UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BROOKHART, WALKER, and PENLAND
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class SHAYNE C. GRINDSTAFF
United States Army, Appellant

ARMY 20200315

Headquarters, 1st Cavalry Division
Douglas K. Watkins and James P. Arguelles, Military Judges
Colonel Emily C. Schiffer, Staff Judge Advocate (pre-trial)
Colonel Howard T. Matthews, Jr., Staff Judge Advocate (post trial)

For Appellant: Captain Carol K. Rim, JA (argued); Colonel Michael C. Friess, JA; Jonathan F. Potter, Esquire; Major Joyce C. Liu, JA; Captain Carol K. Rim, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Joyce C. Liu, JA; Captain Carol K. Rim, JA (on reply brief).

For Appellee: Captain R. Tristan C. De Vega, JA (argued); Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Brett A. Cramer, JA; Captain R. Tristan C. De Vega, JA (on brief).

30 August 2022

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

Per Curiam:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 [UCMJ]. The military judge sentenced appellant to a dishonorable discharge, confinement for nine months, and reduction to the grade of E-1.

Appellant raised three assignments of error and we granted oral argument as to two of his claims: (i) whether appellant was denied the right to speedy trial under the Fifth and Sixth Amendments of the Constitution; and (ii) whether the military

judge erred in admitting testimony of the contents of a "Snapchat" video without admission of the video.[1] For the reasons set forth below, we find no error regarding appellant's rights to speedy trial. As to the second issue, we find a series of errors resulting in the arguably improper admission of testimony regarding the Snapchat video, but find appellant suffered no prejudice and is entitled to no relief.[2]

BACKGROUND

A. Timeline from Offense to Trial

On 19 May 2017, appellant, [redacted] (seventeen years old at the date of incident), and a group of friends went out for the evening near Monterey, California. They drank alcoholic beverages purchased by appellant and [redacted] consumed a portion of a "large, very intoxicating" alcoholic drink and some malt liquor. At least one witness, CB, saw [redacted] and appellant kissing and acting flirtatiously. At some point in the evening, [redacted] began to feel sick and walked towards the vehicle so she could vomit privately. Appellant followed her to the car and witnesses saw them together in an apparently romantic stance. He made advances towards [redacted] despite indications that she had recently vomited. When the party returned to the vehicle to go home, [redacted] and appellant sat alone in the back seat. [redacted] still felt sick and, at least once, asked to stop the car so she could vomit again. Both witnesses in the front seat observed appellant and [redacted] kissing and appellant remove some of [redacted] clothing in order to perform oral sex on her. DB, appellant's friend, took a Snapchat video from the front passenger seat, which he narrated, "my [appellant] is out here raping a bitch" or words to that effect, and forwarded the video to at least one other witness, HF. The group stopped at a beach and exited the vehicle, where appellant presumed he would have sexual intercourse with [redacted] She declined and requested they take her home, which they did. [redacted]s trial testimony was substantially similar to these accounts, but she indicated that she was heavily intoxicated during the incident, falling in and out of sleep, and felt afraid when appellant laid her down, removed

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[1] As for appellant's third assigned error, dilatory post-trial processing, we agree with appellant that the government did not process his case in a timely manner. Specifically, we can find no justification for the 142-day delay between authentication of the record and docketing the case with this Court. Such a lengthy delay for what amounts to packaging and mailing the record is inexcusable. However, we find the delay does not warrant setting aside appellant's punitive discharge, and any relief with regards to confinement would have no practical effect as appellant was only sentenced to nine-months confinement. Nonetheless, we admonish the government to process cases in a timely manner.

[2] We have also fully and fairly considered the matters personally submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find they warrant neither discussion nor relief.

parts of her clothing, and sexually assaulted her. She denied that she ever consented to the sexual contact.

The next day, [redacted] reported that appellant sexually assaulted her during the car ride and civilian authorities initiated an investigation. The case was transferred to the U.S. Army's investigative jurisdiction in January 2019, and the charge and its specification were subsequently preferred on 7 May 2019. Appellant was arraigned on 19 June 2019. Both parties initially agreed to an August 2019 trial date, although appellant quickly amended his request and sought a trial date no earlier than October 2019. In September 2019, the government moved for the first of four continuances, based primarily on the delays related to the forensic testing, and appellant did not object. Trial was therefore continued until February 2020.

Appellant complains, and we agree, that the government was less than diligent in its initial investigation. They did not process potentially material DNA evidence until August 2019—well after preferral—and only at the request of trial defense counsel. This delay was the first in a series of delays that lasted from approximately October 2019 through February 2020, as the parties waited for the completion of forensic DNA testing and analysis. The government approved a defense expert consultant in DNA analysis in August 2019 but did not follow through and award the contract until several months later in January 2020. Additional issues, primarily involving witness availability for both parties, further impeded the road to trial.

On 10 February 2020, appellant filed his first motion to dismiss for speedy trial violations, or alternatively to abate the proceedings, due to alleged failures of the government to produce two material witnesses. The military judge abated the proceedings for thirty days.[3] On 16 March 2020, appellant renewed his motion to dismiss for speedy trial violations and the government again sought a continuance in response. On 24 April 2020, appellant formally demanded speedy trial, but trial was again continued and ultimately commenced on 12 June 2020. Although there is a certain amount of unjustifiable delay—and the government concedes responsibility for at least six months of it—the remainder was caused by the unavailability of essential witnesses, appellant's own requests for delays due to defense witnesses' availability, and the novel travel restrictions associated with COVID-19, which impeded regular court operations beginning in March 2020.

[3] As is common, on 14 February 2020, appellant reached his expiration of term of service (ETS) date while pending trial. His identification card was deactivated and pay stopped for approximately two weeks. However, there is no evidence of record to indicate he suffered harm as a result.

B. Trial Testimony About a Snapchat Video

The government presented testimony about the contents of a Snapchat video of appellant sexually assaulting the victim, without admitting a copy of the video. The substance of the Snapchat video was first raised in the government's opening statement, promising HF would testify about what she saw in the video. Specifically, the government proffered that HF would testify that the video showed appellant attempting to kiss and remove [redacted]s clothing, who was visibly limp and non-responsive. HF also heard a voice saying, "[a]re you raping her?" Appellant countered this proffer in his own opening statement, claiming the victim's motive to fabricate manifested when she learned of the video the morning after the assault.

Four witnesses testified at trial about the Snapchat video. On direct examination, the victim testified she only woke up during the assault because she saw the flash of a camera and heard a guy yelling about someone being raped in his backseat, but she denied ever seeing the Snapchat video. Appellant did not object to this testimony. Instead, his defense counsel cross-examined the victim on her knowledge of the video's existence, attempting to demonstrate a motive to fabricate, i.e., her fear that the video might be released to her boyfriend or mother.

HF testified as a government witness and stated she received the Snapchat video from DP. Appellant objected to this testimony, citing the best evidence rule and authentication (presumably Mil. R. Evid. 1002 and Rule for Courts-Martial (R.C.M.) 901, respectively), both of which were overruled. However, the military judge asked trial counsel, "do you want to lay a foundation that the video doesn't exist anymore?" The government proceeded to ask HF, a lay witness, how Snapchat works. The government then asked HF what she observed in the videos, and HF responded:

> I observed that [redacted] was highly intoxicated and her eyes were closed towards – at the end, the last video of it ended on her eyes closed, her body was limp/weak and she was across [appellant's] lap and he was unzipping her jacket and using his teeth to remove her right bra strap.

When the government asked whether anyone in the video was saying anything, appellant objected based upon hearsay. The government then asserted that it had laid the foundation for Mil. R. Evid. 803(1), present tense [sic] impression. The military judge heard argument on the issue and overruled the objections. Noting that the evidence (of DP's verbal statement) was "obviously powerful evidence" the military judge allowed trial counsel to elicit the statement in order to determine whether a proper foundation was laid for its admission. The military judge stated that "it's a judge alone trial, it's not like I have to — the bell has already been rung, right. Just presume that, I, as the court can un-ring the bell and not consider that

fact if it is not admissible." After multiple attempts to refresh or recall the statement, HF testified that she heard DP say, "what are you doing? Are you raping her?" Appellant did not renew his objections and the military judge allowed the statement as a non-specific present sense impression exception. Mil. R. Evid. 803(1).

Civilian law enforcement was notified of the potential Snapchat video the day after the assault. Officer JA testified that he attempted to locate the video through various witnesses and asked Snapchat if they could pull it from their records; but Snapchat did not provide the video. Officer JA did not obtain a subpoena for Snapchat, but he did execute a search warrant for DP's phone and was unable to recover the video. The U.S. government apparently never tried to subpoena Snapchat records.

DP testified as a witness for appellant and admitted that he made the video and uttered the statements indicating that appellant was raping [redacted]. When pressed as to the meaning of his statements in the video, DP explained that he did not mean that he had observed a rape, rather the phrase reminded him of certain song lyrics.

LAW AND DISCUSSION

A. Speedy Trial

We review appellant's constitutional claims of speedy trial violations de novo. *See United States v. Hendrix*, 77 M.J. 454, 456 (C.A.A.F. 2018); *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F 2005); *United States v. Wilder*, 75 M.J. 135, 138 (C.A.A.F. 2016). In conducting our review of a well litigated speedy trial issue, we give substantial deference to the military judge's findings of fact, reversing only if they are clearly erroneous. *See Mizgala*, 61 M.J. at 127. Our "framework to determine whether the Government proceeded with reasonable diligence includes balancing the following four factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for speedy trial; and (4) prejudice to the appellant." *United States v. Wilson*, 72 M.J. 347, 351 (C.A.A.F. 2013) (citing *Mizgala*, 61 M.J. at 129) (quoting *Barker v. Wingo*, 407 U.S. 514, 530 (1972)) (hereinafter "the *Barker* factors").

For reasons set forth below in greater detail, we find no speedy trial violation. However, we first dispense with appellant's due process claims pursuant to the Fifth Amendment. Ordinarily, we would adhere to the principle that when constitutional rights are at issue, an appellate court applies a presumption against finding waiver. *See United States v. Blackburn*, 80 M.J. 205, 209 (C.A.A.F. 2020). However, the Due Process Clause under the Fifth Amendment has a limited role in protecting speedy trial rights. *See, e.g., United States v. Lovasco*, 431 U.S. 783, 789 (1977). To prevail on such a claim, appellant would need to prove that the pretrial delays

caused substantial prejudice to his rights to a fair trial and that the delay was an intentional device to gain tactical advantage over him. *See United States v. Marion*, 404 U.S. 307, 324 (1971). However, there is simply no evidence of record to support a finding of a Fifth Amendment due process violation, and we see no colorable argument in support of such a claim. Appellant did not—either at trial or on appeal—raise this argument nor did he present any evidence that the delays between date of incident, preferral, and ultimately trial, violated "those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' . . . and which define 'the community's sense of fair play and decency.'" *Lovasco*, 431 U.S. at 790 (citations omitted). There is no evidence before this court that any delay was due to an intentional tactical strategy, nor is there evidence of actual prejudice. As such, there is every reason to presume that any potential claim of a Fifth Amendment violation was not supported by the evidence. Moreover, appellant raised multiple speedy trial claims leading up to his trial, each focused on Art. 10, UCMJ, R.C.M. 707, and the Sixth Amendment. Because there was no basis in fact for the newly raised due process claim, any possible failure to raise the claim—at or prior to trial—was an "intentional relinquishment or abandonment of a known right." *United States v. Sweeney*, 70 M.J. 296, 303 (C.A.A.F. 2011).

The Barker Factors

Length of delay. Because the government concedes responsibility for at least 181 days of post-preferral delay, we conclude there is delay sufficient to trigger a full analysis of the remaining *Barker* factors. *See, e.g., United States v. Cossio,* 64 M.J. 254, 257 (C.A.A.F. 2007).

Reasons for the delay. In this case, there are a variety of reasons that resulted in delay, and "different weights should be assigned to different reasons." *Barker,* 407 U.S. at 531. We first address delays caused by the defense. Charges were preferred on 7 May 2019 and referred on 3 June 2019. On 5 June 2019, the defense submitted its electronic docket request and did not object to the government's requested earliest trial date of 5 August 2019, with both parties presenting various dates in conflict. On 12 June 2019, defense counsel amended this request and asked for additional delay through 30 September 2019, citing witness availability concerns.

Some intervening circumstances raise concern and warrant discussion. On 14 August 2019, the defense identified material evidence that had not been properly investigated or submitted to appropriate agencies for forensic examination. This caused delay resulting, at least in part, in the government's first request for continuance, which was granted as unopposed. In August, the government authorized a defense DNA expert, but failed to execute a contract and allow the expert to start work until January 2020. We presume, based on a lack of information

in the evidence, that these delays were the result of negligence, not untoward pre-trial tactics. Negligent delay certainly weighs against the government, although the overlap of delay with the aforementioned defense requests does neutralize some of its impact on appellant's pretrial rights. *See,* e.g., *United States v. Cooley*, 75 M.J. 247, 260 (C.A.A.F. 2016) (citing *Barker,* 407 U.S. at 531). Unfortunately, in March of 2020, the novel coronavirus brought the country and its operations, including judicial processes, to a virtual standstill. Various witness issues, refusals to travel, departmental policies precluding travel, and overall force health protection concerns impeded the ability to assemble this court-martial. Under the circumstances, not all of the delay is attributable to government error or ineptitude.

Appellant's demand for speedy trial. An appellant's "assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the [appellant] is deprived of the right." *Wilson*, 72 M.J. at 353 (citation omitted) (omission in original). Between 10 February 2020 and 21 April 2020, appellant repeatedly brought his speedy trial concerns to the attention of the court. Although trial defense counsel acquiesced to initial government requests for delay, from February through April, appellant was persistent in repeated demands for speedy trial, clearly alleging constitutional violations. This factor weighs heavily in appellant's favor.

Prejudice. "Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." *Mizgala,* 61 M.J. at 129 (citation omitted). The U.S. Supreme Court identified three discrete protected interests in *Barker*, two of which are applicable here: to minimize anxiety and concern; and to limit the possibility that the defendant will be impaired in his ability to pursue and prepare a defense. *Barker*, 407 U.S. at 532. Appellant contends that he was prejudiced by the February 2020 expiration of his ETS date and subsequent two-week period that he was in a no-pay status and unable to eat at the DFAC. However, there is simply no record evidence to demonstrate that he was in fact harmed by this oversight, or that any arguable harm was caused by speedy trial violations. While the lack of pay may have caused Appellant an unexpected level of anxiety, the "conditions were not unique to his case." *United States v. Danylo,* 73 M.J. 183, 188 (C.A.A.F. 2014). Appellant has not argued that the totality of delays in any way impeded his ability to investigate and assert a defense, other than general allusions to witnesses' minor lapses in memory. With little to no evidence of actual prejudice, this factor favors the Government.[4]

[4] At oral argument, this Court was particularly interested in whether appellant endured any tangible deprivations, such as malnourishment, as a result of losing access to his assigned installation and its services. The parties did not know, and, in any event, appellant did not carry his burden to prove any.

Balancing these factors, we conclude that Appellant was not denied his rights to a speedy trial. We join the military judge in admonishing the government for its apparently negligent pretrial investigation. However, that delay of four months was relatively minimal when we consider the totality of the circumstances — encapsulating October 2019 (following a defense request for delay to accommodate witnesses) until approximately February 2020. Four months to remediate a deficient investigation is not unreasonable. It is inarguably true that a more diligent approach may have avoided the unforeseeable impacts of the novel coronavirus pandemic, but we cannot speculate to any degree of certainty that there was a causal link between the government's period of negligent processing and the ensuing months of delay in this case. There were ongoing witness issues—many deemed "material" by the defense—that required additional time and resources to secure their availability. In short, this could have been done better, but it was not so deficient a performance to violate Appellant's constitutional right to a speedy trial. The standard used to evaluate the Government's progress is not perfection, but reasonable diligence. *See Cooley*, 75 M.J. at 259. In weighing the *Barker* factors, we find no unreasonable delay.

B. Improper Consideration of Unavailable Digital Evidence

We review a military judge's decision to admit evidence for an abuse of discretion. *United States v. Finch*, 79 M.J. 389, 394 (C.A.A.F. 2020) (citing *United States v. Frost,* 79 M.J. 104, 109 (C.A.A.F. 2019)). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Kelly,* 72 M.J. 237, 242 (C.A.A.F. 2013). Appellant objected to HF's testimony regarding the video on best evidence and authentication grounds. However, he did not object to [redacted] earlier testimony regarding the substance of the video, instead questioning her about it to establish a possible motive to fabricate the assault. The lack of a timely objection to evidence at trial forfeits that error in the absence of plain error. Mil. R. Evid. 103(a)(1)(A); *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014). To prevail under this standard, an appellant must show "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007) (citations omitted).

The question of the admission of secondary evidence of the Snapchat video is of greater concern. The government did not secure or seek to preserve digital evidence, i.e., DP's video of the sexual assault wherein he seemed to narrate the offense, stating "my [appellant] is out here raping a bitch." The evidence was discussed substantively in both counsels' opening statements, twice in the government's case-in-chief—through [redacted] and HF's direct testimony, and appellant's own cross-examination—and appellant's direct examination of DP. We determine

that there was a complex web of errors surrounding the Snapchat testimony, and we discuss each error in turn.

1. Discovery

Rule for Courts-Martial 701(a)(2)(A)(ii) requires disclosure of any documents and other tangible objects that the government intends to use in the case-in-chief at trial. The government has an affirmative duty to seek out material evidence, including evidence in the possession of third parties. There is no evidence the government sought to do so in this case, though counsel's opening statements clearly indicate the government's intent to use the Snapchat video in its case-in-chief. The circumstances surrounding the video here demonstrate an apparent and fundamental misunderstanding of the government's obligations to secure material evidence. Rule for Courts-Martial 703A states the requirements to seek a warrant or order for wire or electronic communications. This rule, effective 2019, incorporates the parameters of the Stored Communications Act ["SCA"], 18 U.S.C. §§ 2701-2712, which governs digital evidence, e-discovery, and access thereto. Military courts-martial are courts of competent jurisdiction, for purposes of the SCA, via R.C.M. 703A (2019); Article 46(d)(3), UCMJ; 18 U.S.C. § 2703. Yet, neither party nor the trial court sought to exercise this subpoena power and secure the original video evidence. However, there is no evidence that the Snapchat video, or even secondary evidence summarizing it, was concealed or withheld from appellant. There is likewise no evidence that the video testimony was subject to a motion in limine, suppression, or motion to compel the original video. While that in no way obviates the government's affirmative disclosure obligations, the defense's apparent decision not to pursue appropriate remedies does lead us to conclude that the discovery violations were waived.

Whether appellant affirmatively waived the opportunity to object to potential discovery violations is a question of law that we review de novo. *See generally United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F 2020). "[W]aiver is the intentional relinquishment or abandonment of a known right." *Id.* "[W]e cannot review waived issues at all because a valid waiver leaves no error for us to correct on appeal." *Id.* (internal citations omitted).

Appellant had multiple pretrial opportunities to litigate potential discovery lapses. We recognize R.C.M. 703A was a newly enacted rule, effective 2019. However, it did little more than codify best practices in seeking digital evidence from third parties (long contemplated in R.C.M. 701). Once trial began, trial defense counsel passed on multiple opportunities to object to the loss of the Snapchat video, or testimony regarding its substance. Instead, defense counsel raised the issue of the video in his/her own opening statement and did not object to the government's questioning of [redacted] about its existence. [redacted] did not personally see the video, but—without objection from the defense—she testified she was made

aware of its substance and corroborated the video by stating she saw the camera flash and heard DB's original out of court statement "are you raping her?" On cross-examination, the defense asked about [redacted]'s knowledge of the video, establishing that she was made aware of a possible video when she woke up the morning after the assault, laying groundwork for a possible motive to fabricate. A trial defense counsel's decisions regarding evidence and witness testimony is a tactical and strategic matter, which we are reluctant to question on appeal. *See,* e.g., *United States v. Akbar,* 74 M.J. 364, 379 (C.A.A.F 2014).

2. Best Evidence

We first note that the video was made simultaneously with the assault and that [redacted] reported the incident to her mother and civilian law enforcement, Officer JA, within 24 hours. The parties do not dispute that Officer JA was made well aware of the existence of the video, originally recorded on DP's cell phone. He tried to contact possible witnesses who may have received the Snapchat video and accepted as true that it was no longer in their possession. Officer JA did execute a search warrant for DP's phone but the video was ultimately not recovered. Finally, and most importantly, Officer JA contacted Snapchat via telephone and asked if it would be possible to recover the video. Officer JA testified he was "unable" to obtain the video from Snapchat. Once the investigation was transferred to military jurisdiction, no party attempted to secure or subpoena the digital evidence from any party or from Snapchat.

After both parties discussed the video in their opening statements, the victim was questioned and cross-examined regarding her knowledge of the video. The government then elicited testimony from HF, to describe the Snapchat video. Appellant objected to HF's testimony about the video, citing the best evidence rule and authentication (presumably Mil. R. Evid. 1002 and R.C.M. 901, respectively). The military judge did not determine whether the video was in fact available through normal avenues, such as subpoena powers. Instead, he allowed the prosecution to lay a foundation for a "video [that] doesn't exist anymore." HF thus testified as a lay witness describing the Snapchat operations. The parties accepted as true that the original video was deleted from DP's phone due to operation of the Snapchat app, and the loss was not attributable to the video's proponent, i.e., the prosecution. Appellant did not renew his objections after HF laid the foundation, and the military judge allowed HF's testimony as evidence of a present sense impression. Mil. R. Evid. 803(1).

While the government was certainly negligent in not pursuing a subpoena or compulsory judicial process, there was a substantial lapse in time between the date of the incident and transfer of jurisdiction to the military, making it apparent that all parties believed the video itself was unrecoverable. Despite this apparent belief regarding the video's availability, Mil. R. Evid. 1002 states "[a]n original . . .

recording . . . is required in order to prove its content" unless an exception applies. In this case, Mil. R. Evid. 1004 could have provided the requisite exception. The two applicable options required the government to either show the original was "lost or destroyed" or the original could not be "obtained by any available judicial process." Mil. R. Evid. 1004(a)-(b). We determine neither exception applied, and therefore it was an abuse of discretion to allow testimony regarding the contents of the video.

The first exception requires the government to show "[a]ll the originals are lost or destroyed, and not by the proponent acting in bad faith." Mil. R. Evid. 1004(a). In this case, the facts support the conclusion that the original video contained on DP's phone was deleted because of the nature of the Snapchat application. However, this does not mean all "originals" were lost or destroyed, as the government never made a valid attempt to obtain the video directly from Snapchat. The closest testimony came from Officer JA, who testified he "also attempted to contact Snapchat to see if [he] could pull it from their records which [he] was unable to do." However, the reason Officer JA could not retrieve the video from Snapchat is unknown. It could be because all originals were destroyed, which would satisfy Mil. R. Evid. 1004(a). It could be because Officer JA needed a subpoena to obtain the video, in which case the government would not have satisfied the rule.

As we do not know whether all originals were lost or destroyed, we turn to Mil. R. Evid. 1004(b), which allows other evidence of the content of a recording when an original cannot be obtained by any available judicial process. We easily dismiss this exception, as the government never attempted to obtain the video via subpoena or other judicial process.

Accordingly, as the evidence does not support finding either exception applicable to this case, we find it was an abuse of discretion to allow HF to testify as to the contents of the video. However, as outlined below, we find no prejudice, primarily because testimony about the contents of the video was cumulative to [redacted]s testimony about the assault and DP's eye witness testimony.

3. Prejudice

We hold appellant did not suffer material prejudice to a substantial right because of HF's testimony. "[T]he government bears the burden of demonstrating that the admission of erroneous evidence was harmless." *Finch*, 79 M.J. at 398. "'For preserved nonconstitutional evidentiary errors, the test for prejudice is 'whether the error had a substantial influence on the findings.'" *Id.* (quoting *Frost*, 79 M.J. at 111). When reviewing prejudice, this court balances: "(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." *Frost*, 79 M.J. at 111 (quoting *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019)).

As the military judge noted HF's testimony was "powerful" evidence. The substance of the video was relevant in light of [redacted]s testimony and appellant's attempts to characterize the video as evidence of [redacted]s motive to fabricate an assault. However, even without testimony as to the contents of the video the government's case was strong. Both [redacted] and DP provided direct testimony about appellant's actions and statements while in the back of the vehicle with [redacted]. On balance, the defense case was not nearly as strong. The defense asserted that [redacted] consented to the sexual acts with appellant and she fabricated the allegations upon learning of the video in order to protect her relationship with her boyfriend. However, [redacted] reported the assault to her boyfriend before even knowing the exact contents of the video thereby diluting the defense's assertion of a motive to fabricate. The video was not material evidence to the government's case given the victim testified about her recollection of the assault, the DNA evidence, and DP's eye witness testimony. Accordingly, we find no prejudice in the admission of HF's testimony regarding the snapchat video.

CONCLUSION

After careful consideration of the record, and the briefs and arguments of appellate counsel, we have determined that the approved findings and sentence are correct in law and fact and that no error materially prejudicial to appellant's substantial rights occurred. Arts. 59 and 66, UCMJ. The findings and sentence are thus AFFIRMED.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court