

# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before  
BROOKHART, PENLAND, and ARGUELLES<sup>1</sup>  
Appellate Military Judges

**UNITED STATES, Appellee**  
**v.**  
**Major ANTHONY R. RAMIREZ**  
**United States Army, Appellant**

ARMY 20210376

Headquarters, 82nd Airborne Division  
J. Harper Cook, Military Judge  
Major Donel J. Davis, Acting Staff Judge Advocate

For Appellant: Captain Andrew R. Britt, JA; William E. Cassara, Esquire (on brief and reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline J. DeGaine, JA; Major Pamela L. Jones, JA; Captain Andrew M. Hopkins, JA (on brief).

16 November 2022

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*This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.*

ARGUELLES, Judge:

An officer panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of abusive sexual contact, two specifications of assault consummated by battery, and one specification of conduct unbecoming an officer, in violation of Articles 120, 128, and 133, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 928, and 933 (2018) [UCMJ]. The panel acquitted appellant of two specifications of abusive sexual contact and one specification of attempted sexual assault in violation of Articles 120 and 80, UCMJ,

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<sup>1</sup> Judge Arguelles decided this case while on active duty.

10 U.S.C. §§ 880 and 920. The military judge sentenced appellant to confinement for five months and a dismissal, and the convening authority took no action on the sentence.

This case is before the court for review pursuant to Article 66, UCMJ. Appellant raises four assignments of error, three of which merit discussion, but none of which merit relief.<sup>2</sup>

## BACKGROUND

All of the charges against appellant, a Major, pertained to his interaction with the wife (“Wife/wife”) of one of his subordinate Lieutenants (“First Lieutenant”). Appellant and First Lieutenant served together in Iraq as signal officers, and First Lieutenant returned home two weeks before appellant. When appellant returned from deployment at 0200, he realized that the house he was supposed to stay in was not available, so he called First Lieutenant, who picked him up and let him stay the night with him and his wife. The next morning, while First Lieutenant was driving appellant to get his car, appellant asked if he could come over again that night and watch the Super Bowl with First Lieutenant and his wife. Although he was not planning on watching the game, First Lieutenant agreed, although there was no mention of appellant staying the night again. During the game, appellant drank heavily, and at various points during the game, appellant, First Lieutenant, and his wife all fell asleep on the couch.

After the game with First Lieutenant still asleep on the couch, appellant and Wife began talking about the difficulties of deployment and family life, and at some point, Wife opened up about her concerns that First Lieutenant was having issues since returning home. Wife also shared with appellant that she saw a text exchange on First Lieutenant’s phone in which he told a female Soldier that he loved her. As First Lieutenant was still sleeping on the couch, appellant suggested that they continue their conversation in the kitchen. Sometime around 0200 or 0300, First Lieutenant woke up and joined appellant and his wife in the kitchen, where appellant convinced First Lieutenant to drink a beer with him. After drinking his beer, First Lieutenant retired to his bedroom at some point between 0400 and 0500.

After First Lieutenant went to bed, appellant and Wife continued to talk. Appellant asked Wife if he could give her a hug, which she testified she thought

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<sup>2</sup> Appellant’s first assignment of error is factual and legal insufficiency. Other than to note that both parties appear to have overlooked the applicability of the revised standards set forth in Article 66(d)(1)(B), UCMJ (effective 1 January 2021), we find that this claim is without merit and does not warrant further discussion.

“was a little strange,” but she agreed, and they hugged. After talking a little while more, appellant asked for another hug, which Wife testified she felt somewhat compelled to agree to because appellant was her husband’s boss. This hug lasted longer than the first one, and at the end of the hug appellant rubbed Wife’s back and then grabbed her butt over her leggings.<sup>3</sup> Wife testified that as appellant ended the hug, he kissed her on the mouth, but she did not kiss him back or “actively participate” in the kiss. Wife also stated that after the kiss, she told appellant that he had a wife and kids and they couldn’t do this.<sup>4</sup>

Wife further testified that appellant then started asking her “when are we going to fuck?” At that point, after she went back to the living room and sat on the couch to process things, appellant came and sat next to her on the couch and asked for sex again. Wife testified that when she stood up and faced him, he pulled down her leggings and underwear and touched her vulva.<sup>5</sup> After appellant then went back to the kitchen, Wife realized he was really drunk and should not be driving. She went into the kitchen to tell appellant that he should go to bed, and to ask for his keys to keep him from driving. While in the kitchen, Wife testified that appellant again asked her for sex, and grabbed her neck and tried to force her head towards his exposed penis.<sup>6</sup> After she resisted and pulled away, appellant put his arms around Wife, backed her into the stove, and continued to try and kiss her on the mouth.<sup>7</sup>

At some point during the second interaction in the kitchen, Wife began to audio record her conversation with appellant on her phone, and in total the recording lasted about six and a half minutes. During this recording, Wife can be continuously heard saying “no” and “stop,” and telling appellant that “we cannot do this” because he had a wife and kids, and that they were doing something wrong because appellant was married and she was married. On the other hand, at several points in the recording she does appear to be laughing. Contrary to Wife’s testimony, appellant never says “when are we going to fuck” on the recording. On the other hand, during

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<sup>3</sup> This conduct formed the basis for the one specification of abusive sexual contact for which the panel returned a guilty verdict.

<sup>4</sup> This conduct formed the basis for the first assault consummated by a battery specification for which the panel returned a guilty verdict.

<sup>5</sup> The panel acquitted appellant of abusive sexual contact related to this conduct.

<sup>6</sup> The panel acquitted appellant of attempted sexual assault related to this conduct.

<sup>7</sup> This conduct formed the basis for the second assault consummated by battery specification for which the panel returned a guilty verdict.

the recording he does ask her to “lay down with me,” and can be heard saying “I can meet you in the bedroom.”<sup>8</sup> The recording ends with Wife telling appellant to “go jack off in the bathroom,” and saying “Good Lord.”

After appellant went to the guest bedroom, Wife found his keys and went to her bedroom where First Lieutenant was still sleeping. Once in the bedroom, she locked the door, shook First Lieutenant awake and took him to their walk-in closet to prevent appellant from hearing the conversation. Crying, she told First Lieutenant that appellant kissed and hugged her, and played the recording for him. After listening to about 90 seconds of the recording, First Lieutenant told his wife to stay in the bedroom. First Lieutenant went to the guest room where appellant was asleep slumped over a chair. When appellant refused to leave, First Lieutenant punched him in the face and smashed his head into the wall, which apparently convinced appellant that it was in fact time to leave. Appellant tried unsuccessfully to call First Lieutenant several times after he left, and on the one call he did answer, First Lieutenant told appellant that he had a recording of what happened and that his “career was over.”

## LAW AND DISCUSSION

### *A. Pretrial Voir Dire Into Racial Bias*

#### *1. Additional Facts*

Prior to trial, defense submitted a list of proposed voir dire questions, to include the question “Does anyone’s cultural background influence your perception on relationships between individuals of different races?” The military judge issued a written ruling denying that question on the grounds that it was “too confusing, a trick question, or unhelpful to ferreting out sincerity and ability to sit as a panel member.” The military judge asked for the submission of any requests for reconsideration before 1700 the night before trial.

Discussing this issue on the morning of trial, the military judge noted that he did not receive written requests for reconsideration on any of his voir dire rulings, but also indicated that he was “happy to entertain a motion on the fly if anyone wants a reconsideration of the court’s voir dire ruling.” Defense counsel did not request reconsideration or any further discussion of this question. On appeal, we allowed appellant to supplement the record with his declaration that he is Hispanic and that both First Lieutenant and Wife are Caucasian. Appellant now asserts that

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<sup>8</sup> The conduct related to the recording formed the basis for the panel’s guilty verdict on the Article 133 conduct unbecoming specification.

the military judge abused his discretion in not allowing defense counsel to inquire into racial bias during his voir dire.

## 2. Law

We review a military judge's refusal to allow defense voir dire for an abuse of discretion. *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001); *United States v. Jefferson*, 44 M.J. 312, 317 (C.A.A.F. 1996). The abuse of discretion standard is deferential, predicated reversal on more than a mere difference of opinion. *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015); *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) (“[T]he abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range.”) (citation omitted).

In *United States v. Witherspoon*, 12 M.J. 588, 589 (A.C.M.R. 1981), we addressed a similar situation wherein the military judge rejected as “too broad” defense counsel’s proposed voir dire question asking the members if they were “in any way racially prejudiced.” In *Witherspoon*, we first broadly recognized that depending on the circumstances of the case, “counsel for an accused may properly inquire into possible racial or ethnic prejudice on the part of court-members.” *Id.* Applying that holding to the case at bar, we found that it would have “been appropriate to permit the defense to question the members concerning any racial prejudice they might have held against [B]lacks.” *Id.* But, on the other hand, we rejected appellant’s contention that the military judge precluded him from developing the matter and ultimately found no error, noting that in response to the trial court’s ruling that his first question was too broad, defense counsel declined to ask a more specific question. *Id.*

In *Rosales-Lopez v. United States*, 451 U.S. 182, 190 (1981), the U.S. Supreme Court held that “[o]nly when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court’s denial of a defendant’s request to examine the juror’s ability to deal impartially with this subject amount to an unconstitutional abuse of discretion.” Earlier in the opinion, the Court opined that such an example would arise where the “racial issues are ‘inextricably bound up with the conduct of the trial.’” *Id.* at 189 (quoting *Ristaino v. Ross*, 424 U.S. 589, 597 (1976)). Moreover, the Supreme Court held that failure to honor a defense request for a voir dire question about racial bias “will be reversible error only where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury.” *Id.* at 191. Along the same lines, the Court further noted in a footnote that a trial court need not defer to a defendant’s request “where there is no rational

possibility of racial prejudice,” but that such requests should ordinarily be granted when “the defendant claims a meaningful ethnic difference between himself and the victim.” *Id.* at 191 n.7.<sup>9</sup>

### 3. Analysis

Given the broad nature of the requested voir dire question, combined with the fact that defense counsel did not narrow his request or propose a more specific question, under *Witherspoon* the Military Judge did not abuse his discretion in denying the request.

Likewise, given that appellant’s arraignment was on the first day of trial, and there is no indication in the record that the military judge was aware of Wife’s race when he issued his voir dire ruling, defense counsel also failed to assert a “meaningful ethnic difference between himself and the victim” in support of his proposed voir dire question. *Id.* (defendant needs to claim “a meaningful ethnic difference between himself and his victim” to justify racial bias voir dire question); *see also United States v. Lloyd*, 69 M.J. 95, 100-01 (C.A.A.F. 2010) (“In reviewing a military judge’s ruling for abuse of discretion . . . we review the record material before the military judge”). Finally, and in any event, because there is no evidence in the record, either at trial or on appeal, that racial issues were “inextricably bound up with the conduct of the trial,” the military judge did not abuse his discretion in denying appellant’s proposed racial bias voir dire question.<sup>10</sup>

### B. Wife’s Excited Utterance

#### 1. Additional Facts

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<sup>9</sup> Appellant cites to *Rosales-Lopez* for the proposition that trial courts should make such an inquiry when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups. *Id.* at 192. This portion of the opinion was part of a non-binding four-justice plurality, and expressly rejected by the two concurring justices. Moreover, even in this same section of the opinion, the plurality again emphasized that the decision as to “whether the total circumstances suggest a reasonable possibility that racial or ethnic prejudice will affect the jury remains primarily with the trial court . . . .” *Id.*

<sup>10</sup> Alternatively, even if the military judge did err in refusing to give the requested voir dire question, because there is no evidence suggesting a “reasonable possibility that racial or ethnic prejudice might have influenced the jury,” any such error was harmless. *Rosales-Lopez*, 451 U.S. at 191.

At trial, Wife testified that once she got into her bedroom and locked the door behind her, a “wave of emotion hit me,” to include “fear, betrayal, [and] sadness.” She said that she was crying when she woke up First Lieutenant and told him that appellant was kissing and touching her. Wife further testified that because she thought appellant might be at the door, she took her husband into the walk-in closet and played the recording for him. When asked about her emotional state in the closet, Wife said that she was “[p]anicking a little bit” and did not get “a hold of her emotions.”

First Lieutenant testified that he remembered his wife coming into the bedroom and locking the door, which was strange because they did not usually lock doors in the house. After his wife came over and shook him, First Lieutenant was “immediately wide awake” and described his wife’s face as “frantic” and “very scared looking,” and her voice as “low and shaky.” When asked if he had ever seen his wife in such a state, First Lieutenant replied “absolutely not.” Finally, First Lieutenant explained how once they went into the closet, although wife was “kind of breaking down[,] . . . through the tears and through her struggling to get it out,” she was able to tell him what happened with appellant.

At trial, defense counsel objected to First Lieutenant testifying about what his wife told him on hearsay and speculation grounds. In response, trial counsel stated “[e]xcited utterance,” and the military judge overruled both objections.

## 2. Analysis

Appellant now argues that the military judge erred in admitting First Lieutenant’s testimony about what his wife told him under the excited utterance hearsay exception. Military Rule of Evidence [Mil. R. Evid.] 803(2) provides that a “statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused,” is not hearsay. A statement must meet three requirements to qualify as an excited utterance: (1) it must be spontaneous, excited, or impulsive rather than the product of reflection and deliberation; (2) the event prompting the utterance must be startling; and, (3) the declarant must be under the stress of the excitement caused by the event. *United States v. Arnold*, 25 M.J. 129, 132 (C.M.A. 1987). We review a military judge’s decision to admit evidence as an excited utterance for an abuse of discretion. *United States v. Henry*, 81 M.J. 91, 95 (C.A.A.F. 2021), citing *United States v. Feltham*, 58 M.J. 474-75 (C.A.A.F. 2003).

Appellant’s assignment of error is based primarily on a pretrial interview with First Lieutenant that was *not* part of the record at trial, nor was it brought up in defense counsel’s cross-examination or otherwise mentioned at trial. Appellant now argues that based on First Lieutenant’s statements in this “Allied papers” interview, it was more likely that at least fifteen to twenty-five minutes passed between Wife’s

last encounter with appellant and when she woke up her husband, such that her statements were no longer spontaneous.

As an initial matter, given that we may not consider such extra-record evidence on appeal, to the extent appellant relies on the pretrial interview, it is easy to dispose of his claim. *See United States v. Gonzalez*, 60 M.J. 572, 574 (Army Ct. Crim. App. 2004) (holding that we are barred from considering allied papers in contested cases); *United States v. Gray*, 51 M.J. 1, 15 (C.A.A.F. 1999) (“It is the normal rule of military appellant practice that review of the guilt of an accused is limited to evidence presented at trial”), *citing United States v. Bethea*, 46 C.M.R. 223, 225 (C.M.R. 1973).

Moreover, to the extent it is possible to parse out the extra-record interview from the remainder of appellant’s claim, which is not entirely clear, given the testimony of both First Lieutenant and his wife, the military judge did not abuse his discretion in overruling the defense hearsay objection. *See Feltham*, 58 M.J. at 475 (“The critical determination is whether the declarant was under the stress or excitement caused by the startling event.”); *Henry*, 81 M.J. at 96 (“[I]t is the totality of the circumstances, not simply the length of time that has passed between the event and the statement, that determines whether a hearsay statement was an excited utterance”), *citing United States v. Belfast*, 611 F.3d 783, 817 (11<sup>th</sup> Cir. 2010).

### *C. Admission of the Transcript of the Recording into Evidence*

#### *1. Additional Facts*

During the trial the following exchange occurred [Wife’s recording of the conversation between her and appellant is Prosecution Exhibit 2, and the transcript of that conversation is Prosecution Exhibit 3]:

TC: Retrieving Prosecution Exhibit 2 for identification. Your Honor, the government moves to admit Prosecution Exhibit 2 for identification into evidence, and Prosecution Exhibit 3 for identification into evidence.

MJ: Okay. Mr. Poppe [Civilian Defense Counsel]?

CDC: No objection to 2, and no objection to 3, but we would object to 3 being published before 2, the actual recording.

MJ: Okay. So that’s just – that’s just a comment on the sequence of publishing.

MJ: Any problem with that there, government?

TC: No, Your Honor.

CDC: No objections, Your Honor. Thank you.

MJ: Government, please hand me 2 and 3. Without objection, they are admitted.

During his cross-examination of Wife, defense counsel made multiple references to the transcript. In his closing argument, government counsel argued about and referred to the actual recording, but made no mention of the transcript. On the other hand, defense counsel referenced the transcript multiple times in his closing.

Appellant now argues that the military judge erred in admitting the unauthenticated transcript and failing to instruct the panel on its use. For the first time on appeal, appellant also alleges prejudice in that the transcript makes reference to a “kissing sound.” Appellant concedes that defense counsel did not object at trial or request any additional admonitions or instructions pertaining to the transcript, but asserts that since he only forfeited the instant claim, it is subject to plain error review on appeal.

## 2. Law

With respect to the use of a transcript at trial, in *United States v. Craig*, 60 M.J. 156, 160, 162 (C.A.A.F. 2004), the Court of Appeals for the Armed Forces (CAAF) held that subject to foundational requirements and appropriate procedural safeguards, the transcript of an audio recording may be admitted at courts-martial, and that trial courts have “considerable discretion” in determining whether to allow the fact-finder to consider such transcripts during deliberations. Explaining the necessary foundational requirements and procedural safeguards, the CAAF first held that: (1) the judge should review the transcript for accuracy; (2) defense counsel should be allowed to highlight alleged inaccuracies and to introduce alternative versions; (3) the jury should be instructed that the tape, rather than transcript, is evidence; and (4) the panel should be allowed to compare the transcript and tape and hear argument about the same. *Id.* at 161, citing *United States v. Delgado*, 357 F.3d 1061, 1070 (9<sup>th</sup> Cir. 2004).

In addition, the CAAF in *Craig* held that the panel should be instructed that the tape recording is the evidence, that it should disregard anything in the transcript that they did not hear on the recording itself, and that the transcript is to be used only in conjunction with the recording. *Id.*, citing *United States v. Holton*, 116 F.3d 1536, 1543 (D.C. Cir. 1977). Notwithstanding the fact that the military judge in

*Craig* also admitted the transcript into evidence, the CAAF did not meaningfully address the inconsistency in telling panel members that one admitted exhibit need be given priority over another admitted exhibit, or how the military judge could instruct the panel members that an admitted exhibit is not “evidence.”

Whether an appellant has waived an issue is a question of law that we review de novo. *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017). In *Ahern*, the CAAF specifically held that appellant’s statement that he had “no objection” to the admission and use of his pretrial statements “constitutes a waiver of his right to object.” *Id.*, citing *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009). Likewise, in *Campos*, the CAAF held that a challenge to admissibility of a document at trial is waived on appeal when the military judge asked if there were any objections and defense counsel expressly indicated that he had none. 67 M.J. at 332. See also *United States v. Davis*, 79 M.J. 329, 330 (C.A.A.F. 2020) (holding that where defense counsel “‘expressly and unequivocally acquiesce[s]’ to the military judge’s instructions, appellant waived all objections to the instructions”) (quoting *United States v. Smith*, 9 C.M.R. 70, 72 (1953); *United States v. Rich*, 79 M.J. 472, 476–77 (C.A.A.F. 2020) (same)).

Finally, to prevail under a plain error analysis, an appellant must show that (1) there is error; (2) the error is plain or obvious; and (3) the error results in material prejudice to a substantial right of the accused. *United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008) (citations omitted). “As all three prongs must be satisfied in order to find plain error, the failure to establish any one of the prongs is fatal to a plain error claim.” *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006). In *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006), the CAAF held that under the plain error standard, claimed instructional errors “must be tested for prejudice under the standard of harmless beyond a reasonable doubt,” and that such inquiry is “whether, beyond a reasonable doubt, the error did not contribute to the defendant’s conviction or sentence.” (citations omitted); see also *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019) (holding the plain error harmless beyond a reasonable doubt prejudice standard “is met where a court is confident that there was no reasonable possibility that the error might have contributed to the conviction”) (citing *Chapman v. California*, 368 U.S. 18, 24 (1967)).

### 3. Analysis

Because defense counsel expressly stated that he had “no objection” to the admissibility of the transcript at trial, appellant has waived his right to challenge this error on appeal. See *Ahern* 76 M.J. at 197; *Campos*, 67 M.J. at 332; *Davis*, 79 M.J. at 330; *Rich*, 79 M.J. at 476–77. We recognize that under the *prior* version of Article 66 of the UCMJ, we retained the discretion to “treat a waived or forfeited claim as if it had been preserved at trial” in order to determine if the findings “should be approved.” *United States v. Conley*, 78 M.J. 747, 750 (Army Ct. Crim.

App. 2017) (citing *United States v. Britton*, 26 M.J. 24, 27 (C.M.A. 1988)); Article 66(d)(1), UCMJ (2016) (“The Court may affirm only such findings of guilty . . . as the Court finds correct in law and fact and determines, on the basis of the entire record, *should be approved*.”)(emphasis added). The amended version of Article 66, effective 1 January 2021, however, provides in pertinent part that we “may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with subparagraph (B).” Article 66(d)(1)(A), UCMJ (2021). As such, because we no longer have the “should be approved” discretion under Article 66 to review a waived claim, we are precluded from any further review of this claim. *See also Ahern*, 76 M.J. (holding that a valid waiver extinguishes the claim of legal error).

For the first time in his reply briefing, appellant argues that while he did not object to the admission of the transcript, he never affirmatively stated on the record that he did not want the military judge to instruct the jury or otherwise comply with the procedural requirements set forth in *Craig*. First, because appellant raises it for the first time in his reply brief, we decline to consider the merits of this argument. *United States v. Ozbirn*, 81 M.J. 38, 44 (C.A.A.F. 2021). Moreover, even if we were to consider this contention, to the extent appellant is alleging that the military judge failed to properly instruct the panel on how they could use the transcript, he expressly waived any such claim when defense counsel stated he had no objections to the military judge’s proposed instructions. *See Davis*, 79 M.J. at 330; *Rich*, 79 M.J. at 476–77.

In any event, we find the new argument set forth in the reply to be a distinction without a difference. Put simply, by unconditionally stating he had “no objection” to admitting the transcript into evidence, defense counsel waived any technical challenges to the transcript’s foundation and authenticity, or the military judge’s failure to instruct the panel on the proper use of that exhibit. *Cf. Ahern*, 76 M.J. at 197 (rejecting appellant’s argument that a waiver of the admission of the phone calls does not constitute a waiver of his right to object to the government’s use of the phone calls). On the other hand, military judges can certainly avoid this issue in the future by complying with *Craig*’s foundational requirements and procedural safeguards, regardless of any objections and/or whether the transcripts are admitted as exhibits or used as demonstrative aids. *See United States v. Banks*, 36 M.J. 150, 169 n.23 (C.A.A.F. 1992) (“We gratuitously recommend that judges explicitly state on the record whether they have viewed videotapes or reviewed transcripts of them”).

Finally, even if we assume the military judge erred in failing to properly authenticate the transcript and/or give the panel transcript-specific instructions, because such errors are nevertheless harmless beyond a reasonable doubt, they did not result in plain error or any material prejudice to appellant’s substantial rights. Among other things, not only did defense counsel make multiple references to the

transcript in both his cross-examination and closing, he also did not dispute that appellant and Wife kissed, and indeed never objected at trial to the transcript's reference to "kissing sound." *See Lloyd*, 69 M.J. at 100-01 ("In reviewing a military judge's ruling for abuse of discretion ... we review the record material before the military judge.").

In addition, based on our review of the transcript, we find that it was "substantially accurate." *Craig*, 60 M.J. at 161. We note that defense counsel had the opportunity to highlight any perceived inaccuracies in the transcript, and that the members had the opportunity to compare both the transcript and the recording in open court and in their deliberations. *See United States v. Miller*, 64 M.J. 666, 671-72 (A.F. Ct. Crim. App. 2007) (holding no plain error where military judge fails to comply with requirements of *Craig*). Accordingly, we find beyond a reasonable doubt that any error in admitting the transcript did not materially prejudice appellant's substantial rights, as we are "confident that there was no reasonable possibility that the error might have contributed to the conviction." *Tovarchavez*, 78 M.J. at 460.

### CONCLUSION

Upon consideration of the entire record, the findings of guilty and the sentence are AFFIRMED.

Senior Judge BROOKHART and Judge PENLAND concur.

FOR THE COURT:

A large black rectangular redaction box covers the signature of the Clerk of Court. A small red square is visible within the redacted area.

JAMES W. HERRING, JR.  
Clerk of Court