UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
KRIMBILL, BROOKHART, and ARGUELLES[1]
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant ZACHARY O. HANNAH
United States Army, Appellant

ARMY 20190514

Headquarters, 82d Airborne Division
Fansu Ku, Military Judge
Colonel James A. Bagwell, Staff Judge Advocate

For Appellant: Captain Paul T. Shirk, JA; William E. Cassara, Esquire (on brief); Captain Julia M. Farinas, JA; William E. Cassara, Esquire (on reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Brett A. Cramer, JA; Captain Anthony A. Contrada, JA (on brief).

19 April 2021

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

ARGUELLES, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of sexual assault, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2016) [UCMJ]. The convening authority approved the adjudged sentence of a dishonorable discharge, confinement for three years, and reduction to the grade of E-1.

This case is before the court for review pursuant to Article 66, UCMJ. Appellant raises three assignments of error, one of which merits relief as provided in

[1] Chief Judge (IMA) Krimbill and Judge Arguelles decided this case while on active duty.

our decretal paragraph. We have also considered the matters appellant raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) and find they warrant neither discussion nor relief.

BACKGROUND

On 28 October 2016, Ms. [redacted] [hereinafter referred to as the "victim"], her husband [redacted] ["victim's husband"], and cousin Ms. [redacted] ["female cousin"] traveled from Maryland to Fayetteville, North Carolina for a weekend Halloween party thrown by appellant and his wife KH ["appellant's wife"]. The victim, her female cousin, and appellant's wife grew up together as cousins and were extremely close. Also living in appellant's residence was [redacted] ["male cousin"], brother of appellant's wife and cousin of the victim and her female cousin.

The victim and her husband slept on a creaky fold-out couch that was located in the guest bedroom, also known as the "animal room" because it was where appellant and his wife kept their reptile cages, many of which had glow lights illuminated night and day. Appellant also used this room as storage for his military gear, a closet for his clothes, and his personal "laundry bin."

After helping prepare for the party during the day, at around 1830 or 1900 on Saturday night, the victim, her female cousin, and appellant's wife got dressed in their costumes. The victim's "Harley Quinn" costume consisted of a t-shirt, spandex shorts, belt, fishnet tights, and wedge-heeled shoes.

During the party, the victim consumed eight or nine alcoholic drinks and smoked marijuana several times. At some point after she felt drunk and sick, the victim's female cousin and appellant's wife helped her to the bathroom, where she alternated between spells of diarrhea and vomiting. After spending a fair amount of time in the bathroom, the victim's female cousin and appellant's wife took the victim to the animal room to lie down in her bed. The female cousin stayed with the victim for about thirty minutes. The female cousin also observed that the victim's dog, Hercules, was in the bed as well. Unbeknownst to the victim, shortly after she got sick, her husband left the party to go to a bar with some of the other guests.

At trial the victim testified that she woke up at some point to see appellant's profile in her peripheral vision. After she realized that her underwear, tights, and shorts were pulled down, she felt his finger in her anus. The victim did not move or say anything, and after appellant stopped and left the room she pulled up her underwear, tights, and shorts, and went back to sleep. Sometime after that the victim again woke up and saw appellant behind her, she again felt either appellant's finger or penis in her anus. The victim testified that when she attempted to push appellant away, he used his hands to hold her arm and hip. After this second assault, the victim again pulled up her clothes and underwear and again went back to sleep.

Finally, the victim testified that appellant entered the room one more time, at which point he removed her tampon and penetrated her vagina. Upon questioning by both trial counsel and the military judge, the victim testified that she thought appellant penetrated her with his penis "because of the way it felt." The victim also testified that each time appellant entered her room, she was aware that his wife was just outside the door.

After falling asleep again, at some point later in the evening the victim went into the master bathroom where she changed out of her costume and put it and her underwear into a bag. She testified that she had a bloody stool while in the master bathroom and saw blood in her underwear. She changed her underwear and went back to bed, where her husband was now also sleeping. The next morning the victim placed the second pair of underwear, along with her toothbrush, into the same bag as the costume and first pair of underwear. The underwear she ultimately submitted to the crime lab did not have any blood stains.

Appellant's wife testified that in his drunken state appellant on several occasions went to check on the victim and the victim's husband in the animal room. Appellant's wife explained that she was with appellant every time and kept telling him that the victim was fine, that the victim's husband was at the bar, and "can we go to bed now." She reiterated that appellant was never out of her sight when he went into the animal room and that Hercules barked whenever appellant opened the door. After getting tired of trying to get appellant to come to bed, appellant's wife retired around 0130 or 0145, at which time he was trying to clean up. Finally, appellant's wife testified that there was no blood on either the floor or the sheets, and she did not find a discarded tampon on the floor or in the trash.

The victim's male cousin (who again lived at the residence with appellant and his wife) did not drink at the party. He testified that he personally checked on the victim several times after her female cousins put her in the animal room. He further described how the victim appeared to be unconscious, and that her dog barked whenever he checked on her. The victim's male cousin also testified that he saw appellant check on the victim several times. He confirmed that each time appellant went into the animal room, his wife went upstairs with him. He heard appellant's wife tell appellant several times that the victim was fine and he should go downstairs and stated Hercules barked every time appellant opened the door. In addition, the male cousin testified that after appellant's wife went to bed around 0130 or 0145, he heard appellant drunkenly shuffling around, attempting to clean up, and going halfway up the stairs and back in an attempt to work off his drunkenness. The male cousin stated that the victim's husband came home sometime after 0200, briefly spoke to appellant, and then went up to the animal room to go to bed. Finally, both the male cousin and the victim's female cousin (who were sharing the same room) testified that they never heard Hercules bark, or the animal room door

open, after appellant's wife went to bed and before the victim's husband came home from the bar.

As planned, the victim, her husband, and her female cousin stayed with appellant and his wife the next day and did not leave until Monday morning. The victim did not say anything about the assaults during this period. Per the testimony of appellant's wife and the victim's two cousins, the victim seemed normal and happy. Moreover, the victim's female cousin testified that on the trip home they talked about how much fun they had over the weekend and made plans for their next visit.

On Tuesday 1 November 2016, the victim for the first time disclosed to her husband that appellant entered the animal room on the night of the party and raped her at least three times. The next day the victim submitted to a sexual assault nurse examination [SANE] at Mercy Medical Center in Maryland, and turned over the plastic bag which now contained her costume, bra, belt, two pairs of underwear, and the toothbrush she used over the weekend. The victim told the SANE nurse that appellant anally raped her twice by penetrating her anus digitally and possibly with his penis. The victim also told the SANE nurse that appellant removed her tampon after the second assault, but made no mention of any vaginal rape. Although the victim also reported a painful bowel movement and blood in her stool after the assaults, the SANE nurse did not find any injuries to the victim's anus or vagina, nor did she observe any tissue that looked like it was healing. Moreover, as noted above, there were no blood stains on either pair of underwear submitted by the victim.

On 13 December 2016, the victim told appellant's wife (who was again also her cousin) about the assaults. The victim reported to the police for the first time two days later. In her initial intake with police, the victim did not say anything about appellant removing her tampon. When she spoke with the investigating detective on 22 December 2016, the victim claimed that appellant raped her four times: (1) anally by either digital or penile penetration; (2) again anally by either digital or penile penetration; (3) digital penetration of both her anus and vagina; and (4) anally by "an unknown object."

In August of 2018, the victim told an Army Criminal Investigations Command (CID) agent that she placed two pairs of underwear in the collection bag because she was not sure which pair she wore during the assault. The victim told the agent that appellant first penetrated her anus with his penis, then came back a second time and removed her tampon and penetrated her vagina, and then came back the third and final time and penetrated her vagina with either his finger or his penis. The victim also turned over her diary to the agent, although before doing so she crossed out a page and half containing details about the party. At trial the victim testified that she

thought the crossed-out portion was not relevant, although she could not remember what it said or why she thought it was not relevant.

At trial the government called a DNA expert who testified that appellant was a contributor to the DNA sample collected from the inside crotch of one pair of the underwear submitted. Because there was no blood, sperm or semen on the underwear, the expert concluded that appellant's DNA came from his skin cells, and that the possibility of randomly selecting an individual unrelated to appellant that contributed to the sample was 1 to 242 quintillion. The expert also testified that there was no DNA present on the victim's cervical, anal, perineal, or external genitalia swabs. With respect to the possibility that appellant's DNA was "secondarily transferred" to the underwear, the expert testified that based on the amount of DNA recovered, "it would have to be direct contact. I couldn't think of a scenario where you could indirectly put that much DNA on an object."

The defense called a forensic toxicologist who testified that when combined with alcohol, marijuana can affect memory and even cause hallucinations, paranoia, and delusions.

LAW AND DISCUSSION

A. Confrontation Clause

1. Additional Facts

At trial the government did not present the analyst who performed the DNA sample examination, but rather called the technical reviewer who signed off on the process. The technical reviewer did not conduct any DNA testing in this case, nor did she observe the analyst's testing procedures. Although the defense did not object to the technical reviewer's expertise as a DNA analyst, counsel did object to her testimony on Sixth Amendment/Confrontation Clause grounds.

The technical reviewer testified that she started her analysis by first reviewing the analyst's notes to make sure that the analyst properly documented all of the evidence received by the crime lab. The technical reviewer then reviewed the "extraction page," which documented the actual extraction conducted by the analyst. After that she looked at the analyst's quantitation step to make sure that the correct DNA extracted samples were amplified. The technical reviewer explained that after a sample is amplified, it is put on the capillary electrophoresis machine to generate an electropherogram consisting of the graphs of the DNA peaks and their corresponding numbers.

In reviewing the machine-generated electropherograms, the technical reviewer first checked that all of the positive and negative controls were correctly displayed,

and then moved on to the actual evidence sample. The first step in this review was to independently confirm that the analyst did not incorrectly label any artifacts (peaks not produced from the amplification or extraction process) as DNA actual peaks. The technical reviewer explained that, in general, if she experienced trouble determining if something was an artifact, she could consult the raw data, but that was not necessary in this case.

The technical reviewer then explained that in cases like this one, where there was more than one DNA contributor to the sample, determining the "major" contributor required the initial analyst to confirm that the major profile was at least three rows higher than the minor profile. As part of her review, the technical reviewer was required to "do the math" herself to confirm that the major profiles identified by the analyst did in fact meet the required three-to-one ratio.

After personally verifying that the analyst correctly identified peaks associated with the major and minor contributors, the technical reviewer ensured that the analyst correctly input all of the correct peak number data onto the statistics page, which was in turn entered into the computer program to generate the probability number. The technical reviewer then looked at the analyst's final report to make sure she agreed with everything in it, including all of the chain of custody and quality control annotations. The technical reviewer testified that after her review she had a discussion with the analyst about doing further tests on one of the samples, but was satisfied with the analyst's explanation that do so would be redundant.

Upon further questioning by trial counsel, the technical reviewer confirmed that she independently determined: (1) what were peaks and what were artifacts on the machine-generated underwear DNA sample electropherogram; (2) the three-to-one ratio between the major and any minor contributors on the same electropherogram; and (3) what the inputs were to the statistics page used to generate the probability that appellant was a contributor to the DNA sample. The technical reviewer also testified that she reviewed the outputs from the tests of the underwear sample and appellant's known sample, and compared them to each other. On cross-examination, the technical reviewer admitted that she did not recalculate the percentage probability by running the statistics through the computer again. She also reiterated that she did not look at or do anything with the raw data in this case.

Appellant now asserts that the military judge incorrectly found that the technical reviewer "did not look at the analyst's report and conclusions until she has reviewed all the data and process and reached her own conclusions." (Appellant's Br. 30). Looking at the actual testimony, however, we disagree:

MJ: Okay. So you looked at her opinion.

> A: Right - - - -
>
> MJ: Reaching your own opinion.
>
> A: Right. Well - - - -
>
> MJ: Okay.
>
> A: - - - - when I'm reviewing, I don't necessarily look at her report first, I look at all the data first and make my own opinion. And then I see if my opinion matches hers. *So that's what I did in the review process* . . . . (emphasis added).

Finally, in the same exchange the technical reviewer confirmed that she was "satisfied, [herself], of the reliability of the results [she] testified to based on [her] own review and analysis."

2. Discussion

In pertinent part, the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. This gives an accused the right to cross-examine not only witnesses who testify against him in court, but also the declarant of any hearsay that is "testimonial." *Crawford v. Washington*, 541 U.S. 36, 50–52 (2004).

Appellant now claims that the military judge violated his Sixth Amendment right to confrontation by allowing the technical reviewer to testify about the DNA evidence. While we generally review a military judge's evidentiary rulings for abuse of discretion, "the antecedent question here—whether evidence that was admitted constitutes testimonial hearsay—is a question of law reviewed de novo." *United States v. Blazier*, 68 M.J. 439, 441–42 (C.A.A.F. 2010) (citing *United States v. Clayton*, 67 M.J. 283, 286 (C.A.A.F. 2009)).

In *United States v. Katso*, 74 M.J. 273, 276 (C.A.A.F. 2015), the Court of Appeals for the Armed Forces [CAAF] addressed a similar situation wherein the government called the technical reviewer, as opposed to the actual analyst, to elicit expert testimony about the DNA forensic analysis. In *Katso*, although he did not handle the initial evidence or observe the analyst, the technical reviewer reviewed all of the items in the case file, to include the forms submitted by law enforcement, the analyst's handwritten notes, records of the quality control measures used during testing, all printouts generated during the testing process, the raw DNA profile data, and the final report. *Id.* at 277. In addition, the technical reviewer independently

compared the DNA profiles of the evidentiary and known samples to verify the matches, which involved processing the machine-generated raw data profile data using a computer program and interpreting the profiles to detect matches between the samples. *Id.* The technical reviewer then personally recalculated the probability of a match between the DNA profiles for each matching evidentiary sample and a randomly selected person. *Id.*

The CAAF held that determining whether an expert's testimony violates the Confrontation Clause turns on two questions: (1) did the expert's testimony rely in some way on out-of-court statements that were themselves testimonial; and (2) if so, was the expert's testimony nonetheless admissible because she reached her own conclusions based on knowledge of the underlying data and facts, such that the expert herself was the witness against the appellant. *Id.* at 279 (citations omitted). With respect to the first question, the court held that law enforcement documents, computer-generated data, and the analyst's handwritten notes regarding chain of custody and quality control measures were not "testimonial" hearsay. *Id.* at 279–280.

With respect to the second question, the CAAF held that the pertinent inquiry was whether the technical reviewer "had sufficient personal knowledge to reach an independent conclusion as to the object of his testimony and his expert opinion." *Id.* at 280 (citing *United States v. Blazier*, 69 M.J. 218, 224–25 (C.A.A.F. 2010)) (*Blazier II*). Specifically, the CAAF held that testifying experts can review and rely upon the work of others, including laboratory testing conducted by others, "so long as they reach their own opinions in conformance with evidentiary rules regarding expert opinions." *Id.* at 282 (citing *Blazier II*, 69 M.J. at 224). Given that the technical reviewer in *Katso* reviewed all of the calibrations and work underlying the tests, closely scrutinized and analyzed the results, compared the DNA profiles, and re-ran the statistical analysis, the CAAF held that he "presented his own expert opinion at trial, which he formed as a result of his independent review." *Id.* at 284. As such, the expert's testimony did not violate the Confrontation Clause. *Id.* Finally, the CAAF held that the fact that the technical reviewer did not perform certain aspects of the tests "'goes the weight, rather than to the admissibility' of his opinion." *Id.* (quoting *Blazier II*, 69 M.J. at 225).

In *United States v. Bailey*, 75 M.J. 527, 530 (Army Ct. Crim. App. 2015), the government called a forensic toxicologist team leader who did not actually perform any of the tests on the relevant blood samples. Nevertheless, because she was able to describe the testing processes in detail and interpret the computer-generated data supporting her own conclusions, we found that the team leader was "neither a surrogate nor a conduit for someone else's testimony." *Id.* at 535 (citations omitted). As such, we held that the admission of her testimony did not violate appellant's right to confrontation, and that the military judge did not abuse his discretion by admitting her testimony. *Id.*

Following *Katso*, the technical reviewer's testimony in this case about her review of the analyst's file, to include law enforcement records, quality control and calibration notes, and computer-generated reports, is admissible non-testimonial hearsay. Indeed, it appears that the only substantive differences between *Katso* and the case at bar are that the technical reviewer here did not re-process the machine-generated raw data profile data using a computer program, and she did not re-run the statistical analysis. But, as the CAAF in *Katso* squarely held, the fact that the technical reviewer did not perform (or re-perform) certain aspects of the tests goes to the weight, rather than the admissibility of her opinion. This is especially true here, where the tests not performed by the technical reviewer involve computer-generated results.

Moreover, in some respects the technical reviewer in this case provided significantly more detail than the reviewer in *Katso*. For example, the technical reviewer explained: (1) how she independently verified what were peaks and what were artifacts on the machine-generated underwear DNA sample electropherogram; and (2) how she then recalculated the three-to-one ratio to confirm the analyst's determination of the major and minor contributors on that same graph. Although appellant now asserts that this is little more than "checking the math" by independently determining the minor peaks in the underwear sample and then comparing those minor peaks to appellant's sample, the technical reviewer presumably reached her own independent conclusion that appellant was a match. Likewise, although she did not re-run the statistical analysis computer program, the technical reviewer did independently verify that the analyst properly documented all of the inputs and numbers on the "statistics forms" that were ultimately input into the program. The fact that the technical reviewer did not re-enter the exact same numbers into the same statistical computer program, which almost certainly would have generated identical results, is of little import.

Returning to *Katso*'s two-factor analysis, for all of the reasons set forth above, we conclude that: (1) the technical reviewer's testimony did not rely on any out-of-court "testimonial" statements; and (2) in any event, she reached her own conclusions based on her knowledge of the underlying data and facts. As such, because the DNA expert's testimony in this case did not violate appellant's right to confrontation, the military judge did not err by overruling the defense's Sixth Amendment objection.

B. Factual and Legal Sufficiency

1. Factual Sufficiency

In pertinent part, Article 66(d)(1), UCMJ provides that this court may "weigh the evidence, judge the credibility of witnesses, and determine controverted

questions of fact." In doing so, we are required to undertake a de novo "fresh, impartial look at the evidence" and need not give deference to the findings of the trial court. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). On the other hand, our ability to conduct such a "factual sufficiency" review is not completely unfettered.

Rather, Article 66(d)(1), UCMJ, mandates that in conducting such an assessment, we must recognize "that the trial court saw and heard the witnesses." As such, 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 accused's guilt beyond a reasonable doubt. *United States v. Turner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (emphasis added). In *United States v. Crews*, ARMY 20130766, 2016 CCA LEXIS 127, at *11–12 (Army Ct. Crim. App. 29 Feb. 2016 (mem. op.), we further explained:

> 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 the 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.

Likewise, in *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015), *aff'd on other grounds* 76 M.J. 224 (C.A.A.F. 2017), we held 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." *See also United States v. Conley*, 78 M.J. 747, 752 (Army Ct. Crim. App. 2019) (stating the expansive authority given to our court under Article 66, UCMJ, should serve as a "safety valve of last resort" such that "on a practical level the exercise of this unique power is more likely to be found in certain military circumstances . . . born from uniquely military origins").

Appellant now asserts that the evidence in this case is factually insufficient because: (1) since the victim herself testified that appellant's wife was outside the door when the assaults took place, he had neither the time nor the opportunity to commit the assaults; (2) the victim's multiple descriptions of the assaults were wildly inconsistent; (3) the victim's memory of the evening and events in question was "abysmal"; (4) appellant's skin cell DNA does not prove that he sexually

assaulted the victim; and (5) believing the victim "required a total suspension of logic."

Appellant places great weight on his argument that there was most likely an innocent and indirect "secondary" transfer of his DNA onto the victim's underwear (i.e., the victim sleeping on the bed he threw his dirty clothes on, using the same bathroom, etc.). Yet, he fails to acknowledge that the *only* actual evidence pertaining to DNA transfer was offered by the government's expert, who testified that the amount of appellant's DNA found inside the underwear required "direct contact." The same expert reiterated that in her experience she "couldn't think of a scenario where you could indirectly put that much DNA on an object."

In sum, based on the cold record, including but not limited to the victim's testimony, we share some of appellant's concerns about the sufficiency of the evidence. On the other hand, we must take into account the trial court's superior position in making credibility determinations, especially in a case like this one, where the outcome in large measure depends on "the degree to which the credibility of the witnesses is at issue." *Davis*, 75 M.J. at 546. Giving due deference to the military judge's ability to see and hear the witnesses, combined with the fact that the only evidence before the military judge was that appellant's skin cell DNA was almost certainly directly transferred to the inside of the victim's underwear, the military judge's findings were factually sufficient. *See also United States v. Crowder*, ARMY 20150728, 2017 CCA LEXIS 624, at *6 (Army Ct. Crim. App. 26 Sep. 2017) (summ. disp.) ("Here, this case turned on the relative credibility of the witnesses. After taking into account that the trial court saw and heard the witness, we find the evidence factually sufficient.").

2. Legal Sufficiency

We also review questions of legal sufficiency de novo. *Washington*, 57 M.J. at 399. In conducting this review, "the relevant question an appellate court must answer 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. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original) (internal quotation marks omitted)). "Such a limited inquiry reflects our intent to give full play to *the responsibility of the trier of fact* fairly to resolve conflicts in the testimony, to weigh the evidence, *and to draw reasonable inferences* from basic facts to ultimate facts." *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995) (quoting *United States v. Hart*, 25 M.J. 143, 146 (C.M.A. 1987) (emphasis in original) (internal quotation marks omitted)).

Given the relatively low threshold for establishing legal sufficiency, and when viewing the evidence in the light most favorable to the prosecution, we find that a

reasonable factfinder could have found all of the essential elements of the sexual assault offenses at issue beyond a reasonable doubt. Accordingly, we also affirm the findings as legally sufficient.

C. Military Judge's Conduct Towards the Defense

1. Additional Facts

Throughout the trial, and especially when the defense cross-examined the victim, the military judge repeatedly sua sponte interrupted, criticized defense counsel, and sustained her own objections. For example, although the government offered no objection, when defense counsel tried to pin down the victim (who was vacillating) over when and what exactly she told her husband about the assaults, the military judge interrupted several times and indicated that defense counsel was mischaracterizing the witness's testimony. In addition, at one point after the victim clearly answered a question and defense counsel attempted to move on, the military judge sua sponte interrupted and told the witness "to say whatever it is you would like to say."

During the same cross-examination, the military judge sua sponte criticized defense counsel for the length of her questions, criticized her attempts to impeach, and limited her ability to explore what appeared to be relevant topics. Along the same lines, the military judge told defense counsel that she was "not doing a very good job setting up inconsistencies" and asked, despite no objection from trial counsel, why she kept repeating the same questions. The military judge also sua sponte interjected herself into a line of questioning about what the witness told CID about the two pair of underwear, telling defense counsel "don't try to repeat that again, try to turn it into something else." Likewise, when trying to frame a prior inconsistent statement, defense counsel started her question by saying, "Again, I'm sorry to be repetitive," to which the military judge interrupted, stating, "Don't – then don't be repetitive. If you have to start off a question with, 'I apologize for being repetitive,' then you should not be, then you should just move on . . . Because I don't want to keep hearing the same question over and over again."

Again, the above descriptions are only examples of the military judge's conduct during the victim's cross-examination. Indeed, and in sum, based on our rough count it appears that the military judge sua sponte either interrupted or interjected herself into defense counsel's cross-examination at least twenty times.

At the end of the first day of trial, defense counsel informed the military judge that based on their conversations with the government's DNA expert the day prior, the defense was objecting to the expert's testimony on Sixth Amendment grounds. After reprimanding counsel for failing to object before trial (notwithstanding that counsel explained that the objection was based on a

conversation with the expert the day prior), the military judge stated that she would not "penalize your client for your poor decision." The military judge then acknowledged that she had already pulled up *Katso* "because I thought the defense may pull this – may decide to object [to] this on the last minute."

At that point the military judge announced that the government's DNA expert would not testify until the next morning in order to allow government counsel sufficient opportunity to ensure that her testimony was consistent with *Katso*. Although the government made no mention of any potential request for a continuance if the defense objection was sustained, just prior to calling the DNA expert the next morning, the military judge sua sponte stated "[a]nd, government, I will let you know that should this court determined [sic] that her testimony is not sufficient, you will be given an opportunity one way or the other to get the right witness here whether it's her or somebody else."

The military judge also made several questionable evidentiary rulings during the defense cross-examination of the government's DNA expert. For example, at one point the expert agreed with counsel that what she did was a "verification." After the military judge sustained her own objection to the next question, defense counsel again tried to ask about the expert's verification:

> DC: Okay, so moving on from the three to one ratio, you verified it, you didn't - - you verified that - -
>
> MJ: She said she recalculated it.
>
> DC: - - it was arrived at correctly. I believe - -
>
> MJ: She said she recalculated it. You recast it as a re-verification.
>
> DC: Did [expert] agree with that statement? That - -
>
> MJ: Are you questioning me?
>
> DC: May I ask the witness?
>
> MJ: No you may not. Move on.

Likewise, when defense counsel asked the expert if the lab could have tested the waistbands of the victim's clothing for DNA, the following exchange occurred:

> ATC: Objection, Your Honor.

MJ: Sustained.

DC: Your Honor, what's the basis for the objection?

MJ: I sustained it.

In addition, when trial counsel raised a general objection with no stated basis to defense counsel's question about whether the expert would expect to see blood on an underwear sample if the person wearing it was bleeding from her genitalia, the military judge responded "[t]hat's speculate – it's speculative defense. So it's just sustained."

Finally, after the government DNA expert finished her testimony, defense counsel asked for a fifteen-minute recess to confer with the defense DNA consultant. In direct contrast to her open-ended promise to give trial counsel "an opportunity one way or another to get the right witness here," the military judge denied the defense request, stating:

> You may not. You can consult right now. This witness is not a surprise, and you told me yesterday, you've talked to this witness before. So we will rest in place right now, if you would like to consult with your DNA expert and then proceed with your cross.[2]

After hearing from all of the other witnesses, the defense informed the court that they were going to "convert" their forensic toxicologist consultant into an expert witness. After chastising the defense for not providing notice of the expert on the defense's witness list, the military judge said she found it "hard to believe" that the defense did not know it would be calling the expert. Although at that point the government did not object or request any additional accommodations, the military judge sua sponte announced, "Tell you what, government, I will give you plenty of leeway tomorrow morning to conduct the cross-examination any way you would like."

The next morning when the government requested permission for the assistant trial counsel to cross-examine the defense toxicologist, the military judge responded:

> Whichever one of you, or more than one of you if you would like. And, also, government, I wanted to let you know, in case you didn't think it's an option, this court

[2] The recess in place lasted three minutes and eighteen seconds.

> will give you a continuance if you want in order to get an expert on your own to rebut the testimony. That is an option. And this court will also give you the option, I will also favorably consider any other options you would like this court to consider in order to rebut the testimony of [the expert].

In appellant's post-trial request for clemency, defense counsel stated that the military judge's "demeanor, tone, and attitude towards the defense was antagonistic so much so that neutral bystanders, including three chasers/escorts and two bailiffs," independently approached the defense after the findings were announced to say that they all believed that appellant did not receive a fair trial because the judge appeared biased against the defense. Defense counsel also stated:

> [T]he judge's tone, attitude, and demeanor towards the defense, particularly me, was dripping with animosity, hatred, and condescension . . . Overall, this atmosphere throughout all three days of trial, beginning from the very first witness, caused counsel to be gun shy and reticent . . . Counsel was also cognizant of the fact that the judge was the fact-finder . . . This prejudiced the client because the judge set a mood in the courtroom that was contrary to a fair and unbiased trial.

As part of the clemency submissions, the defense provided statements from a Funded Legal Education Program [FLEP] intern and five enlisted personnel who observed the trial, as well as the defense forensic expert. Captain BS, the FLEP intern, stated that although he "could never say for certainty how it affected the outcome of the case, it did appear to me that the judge interacted more aggressively with the defense counsel than government counsel," and then went on to delineate seven specific instances to support his observations. He also noted that since the DNA evidence "seemed to be the most pivotal factor in the decision," it was "worrisome that the judge appeared to limit/constrict and sometimes interrupt [defense counsel's] questioning."

Staff Sergeant [redacted] served as an escort/chaser for the trial. Among other things, he noted that "[e]very time the defense was questioning someone under oath the Judge was very harsh toward the defense attorney. The judge was clearly controlling how the defense asked questions in the trial, which I felt was extremely unfair to the accused in this case." He concluded by stating that "it was hard for me to witness this trial, knowing that if I had been accused of the same there was a possibility of an unfair trial. I woke up everyday [sic] trusting in the systems of our great Military, however I can no longer say that is the case."

Corporal [redacted], another escort/chaser, described how the military judge "made up her mind right then that [appellant] was guilty" after the direct examination of [the victim] and that the judge "would not entertain the defenses [sic] questions about a possible motive for [the victim] to lie." He concluded by saying, "I have no doubt in my mind that [appellant] is innocent and if given a trial with a different judge he would be found innocent."

Sergeant [redacted], the third escort/chaser believed that the military judge displayed "blatant bias towards the prosecuting side" and that "[i]t appeared as if the judge was catering to the prosecuting side, which is why I do not believe the trail [sic] was fair. It is quite disheartening to see a fellow solider be convicted of something I don't believe he did by other soldiers. This situation can happen to anyone and it is frightening to think our own community will not see the obvious truth and put a soldier in this situation."

Staff Sergeant [redacted], who served as one of the bailiffs, stated that "[t]he judge seemed very hostile to [appellant's] attorneys . . . I don't believe [appellant] received a fair trail [sic]." Sergeant [redacted], the other bailiff, stated that he believed "the judge had made up her mind on the verdict before the case have even begin [sic]," and that:

> I do not believe in our legal system anymore and do not believe it would help myself or others if we were put into a situation in which one would be truly innocent. I currently fear what would happen to many innocent bystanders at this point and for my own career. I personally do not believe that a trial for myself like that would have been fair, nor do I believe that [appellant] was given a fair trail [sic].

Finally, the defense forensic expert submitted a statement in which she averred that the military judge appeared biased against the defense which resulted in "the appearance of an unfair trial procedure for [appellant]," and concluded that "[i]n my 35 years of consulting I've not seen a Judge behave quite the way this Judge did . . ."

2. Discussion

Among other things, the Code of Judicial Conduct for Army Trial and Appellate Judges (16 May 2008) requires trial judges to "aspire at all times to conduct that ensures the greatest possible public confidence in their independence [and] impartiality," and be "patient, dignified, and courteous to litigants." *See also United States v. Quintanilla*, 56 M.J. 37, 42 (C.A.A.F. 2001) (quoting American Bar Association Standards for Criminal Justice: Special Functions of the Trial Judge,

Standard 6-3.4 (2d ed. 1980) ("The judge should . . . exercise restraint over his or her conduct and utterances . . . and control his or her temper and emotions.")); *id.* ("When it becomes necessary during the trial for the judge to comment upon the conduct of . . . counsel . . . the judge should do so in a firm, dignified, and restrained manner, avoiding repartee, limiting comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues.").

When a military judge's impartiality is challenged on appeal, the test is whether, taken as a whole in the context of the trial, a court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions. *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011) (citing *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000)). If, as in this case, appellant does not raise the issue of disqualification until appeal, we examine the claim under the plain error standard of review, which occurs when: (1) there was error; (2) the error was plain or obvious; and (3) the error results in material prejudice to appellant's substantial rights pursuant to Article 59(a), UCMJ. *Id.* (citations omitted). Moreover, there is strong presumption that a judge is impartial, and an appellant seeking to demonstrate bias must overcome a high hurdle, especially when the alleged bias involves actions taken during the trial. *Quintanilla*, 56 M.J. at 44.

We review the appearance of impropriety or impartiality objectively under the standard of "any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned." *United States v. Springer*, 79 M.J. 756, 759–60 (Army Ct. Crim. App. 2020) (quoting *United States v. Kincheloe*, 14 M.J. 40, 50 (C.M.A. 1982)). Allegations of partiality must be supported by facts or "some kind of probative evidence" which would warrant a reasonable inference of lack of impartiality on the judge's part. *Kincheloe*, 14 M.J. at 50.

On the other hand, not every instance of judicial impartiality requires reversal. Rather, we must undertake a two-step analysis to determine if: (1) the trial judge's errors prejudiced appellant's substantial rights under Article 59(a) and, even if not; (2) whether reversal is nevertheless warranted under the standards set forth in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988). *See United States v. Black*, 80 M.J. 570, 574–75 (Army Ct. Crim. App. 2020) (discussing the "narrow" view under R.C.M. 902(a) and the "broad" view under *Liljeberg*); *see also Martinez*, 70 M.J. at 158–59; *Springer*, 79 M.J. at 760.

In *Liljeberg*, the Supreme Court articulated three factors "to consider" when determining whether a conviction should be vacated, specifically: (1) "the risk of injustice to the parties in the particular case"; (2) "the risk that the denial of relief will produce injustice in other cases"; and (3) "the risk of undermining the public's confidence in the judicial process." 486 U.S. at 864; *see Martinez*, 70 M.J. 158–59;

Springer, 79 M.J. at 760. As the CAAF explained in *United States v. Butcher*, employment of the *Liljeberg* appearance standards helps to ensure confidence in the fairness of the proceedings, "because in matters of bias, the line between appearance and reality is often barely discernible." 56 M.J. 87, 90 (C.A.A.F. 2001) (citations omitted).

Addressing the preliminary question of whether there was an appearance of impropriety in this case, we can easily conclude that the military judge's conduct might lead a reasonable person to conclude that her impartiality "might be questioned." *Springer*, 79 M.J. at 759–60. Put another way, the military judge's course of conduct under the circumstances reasonably created at least the appearance that she was not impartial. Consequently, we reject the government's contention that the military judge in this case was simply exercising "reasonable control over the mode and order of examining witnesses and presenting evidence" pursuant to Military Rule of Evidence 611(a). While military judges unquestionably have a duty to "exercise reasonable control over the proceedings," in doing so they "must avoid undue interference with the parties' presentation or the appearance of partiality." Rule for Courts-Martial 801(a)(3) and discussion. Reviewing the entire record, we find the military judge crossed the line and did precisely what the rule cautions against when she unduly interfered with defense counsel's presentation and created the appearance of partiality.

Finding error, we first address whether the error materially prejudiced appellant's substantial rights under Article 59(a), UCMJ. Notwithstanding her erroneous evidentiary rulings, including but not limited to her sustaining objections that precluded from defense counsel from making inquiries into relevant topics, unduly harsh interactions with defense counsel, and unsolicited offers to give the government whatever it needed to present its expert testimony and/or cross-examine the defense expert, we are not convinced that the military judge was actually biased or that her appearance of bias prejudiced appellant's substantial rights. As such, and although certainly a close call, we find that her conduct in presiding over the trial did not rise to the level of plain error. *See Liteky v. United States*, 510 U.S. 540, 556 (1994) (finding the trial judge's "judicial rulings, routine trial administration efforts, and ordinary admonishments (whether or not legally supportable) to counsel" insufficient to require disqualification).

Even absent a finding of material prejudice to appellant's substantial rights under Article 59(a), UCMJ, we must still apply the three-prong *Liljeberg* test to determine if reversal if required. Regarding the first inquiry, the risk of injustice to the appellant is somewhat diminished by the fact that the military judge made the correct ruling on the Confrontation Clause objection (the only legal issue raised on appeal), and our finding *supra* that she was not actually biased against appellant. We also note that the military judge sentenced appellant, who was facing a maximum sentence of confinement for sixty years, to a total of confinement for three years.

With respect to the second factor, because we view the military judge's actions in this case as an aberration, denying relief in this case will not have any meaningful impact on other cases. *See Butcher*, 56 M.J. at 92–93 ("It is not necessary to reverse the results of the present trial in order to ensure that military judges exercise the appropriate degree of discretion in the future.").

As in *Springer*, however, we find the third factor to be dispositive. Again, we recognize that "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges," do not per se establish actual bias or partiality. *Liteky*, 510 U.S. at 555–56; *see Black*, 80 M.J. at 574–76 (rejecting the appellant's claim of bias based on the "language and tone" of the military judge's written pretrial rulings). But, the critical question before us is not whether the military judge was actually biased, but rather whether the public can be confident that appellant received a fair trial. Finally, when analyzing the third *Liljeberg* factor, we review the entire record, including but not limited to post-trial clemency matters, the convening authority action, and appellate matters. *Martinez*, 70 M.J. at 160; *Springer*, 79 M.J. at 761. Our *Liljberg* analysis is informed by *Martinez* and *Springer*.

In *Martinez*, the Chief Circuit Judge [CCJ] was observing a reservist military judge presiding over his first court-martial. During the trial, the CCJ on two separate occasions passed notes to the trial counsel and also accompanied the judge into chambers during recesses and deliberations. 70 M.J. at 155. The CAAF concluded the actions of the military judge and CCJ created an appearance that neither was impartial. *Id.* at 159. In testing the error for prejudice under Article 59(a), UCMJ, the CAAF concluded there was no support in the record that either the CCJ or the military judge was actually biased. *Id.* The CAAF also concluded the appearance of bias—while error—did not rise to Article 59(a), UCMJ, prejudice principally because the convening authority granted appellant's clemency request. *Id.* ("This certainly implied that if the clemency request was approved, it would rectify any prejudice suffered him.").

Finding no Article 59(a), UCMJ, prejudice, the CAAF in *Martinez* then applied the three-part test from *Liljeberg*. *Id.* The first *Liljeberg* factor was not implicated because "the record [did] not support, nor [did appellant] identif[y] any specific injustice that he personally suffered under the circumstances." *Id.* The CAAF found the second *Liljeberg* factor was also not implicated because it was not necessary to reverse the results of the appellant's court-martial in order to ensure military judges in other cases exercise the appropriate amount of discretion. *Id.* (citing *Butcher*, 56 M.J. at 93). In analyzing the third *Liljeberg* factor, the CAAF found "the public's confidence in the military justice system would not be undermined" because after viewing the entire proceedings, including the convening authority's action on appellant's clemency request, the public would see that the

error in appellant's trial was "recognized" and military authorities "fashioned an appropriate remedy." *Id.* at 160.[3]

On the other end of the spectrum is *Springer*, where the military judge refused to disclose, and indeed actively tried to conceal, his involvement in an inappropriate relationship with trial counsel's wife. 79 M.J. at 761. Finding that the military judge's misconduct "pose[d] a risk of undermining public confidence in the military justice system," we held that the only appropriate remedy was to set aside the findings and sentence and authorize a rehearing. *Id.*

Although this case falls somewhere between the continuum of *Martinez* and *Springer*, on balance and based on our consideration of the entire record, affirming the military judge's findings would violate the third *Liljeberg* factor because it would create an intolerable risk of undermining public confidence in the military justice system. Accordingly, we must set aside the findings and sentence and authorize a rehearing. Among other things, the following factors compel us to reach this conclusion: (1) the sheer number of the military judge's unprovoked and, for the most part unwarranted, interruptions and criticisms of the defense counsel while she attempted to cross-examine the victim and government DNA expert; (2) the military judge's announcement, in no way prompted or requested by trial counsel, that she would give the government the "opportunity one way or the other to get the right [DNA expert] witness here whether it's her or somebody else"; (3) the military judge's denial of the defense counsel's request for fifteen minutes to consult with her consultant before cross-examining the government's DNA expert; and (4) the military judge's unsolicited announcement that if the government "didn't think it's an option, this court will give you a continuance if you want in order to get an expert on your own to rebut the testimony [of the defense forensic expert]. . . [a]nd this court will also give you the option, I will also favorably consider any other options you would like this court to consider in order to rebut the testimony of [the expert]." Regardless whether they were justified or not, and/or if the government acted on her suggestions, the military judge's sua sponte comments regarding the experts certainly made it appear that she was favoring the government. And, finally, as appellate counsel points out, the statements of the six independent observers

[3] We recognize that due to intervening changes to Article 60, UCMJ, the convening authority in this case did not have the authority to grant the same clemency that was awarded in *Martinez*. It is still worth noting, however, that neither the staff judge advocate nor the convening authority addressed, much less even acknowledged, the improprieties set forth in appellant's post-trial submissions and in this opinion.

amply demonstrate that this court-martial has in fact undermined the public's confidence in the military justice system.[4]

CONCLUSION

The findings of guilty and the sentence are SET ASIDE. A rehearing may be ordered by the same or different convening authority. All rights, privileges, and property, of which appellant has been deprived by virtue of the findings and sentence set aside by this decision are ordered restored. *See* UCMJ arts. 58b(c) and 75(a).

Chief Judge (IMA) KRIMBILL concurs.

BROOKHART, Senior Judge, concurring in part and dissenting in part:

I concur with the majority regarding appellant's first and second assigned errors, however, I dissent from the majority's decision to set aside the findings and sentence based upon the third prong of the *Liljeberg* test.

It is without question that an accused facing trial by court-martial is entitled to a military judge who is both independent and impartial. *United States v. Mcllwain*, 66 M.J. 312, 313–14 (C.A.A.F. 2008) (citing *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999)). These requirements are embedded in the Rules for Court-Martial (R.C.M.) as well as rules of conduct applicable to judges. *See* R.C.M. 902; Code of Judicial Conduct for Army Trial and Appellate Judges (16 May 2008). Any judge who cannot meet the required standard for impartiality in any given proceeding should be disqualified. R.C.M. 902(a). Even the appearance of conflict or impartiality can be sufficient to warrant disqualification in a given case. *See United States v. Quintanilla*, 56 M.J. 37, 78 (C.A.A.F. 2001) (citing *United States v. Kincheloe*, 14 M.J. 40, 50 (C.M.A. 1982)).

At the same time, military judges bear the enormous responsibility of marshalling the orderly presentation of evidence and argument in the context of an adversarial proceeding. *See Quintanilla*, 56 M.J. at 41 (citing UCMJ art. 26; R.C.M.

[4] We note that five of the six servicemembers who wrote statements as part of appellant's post-trial submissions were in appellant's unit. Captain BS was temporarily assigned to appellant's unit as a FLEP intern. However, only two of the six servicemembers, SSG [redacted] and SGT [redacted], actually knew of appellant, and neither had a significant working or personal relationship with appellant. In any event, even setting aside the statements contained in appellant's post-trial submissions, for all of the other reasons set forth above, we would nevertheless reach the same conclusion.

801(a) and discussion). The adversarial nature of the process inevitably requires military judges to address courtroom conduct of counsel ranging from incompetence to contumaciousness. The Army also expects military judges to assume a training role with the military counsel that practice in their courts. Army Reg. 27-10, Legal Services, Military Justice, para 7-4*c*.(6) (20 Nov. 2020). Ideally, judges should meet these obligations in a firm but professional manner, suitable for the solemn purpose they serve. *See* Code of Judicial Conduct for Army Trial and Appellate Judges (16 May 2008). However, judges are human, and as such, there may be times when they are too severe in their reproaches of counsel, calling into question their impartiality. *See Liteky v. United States*, 510 U.S. 540, 555–56 (1994). If such conduct creates actual prejudice to the accused's right to a fair trial, relief may be warranted. *See United States v. Martinez*, 70 M.J. 154, 157–58 (C.A.A.F. 2011) (summarizing standards for appellate review for judicial disqualification). Even when there is no actual prejudice, relief may be justified if the military judge's actions are so extreme that they undermine the public perception of fairness in our judicial system. *Id.* (citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988)). However, in such cases, public perception is assessed objectively from the perspective of a member of the public, duly informed of all the facts and circumstances related to the case from pretrial through appellate review. *Id.* at 160.

In this case, appellant avers that the military judge's interactions with his trial defense counsel were so antagonistic and so unbalanced when compared to those with government counsel, that he did not receive a fair trial. Appellant's complaint relies primarily on the military judge's reactions to three distinct events during the course of what amounted to a three-day trial.[5]

One exchange challenged by appellant, and highlighted by the majority, occurred when trial defense counsel raised a Confrontation Clause objection to the government's DNA expert, this being the same objection that is the subject of appellant's first assignment of error. Although the expert witness was properly noticed prior to trial, defense counsel did not object until immediately prior to the witnesses taking the stand, which was well after the time for filing motions had passed. *See* R.C.M. 905. Under the circumstances, it might well have appeared to the military judge that trial defense counsel had delayed raising the issue until mid-

[5] Appellant also relies heavily on a multiple statements from personnel who observed the court-martial and thought it was unfair. The statements were marshalled by trial defense counsel as a part of appellant's post-trial matters under R.C.M. 1105 and 1106. The bulk of the statements are from male members of appellant's unit or personnel associated with the defense team. While the statements provide some value as observations, they do not represent anything near a scientific survey of the perceptions of those observing appellant's trial.

trial in hopes of gaining some tactical advantage, particularly if the witness was disqualified. The military judge might also have found counsel's protestations to the contrary to be disingenuous, given that counsel acknowledge interviewing the witness well prior to trial and that the information provided in pre-trial discovery would have clearly reflected that the witness identified to testify was not the one who directly tested appellant's DNA. Nonetheless, despite her obvious frustration, the military judge heard the motion and correctly ruled that there was no Confrontation Clause issue with the witness's testimony.

Appellant also complains of the military judge's reactions to trial defense counsel's announcement, during the defense case on the merits, that the defense was converting its expert consultant into an expert witness on the effects of alcohol. When challenged by the military judge as to why that conversion had not been made earlier, trial defense counsel suggested that the decision was just made based upon the evidence presented. Again, the military judge might have found this assertion belied by trial defense counsel's opening statement as well as the focus of the questioning of multiple witnesses, all of which seemed to demonstrate the necessity of expert testimony on the effects of alcohol and drug use on perception and memory. While nothing in the Rules for Court-Martial nor the military judge's pretrial order directly prohibited defense counsel's actions, they again raised the specter of gamesmanship designed to achieve a tactical advantage. Ultimately, the military judge allowed the witness to testify when the trial resumed the next day.[6]

Finally, appellant highlights the military judge's interactions with defense counsel during cross-examination of the victim. As the majority observes, the military judge interjected numerous times, scolded defense counsel, and frequently granted government objections without even hearing the basis. However, by trial defense counsel's own admission in her post-trial submissions, the cross-examination was not a model of precision. It was at times repetitive, confusing, and contained several argumentative questions. This likely drew the ire of the military judge because during the examination of any witness, the military judge is responsible for protecting the record by ensuring both questions and answers are in compliance with the rules of evidence. *United States v. Solomon*, ARMY 20160456, 2019 CCA LEXIS 149, at *3 n.1 (Army Ct. Crim. App. 3 Apr. 2019) (mem. op.)

---

[6] Both appellant defense counsel and the majority, as evidence of unfairness, contrast the overnight break the military judge afforded government counsel to prepare for the defense expert, with the mere "45 minutes" defense counsel received to interview the victim for the first time in preparation for cross-examination. However, the record of trial indicates that the recess actually lasted over an hour and thirty minutes. There is no indication trial defense counsel needed or requested any additional time.

(subsequent history omitted) (citing UCMJ art. 46; Mil. R. Evid. 611(a)) (noting a military judge shall exercise reasonable control over the mode and order of examinations). Moreover, a military judge is also specifically obligated to "protect witnesses from harassment or undue embarrassment." Mil. R. Evid. 611(a)(3).

Actions such as inartful cross-examination, raising objections out of time, or delayed conversion of expert advisers to witnesses force the military judge to react to protect the fairness of the trial. With regard to the latter, this often means recessing the trial to allow opposing counsel to address newly identified witnesses or objections, all of which throw off the trial schedule for which the military judge is responsible. *See United States v. Loving*, 41 M.J. 213, 252, 53 (C.A.A.F. 1994) (citing R.C.M. 801(a)(3)) (noting military judges should prevent unnecessary waste of time and promote ascertainment of the truth). In a judge-alone trial, such as this, those delays might not be as significant, especially where, as here, both occurred near the end of the trial day, creating a convenient stopping point. Nonetheless, the military judge might have seen an opportunity to educate counsel for the benefit of future cases where the disruptions might be more impactful.

I highlight the above context only because I believe it is a necessary element of the third prong of the *Liljeberg* test. A better understanding of the circumstances certainly helps explain the military judge's intemperate exchanges with counsel, however, I do not believe it excuses them. I agree with the majority that the military judge's responses, even if validly motivated, were frequently unnecessary, often went too far, and ran the predictable risk of creating an appearance of bias. If there were necessary lessons for counsel, they would have been much better taught in chambers or some other venue. *See United States v. Reynolds*, 24 M.J. 261, 264 (C.M.A. 1987) (finding the military judge's "harsh" comments made during an Article 39(a), UCMJ, session reflected proper control of the proceedings). However, in the absence of any prejudice, I cannot find that the military judge's actions went so far as to warrant granting appellant the incredible windfall of overturning his otherwise valid conviction. In my opinion, the extraordinary power founded in *Liljeberg* should be reserved for only the rarest of circumstances, such as in *United States v. Springer*, 79 M.J. 756 (Army Ct. Crim. App. 2020), where the appearance of bias was founded in extrajudicial conduct. This is not to suggest that there could never be a case where the military judge's interactions with counsel trigger *Liljeberg* relief; it is just not this case. As the Supreme Court noted in *Liteky*, judicial remarks that are "critical or disapproving of, or even hostile to, counsel" do not ordinarily constitute grounds for bias challenges. 510 U.S. at 555. Accordingly, I dissent.

FOR THE COURT:

[redacted]

JOHN P. TAITT
Acting Clerk of Court