↑] Absent a clear showing of specific prejudice, "or where application of waiver would result in a miscarriage of justice," failure to challenge a member at trial constitutes waiver of that issue on appeal. *United States v. Wilson*, 21 M.J. 193, 197 (C.M.A. 1986). "Allowing appellate defense counsel to label a decision not to challenge court members as 'ineffective assistance of counsel,' would . . . defeat the longstanding waiver rule for challenges [*20]" *United States v. Travels*, 47 M.J. 596, 598 (A.F. Ct. Crim. App. 1997).

We agree with the Air Force court and "find that **HN12** [↑] when, as here, detailed voir dire is conducted by the defense counsel, counsel's subsequent failure to challenge a member is a tactical decision which waives any ground for challenge revealed by voir dire." *Travels*, 47 M.J. at 598. Appellant cannot strategically decline to assert a challenge during voir dire and then complain of the inaction on appeal in order to revive an issue he previously waived. Appellant's allegation is a poor attempt at appellate "CPR," but new life cannot be breathed into legal issues previously waived by calling his counsel ineffective.

Notwithstanding our finding of waiver, we will review counsel's "inaction" under the framework for ineffective assistance of counsel, a review that similarly results in no relief for appellant.

B. Ineffective Assistance of Counsel

HN13 [↑] In order to prevail on a claim of ineffective assistance of counsel, appellant must demonstrate both

(1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice. *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674(1984)). We review both deficiency and prejudice de novo. *United States v. Davatz*, 71 M.J. 420, 424 (C.A.A.F. 2012) (citing *United States v. Gutierrez*, 66 M.J. 329, 330-31 (C.A.A.F. 2008)). Appellant's claim fails on both counts.

To establish deficient performance, appellant must show [*21] that his counsel's "representation amounted to incompetence under 'prevailing professional norms.'" *Harrington v. Richter*, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (quoting *Strickland*, 466 U.S. at 690). In order to establish prejudice, appellant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Green*, 68 M.J. at 362 (citing *Strickland*, 466 U.S. at 698).

1. No Deficiency

Any analysis of appellant's ineffective assistance of counsel claim necessarily requires an assessment of whether appellant had a viable challenge for cause against LTC CF. Defense counsel's performance cannot be called "deficient" for declining to make a challenge that would not have been successful.

HN14 [↑] "A military judge's ruling on a challenge for cause is reviewed for an abuse of discretion." *United States v. Woods*, 74 M.J. 238, 243 (C.A.A.F. 2015) (citations omitted). "The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law." *United States v. Wood*, 299 U.S. 123, 133, 57 S. Ct. 177, 81 L. Ed. 78 (1936).

HN15 [↑] "Actual bias [is defined] as 'bias in fact'—the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." *United States v. Ai*, 49 M.J. 1, 5 (1998) (internal quotations omitted). "The test for [*22] actual bias [in each case] is whether any bias 'is such that it will not yield to the evidence presented and the judge's instructions.'" *United States v. Napoleon*, 46 M.J. 279, 283 (1997) (internal quotations omitted). "There is implied bias when most people in the same position would be prejudiced." *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999) (internal quotations omitted).

Implied bias is "evaluated objectively under the totality of the circumstances and through the eyes of the public, reviewing the perception or appearance of fairness of the military justice system." *United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017) (citations and quotations omitted).

Appellant argues that implied bias exists when a family member is the victim of a similar crime. Our superior court disagrees, as do we. **HN16** [↑] It is well established that "[a] prior connection to a crime similar to the one being tried before the court-martial is not per se disqualifying to a member's service." *United States v. Terry*, 64 M.J. 295, 297 (C.A.A.F. 2007); see also *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996) (a member is not per se disqualified because [the member] or a close relative has been a victim of a similar crime.).

In *Terry*, the Court of Appeals for the Armed Forces (C.A.A.F.) concluded it was error for the military judge to deny a challenge for cause against a member whose "experience with rape was pronounced and distinct." 64 M.J. at 297. The member's longtime girlfriend [*23] whom he intended to marry had been raped, a rape that resulted in her pregnancy. *Id.* The member's longtime girlfriend broke off their relationship because she "felt unworthy" of being with him after the rape. *Id.* at 300. Despite being a support system for the rape victim, the rape ultimately led to the end of the relationship, changing the course of the member's life. Lieutenant Colonel CF's experience with his wife's sexual assault is distinguishable.

Lieutenant Colonel CF appeared to know few details of his wife's 20-year-old sexual assault. The crime occurred before he married his wife and it did not derail their lives together, as the rape did to the challenged member in *Terry*. Mere knowledge of his wife's experience as a sexual assault victim and an acknowledgement that it continues to impact her, albeit significantly, does not amount to a "pronounced and distinct" personal experience with a crime similar to those charged.

To agree with appellant's allegation that he received ineffective assistance of counsel, this court would have to find that defense counsel are per se ineffective when they choose not to challenge a member that reports a personal experience with a crime similar to those [*24] charged. Such a holding would fly in the face of the longstanding premise that a prior connection to a crime similar to the one being tried before the court-martial is

not per se disqualifying to a member's service on a panel. See *Terry*, 64 M.J. at 297. Imposing such a rule would also trample on the necessary strategic autonomy exercised by defense counsel in the presentation of an accused's defense. **HN17** [↑] Our superior court recognized that military judges are "specially suited" to determine challenges because, unlike a reviewing court that is not physically present, military judges have observed a challenged member's demeanor during voir dire. *Id.* at 302. Similarly, we find a trial defense counsel is best poised to determine whether to challenge panel members, as she observes each member, converses directly with them during individual voir dire, and reads their pretrial questionnaires, which are not part of the appellate record.

During individual voir dire, LTC CF's colloquy with the defense counsel provides insight into his fairmindedness and impartiality. Rather than simply giving affirmative or negative responses to defense counsel's queries, LTC CF delivered an unsolicited monologue about his intent to fairly decide **[*25]** the case on its merits. Lieutenant Colonel CF noted, "I'd make sure to be fair. At least, I believe, I'm fair and will look at the evidence based on the merits. I don't come here with any preconceived notions regarding the case one way or the other." There were no leading questions posed to suggest to LTC CF that he should dutifully set aside his wife's personal experience in order to sit as an unbiased member; he freely articulated his intent to do so in his own words.

Appellant has failed to support his allegation against his defense counsel. He could have provided an affidavit explaining that he noticed something off-putting about LTC CF's demeanor and expressions in court. He could have explained that he was uncomfortable having LTC CF on his panel and had in fact expressed that concern to his defense team. The absence of any affidavit from appellant speaks volumes. Because he did not, we must assume that he did not personally notice anything noteworthy about LTC CF during voir dire that would have caused him to request that the member be challenged. Likewise, if there were disturbing answers contained in LTC CF's pretrial questionnaire, appellant did not move to attach it to **[*26]** the appellate record to support his bold assertion that a challenge against LTC CF would have been successful and should have been made by his counsel.

We do not find that appellant's counsel were deficient in their decision not to challenge LTC CF because appellant has failed to demonstrate a challenge for

cause against LTC CF would have been successful.

2. No Prejudice

We need not address prejudice, as we find no deficiency in defense counsel's performance. However, we turn to the second prong of the *Strickland* analysis to point out that appellant has failed to even allege any prejudice, let alone support such a claim. Instead, appellant presumes prejudice, as if the failure to challenge a member automatically creates a reasonable probability of a different result sufficient to create serious doubt as to the outcome of the trial. Appellant would like us to treat his ineffective assistance of counsel allegation as structural error, one that "affects the framework within which the trial proceeds," such that it "defies analysis by harmless error standards." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907-08, 198 L. Ed. 2d 420 (2017) (citations omitted). But assuming we agreed with appellant that his counsel was deficient for failing to challenge LTC CF, appellant **[*27]** still bears the burden of showing how that prejudiced him at trial. The findings reached by the panel and LTC CF's behavior during trial make us confident that the defense counsel's decision not to challenge LTC CF did not prejudice appellant.

First, the panel acquitted appellant of rape, the gravamen offense. Even if LTC CF harbored some bias due to his wife's status as a victim of sexual assault, appellant's acquittal cuts against the contention that the failure to challenge LTC CF prejudiced appellant. Second, we have considered that LTC CF posed six thoughtful questions during the course of trial that were directed at a variety of witnesses. His questions demonstrate a focused attention to the evidence presented at trial and a personal desire to understand the testimony of the witnesses, including expert witnesses. Even during deliberation, LTC CF asked to reexamine CPL AK's testimony, which supports the conclusion that he was a thoughtful deliberator, not a biased husband. Despite his wife's personal experience with sexual assault, LTC CF did not exhibit a biased attitude or inelastic disposition.

Appellant's lead defense counsel conducted a thorough group voir dire and individual **[*28]** voir dire with every member. She gained insight from personal conversations with each member. Viewing the record as a whole, we conclude that appellant's defense team conducted a strategically savvy voir dire and simply made a tactical decision not to challenge LTC CF for

cause after hearing his answers and observing his affect and behavior. Notwithstanding our conclusion that appellant waived the issue of challenging LTC CF, defense counsel's decision not to challenge LTC CF did not constitute ineffective assistance of counsel.

CONCLUSION

Upon consideration of the entire record, the findings of guilty and the sentence are AFFIRMED.

Senior Judge MULLIGAN and Judge SALUSSOLIA concur.

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CERTIFICATE OF SERVICE, U.S. v. TINSLEY (20200337)

I certify a copy of the foregoing was sent via electronic submission to
Mr. [REDACTED] civilian appellate defense counsel, at [REDACTED]
[REDACTED] and the Defense Appellate Division at [REDACTED]
[REDACTED] on the 25th day of August 2021.
Hard-copy of the unredacted (sealed) brief has been hand-delivered to the
court.

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