UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WALKER, EWING,[1] and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Chief Warrant Officer Two SAMUEL H. ZIMMER
United States Army, Appellant

ARMY 20200671

Headquarters, 1st Infantry Division and Fort Riley
Ryan W. Rosauer, Military Judge
Colonel Runo C. Richardson, Staff Judge Advocate

For Appellant: Captain David D. Hamstra, JA; Patrick J. Hughes, Esquire (on brief and reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Brett A. Cramer, JA; Captain Melissa A. Eisenberg, JA (on brief).

4 January 2023

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

PARKER, Judge:

Appellant raises multiple assignments of error before this court, three of which merit discussion but no relief.[2] One, appellant alleges his Rule for Courts-

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[1] Judge Ewing decided this case while on active duty.

[2] We have given full and fair consideration to appellant's other assignments of error, to include matters submitted personally by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find they lack merit and warrant neither additional discussion nor relief.

Martial [R.C.M] 707 speedy trial rights were violated. Two, appellant alleges that his conviction of Specification 4 of Additional Charge III, battery upon an intimate partner, is legally and factually insufficient because it was based on sparse residual hearsay. Three, appellant alleges that his representation by trial defense counsel was deficient to the extent that appellant would have otherwise had a different trial outcome. We disagree with appellant on all three issues for the reasons set forth below.

BACKGROUND

In 2020, appellant was tried before an officer panel at a general court-martial located at Fort Riley, Kansas. At trial, appellant faced several charges consisting of thirty specifications involving multiple victims, over multiple years, across a variety of locations, and was convicted of eighteen of those specifications. Contrary to his pleas, appellant was convicted of willfully disobeying a superior commissioned officer, destruction of nonmilitary property, two specifications of communicating a threat, two specifications of kidnapping, simple assault, assault consummated by battery, five specifications of battery upon an intimate partner or a spouse, aggravated assault by strangulation, two specifications of obstruction of justice, disorderly conduct, and an interstate violation of a protective order, in violation of Articles 90, 109, 115, 125, 128, 131b, 134, Uniform Code of Military Justice, 10 U.S.C. §§ 890, 909, 915, 925, 928, 931b, 934 [UCMJ]. Appellant was sentenced to a dismissal and confinement for ten years.

The charges and thirty specifications with which appellant was charged included offenses involving three intimate partners and two of appellant's children spanning approximately four years. Appellant was found not guilty of the charges involving three of these victims: one intimate partner and his two children. Our factual background is limited to appellant's convictions for the remaining two intimate partner victims,[3] appellant's former girlfriend, V1 and appellant's wife, V2

Appellant was convicted of nine specifications related to V1 including simple assault, assault consummated by battery, two specifications of battery upon an intimate partner, disorderly conduct, kidnapping, two specifications of communicating a threat, and obstruction of justice. V1 dated appellant for about six months beginning in September 2018. In January of 2019, appellant and V1 went to a bar, had a few drinks, and appellant began asking V1 to point out men in the bar with whom she had a previous relationship. This conversation escalated into

[3] We note all of the original charges as they are relevant to the R.C.M 707 timeline discussion.

an argument, with appellant calling V1 names, V1 crying, and the bouncer asking appellant to leave the bar.

Once outside, appellant yelled for V1 to get in the vehicle and then began assaulting her. During the drive, appellant relentlessly hit V1 on the left side of her body with a closed fist, including her forearm, jaw, and chest, eventually causing V1 to jump out of the moving vehicle. After jumping from the vehicle, V1 tried unsuccessfully to flag down a passing car while appellant chased her down the road. Eventually, appellant tackled V1 by slamming her into the ground and knocking the breath out of her. Appellant dragged V1 back into the vehicle while threatening to kill her, her parents, and her dog. Once back in the vehicle, appellant continued to hit V1 and prevented V1 from again trying to jump from the vehicle.

V1 eventually calmed appellant down by apologizing and agreeing to go back to the bar per appellant's request, in order to tell the staff that they had wrongly kicked appellant out. Once inside the bar, V1 who was covered in visible injuries, told the bartender to call the police because appellant had assaulted her. Upon arrival, the police photographed V1 s injuries and transported her to the hospital. While in the hospital, appellant texted V1 to not speak to law enforcement and apologized but then accused V1 of ruining his life and the lives of his three children. The government introduced pictures of V1 injuries along with her statements to police. During one of her interviews with police, V1 reported that this incident was not the only time appellant had assaulted her. She relayed that in October or November of 2018 while at their home, appellant grabbed her by the feet and dragged her across the living room floor because he was upset that she may be cheating on him. However, after appellant texted V1 in the hospital, she recanted all allegations and reunited with appellant.

Around March of 2019, after reuniting with appellant, V1 and appellant began arguing again. During one argument, appellant pushed V1 against the wall in the bedroom and then hit the wall next to her face, with his fist breaking the wall. During another argument in the kitchen, appellant threw a water bottle at V1 hitting the wall above her head, denting the wall. V1 eventually left appellant in April of 2019.

Appellant was convicted of nine specifications related to V2 involving destruction of nonmilitary property, kidnapping, aggravated assault by strangulation, three specifications of battery upon a spouse or intimate partner, obstruction of justice, a violation of a civilian protective order, and willfully disobeying a military protective order issued by appellant's superior commissioned officer. At the time of trial, V2 had recanted her allegations, reconciled with appellant, and was a non-cooperating government witness.

On the night of 6 December 2019, V2 and appellant were involved in an argument while out at a restaurant. After the argument, V2 started walking toward her truck outside and appellant followed. Appellant grabbed V2 phone and threw it to the ground, then grabbed her wallet and threw the contents into the street. V2 walked away and got into her truck, then drove back to appellant and asked to take him home. Appellant responded by reaching into V2 truck, pulling the keys out of the ignition, pulling the truck door handle off the truck, and then pulling V2 through the window of the driver seat. Appellant then picked up V2 and threw her over a barbed wire fence into a field. Appellant came through the fence, used vulgar language toward V2 while telling her to get up, and when she did not, he began dragging her to the center of the field. V2 sat in the middle of the field with appellant while asking repeatedly to go home, to which appellant replied "no." V2 eventually began to scream for help, and appellant grabbed her by her neck and covered her mouth, telling her to "shut the [f**k] up." V2 tried to leave the field multiple times, but when she attempted to do so, appellant would drag her back to the center of the field.

Eventually V2 convinced appellant to return home so they walked back to her truck. Once there, V2 hit a button on her Apple watch, activating her OnStar system. Appellant saw V2 watch light up, then grabbed it off her wrist and threw it. V2 told him she would not call the police nor tell anyone what happened. On the way home, appellant asked V2 "what happens next," and she responded she didn't know, which resulted in appellant hitting V2 with the open palm of his left hand on her right cheek, pushing her against the truck's driver-side window.

Once home, V2 told appellant she had hit the SOS OnStar button on her truck and that the police would arrive soon. Appellant then shoved her onto the bed, twisting her neck and pressing her face into the bed. V2 acted calm, started walking downstairs as if to turn off the SOS button, and then began screaming for help. V2 ran into her roommate's bedroom and called the police from their phone. Officer VR from the Fort Worth Police Department responded. Officer VR testified that he interviewed V2 that night, and that V2 had visible injuries on her arms and neck. Officer VR took photos of the injuries and also recorded the interview using his body camera, all of which was entered into evidence. Officer VR stated V2 did not appear intoxicated, was speaking clearly, understood his questions, and that she filled out a victim voluntary statement. In that statement, which was introduced into evidence and read to the panel, V2 detailed what happened that night with appellant as recited above.

While on the stand, Officer VR was also asked about the process he used in collecting the above victim statement from V2 and testified that as part of the domestic interview process, he asks about a person's prior history using a family violence packet. When he asked V2 about her prior history with appellant, V2 disclosed that appellant had strangled or choked her in August 2019.

At trial, the two roommates who were with V2 the night of 6 December 2019 both testified. They testified V2 was living with them, they awoke in the early morning to loud banging in the residence, that V2 came running down the stairs screaming "bloody murder" and burst into their bedroom, stating that appellant was trying to kill her. They testified V2 was crying, trembling and scared, appeared to need help, and that V2 stayed in their bedroom with the door locked while calling 911. One roommate testified to seeing visible injuries on V2 The 911 operator also testified and the audio recording of V2 s 911 call was admitted into evidence.

On 17 January 2020, a Fort Riley police officer who was manning the visitor control center met with appellant and V2 as they walked in to request an installation pass for V2 Appellant filled out the installation pass request, provided his driver's license information, and a background check revealed issuance of a Texas civilian protective order against appellant. The Fort Riley police officer verified the female with appellant, V2 was the protected person on the order and appellant's command was notified. On 21 January 2020, appellant's commander issued a military protective order (MPO), which among other things, prevented appellant from contacting V2

[redacted] testified at trial and provided a different version of events than what she reported to Officer VR. V2 testified she was out having drinks with appellant when she received a message from a woman who had matched with appellant on an online dating application. When V2 questioned appellant about the message, appellant grabbed V2 iPhone and threw it, breaking the device. V2 further testified that appellant did not pull her out of the truck, did not throw her over a barbed wire fence, did not drag her into a field, did not strangle her, did not drop her on her head, and that she was the one chasing appellant the entire time. She testified that when she went into her roommate's bedroom, she was not terrified and that she was acting, and that appellant did not beat her that night or on prior occasions. She admitted to writing in her statement that all of these things happened, but that she made them up because she was angry with appellant. V2 testified she called 911 from her roommate's phone because she did not want appellant to leave the residence.

LAW AND DISCUSSION

A. R.C.M. 707

Appellant argues that the government violated his speedy trial rights pursuant to the Sixth Amendment, Article 10, UCMJ, and R.C.M. 707 and requests dismissal

of the charges with prejudice. We disagree and find the R.C.M. 707 assignment of error warrants discussion but no relief.[4]

1. Facts

Relevant to our R.C.M. 707 discussion is the following timeline of appellant's case:

3 September 2019 – Charges are preferred against appellant (involving three intimate partners, KZ, V1 and TP, and his two children, HZ and GZ).

17 September 2019 – Original date of the Article 32 hearing. Defense requested a delay thru 24 September 2019.

25 September 2019 – Article 32 hearing.

2 October 2019 – The Preliminary Hearing Officer (PHO) produced his report and recommended numerous changes to the charge sheet.

18 November 2019 – Government preferred an Additional Charge of disorderly conduct (involving TP). Defense counsel submitted a request for an expert consultant in Forensic Social Work (referencing possible post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI)).

5-6 December 2019 – Events occurred forming the basis of charges regarding V2. Appellant was arrested and a Texas court issued a protective order against appellant.

10 December 2019 – Appellant began emergency leave in Alaska.

20 December 2019 – The Special Court-Martial Convening Authority (SPCMCA) received a verbal government request for a sanity board to be convened pursuant to R.C.M. 706. The SPCMCA established a thirty-day deadline to produce the R.C.M. 706 board's findings.

3 January 2020 – Appellant returned from emergency leave.

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[4] We disagree with appellant's assertion that appellant was effectively placed under arrest pursuant to Article 9, UCMJ, and therefore find appellant's arguments under Article 10, UCMJ, and the Sixth Amendment to be without merit.

6 January 2020 – Appellant's first full duty day after emergency leave.

7 January 2020 – The government gave the SPCMCA's sanity board order to Irwin Army Community Hospital. The hospital requested sixty days to complete the evaluation

15 January 2020 – The government dismissed the preferred charges (from 3 September 2019 and 18 November 2019) and re-preferred charges with changes based on recommendations from the PHO. The SPCMCA re-issued the R.C.M. 706 order to provide sixty days for completion. The SPCMCA appointed a new PHO for a second Article 32 hearing.

17 January 2020 – The government learned appellant was arrested for the 5-6 December 2019 events concerning V2 and a military protective order (MPO) was issued prohibiting appellant from contacting V2

23 January 2020 – Appellant's off-post pass privileges were revoked and he was required to sign in with the Charge of Quarters (CQ) desk twice daily on non-duty days.

17 March 2020 – The R.C.M. 706 evaluation results were provided to government, indicating appellant was competent to stand trial.

1 April 2020 – The second Article 32 preliminary hearing occurred.

13 April 2020 – The PHO completed his report with a recommendation to change the assault specifications (same as previous PHO).

15 April 2020 – The SPCMCA excluded 16 January 2020 to 16 March 2020 from R.C.M. 707 timeline.

18 May 2020 – All charges were referred to General Court-Martial.

11 August 2020 – Defense filed a R.C.M. 707 Motion to Dismiss with prejudice, all charges and specifications preferred on 15 January 2020 (Charges I through V and their specifications), except Specifications 11 and 12 of Charge I.

1 September 2020 – Motions hearing and arraignment.

26 October 2020 – The military judge issued his ruling.

At issue here is the R.C.M. 707 timeline between 3 September 2019 and the dismissal and re-preferral of charges that occurred on 15 January 2020. Appellant alleges that the government violated his R.C.M. 707 speedy trial rights, that the R.C.M. 707 timeline should not have restarted on 15 January 2020, and that this court should dismiss the charges against appellant with prejudice. The R.C.M. 707 timeline from 3 September 2019 to 15 January 2020, without accounting for excludable delay, was 134 days. The military judge found excludable delay from 17 September 2019 to 24 September 2019, and 20 December 2019 to 15 January 2020, totaling 35 days, which brought the R.C.M. 707 timeline total to 99 days.

At trial, the defense filed a motion to dismiss pursuant to R.C.M. 707 arguing that the government failed to bring appellant to trial within 120 days. They conceded that 17-24 September 2019 constituted excludable delay but argued that 20 December 2019 to 15 January 2020 was not excludable because the R.C.M. 706 inquiry was unnecessary and that the government did not provide timely notice of the inquiry order to the hospital, compounding the delay in the sanity board completion. The defense acknowledged that typically a new 120-day period begins after a dismissal and repreferral of charges but argued this should not apply in this case because the government's dismissal and repreferral was subterfuge to avoid a R.C.M. 707 violation, which was an improper purpose, so the charges should be dismissed with prejudice. In opposing the motion, the government stated, among other things, that the R.C.M. 706 inquiry was requested for a legitimate purpose and that numerous changes were needed on the charge sheet, which included adding, dismissing, and amending charges based on the Article 32, UCMJ, PHO report, which justified the government's action of dismissal and repreferral.

The military judge identified two points of contention between the parties in his ruling: (1) whether the dismissal and repreferral stopped and then restarted the original 120-day clock and; (2) whether 3 September 2019 to 15 January 2020 contained any period of excludable delay. In analyzing the second point, which was necessary to determine whether the government was about to run afoul of the 120-day clock, the military judge agreed that the defense delay from 17 September 2019 to 24 September would be excludable. However, as to the delay between 20 December 2019 and 15 January 2020, the military judge rejected the defense's argument that the R.C.M. 706 was unnecessary, finding the government had a duty to appoint an R.C.M. 706 board to ensure appellant's competence to stand trial. The military judge found that although the government waited eighteen calendar days to deliver the R.C.M. 706 order to the hospital, nothing could have happened with the inquiry until early January since appellant was on leave and unavailable. Thus, the military judge found 20 December 2019 to 15 January 2020 excludable delay. The military judge also noted the government did not seem to have any concern about running afoul of the R.C.M 707 clock because they did not have the convening authority exclude any time and found the government's argument that they dismissed and repreferred to make numerous substantive changes to the charge sheets credible.

The military judge found that the government did not dismiss and reprefer for an improper reason, the R.C.M. 707 clock restarted on 15 January 2020, and denied the defense motion to dismiss.

Akin to the defense argument at trial, appellant alleges the R.C.M. 707 clock should have not restarted on 15 January 2020 once charges were dismissed. Appellant alleges that the government rushed to prefer charges in September and November of 2019 and were not adequately prepared for trial, which is what forced the government to dismiss and re-prefer the charges on 15 January 2020. Appellant further alleges the reasoning provided by the government that they needed to make numerous charges to the charge sheet is unbelievable and therefore the military judge's ruling is clearly erroneous. While not all of the charges were altered, we disagree with appellant that the charge sheets are nearly identical as evidenced by the numerous changes to the charge sheet and disagree with appellant that the military judge's ruling was clearly erroneous.[5]

2. Standard of Review and Applicable Law

"This Court conducts a de novo review of speedy trial claims." *United States v. Guyton*, 82 M.J. 146, 151 (C.A.A.F. 2021) (citations omitted). An accused must be brought to trial, which is at the time of arraignment, within 120 days after preferral. R.C.M. 707(a)(1), (b)(1). "However, we review for an abuse of discretion the decision of a military judge to grant a delay, thereby rendering that period of time excludable for speedy trial purposes." *Id.* (citing *United States v. Lazauskas*, 62 M.J. 39, 41-42 (C.A.A.F. 2005)).

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[5] Appellant also argues that even if this court were to disagree with appellant that there was an improper purpose behind dismissing and repreferring the charges, we should nonetheless find R.C.M. 707 was violated because the time between the referral of charges on 18 May 2020 and arraignment on 1 September 2020 cannot be considered excludable delay and exceeds 120 days. We disagree with appellant and find this argument to be without merit. *See United States v. Hawkins*, 75 M.J. 640, 641-42 (Army Ct. Crim. App. 2016) (finding that judicial delay between referral and the time of arraignment is presumed to be approved unless specified otherwise by the military judge); *see Rules of Practice Before Army Courts-Martial*, R. 1.1 (1 Nov. 2013) (applicable to courts-martial occurring prior to 1 February 2022); *cf. Rules of Practice Before Army Courts-Martial*, R. 3.2 (1 Feb. 2022) (stating that for courts-martial occurring on or after 1 February 2022 "[a]ny period of delay from the judge's receipt of the referred charges until arraignment must be accounted for by the government under [R.C.M.] 707 [and] . . . is excludable judicial delay only at the discretion of the docketing judge upon request by the government.").

"Applying the speedy trial provisions of R.C.M. 707(c) does not merely consist of calculating the passage of calendar days." *Guyton*, 82 M.J. at 151. Pretrial delays approved by the military judge are excluded from the 120-day clock and "[t]he R.C.M. 'does not preclude after-the-fact approval of a delay by' the military judge." *Id.* (quoting *United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997)). "The decision to grant or deny a reasonable delay is a matter within the sole discretion of the convening authority or a military judge . . . [and] should be based on the facts and circumstances then and there existing." R.C.M. 707(c)(1) discussion. However, there must be "good cause for the delay and . . . the length of time requested [must] be reasonable based on the facts and circumstances of each case." *Guyton*, 82 M.J. at 151 (cleaned up).

"Ordinarily, when an accused is not under pretrial restraint and charges are dismissed, a new 120-day time period begins on the date of repreferral." *Id.* (citing R.C.M. 707(b)(3)(A)(i)). The exception is if the dismissal "is either a subterfuge to vitiate an accused's speedy trial rights, or for some other improper reason[;]" in those cases, the 120-clock will not restart. *United States v. Leahr*, 73 M.J. 364, 369 (C.A.A.F. 2014). A proper reason to withdraw and reprefer charges is "a legitimate command reason which does not unfairly prejudice an accused." *Id.* (cleaned up).

3. Analysis

Despite the fact that 134 days had elapsed from the time of the original preferral on 3 September 2019 to the dismissal and repreferral of charges on 15 January 2020, we find that the government did not violate appellant's speedy trial rights pursuant to R.C.M. 707. We reach this conclusion because the military judge did not abuse his discretion in granting the excludable delay described above, which totaled 35 days, so the government had not exceeded the 120-day limit mandated by R.C.M. 707(a).

The military judge did not abuse his discretion in granting the eight days of excludable delay between 17-24 September 2019, as both parties agreed on this issue. As to the excludable delay between 20 December 2019 and 15 January 2020 relating to the R.C.M. 706 inquiry, we find the military judge's decision to grant this time as excludable delay to be reasonable and not an abuse of discretion. First, conducting a R.C.M.706 inquiry, after the defense filed a motion for an expert to address potential competency concerns, was a reasonable and diligent decision by the government. Even considering that the government reissued the R.C.M. 706 order a second time after the charges were dismissed and repreferred on 15 January 2020, we remain unpersuaded this rendered a R.C.M. 706 inquiry unnecessary. As to the delay in conducting the R.C.M. 706 inquiry from when it was first appointed on 20 December 2019, we find the military judge's reasoning that no inquiry could take place with appellant on leave was within his discretion, so the effect of the later delivery of the appointment memo to the hospital has little, if any, effect on the

overall timeline for the completion of the sanity board. We therefore disagree with appellant's assertion that the military judge abused his discretion when he found the case was not in speedy trial trouble and found excludable delay between 20 December 2019 and 15 January 2020. We find the alleged R.C.M. 707 violation to be without merit.

B. Factual and Legal Sufficiency and Military Rule of Evidence 807

Appellant alleges that his conviction of Specification 4 of Additional Charge III, battery upon an intimate partner involving V2 is legally and factually insufficient because it is based solely on sparse residual hearsay concerning an event occurring four months prior to when V2 made the statement to police. We disagree.

1. Standard of Review and Applicable Law

This court reviews questions of legal and factual sufficiency de novo. *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017). "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (cleaned up). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt." *Rosario*, 76 M.J. at 117 (cleaned up). This court applies "neither a presumption of innocence nor a presumption of guilt" but "must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). This "does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019). "In considering the record, [this court] may weigh the evidence, judge the credibility of witness[es], and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." Art. 66(d)(1), UCMJ. The degree of deference this court affords the trial court for having seen and heard the witnesses will typically reflect the materiality of witness credibility to the case. *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015).

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[6] Specification 4 of Additional Charge III states that appellant "did, at or near Fort Worth, Texas, between on or about 1 August 2019 and on or about 31 August 2019, unlawfully strike [V2] the intimate partner of the accused, by causing her to strike a wall, putting her on a bed, and putting his hand on her neck."

Although not directly raised by the parties, we also find the military judge's decision to admit V2 statements into evidence pursuant to Military Rule of Evidence [Mil. R. Evid.] 807 warrants discussion but no relief.[7] "A military judge's decision to admit evidence is reviewed for an abuse of discretion." *United States v. Ayala*, 81 M.J. 25, 27 (C.A.A.F. 2021) (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." *Frost*, 79 M.J. at 109 (cleaned up). Military Rule of Evidence 807 allows for a hearsay statement to be admissible if the follow circumstances are met:

> (1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice.

Mil. R. Evid. 807(a)(1)-(4).

2. Facts

At the time of trial, V2 had reconciled with appellant and was a non-cooperating government witness. The military judge granted the government's motion to admit V2 oral statement to Officer VR on 6 December 2019 as residual hearsay under Mil R. Evid. 807. Officer VR testified that he interviewed V2 following her 911 call on the night of 6 December 2019. He testified that in addition to questioning V2 about the events of that night, he completed a family violence form with V2 and documented on the form what V2 told him, which was in addition to the written statement V2 provided. Officer VR testified that as part of the family violence form, he inquired into whether there were any prior incidents with appellant, to which V2 replied that appellant had strangled her in August of 2019. V2 statement about appellant strangling or choking her in August 2019 was

[7] Our broad authority under Article 66(d), UCMJ, allows us to address issues not directly raised by the parties on appeal, and it is under this authority we address the military judge's residual hearsay ruling. Appellant alleged no assignment of error as to the military judge's residual hearsay ruling directly. However, appellant alleged an assignment of error asserting legal and factual insufficiency due to the military judge's residual hearsay ruling. We therefore find it prudent to address this issue.

captured in the body camera footage that was played to the panel. In the body camera footage, V2 stated that in August 2019, appellant wanted her to get out of bed so he picked up a mattress she was on and threw her into a wall. After informing him she was not afraid, appellant grabbed her by the throat and forcibly pulled her out of the bed.

V2 provided different testimony during trial than what she provided to Officer VR. At trial, V2 testified that she told Officer VR about an incident in August of 2019, and explained that while appellant strangled her in August of 2019, it was sexually consensual, and denied appellant strangled her without her consent. V2 testified that the incident in August 2019 involved appellant flipping over a mattress V2 was sitting on, causing her to fall off the bed and hit the wall. V2 stated she believed it was an accident, as appellant was looking for a cat under the bed. V2 also testified that while she had made these statements about appellant to Officer VR, she had made up the claims against appellant because she was angry. The military judge found that V2 statement to Officer VR was admissible under Mil. R. Evid. 807 and that the panel could weigh V2 in court testimony against her statement to Officer VR and make their own credibility determination of V2 The panel convicted appellant of assault on an intimate partner for this incident.

3. Analysis

We first address the military judge's decision to admit V2 statement to Officer VR into evidence pursuant to Mil. R. Evid. 807. First, we agree with the military judge that factors two and three from Mil. R. Evid. 807 favor admission because her statement was the main piece of evidence against appellant given V2 decision not to cooperate with the prosecution and her unwillingness to testify against her husband at trial. Second, we agree with the military judge's analysis of the first factor of Mil R. Evid. 807 concerning the guarantees of trustworthiness of V2 statements to Officer VR. As the military judge noted, only a couple of hours had passed from the time appellant had attacked her in the field to when she reported and made statements to 911 and law enforcement, she did not appear intoxicated or angry, she was asked open ended questions by the police, and she had no outside influence to make the accusations against appellant. As to the fourth and final factor of Mil. R. Evid. 807, we agree that admitting V2 s statement served the purpose of the rules and the interests of justice, given the statement V2 made to Officer VR was the only evidence against appellant and to exclude it would, as stated by the military judge, unjustly allow V2 s "recantation of her allegations control the presentation of evidence" against appellant. We therefore find the military judge did not abuse his discretion in admitting V2 statement pursuant to Mil. R. Evid. 807.

Next, we address appellant's argument that his conviction for Specification 4 of Additional Charge III is legally and factually insufficient because the sole evidence to support his conviction involves "sparse residual hearsay concerning an

event occurring four months prior to when the statement was made." Appellant argues that V2 oral statement to Officer VR involved limited questioning, and was tangential to the reason why police responded, and that more facts were needed to sustain this conviction because V2 s response failed to elicit whether she had consented or not. Additionally, appellant argues that V2 did not recall telling Officer VR about the strangulation that occurred in 2019, that the only strangulation that occurred in 2019 was consensual strangulation during sexual activity, and appellant had never nonconsensually strangled V2 in August of 2019, so no reasonable factfinder could have found appellant guilty beyond a reasonable doubt. We disagree, with one caveat: we find the language "putting her on a bed" from the specification is not correct in fact because it was not proven at trial. In her oral statement, as recorded on body camera footage, V2 told the officer that appellant pulled her out of the bed, as opposed to being placed on the bed. We therefore find the offense alleged in Specification 4 of Additional Charge III to be legally and factually sufficient with the exception of that language. Our superior court reiterated our authority to "narrow the scope of an appellant's conviction to conduct it deems legally and factually sufficient." *United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019). We find this revision narrows the scope of Specification 4 of Additional Charge III and therefore it remains the same offense with which appellant was originally charged.

We find appellant's conviction for this offense, as modified above, to be factually and legally sufficient. The evidence admitted at trial proved beyond a reasonable doubt that appellant committed this offense. The oral statement V2 provided to Officer VR stated every element of the offense: that appellant did bodily harm to V2 by unlawfully using force which caused her to strike a wall and by putting his hand on her neck. We reject appellant's argument that the oral statement was insufficient to show whether she consented to appellant's conduct. The context in which V2 was informing the officer of appellant's conduct was in reporting a previous time appellant had committed domestic violence against her before the offenses committed on 1 December 2019. V2 statement satisfies us that this conviction is factually sufficient, as it describes from V2 the actions of appellant in August 2019. While V2 provided a different description of these events at trial, we find V2 statement to Officer VR more credible than her testimony at trial. At the time she made the statement, it was only four months since the incident in August 2019 had occurred. By trial, V2 was a noncooperating witness who had recanted. We therefore find V2 oral statement to Officer VR to be sufficient evidence that convinces us beyond a reasonable doubt that this battery upon an intimate partner occurred. We also find appellant's conviction to be legally sufficient, as a rational trier of fact could have found all the essential elements of the battery upon an intimate partner offense at issue beyond a reasonable doubt when considering V2 statement to Officer VR. Accordingly, we find appellant's conviction for Specification 4 of Additional Charge III, as modified, to be legally and factually sufficient.

C. Ineffective Assistance of Counsel

Appellant alleges that his trial defense counsel, MW and Major BW, were ineffective by failing: (1) to make an appearance at appellant's Article 32 hearing, arraignment, and motions hearing; (2) failing to cross-examine thirteen government witnesses called to testify during findings; (3) choosing not to put on a defense case during the merits, to include not putting the defense expert on the stand; (4) conceding guilt during closing argument; and (5) failing to object to the government's discussion of appellant's prior civilian convictions during their presentencing argument. Appellant alleges that taken together under the circumstances, but for the failures of his counsel, there is a reasonable probability the outcome would have been different.[8] We disagree and find appellant's defense counsel were not ineffective.

Allegations of ineffective assistance of counsel are reviewed de novo. *United States v. Cueto*, 82 M.J. 323, 327 (C.A.A.F. 2022) (citing *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011)) (citation omitted). "To prevail on an ineffective assistance claim, the appellant bears the burden of proving that the performance of defense counsel was deficient and that the appellant was prejudiced by the error." *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) (citing *Strickland v. Washington*, 466 U.S. 668, 698 (1984)). "With respect to *Strickland's* first prong, courts 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (quoting *Strickland*, 466 U.S. at 694). "As to the second prong, a challenger must demonstrate 'a reasonable probability that, but for counsel's [deficient performance] the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 694) (alteration in original). "It is not enough to show that the errors had some conceivable effect on the outcome . . . ." *Id.* (cleaned up). "When there is an allegation that counsel was ineffective in the sentencing phase of the court-martial, we look to see 'whether there is a reasonable probability that, but for counsel's error, there would have been a different result.'" *Captain*, 75 M.J. at 103 (quoting *United States v. Quick*, 59 M.J. 383, 386-87 (C.A.A.F. 2004)).

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[8] Having considered the principles set forth in *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997), we find it unnecessary to expand on this analysis as there are no competing affidavits, as appellant did not submit affidavits addressing most of his ineffective assistance of counsel allegations, other than one addressing his counsel's closing argument. The record of trial provides us all necessary information to decide appellant's allegation involving the closing argument. Therefore, we are able to resolve appellant's claim of ineffective assistance of counsel without ordering a post-trial evidentiary hearing. *See Ginn*, 47 M.J. at 248.

Appellant first alleges his civilian defense counsel was ineffective due to his absence from his Article 32 hearing on 1 April 2020, and that the summarized transcript does not reflect that appellant waived the presence of his civilian defense counsel. Second, appellant alleges this same counsel was absent from the arraignment and motions hearing on 1 September 2020, and that appellant reluctantly agreed to proceed with the hearing despite his counsel's unapproved absence, and despite appellant's acknowledgment on the record to the military judge that he was comfortable proceeding with only his military defense counsel.

Regarding the Article 32 hearing, appellant was represented by his military defense counsel. Appellant's civilian defense counsel, in his court ordered affidavit, stated he was not contracted to represent appellant at the Article 32 hearing, that appellant was informed of this, and that the plan was for appellant's military defense counsel to represent him, which he did. In another court ordered affidavit from appellant's military defense counsel, he acknowledged that civilian defense counsel was not expected to be present at this hearing. There is no evidence to suggest any facts to the contrary. In fact, appellant does not allege civilian defense counsel should have been present, only that the waiver of his presence was not contained in the summarized transcript. Appellant has not met his burden of proving any deficiency by his civilian defense counsel regarding the Article 32 hearing.

As to the arraignment and motions hearing, appellant argues that unbeknownst to him, his civilian defense counsel was again absent, that appellant informed the military judge he had not had an opportunity to speak with his civilian defense counsel, and that he reluctantly agreed to proceed with the arraignment and motions hearing despite civilian counsel's absence. We highlight that during his colloquy with the military judge, appellant responded in the affirmative when asked if he was comfortable with proceeding without civilian defense counsel's presence, and that the military judge even recessed the proceeding so appellant could confirm whether he wanted to proceed with the hearing, to which appellant again responded in the affirmative after the recess. Additionally, in his affidavit, civilian defense counsel responded that he was not contracted to represent appellant at this hearing, that he discussed motions with appellant and that appellant decided to use his financial resources to hire counsel for V2 In the military defense counsel's affidavit, he also stated that he knew civilian counsel would not be present as appellant had not agreed to pay for his attendance at the hearing, that he spoke with appellant prior to the hearing regarding civilian counsel's absence, and that appellant did not seem surprised or concerned about the absence. There are no facts or evidence to contradict what is stated in these affidavits. We find that based on the explanation by both defense counsel, along with appellant's acknowledged confusion in his interpretation of his contract with civilian counsel in his *Grostefon* matters, and no facts to the contrary, appellant has failed to meet his burden of proving any deficiency by counsel regarding the arraignment or motions hearing.

Appellant next alleges his defense team was ineffective in that they failed to cross-examine thirteen government witnesses during findings. Civilian defense counsel stated that the defense team was prepared to cross-examine all witnesses, and for strategic reasons that differed for each witness as detailed in his affidavit, opted not to do so. Civilian defense counsel cited a variety of reasons for this decision, including but not limited to, witnesses being merely foundational and a concern to not open the door for uncharged misconduct by appellant or prior consistent statements of a victim. The military defense counsel's affidavit describes the defense's pretrial interviews of witnesses, and tactical reasons for opting to not cross-examine certain witnesses at trial. We find these explanations by counsel to be within their tactical discretion, and that appellant has failed to meet his burden of proving counsel's deficiency on this issue.

Appellant further alleges his defense team was ineffective by choosing not to put on a defense case during the merits, to include not calling the defense expert to testify. Specifically, appellant alleges that his counsel could have called the defense expert to argue that V1 s injuries were "consistent with a fall from a vehicle at 20-30 miles per hour." As to whether to call the defense expert to testify, as referenced in military defense counsel's affidavit, it was a tactical decision to preclude his testimony. Counsel stated that based on conversations with his expert, if the expert was asked while on the stand whether the injuries to V1 could have been caused by appellant as V1 described, the expert would answer yes, despite also conceding the injuries could have alternatively been caused from a vehicle fall. In deciding whether the expert testifying would be an effective defense strategy, counsel also highlighted that there was evidence involving the injuries to appellant's knuckles that were consistent with punching repeatedly with force, as alleged by V1 The defense counsel ultimately decided the value of the expert's testimony was not worth the risk as the expert would say he could not rule out that V1 was punched, and counsel were concerned it would have helped the government more than the defense, damaging the defense case in front of the panel. This is a tactical decision made by the defense team and appellant has not met his burden of proving any deficiency.

As to appellant's claim of ineffectiveness for his defense team not putting on a defense case on the merits, we find this argument to be without merit. Appellant alleges, without much specificity, that the defense chose not to put on any defense case. The defense team states they considered presenting evidence, but that they did not have helpful evidence worth presenting because it could be easily attacked or rebutted by the government. They articulated their concern that appellant continued to commit misconduct in violation of the UCMJ, that they were unsure of what, if anything, the government knew about appellant's continued misconduct, and that they were reluctant to have either appellant, or character witnesses, testify. Additionally, appellant fails to articulate what evidence or what case was not presented. We find these tactical decisions by defense to be reasonable and that appellant has failed to meet his burden of proving this was deficient performance.

Next, appellant alleges his defense counsel were ineffective because they conceded appellant's guilt during closing arguments. Appellant provides a litany of quotes and statements from civilian defense counsel's closing argument that appellant characterizes as counsel conceding guilt, and further summarizes that the effect of these statements is that no person could conclude these comments were effective assistance. On this alleged assignment of error, appellant also filed a motion to attach an affidavit stating that he did not concede or approve his civilian defense counsel's closing statements. This statement is not contradicted by civilian defense counsel's affidavit, as he makes no mention of discussing his closing argument with appellant. Civilian defense counsel explained he did not concede guilt, but rather made statements as part of his argument strategy to gain panel credibility and create reasonable doubt in the government's case. He argued that the government overcharged appellant, burden shifted to the defense, and that the defense therefore employed a theory of spillover by the government, all with the intent of creating reasonable doubt for the panel on the large volume of charges appellant faced. Based on our review of the record, we find counsel's explanation to be reasonable and that appellant has failed to prove deficient performance based on counsel's closing argument.

Last, appellant alleges ineffectiveness by defense counsel's failure to object to the government's discussion of appellant's prior civilian convictions during their presentencing argument. We highlight that the military judge stopped the government's argument when facts not in evidence were referenced and instructed the panel to disregard the trial counsel's argument regarding the conviction related to appellant's parents. Panels are presumed to follow the military judge's instructions and there is no evidence to indicate they did otherwise in this case. *See United States v. Stewart*, 71 M.J. 38, 43 (C.A.A.F. 2012). We find appellant has not met his burden to provide defense counsel was deficient on this issue.

In summary, appellant alleges that under the totality of these circumstances based on the reasons alleged above, appellant was provided ineffective assistance of counsel. We disagree. We find that based on our review of the record, and under the objective standard of reasonableness, the performance of appellant's counsel was not deficient. While we find no deficient performance and no error by counsel, we add that appellant has also failed to show prejudice and a reasonable probability there would have been a different result but for these alleged errors by counsel. Appellant's arguments merely attempt to lump together defense counsels' trial decisions, strategies, and techniques, to collectively attempt to persuade this court performance was deficient. We are unpersuaded and reiterate that appellant has offered nothing more than conjecture about a different trial outcome.

CONCLUSION

The finding of guilty of Specification 4 of Additional Charge III, except the words "putting her on a bed" is AFFIRMED. The remaining findings of guilty and sentence are AFFIRMED.[9]

Senior Judge WALKER and Judge EWING concur.

FOR THE COURT:

JAMES W. HERRING, JR.
Clerk of Court

[9] At trial, Specification 7 of Charge I was dismissed by the government and Specifications 8 through 14 of Charge I were then renumbered to Specifications 7 through 13. However, the Statement of Trial Results (STR) Findings Worksheet, as incorporated into the Judgment of the Court, does not address this renumbering of the specifications that occurred at trial. Therefore, the STR Findings Worksheet is amended to reflect the following: after the number "8." the words "(as renumbered to Specification 7)" are added to the box for Specification 8 of Charge I; after the number "9." the words "(as renumbered to Specification 8)" are added to the box for Specification 9 of Charge I; after the number "10." the words "(as renumbered to Specification 9)" are added to the box for Specification 10 of Charge I; after the number "11." the words "(as renumbered to Specification 10)" are added to the box for Specification 11 of Charge I; after the number "12." the words "(as renumbered to Specification 11)" are added to the box for Specification 12 of Charge I; after the number "13." the words "(as renumbered to Specification 12)" are added to the box for Specification 13 of Charge I; and after the number "14." the words "(as renumbered to Specification 13)" are added to the box for Specification 14 of Charge I. Additionally, Specification 1 of Charge II was dismissed pursuant to a motion under R.C.M. 917, however the STR states the findings of this specification were 'Not Guilty." The STR Findings Worksheet is amended to reflect the following for Specification 1 of Charge II: "Dismissed pursuant to R.C.M. 917."