

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BROOKHART, PENLAND, and ARGUELLES¹
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist THOMAS R. YEPEZ
United States Army, Appellant

ARMY 20210236

Headquarters, 1st Cavalry Division
Lanny J. Acosta Jr., Military Judge
Colonel Howard T. Matthews Jr., Staff Judge Advocate

For Appellant: Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Christian E. DeLuke, JA; Captain Sarah H. Bailey, JA (on brief).

For Appellee: Colonel Christopher B. Burgess, JA; Major Pamela L. Jones, JA; Captain Lisa Limb, JA (on brief).

11 January 2023

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

PENLAND, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his plea, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. §§ 920 [UCMJ]. The military judge sentenced appellant to a dishonorable discharge and to be confined for twenty-eight months. The convening authority took no action on the findings or sentence.

We review the case under Article 66, and we have fully and fairly considered all matters either assigned as error or personally raised by appellant pursuant to

¹ Judge ARGUELLES decided this case while on active duty.

United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982). Among them, appellant asserts the military judge abused his discretion by denying the defense motion to introduce Military Rule of Evidence [Mil. R. Evid.] 412 evidence. We agree, and, considering this error is of constitutional magnitude, we also find the government has not disproven prejudice beyond a reasonable doubt.^{2,3}

BACKGROUND

The government's evidence at trial consisted mainly of testimony from SGT [REDACTED] (hereinafter referred to as "victim"), who was appellant's friend. On 21 June 2018, she went to his apartment after work; appellant was also there. The victim and appellant listened to music, drank alcohol, and played UNO; after drinking heavily, the victim got sick. Appellant held her hair while she vomited, then encouraged her to rest on a bed, which she did. The victim woke up to appellant "trying to do something to me." She intermittently blacked out, but also told appellant to stop. The victim testified that appellant removed her pants and underwear, saying, "You asked for this. You wanted this . . . You wanted this to happen." According to her testimony, appellant penetrated her vagina with his penis without her consent. The next day, the victim made a restricted report, then changed it to unrestricted approximately one year later. She told her boyfriend three days after the incident. In addition to the victim's testimony, the government called a sexual assault forensic medical examiner and a forensic DNA expert. Taken together, they established DNA transfer between appellant and the victim.

Before trial, the defense sought to introduce evidence of a flirtatious relationship between appellant and the victim. This evidence consisted of three selfie photographs of her; the first two depicted her in underwear, and the third depicted her naked, with emoji images covering her breasts and genitalia. The defense called the victim to testify in a closed Mil. R. Evid. 412 hearing, where she denied flirting with appellant or sending any of the photos directly to him. Of the third photo, she said that – if she sent it to anyone – she would have sent it directly and exclusively to her boyfriend, a person other than appellant. In contrast with her

² Pretrial motion papers regarding appellant's request to introduce evidence under Mil. R. Evid. 412 were sealed, as were the transcripts of the hearing involving the request. Our decision contains discussion of sealed material necessary for our analysis.

³ The remaining assignment of error and the matters personally raised by appellant under *Grostefon* merit neither discussion nor relief.

testimony, the defense offered an “affidavit”⁴ from appellant. He asserted: (1) he and the victim had a flirtatious relationship before the charged misconduct; (2) the victim sent all three photos directly to him, and not to a larger group of people; (3) the victim sent him the photos in the spring and summer of 2018; and, (4) she sent appellant additional photos after the third selfie.

The military judge ruled against appellant, writing that it was unclear where the victim had sent the photographs and that “the Defense ha[d] failed to show any evidence that these photographs were in anyway intended for [appellant] alone.” Among other things, the military judge found as fact “no evidence of the time or date for any of the photos or to whom they were sent.” On the other hand, the military judge did find appellant possessed the three photos. Denying the motion under Mil. R. Evid. 412(b)(2) and (b)(3), he ruled the proffered photos were neither relevant nor material, as they were not evidence of the victim’s “sexual behavior with the accused.”

LAW AND DISCUSSION

We are keenly aware that we review military judges’ Mil. R. Evid. 412 admissibility decisions for an abuse of discretion. *United States v. Carpenter*, 77 M.J. 285 (C.A.A.F. 2018); *United States v. Erikson*, 76 M.J. 231 (C.A.A.F. 2017); *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011). “‘Trial judges retain wide latitude . . . to impose reasonable limits on . . . cross- examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.’” *Gaddis*, 70 M.J. at 256 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). Military Rule of Evidence 412 is an exclusionary rule, requiring a proponent to meet the burden to show that an exception prevails. *Gaddis*, 70 M.J. at 251–52; *United States v. Banker*, 60 M.J. 216, 223 (C.A.A.F. 2004); *United States v. Savala*, 70 M.J. 70, 72 (C.A.A.F. 2011).

In deciding whether a military judge has abused his discretion in establishing evidentiary limits, we do not ask ourselves whether we would have made the same decision if presiding over the trial; such an approach would deprive the trial judge of the deference required by the standard of review. Instead, we ask, among other things, whether his relevant factual findings are clearly erroneous, or whether his

⁴ To characterize the document as an “affidavit” is too generous. Although it concludes “I declare under penalty of perjury that the foregoing is true and correct,” it is still essentially an unsworn memorandum for record, signed by appellant. Nonetheless, we recognize when “deciding [whether evidence is admissible], the military judge is not bound by evidence rules, except those on privilege.” Mil. R. Evid. 104(a).

conclusions from the facts and applicable law are clearly unreasonable. *See Erikson*, 76 M.J. at 235 (quoting *United States v. Olson*, 74 M.J. 132, 134 (C.A.A.F. 2015)) (“A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect.”); *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)) (The challenged action must be “arbitrary, fanciful, clearly unreasonable,” or “clearly erroneous.”). Under the circumstances, we answer yes to both.

The military judge’s factual findings were clearly erroneous in at least two material respects. First, there was evidence of the photos’ timing: appellant’s memorandum stated that he received them from approximately April to June, 2018.⁵ While this might not have dispositively proven when they were made, it was some circumstantial evidence thereof. Second, there was also evidence that appellant received them directly from the victim: again, his memorandum asserted “[s]he sent me these photos directly as a one-on-one Snapchat message.”⁶ It is unclear why the military judge positively stated there was no evidence of these matters. In his ruling, he correctly cited *Banker*, 60 M.J. at 224, for the principle that it was not his function to assess the credibility of the proffered evidence in deciding its admissibility.⁷ We can only conclude he either: (1) made such a determination regarding appellant’s memorandum; or (2) overlooked multiple material parts of it. In either event, the military judge erred.

We also find clearly unreasonable the military judge’s conclusions that the excluded evidence was not relevant or material under Mil. R. Evid. 412(b)(2) and Mil. R. Evid. 412(b)(3). At the very least, the photos “ha[d] [the] tendency to make

⁵ The government charged appellant with sexually assaulting the victim “on or about 21 June 2018[.]”

⁶ On the other hand, the military judge did rely on appellant’s memorandum in making at least one of his findings: that appellant possessed the three photos. The military judge could have only derived that fact from the memorandum.

⁷ Quoting *Banker*, 60 M.J. at 224, the military judge wrote:

In applying M.R.E. 412, the judge is not asked to determine if the proffered evidence is true; it is for the members to weigh the evidence and determine its veracity. Rather, the judge serves as a gatekeeper deciding first whether the evidence is relevant and then whether it is otherwise competent, which is to say, admissible under M.R.E. 412.

a fact⁸ more or less probable than it would be without the evidence; and . . . the fact [was] of consequence in determining the action.” Mil. R. Evid. 401. We hasten to add that we are not finding as a matter of fact that the victim *actually* sent the photos directly to appellant, or that they, by themselves, *actually* established her consent⁹ or an honest—and reasonable —mistake of fact in appellant’s mind. Instead, we find, as a matter of legal relevance, the proffered evidence made it more likely for the fact finder to conclude that she sent the photos to appellant, that she consented, or that he honestly and reasonably believed she did. As a result, the excluded evidence was relevant, and its probative value outweighed the countervailing considerations in Mil. R. Evid. 403 or Mil. R. Evid. 412(b)(3).¹⁰ See *United States v. Roberts*, 69 M.J. 23, 27 (C.A.A.F. 2010) (holding that there is a “low threshold for relevant evidence” under Mil. R. Evid. 412). The error was constitutional in proportion,¹¹ for it unreasonably curtailed both appellant’s Fifth Amendment due process right to present a defense and his Sixth Amendment right to meaningfully cross-examine the victim.

⁸ The disputed facts here were, at minimum, whether the victim consented, or whether appellant honestly and reasonably believed she did.

⁹ We recognize Article 120’s definition of consent, which includes: “A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.” We take this to mean that the photos, by themselves, were insufficient to constitute consent. However, we also recognize that, in accordance with Article 36, the President has promulgated Mil. R. Evid. 412, which allows admission of “evidence of specific instances of a victim’s sexual behavior with respect to the person accused of the sexual misconduct, if offered by the accused to prove consent[.]” Reading them in harmony with one another, we interpret these provisions to mean that, *taken together with other evidence in the case*, a victim’s sexual behavior with an accused may be admissible if it makes it more likely to conclude the victim consented to the charged sexual misconduct.

¹⁰ We do not criticize the military judge for not conducting these balancing analyses; he determined the evidence was not relevant in the first place.

¹¹ Considering the error’s constitutional dimension, we do not assess whether the excluded evidence would cause unfair prejudice to the victim’s privacy. See *Gaddis*, 70 M.J. at 256 (“M.R.E. 412 cannot limit the introduction of evidence required by the Constitution”); Mil. R. Evid. 412(b) (“In a proceeding, the following evidence is admissible . . . (2) evidence of specific instances of a victim’s sexual behavior with respect to the person accused of sexual misconduct, if offered by the accused to prove consent . . . and (3) evidence the exclusion of which would violate the accused’s constitutional rights.”)


Presented with a non-structural constitutional error, “the Government must prove...harmless[ness] beyond a reasonable doubt.” *United States v. Cueto*, 82 M.J. 323, 334 (C.A.A.F. 2022) (quoting *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019)). While the government correctly writes of *Van Arsdall*’s multi-part prejudice inquiry, we are not “confident that there was no reasonable possibility that the error might have contributed to the conviction.” *Tovarchavez*, 78 M.J. at 460 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). The victim’s testimony was pivotal to the government’s case, especially where the government offered no evidence to corroborate her allegation that the sexual activity was non-consensual. And, the excluded evidence was not cumulative with other admitted evidence – the fact finder received no information about the victim’s and appellant’s allegedly flirtatious relationship. Considering these factors, we conclude the fact finder might reasonably have viewed the excluded evidence as a reason to doubt the government’s proof, whether pertaining to the victim’s credibility, lack of consent, or appellant’s state of mind.

CONCLUSION

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

Senior Judge BROOKHART and Judge ARGUELLES concur.

FOR THE COURT:



JAMES W. HERRING, JR.
Clerk of Court