No. 23-___

IN THE

Supreme Court of the United States

JONATHAN M. MARTINEZ, *ET AL.*,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION APPENDIX

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September 8, 2023

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UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
WASHINGTON, D.C.

United States,
Appellee

v.

Jonathan M. Martinez,
Appellant

USCA Dkt. No. 22-0165/AF
Crim. App. No. 39973

ORDER

On further consideration of the granted issue, 83 M.J. 8 (C.A.A.F. 2022), and in view of *United States v. Anderson*, 83 M.J. __ (C.A.A.F. 2023), it is, by the Court, this 18th day of July, 2023,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Jonathan M. MARTINEZ
Airman (E-2)
U.S. Air Force,
Appellant

No. 39973

Decided: 6 April 2022

Appeal from the United States Air Force Trial Judiciary

Military Judge: Bryon T. Gleisner (motions); Mark W. Milam.

Sentence: Sentence adjudged on 13 August 2020 by GCM convened at Hurlburt Field, Florida. Sentence entered by military judge on 18 September 2020: Dishonorable discharge, confinement for 36 months, reduction to E-1, and a reprimand.

For Appellant: Major Ryan S. Crnkovich, USAF; Stephen I. Vladeck, Esquire.

For Appellee: Lieutenant Colonel Matthew J. Neil, USAF; Major Jessica L. Delaney, USAF; Mary Ellen Payne, Esquire.

Amicus Curiae for Appellant: Barbara E. Bergman, Esquire; Donald G. Rehkopf, Jr., Esquire—on behalf

of the National Association of Criminal Defense Lawyers.

Before LEWIS, POSCH, and ANNEXSTAD, Appellate Military Judges.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

LEWIS, Senior Judge:

A general court-martial composed of officer members convicted Appellant, contrary to his pleas, of one specification of wire fraud, two specifications of attempted wire fraud, one specification of wrongful use of marijuana, and one specification of communicating a threat, in violation of Articles 134, 80, 112a, and 115, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 934, 880, 912a, 915.[1,2] Appellant was sentenced by military judge to a dishonorable discharge, 36 months of confinement,[3] reduction to

1. Unless otherwise specified, all references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence are to the Manual for Courts-Martial, United States (2019 ed.). The wire fraud and attempted wire fraud specifications incorporated 18 U.S.C. § 1343.

2. The court members acquitted Appellant of one specification of wrongful use of cocaine and one specification of negligent discharge of a handgun, alleged as violations of Articles 112a and 134, UCMJ, 10 U.S.C. §§ 912a, 934.

3. The confinement terms ran concurrently and varied from a low of no confinement for the wrongful use of marijuana specification to a high of 36 months of confinement for the wire fraud and communicating a threat specifications..

the grade of E-1, and a reprimand. The convening authority took no action on Appellant's sentence.

Appellant raises four issues for our consideration: (1) whether the military judge violated Appellant's Fifth Amendment[4] and Sixth Amendment[5] rights by denying a defense request for an instruction that a guilty verdict required unanimity; (2) whether the wire fraud and attempted wire fraud convictions were legally and factually insufficient; (3) whether the wire fraud and attempted wire fraud convictions were preempted; and (4) whether Fifth Amendment equal protection guaranteed Appellant a unanimous verdict on the wire fraud and attempted wire fraud offenses.[6]

Appellant's first issue is raised in light of *Ramos v. Louisiana*, —— U.S. ——, 140 S. Ct. 1390 (2020). Prior to trial, the Defense filed a written motion requesting a unanimous verdict instruction, arguing such an instruction was required by the Fifth Amendment's Due Process Clause, the Sixth Amendment's right to a unanimous jury verdict, and the implicit equal protection guarantee in the Fifth Amendment. The Government opposed the motion. The military judge denied the motion in a written ruling and subsequently instructed the court members that a conviction resulted if three-fourths of the members (six of eight) voted to convict. *See* Article 52, UCMJ, 10 U.S.C. § 852. The military judge did not poll the court members on whether the findings verdict was unanimous. *See* R.C.M. 922(e) (prohibiting polling of

4. U.S. CONST. amend. V.

5. U.S. CONST. amend. VI.

6. Appellant personally raises issue (4) pursuant to *United States v. Grostefon*, 12 M.J. 431, 435 (C.M.A. 1982). We have reworded the issues slightly.

members about their deliberations and voting except in specific, limited circumstances).[7]

On appeal, Appellant raises similar constitutional arguments to the ones raised at trial. In Appellant's view, Ramos makes clear that the right to unanimous verdict is an essential aspect of the right to an impartial jury. Appellant cites *United States v. Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001), which applied the Sixth Amendment requirement that the "jury be impartial" to court-martial members' selection, conduct during proceedings, and deliberations.[8] Appellant connects *Ramos*, *Lambert*, and other precedents[9] together to argue the military judge's non-unanimous verdict instruction violated the Constitution.[10]

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7. Mil. R. Evid. 606(b) prohibits a court-martial member from testifying during an inquiry into the validity of a finding or sentence except for three limited circumstances, specifically, whether: (1) extraneous prejudicial information was improperly brought to the members' attention; (2) unlawful command influence or any other outside influence was improperly brought to bear on any member; or (3) a mistake was made in entering the finding or sentence on the respective forms.

8. The United States Court of Appeals for the Armed Forces did not address unanimity of verdicts in *Lambert*. At that time, Article 52, UCMJ, 10 U.S.C. § 852, required concurrence of two-thirds of the members for a finding of guilty in a non-capital court-martial. *See Manual for Courts-Martial, United States* (1995 ed.).

9. For example, "[a]s a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001) (citations omitted).

10. Appellant also proposes a narrower ground for requiring a unanimous verdict. According to Appellant, "at the Founding, [he] would only have been subject to trial [for these offenses] in a federal civilian court," if at all. We find this argument does not

The Government answers that the military judge did not err, the Sixth Amendment right to a jury trial does not apply to courts-martial, *Ramos* did not overturn that precedent, and that our court must strictly follow the decisions of higher courts. The Government reminds us that we should leave the role of overruling precedent to the higher court that published the precedent.

Amicus argues a non-unanimous verdict for a serious offense tried in a noncapital court-martial within the territorial limits of the United States violates the Sixth Amendment. According to *amicus*, when Congress statutorily provided for a non-unanimous verdict, it contravened "what the Constitution commands," namely, a unanimous verdict. Amicus also alleges a procedural error when the military judge's ruling assigned the burden of proof on the motion to Appellant, rather than the Government.

In issue (4), Appellant personally asserts that the unanimous verdict instruction was required for the wire fraud and attempted wire fraud offenses because Appellant was similarly situated to active duty military members prosecuted for those offenses in Article III courts. According to Appellant, the absence of a unanimous verdict requirement at his court-martial fails both a strict scrutiny and a rational basis of review.

We do not read *Ramos*, *Lambert*, and the other precedents in the same manner as Appellant. *Ramos* does not mention unanimity of verdicts in courts-martial. It did not analyze whether an impartial jury

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warrant further discussion or relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

and impartial court members are identical under the Constitution. *Lambert* described the right to impartial court-martial members in three specific areas: selection, conduct during proceedings, and conduct during deliberations. *Lambert* says nothing about unanimity of a finding of guilt by such members. Indeed, the United States Court of Appeals for the Armed Forces (CAAF) affirmed the findings of guilt in Lambert even though Article 52, UCMJ, at that time, permitted a conviction by two-thirds of the voting members. The cited precedent also does not address whether Congress may use non-unanimous verdicts under its authority "To make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. 1, § 8, cl. 14. As the United States Supreme Court has said, "[T]he Constitution contemplates that Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.'" *Weiss v. United States*, 510 U.S. 163, 177 (1994) (quoting *Chappell v. Wallace*, 462 U.S. 296, 301 (1983)). We find the military judge's ruling, which instructed the members consistent with the voting procedures in Article 52, UCMJ, was not error.

We considered the other arguments presented for issues (1) and (4); we find neither further discussion nor relief is warranted. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987); *see also Agostini v. Felton*, 521 U.S. 203, 237 (1997) (noting that lower courts should adhere to binding precedent and rely on superior courts to overrule their own precedents); *Whelchel v. McDonald*, 340 U.S. 122, 127 (1950) (noting the right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions); *United States v.*

Easton, 71 M.J. 168, 175 (C.A.A.F. 2012) (stating there is no Sixth Amendment right to trial by jury in courts-martial); *United States v. Anderson*, No. ACM 39969, 2022 WL 884314, 2022 CCA LEXIS 181 (A.F. Ct. Crim. App. 25 March 2022) (unpub. op.) (finding *Ramos* did not require unanimous court-martial verdicts).

After considering the remaining two issues, we find no error that materially prejudiced Appellant's substantial rights. We affirm the findings and sentence.[11,12]

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11. Appellant requested speedy appellate review on 21 December 2021. He repeated that request twice, in two motions to cite supplemental authority, dated 4 January 2022 and 21 March 2022. This opinion was released within 18 months of docketing, and we find Appellant received a timely, full, and fair review of his findings and sentence. *See, e.g.*, *United States v. Arriaga*, 70 M.J. 51, 55–56 (C.A.A.F. 2011).

12. In presentencing, the military judge admitted a record of nonjudicial punishment (NJP). *See* Article 15, UCMJ, 10 U.S.C. § 815; R.C.M. 1001(b)(2) (allowing personnel records to be introduced in sentencing under regulations of the Secretary concerned). Appellant received the NJP in December 2013 for a violation of Article 134, UCMJ, for conduct that was prejudicial to good order and discipline. Appellant received a suspended reduction in grade from Airman First Class (E-3) to Airman Basic (E-1) and a reprimand. After six months, the suspended punishment was remitted. NJP records may be admitted at a court-martial if "not over five years old on the date the charges were referred." Air Force Instruction 51-201, Administration of Military Justice, ¶ 12.26.2 (18 Jan. 2019). As referral was 30 March 2020, the admitted NJP was more than six years old. Trial defense counsel did not object, so we review for plain error. *See United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011). The military judge made a clear or obvious error in admitting the 2013 NJP. *See United States v. Lundby*, No. ACM S32500, 2019 WL 1777365 at *__, 2019 CCA LEXIS 181 at *10 (A.F. Ct. Crim. App. 23 Apr. 2019) (unpub. op.); *United States v. Edwards*, 39

I. BACKGROUND

Appellant's convictions for wire fraud and attempted wire fraud arose out of a scheme to trick three female enlisted Airmen at Hurlburt Field, Florida, into sending him nude digital photographs of themselves. Appellant knew the three women—AL, AW, and GMV—and their phone numbers. Appellant used this information to carry out his scheme.

In the scheme, Appellant would impersonate one of the three Airmen using a text messaging application or fake social media account. Appellant would state that the message was from a "new" phone number or account. Once contact was established, Appellant used information he knew to convince the targeted Airman that he was the other female Airman. In time, Appellant would claim the female Airman he was impersonating had been paid thousands of dollars to sell nude, lingerie, or similar photographs to a private subscription magazine. Appellant would then endeavor to convince the

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M.J. 528, 529 (A.F.C.M.R. 1994). Finding clear or obvious error, we test for prejudice by assessing whether the error substantially influenced the sentence. *See United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005). Other admitted sentencing exhibits from Appellant's personnel records included an NJP from January 2019 and an April 2019 vacation of suspended NJP. These two actions resulted in Appellant being reduced in grade from Senior Airman (E-4) to Airman First Class (E-3) in January 2019, and to Airman (E-2) in April 2019. Appellant did not raise this error or assert prejudice. Considering the convicted offenses before this court, the properly admitted evidence, and the 2019 NJP and vacation action offenses, we find the erroneous admission of the 2013 NJP did not substantially influence the military judge's adjudged sentence. Accordingly, Appellant is not entitled to relief.

targeted Airman to sign up and send nude photos so she too could be paid thousands of dollars.

On 1 February 2019, Appellant targeted AL.[13] He impersonated AW using a text messaging application and successfully convinced AL to send him digital photographs, some of which depicted her nude. AL forwarded Appellant photos she already had on her phone, but also took and forwarded new photos when she got home from work. Some of the photos depicted AL wearing parts of her military uniform. AL also provided her bank account and routing number at Appellant's request so she could be paid via electronic funds transfer. Appellant promised AL she would receive the funds "tonight" if she provided her full name, date of birth, and a nickname for the private magazine to use to identify her. AL provided the requested information. After receiving the nude photos and bank information, Appellant sent AL this message:

> Ok so let's cut to the chase. Nudes are illegal in the military, nudes in uniform are illegal .... F.Y.I. this is not [AW] [face with laughing tears emoji] so from now on you do what I say when I say it or you get exposed to the entire base. I'll even make a craigslist and tinder of your nudes. If you tell anyone you go down with me soo keep that in mind. Now take a deep breath and relax. You do what your told your pictures are safe ok. You talk to anyone about this and I hear about

13. By the time of Appellant's trial, AL had separated from the Air Force.

it your exposed. You ignore me your exposed. You block me your exposed.[14]

From that point, Appellant required that every text message that AL sent back would call him "daddy." When AL did not comply, Appellant stated that she owed him additional pictures.

After receiving the threat to expose her photos, AL contacted the real AW and alerted her to the scheme. AL also notified the local Air Force Office of Special Investigations (AFOSI) detachment and reported what had happened. AFOSI agents requested AL respond to new messages while the AFOSI attempted to identify who was sending her messages.

Appellant targeted AW a few days after AL. He sent AW text messages and impersonated AL, stating that AL had a new phone number. Appellant attempted to convince AW to provide nude photos to the private magazine and to disclose her bank account information. He did not succeed, as AW already knew about the scheme from AL. AW feigned interest in providing photos in an attempt to determine who was messaging her. AW and AL confirmed that the same phone number messaged each of them.

Also in early February 2019, Appellant targeted GMV.[15] He impersonated AL by sending GMV a direct message from a fake social media account that he had created and populated with photos of AL. Appellant convinced GMV to text him on a "new" phone number, the same number he used in the scheme with AL and

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14. Quoted messages include misspellings and punctuation errors that we have not corrected. We made appropriate modifications using brackets.

15. By the time of Appellant's trial, GMV had separated from the Air Force.

AW. Appellant attempted to convince GMV to send him nude photos for the private magazine. GMV, who was in Montana at the time, thought she was exchanging messages with the real AL. GMV shared private information in messages; however, she did not send any photos. The next day, GMV began to suspect that someone was impersonating AL. GMV called AL's boyfriend, who notified the AFOSI. Soon after, AFOSI agents conducted a phone interview of GMV and she explained to them what had happened.

About six weeks later, Appellant sent GMV a message from a different phone number, in which he threatened to expose her "secret." The "secret" was the private information GMV had shared. Appellant requested a "selfie cutie" or claimed he would tell "everyone." GMV responded "Haha, well expose away b[**]ch ain't nothing I'm hiding." Appellant responded, "well see about that."

Special Agent (SA) CC investigated the case for the AFOSI. SA CC determined that a North Carolina company leased the phone number that messaged AL, AW, and GMV. This company operated a downloadable texting application. According to SA CC, this texting application allowed a user to "choose any number you want or a number will be provided to you and that number will be different than your own number so the other person won't know who is texting you." SA CC obtained a warrant from a federal magistrate judge for the records held by the North Carolina company. This warrant resulted in the release of a series of Internet Protocol (IP) addresses used by the phone number. SA CC connected those IP addresses to an Internet service provider. SA CC subpoenaed records from the Internet service provider that showed one IP address was at Appellant's residence and another matched a location on Hurlburt

Field near Appellant's primary workplace. SA CC also subpoenaed records related to the fake social media account of AL and the email address used to create that account. The email address used AL's name, though misspelled.

In July 2019, AFOSI agents obtained search authorization for Appellant's electronic devices. AFOSI agents seized a cell phone and a tablet. An initial extraction of Appellant's phone conducted by the AFOSI revealed the photographs that AL sent on 1 February 2019.

SA CC forwarded Appellant's devices to the Department of Defense Cybercrime Center (DC3) for forensic analysis. Mr. BA, a digital forensics expert who testified at trial, examined Appellant's devices and their memory cards. Mr. BA testified that Appellant used an application on his phone that advertised the ability to password protect and hide photos and videos. Mr. BA also found a folder related to this application that contained AL's name, along with pictures of her. Additionally, the application utilized a "break-in alert feature," which took a photo if the wrong passcode was used to access the application. The DC3 examination showed one break-in alert from the application; the photo depicted Appellant.

Other forensic tools showed keywords associated with AL's name, the fake social media account of AL, and the email address associated with the fake social media account of AL. The phone number that messaged AL, AW, and GMV was also found along with its username, which was a misspelling of AL's name. Mr. BA also testified that Appellant's phone had an application installed that allowed simultaneous sign-ins to multiple accounts within one

application. On the tablet, Mr. BA found multiple different email accounts signed in at the same time.

In addition to the above evidence and testimony, Appellant's civilian supervisor testified. Both Appellant and his supervisor worked in a different squadron than AL, AW, and GMV. However, the supervisor explained that Appellant talked about AL and AW while at work "the way a guy would talk about having like a crush on a girl," and stated that Appellant "would go out of his way to see them ... if they were working."

The court members convicted Appellant of four offenses related to the scheme. These included: (1) wire fraud involving AL; (2) communicating a threat to injure the reputation of AL; (3) attempted wire fraud involving AW; and (4) attempted wire fraud involving GMV.

The court members also convicted Appellant of using marijuana. Two civilian witnesses testified that they saw Appellant smoking a blunt. One witness described the blunt as a cigar with the tobacco removed and replaced with marijuana.

II. DISCUSSION

A. Legal and Factual Sufficiency

1. Additional Background

Before us, Appellant challenges the evidence supporting his wire fraud and attempted wire fraud convictions.[16] He quotes recent precedent of the Supreme Court of the United States that "a property fraud conviction cannot stand when the loss to the

16. Appellant does not challenge the sufficiency of the evidence underlying his convictions for communicating a threat and wrongful use of marijuana.

victim is only an incidental byproduct of the scheme." *Kelly v. United States*, —— U.S. ——, 140 S. Ct. 1565, 1573 (2020). He asserts that the scheme was to obtain copies of photographs—not the original property itself—that could be used as "non-pecuniary leverage." He correctly notes that there was no evidence that Appellant sold the photos of AL that he obtained. Appellant also argues that theoretically depriving victims of reputational value is insufficient to support a wire fraud conviction.

The Government answers that the evidence was legally and factually sufficient. It argues that AL had an exclusive property right in her photos stored on her phone and that AL gave up that exclusive control solely due to Appellant's deceitful conduct. According to the Government, AL trusted the person to whom she sent the photos to act as an agent to sell the photos to the private magazine. Instead, Appellant's scheme resulted in him obtaining the photos of AL for his personal use.

Appellant replies that the Government's exclusive property theory is contingent on Appellant depriving AL of an "intangible right" and the specification required proof of a scheme to obtain property in the form of nude photos.[17] Appellant also argues that any

17. Appellant argues in his reply brief that because he was charged with devising a scheme to obtain nude photographs, and "not some unalleged intangible right intimately bound up in these photographs," he lacked fair notice of the "exclusive rights" theory—and that this violated his due process right to know "under what legal theory" he would be convicted. *See United States v. Tunstall*, 72 M.J. 191, 192 (C.A.A.F. 2013). Appellant also argues the Government forfeited the right to make the "exclusive rights" argument when trial counsel stated "[Appellant] has not deprived [AL] of the photos" during an argument on a defense motion pursuant to a R.C.M. 917, which

ambiguity in what "property" is covered by the wire fraud statute should be resolved in favor of lenity consistent with *Cleveland v. United States*, 531 U.S. 12, 25 (2000).

For the attempted wire fraud convictions, Appellant argues there was insufficient evidence that either AW or GMV "took, much less sent, Appellant a picture over which they possessed exclusive control." For preexisting photos that AW or GMV may have possessed, Appellant asserts that the Government failed to prove that they retained exclusive control over such photos and had not already distributed them to another.

For the reasons expressed below, we find Appellant's wire fraud and attempted wire fraud convictions both legally and factually sufficient.

2. Law

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citation omitted); *see also United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). "[I]n resolving questions of legal sufficiency, we

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the military judge denied. We find these arguments do not warrant further discussion or relief. *See Matias*, 25 M.J. at 361.

are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). As a result, the "standard for legal sufficiency involves a very low threshold to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal quotation marks and citation omitted).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are ourselves] convinced of the [appellant]'s guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Our review "involves a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt," and we "must make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399. "The term reasonable doubt does not mean that the evidence must be free from conflict." *United States v. LeBlanc*, 74 M.J. 650, 654 (A.F. Ct. Crim. App. 2015) (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)).

For the wire fraud specification involving AL, a violation of clause three of Article 134, UCMJ, based on the charge sheet, the Government had to prove beyond a reasonable doubt that: (1) at the time and place alleged, Appellant devised a scheme to defraud AL to obtain property by materially false and fraudulent pretenses and representations; to wit: impersonating AW to obtain nude photographs; (2) that Appellant acted with the intent to defraud; and (3) in advancing, furthering, or carrying out the scheme, Appellant transmitted any writing, signal, or

sound by means of a wire communication in interstate commerce in violation of 18 U.S.C. § 1343, an offense not capital. *See Manual for Courts-Martial, United States* (2019 ed.) (MCM), pt. IV, ¶ 91.b.(3); 18 U.S.C. § 1343.

The federal wire fraud statute reads, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1343.

"[M]ateriality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes." *Neder v. United States*, 527 U.S. 1, 25 (1999). "In general, a false statement is material if it has a 'natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed.'" *Id.* at 16 (alteration in original) (quoting *United States v. Gaudin*, 515 U.S. 506, 509 (1995)). "[T]he words 'to defraud' commonly refer 'to wronging one in [her] property rights by dishonest methods of schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching.'" *McNally v. United States*, 483 U.S. 350, 358 (1987) (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)). The mail

fraud statute "had its origin in the desire to protect individual property rights." *McNally*, 483 U.S. at 358 n.8. The federal wire fraud statute is the "lineal descendant" of the mail fraud statute. *Id.* at 374 (Stevens, J., dissenting) (citation omitted).

The federal fraud statutes are "limited in scope to the protection of property rights" and do not "set[ ] standards of disclosure and good government for local and state officials." *Kelly*, 140 S. Ct. at 1571 (quoting McNally, 483 U.S. at 360). Fraud that implicates a state government's role as a sovereign wielding traditional police power, rather than its role as property holder, does not constitute property fraud. *See Kelly*, 140 S. Ct. at 1572; *see also Cleveland*, 531 U.S. at 22–23. A "State's intangible rights of allocation, exclusion, and control [of video poker licenses]—its prerogatives over who should get a benefit and who should not—do not create a property interest." *Kelly*, 140 S. Ct at 1572 (internal quotation marks and citation omitted).

For the attempted wire fraud specifications involving AW and GMV, a violation of Article 80, UCMJ, the Government had to prove beyond a reasonable doubt that: (1) at the time and place alleged, Appellant did certain overt acts, inter alia contacting AW and GMV and attempting to deceive AW and GMV into sending nude photographs by impersonating AL; (2) that the acts were done with the specific intent to commit wire fraud; (3) that the acts amounted to more than mere preparation; and (4) that the acts apparently tended to effect the commission of the intended offense except that AW and GMV did not send nude photographs to Appellant which prevented completion of the offense. *See* MCM, pt. IV, ¶ 4.b. "A person who purposely engages in conduct which would constitute the offense if the

attendant circumstances were as that person believed them to be is guilty of an attempt." MCM, pt. IV, ¶ 4.c.(3) "For example ... a person who reaches into the pocket of another with the intent to steal that person's billfold is guilty of an attempt to commit larceny, even though the pocket is empty." *Id.*

For the attempt offenses, the underlying wire fraud offense that Appellant must have had the specific intent to commit is similar to the wire fraud offense involving AL. The only significant differences are the names of the victims and the name whom Appellant impersonated.

3. Analysis

a. Wire Fraud – AL

A reasonable factfinder viewing the evidence in the light most favorable to the Prosecution could have determined all the essential elements of the wire fraud offense were proven beyond a reasonable doubt. The Government presented overwhelming evidence of Appellant's scheme to defraud AL by impersonating AW in order to obtain nude photographs of AL. Appellant used a text messaging application, which used the Internet, implicating wire communications. There was sufficient evidence that his messages moved in interstate commerce between at least Florida and North Carolina. The only significant question is whether the photos AL sent to Appellant were "property" under the wire fraud statute. A reasonable factfinder could have determined they were.

Appellant argues that AL only lost a copy of her photos. This is true in one sense; AL obviously still had access to the original digital photos. However, copy or original, Appellant obtained AL's property in the form of nude photos from his scheme. Simply

because AL retained the original digital photos does not mean that AL's property loss was only an "incidental byproduct of the scheme." *See Kelly*, 140 S. Ct. at 1573. AL lost the property right to control the distribution of her nude photos. AL relinquished this property right because Appellant convincingly impersonated AW, falsely represented that the magazine paid AW, and induced a belief in AL that she would be paid thousands of dollars in a direct deposit that night. Finally, Kelly states the "property must play more than some bit part in a scheme: It must be an object of the fraud." *Id.* (citations omitted). A reasonable factfinder could have determined that AL's photos were the object of the fraud. Appellant stored the pictures of AL on his phone using an application that hid them. Appellant's civilian supervisor testified that Appellant showed a "deep infatuation" for AL, which provides additional support that the object of his scheme was to obtain nude photographs of AL. Later, when Appellant thought AL did not answer his messages properly by calling him "daddy," he told her she owed him one thing—more photos. A reasonable factfinder could conclude that the scheme was to obtain AL's nude photos, which were property, and the photos were the object of the fraud, not merely some intangible non-property right.

Wire fraud convictions have been affirmed in the federal courts for intangible property. *See, e.g.*, *Carpenter v. United States*, 484 U.S. 19, 26–27 (1987) (stating "[c]onfidential business information has long been recognized as property" and "exclusivity is an important aspect of confidential business information and most private property"); *United States v. Percoco*, 13 F.4th 158, 170 (2d Cir. 2021) (endorsing a right to control theory of wire fraud because "a defining feature of most property is the right to control the

asset in question"); *United States v. Hager*, 879 F.3d 550, 554 (5th Cir. 2018) (determining that exclusive use of proprietary, in-house software qualified as confidential business information, creating a property right that was protected by mail and wire fraud statutes). As the United States Court of Appeals for the Eleventh Circuit stated, "*McNally* and *Carpenter* teach that the mail and wire fraud statutes do not protect against fraudulent schemes involving intangible, non-property, non-monetary rights." *United States v. Belt*, 868 F.2d 1208, 1212–13 (11th Cir. 1989). The court in *Belt* found that wire fraud involving confidential bid information was sufficient to support a conviction. *Id.* at 1209–10. In doing so, the court "acknowledge[d] that convictions which rest solely on an intangible non-property rights theory should be vacated." *Id.* at 1213 (citations omitted).

The parties have not cited a federal case with a wire fraud scheme factually identical to Appellant's.[18] While our court has affirmed convictions under clause three of Article 134, UCMJ, incorporating the federal wire fraud statute, those cases also did not involve a scheme like this one.[19] Therefore, Appellant's challenges appear to raise an issue of first impression.

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18. Appellant cites *United States v. Condolon*, 600 F.2d 7 (4th Cir. 1979). In *Condolon*, the appellant created a bogus talent agency to meet and seduce women in a scheme to gratify his sexual desires. *Id.* at 8. *Condolon* does not appear to involve a scheme with a property interest of nude photographs.

19. *See e.g.*, *United States v. Walton*, No. ACM 40004, 2022 WL 594151, 2022 CCA LEXIS 133 (A.F. Ct. Crim. App. 28 Feb. 2022) (unpub. op.) (involving a scheme to defraud using wrongfully accessed social security numbers); *United States v. Gay*, 74 M.J. 736 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016) (involving a scheme by the appellant to defraud

While the above federal cases involved intangible property of a business, we see no reason for a different result when the intangible property belongs to an individual, like AL.[20] The mail fraud statute, from which the wire fraud statute originated, "had its origin in the desire to protect individual property rights." *See McNally*, 483 U.S. at 358 n.8. We also agree with the United States Court of Appeals for the Second Circuit that a defining feature of most property is the right to control the asset. *Percoco*, 13 F.4th at 170. As the companies in *Belt* and *Hager* suffered a loss of control of their confidential bid information and proprietary software, AL suffered a loss of control of her private nude photos. We distinguish this case from the set-aside convictions in *Kelly* or *Cleveland*.[21] No state or federal sovereign acts were involved in the property rights in this case. This case involved AL's individual property right to control her nude, private photos, which she lost when she

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by using victim's personal information to open credit cards in victim's name).

20. Moreover, to the extent the above cases discuss the potential economic value of the intangible property at issue, Appellant's messages to AL, AW, and GMV included a promise of an economic value of "thousands" of dollars for the photos.

21. *See also Blaszczak v. United States*, —— U.S. ——, 141 S. Ct. 1040 (2021); *Olan v. United States*, —— U.S. ——, 141 S. Ct. 1040 (2021). The Supreme Court vacated and remanded both cases to the United States Court of Appeals for the Second Circuit in light of *Kelly*. These cases involved "misappropriating confidential nonpublic information from the Centers for Medicare & Medicaid Services [(CMS)]." *United States v. Blaszczak*, 947 F.3d. 19, 26 (2d Cir. 2019), *vacated*, — U.S. —, 141 S. Ct. 1040 (2021). CMS employees disclosed the agency's confidential information to a "political intelligence" consultant who tipped the information to employees of a healthcare focused hedge fund. *Id*.

succumbed to Appellant's scheme to defraud. We need not determine whether AL's property right also required her to have and then relinquish "exclusive" control. The specification did not allege that fact and we find the property interest sufficient without the "exclusive" label. We conclude the Government was not required to prove exclusivity as an essential element of this wire fraud conviction.[22]

Drawing every reasonable inference from the evidence of record in favor of the Government, we conclude the evidence was legally sufficient to support Appellant's conviction for wire fraud beyond a reasonable doubt. Additionally, having weighed the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt.

b. Attempted Wire Fraud – AW and GMV

Appellant argues there is insufficient evidence that AW or GMV took or sent him photos over which they possessed exclusive control, and therefore his convictions for attempted wire fraud cannot stand. We disagree and find a reasonable factfinder could conclude that the Government proved the essential elements of both specifications of attempted wire fraud.

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22. We do not decide the question of whether depriving a victim of "reputational value" is a property interest under the federal wire fraud statute. However, we note that Appellant was convicted of communicating a threat to injure AL's reputation under Article 115, UCMJ, 10 U.S.C. § 915. That statute reads, "Any person subject to this chapter who wrongfully communicates a threat to injure the person, *property, or reputation* of another shall be punished as a court-martial may direct." (Emphasis added).

There was overwhelming evidence that Appellant committed overt acts in an attempt to devise a scheme where AW and GMV would send him nude photos. A reasonable factfinder could have concluded that Appellant's impersonation of AL over a texting application and a fake social media account, and his promises to AW and GMV that they would be paid money, were overt acts designed to deceive AW and GMV into sending him nude photographs. Similarly, there was reliable evidence in the messages and the witness testimony that showed Appellant's specific intent to commit the offense of wire fraud. A reasonable factfinder could have concluded the acts amounted to more than mere preparation and would have tended to bring about the commission of the offense of wire fraud.

We find Appellant's challenge that there was insufficient evidence of preexisting nude photos misplaced. This is not an element of the charged attempted wire fraud offenses. As the example in the MCM provides, a would-be thief who believes a person has a wallet in their pocket and tries to steal it, but finds the person's pocket empty, has committed attempted larceny. It does not matter where the person's wallet actually is located. It does not matter whether the person owns a wallet. What matters is that the would-be thief believes the attendant circumstances to be that the person has a wallet in that pocket available for the would-be thief to steal. In this case, it does not matter whether AW and GMV had nude photos already taken and available to send to him as he impersonated AL. What matters is whether there was legally sufficient evidence that Appellant believed those attendant circumstances at the time of the charged offense. Viewing the evidence in the light most favorable to the Prosecution, a

reasonable factfinder could have determined Appellant had the requisite specific intent to commit wire fraud.

Appellant knew AW. He flirted with her, complimented her appearance, and went out of his way to visit her workplace. Appellant's civilian supervisor agreed Appellant could be reasonably described as having a "deep infatuation" with AW. In the messages, Appellant asked AW personal questions and shared some of the photos of AL he received from his earlier, successful scheme. AW already knew about the scheme from AL, but AW messaged Appellant that she was thinking about providing photos in an attempt to see if more information could be provided to the AFOSI. Considering the evidence presented at trial, a reasonable factfinder could have found Appellant had the requisite specific intent for the attempted wire fraud offense involving AW.

Appellant also knew GMV. Impersonating AL, Appellant reached out to GMV on a social media application that GMV described as a place where "you can post pictures" and "like each other's pictures or message each other." Appellant told GMV that AL received money from the private magazine and AW "signed up." GMV knew AW. Furthermore, GMV shared private information with Appellant, believing he was the real AL, and Appellant sent GMV the nude photos of AL as he tried to convince GMV to sign up and send him photos. GMV asked questions including why AL's face was depicted in her photos because GMV "didn't know ... that the face was going to be in the picture." While the evidence did not show that Appellant had the same infatuation with GMV that he did with AL and AW, he certainly knew that his scheme to impersonate AL was working based on the private information that GMV shared with him. Given

the nature and extent of the messages Appellant exchanged with GMV and the testimony of the witnesses, a reasonable factfinder could have concluded Appellant had the requisite specific intent to commit wire fraud by obtaining nude photos of GMV.

Turning to Appellant's "exclusive" control argument for the attempts, we find it unavailing for the same reasons we articulated for the wire fraud offense involving AL. The attempted wire fraud specifications did not allege the words "exclusive control" or imply that it was an essential element the Government had to prove beyond a reasonable doubt.

Drawing every reasonable inference from the evidence of record in favor of the Government, we conclude the evidence was legally sufficient to support Appellant's convictions for attempted wire fraud involving AW and GMV beyond a reasonable doubt. Additionally, having weighed the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt.

B. Preemption

Appellant argues that the wire fraud and attempted wire fraud specifications were preempted by Articles 106 and 121, UCMJ, 10 U.S.C. §§ 906, 921.[23] The Government argues that the UCMJ does

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23. Appellant raises this assignment of error "in the alternative" to his other assignments of error. We do not find Appellant's characterization of alternative assignments of error useful in this case and we see nothing in Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals which permits raising assignments of error in the alternative. Additionally, we note that Appellant did not list Article 106,

not have a punitive article for wire fraud or a closely related offense.[24] It also argues Congress did not intend to occupy the field of fraud through Article 121, UCMJ, and that wire fraud does not consist of a residuum of the elements of larceny.

We conclude that Articles 106 and 121, UCMJ, did not preempt Appellant's wire fraud and attempted wire fraud convictions under Article 134, clause three, and Article 80, UCMJ.

1. Law

This court reviews questions of preemption de novo. *United States v. Benitez*, 65 M.J. 827, 828 (A.F. Ct. Crim. App. 2007) (citations omitted). "The 'preemption doctrine' limits the general article's expansive scope, prohibiting 'application of Article 134 to conduct covered by Article 80 through 132.'" *United States v. Avery*, 79 M.J. 363, 366 (C.A.A.F. 2020) (quoting *Manual for Courts-Martial, United States* (2012 ed.), pt. IV, ¶ 60.c.(5)(a)); see also MCM, pt. IV, ¶ 91.c.(5)(a).

In *United States v. Kick*, our superior court's predecessor, the United States Court of Military Appeals, defined the preemption doctrine as the

> legal concept that where Congress has occupied the field of a given type of misconduct by addressing it in one of the specific punitive

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UCMJ, 10 U.S.C. § 906, in this assignment of error, though he extensively cites it and analyzes it in his brief. We assume the failure to mention Article 106, UCMJ, in this assignment of error was an oversight.

24. The Government does not specifically address preemption under Article 106, UCMJ, in its answer. We will review whether the preemption doctrine applies under either UCMJ article.

> articles of the code, another offense may not be created and punished under Article 134, UCMJ, by simply deleting a vital element. However, simply because the offense charged under Article 134, UCMJ, embraces all but one element of an offense under another article does not trigger operation of the preemption doctrine. In addition, it must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way.

7 M.J. 82, 85 (C.M.A. 1979) (citations omitted); *see also United States v. Erickson*, 61 M.J. 230, 233 (C.A.A.F. 2005).

Accordingly, the preemption doctrine only precludes prosecution under Article 134, UCMJ, where two elements are met: "(1) 'Congress intended to limit prosecution for ... a particular area' of misconduct 'to offenses defined in specific articles of the Code,' and (2) 'the offense charged is composed of a residuum of elements of a specific offense.'" *United States v. Curry*, 35 M.J. 359, 360–61 (C.M.A. 1992) (omission in original) (quoting *United States v. McGuinness*, 35 M.J. 149, 151–52 (C.M.A. 1992)); *see also United States v. Wright*, 5 M.J. 106, 110–11 (C.M.A. 1978). We will "only find a congressional intent to preempt in the context of Article 134, UCMJ, where Congress has indicated 'through direct legislative language or express legislative history that particular actions or facts are limited to the express language of an enumerated article.'" *Avery*, 79 M.J. at 366 (quoting *United States v. Anderson*, 68 M.J. 378, 387 (C.A.A.F. 2010)).

"Article 134, UCMJ, expressly permits charging military members for 'crimes and offenses not capital' that are 'not specifically mentioned' in the UCMJ, and which include, inter alia, 'crimes and offenses

prohibited by the United States Code.'" *United States v. Wheeler*, 77 M.J. 289, 291 (C.A.A.F. 2018) (quoting 10 U.S.C. § 934; *Manual for Courts-Martial, United States* (2012 ed.), pt. IV, ¶ 60.c.(4)); see also MCM, pt. IV, ¶ 91.c.(4). It is "indeed permissible to incorporate violations of noncapital federal crimes through clause three of Article 134, UCMJ." *Wheeler*, 77 M.J. at 293. It is permissible for the Government to incorporate "a specific federal statute aimed with precision at a particular type of intentional conduct with its own evidentiary burden." *Id*. (citing *Curry*, 35 M.J. at 361). However, the Government may not turn "to a hypothetical federal noncapital crime that lessened its evidentiary burden at trial by circumventing the mens rea element or removing a specific vital element from an enumerated UCMJ offense." *Id*.

The elements of an Article 106, UCMJ, 10 U.S.C. § 906, impersonation offense involving intent to defraud are: (1) that the accused impersonated an officer, noncommissioned officer, or petty officer, or an agent of superior authority of one of the armed forces, or an official of a certain government, in a certain manner; (2) that the impersonation was wrongful and willful; and (3) that the accused did so with the intent to defraud a certain person or organization in a certain manner. MCM, pt. IV, ¶ 39.b. The maximum punishment for this offense is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for three years. MCM, pt. IV, ¶ 39.d.(1).

The elements of an Article 121, UCMJ, larceny by obtaining offense are: (1) that the accused wrongfully obtained certain property from the possession of the owner or of any other person; (2) that the property belonged to a certain person; (3) that the property was of a certain value, or of some value; and (4) that the obtaining by the accused was with the intent to

permanently deprive or defraud another person of the use and benefit of the property or permanently to appropriate the property for the use of the accused or for any person other than the owner. MCM, pt. IV, ¶ 64.b.(1). The maximum punishment for larceny of property of a value of $1,000.00 or less is a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for one year. MCM, pt. IV, ¶ 64.d.(1)(a). If the property is non-military and of a value of more than $1,000.00, the maximum punishment is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years. MCM, pt. IV, ¶ 64.d.(1)(c).

As described above, the maximum confinement term for wire fraud under 18 U.S.C. § 1343 is 20 years.

2. Analysis

a. Article 106, UCMJ

The first step in the preemption analysis is to determine whether Congress intended to limit prosecution for all impersonation offenses involving intent to defraud to Article 106, UCMJ. This requires assessing the "direct legislative language or express legislative history" of Article 106, UCMJ. *See Avery*, 79 M.J. at 366.[25] As Appellant has not cited any express legislative history, we will focus on the direct legislative language.

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25. "American military law has criminalized 'impersonating an officer' via the 'General Article' since the 1775 Articles of War." REPORT OF THE MILITARY JUSTICE REVIEW GROUP 789 (22 Dec. 2015) (citation omitted), https://ogc.osd.mil/Portals/99/report_part1.pdf. Effective 1 January 2019, Congress implemented the Military Justice Review Group's recommendation to "migrate" the enumerated Article 134 offense to a punitive article, Article 106, UCMJ. *See id.* at 790.

Appellant argues that impersonation offenses with an intent to defraud exclude impersonation of those enlisted members below the grade of a noncommissioned officer. We agree with this general sentiment. We find support in both the plain language of Article 106, UCMJ, and the enumerated Article 134 offense that criminalized this conduct prior to 1 January 2019. *See Manual for Courts-Martial, United States* (2016 ed.), pt. IV, ¶ 86. Additionally, at the time of Appellant's offenses, neither AL nor AW were noncommissioned officers in the United States Air Force (E-5 or above).

However, the specifications in this case are not mere impersonation offenses. This is not a case where the Government charged Appellant with a novel Article 134 offense and removed the noncommissioned officer element. Instead, the Government charged wire fraud and attempted wire fraud, where the impersonation was just part of the scheme to defraud. We see no evidence that Congress, through direct legislative language or express legislative history, intended to legislate Article 106, UCMJ, to criminalize wire fraud schemes that involve impersonation as a part of the broader scheme.

Turning to the second step in the preemption analysis, we find the charged wire fraud and attempted wire fraud offenses do not compose a residuum of elements of Article 106, UCMJ. First, the charged offenses required use of a wire communication, an essential element. Second, the wire fraud offense required Appellant to "devise a scheme" and the attempted wire fraud offenses required him to commit acts "with the specific intent to commit wire fraud." There is no requirement for the Government to prove a "scheme" or "specific intent to commit wire fraud," under Article 106, UCMJ.

We conclude that it was permissible for the Government to incorporate 18 U.S.C. § 1343, "a specific federal statute aimed with precision at a particular type of intentional conduct"—wire fraud—"with its own evidentiary burden"—use of the wire communications and a scheme to defraud. *See Wheeler*, 77 M.J. at 293. We observe no lowering of the required mens rea by the Government's use of the wire fraud statute; both charged offenses and Article 106, UCMJ, required proof beyond a reasonable doubt of a specific intent to defraud. Therefore, Appellant's Article 106, UCMJ, preemption claim must fail.

b. Article 121, UCMJ

Appellant cites two decisions of the Court of Military Appeals to argue that Congress intended to limit prosecutions for wrongfully obtaining property using false pretenses to Article 121, UCMJ. The first decision stated, "An examination of the legislative history of Article 121 discloses that it was the clear intent of Congress to create the single offense of 'larceny,' and to abolish the technical distinctions theretofore existing among the crimes of larceny, embezzlement, and taking under false pretenses." *United States v. Antonelli*, 35 M.J. 122, 125 (C.M.A. 1992). The second—and earlier—decision stated, "We are persuaded, as apparently the drafters of the Manual were, that Congress has, in Article 121, covered the entire field of criminal conversion for military law." *United States v. Norris*, 8 C.M.R. 36, 39 (C.M.A. 1953).

The Government answers with two points: (1) wire fraud is not a crime of conversion but one that focuses on the scheme and the use of wire communications; and (2) even if Congress originally intended to consolidate all "criminal conversion offenses," the substantial revisions in 2016 show it abandoned that

approach. On its second point, the Government notes that (1) Article 121a, UCMJ, 10 U.S.C. § 921a, criminalizes the fraudulent use of credit cards and debit cards; (2) Article 121b, UCMJ, 10 U.S.C. § 921b, criminalizes the obtaining of services through fraud; and (3) Article 124, UCMJ, 10 U.S.C. § 924, criminalizes frauds against the United States. The Government also argues that wire fraud does not consist of a residuum of the elements of larceny.

The first step in our preemption analysis is to determine whether Congress intended to limit prosecution for a particular area of misconduct to offenses defined in specific articles of the UCMJ. As we see it, the particular area of misconduct in this case was the scheme to defraud through wire communications to obtain property. We observe no "direct legislative language or express legislative history," *see Avery*, 79 M.J. at 366, in the current version of Article 121, UCMJ, to conclude that Congress intended to limit wire fraud offenses to prosecutions under the larceny punitive article.

We acknowledge the statements in Antonelli and Norris regarding the legislative history of Article 121, UCMJ. However, neither case involved preemption or the federal wire fraud statute.[26] We are not persuaded that Congress intended to limit prosecution for obtaining property via a scheme to defraud over a wire communication to Article 121, UCMJ.

Moving to the second step in the preemption analysis, the charged wire fraud and attempted wire

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26. The offense of stealing mail was an enumerated Article 134, UCMJ, offense until 1 January 2019, when it became an offense under Article 109a, UCMJ, 10 U.S.C. § 909a. *See* MCM, pt. IV, ¶ 46; *Manual for Courts-Martial, United States* (2016 ed.), pt. IV, ¶ 93.

fraud offenses do not compose a residuum of elements of Article 121, UCMJ. Under Article 121, UCMJ, there is no requirement for the Government to prove use of wire communication, a "devise a scheme" element, or a "specific intent to commit wire fraud" element. Additionally, we observe no lowering of the required mens rea by the Government's use of the wire fraud statute. The charged offenses and Article 121, UCMJ, both required proof beyond a reasonable doubt of a specific intent to defraud.

We also note that the United States Navy-Marine Corps Court of Criminal Appeals rejected the argument that the federal bank fraud statute, 18 U.S.C. § 1344, was preempted by Article 121, UCMJ. *See United States v. Tenney*, 60 M.J. 838 (N.M. Ct. Crim. App. 2005). Our sister service court determined inter alia that the bank fraud statute required the Government to prove an additional element—that the appellant defrauded a financial institution—and this showed there was not a residuum of the elements of larceny. *Id*. at 843.

For these reasons, Appellant's Article 121, UCMJ, preemption claim fails. It was permissible for the Government to incorporate 18 U.S.C. § 1343, "a specific federal statute aimed with precision at a particular type of intentional conduct with its own evidentiary burden." *See Wheeler*, 77 M.J. at 293.

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d).

Accordingly, the findings and sentence are **AFFIRMED**.[27]

Senior Judge LEWIS delivered the opinion of the court, in which Senior Judge POSCH and Judge ANNEXSTAD joined.

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27. The certified transcript omits one Article 39(a), UCMJ, 10 U.S.C. § 839(a), session conducted on 12 August 2020. The audio recording of this session is contained in the original record of trial. At this less-than-five-minute session, the military judge discussed instructions and a government request for judicial notice. The Government's error in omitting the transcript for appellate review does not render the record of trial incomplete. *See* R.C.M. 1112(b)(1) and (d)(2). Additionally, we note that two audio recording files of the proceedings were not playable, though the certified transcript includes those proceedings. Appellant has not requested correction of the record of trial or claimed material prejudice. We find correction of the record unnecessary. We find no prejudice because we were able to perform our Article 66, UCMJ, 10 U.S.C. § 866, duties using a combination of the playable audio recordings and the certified transcript.

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
WASHINGTON, D.C.

United States,
Appellee

v.

Roberto Aikanoff, Jr.,
Appellant

USCA Dkt. No. 22-0258/AR
Crim. App. No. 20200423

ORDER

On further consideration of the granted issue, 83 M.J. 65 (C.A.A.F. 2022), and in view of *United States v. Anderson*, 83 M.J. __ (C.A.A.F. 2023), it is, by the Court, this 18th day of July, 2023,

ORDERED:

That the decision of the United States Army Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ David A. Anderson
Deputy Clerk of the Court

U.S. ARMY COURT OF CRIMINAL APPEALS

UNITED STATES
Appellee

v.

Sergeant First Class Roberto **AIKANOFF**, Jr.,
United States Army, Appellant

ARMY 20200423

15 June 2022

Headquarters, Fort Drum, Grady J. Leupold, Military Judge, Lieutenant Colonel Travis W. Elms, Acting Staff Judge Advocate

For Appellant: Captain Andrew R. Britt, JA; Jonathan W. Crisp, Esquire (on brief); Jonathan W. Crisp, Esquire (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Mark T. Robinson, JA; Captain Cynthia A. Hunter, JA (on brief).

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

MEMORANDUM OPINION

ARGUELLES, Judge:

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of seven specifications of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice, 10 U.S.C. § 920b (2019) [UCMJ]. The panel found appellant not guilty of four specifications of rape

1. Judge Arguelles decided this case while on active duty.

of a child, two specifications of sexual abuse of a child, and four specifications of attempted rape of a child, in violation of Articles 120b and 80, UCMJ. The panel sentenced appellant to a dishonorable discharge, confinement for twenty years, forfeiture of all pay and allowances, and reduction to the grade of E-1, all of which were approved by the convening authority.

This case is now before us for review under Article 66, UCMJ. Appellant raises four assignments of error, two of which merit discussion but no relief.[2]

BACKGROUND

Appellant married the victim's mother in 2012 and subsequently adopted the victim and her older sister. Appellant and the victim's mother also had one daughter together, who was an infant at the time of the incidents in question. In December of 2016, the family moved to Fort Drum, and on two separate occasions in December of 2017 and October of 2018, appellant's sister moved into the residence with her three children. During the period when appellant's sister and her children were living with the family, the victim shared a room with one of her sisters.

The victim testified that appellant first started to sexually abuse her when his sister and her kids first moved in with the family in December of 2017. At that time, the victim was [redacted] or [redacted]-years-old and in the fourth grade. The victim testified that on several occasions appellant got into bed with her in the morning while she was still asleep and touched

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2. We have also given full and fair consideration to appellant's other assigned errors, as well as the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit.

her buttocks, vagina, and chest. The victim also described how appellant made her touch his penis. After appellant's sister moved out in February of 2018, and the victim got her own room back, and appellant continued to climb into bed with her. Appellant started doing "new things," to include pulling down her underwear and shorts in order to place his penis in her buttocks, and touching her vagina with his hands. The victim also testified that appellant inserted his fingers into her vagina and unsuccessfully tried to place his penis in vagina, and "would make [her] still grab him and touch him, but he would make [her] move [her] hand on his [private area] like an up and down motion."

The abuse stopped when appellant's sister and her children returned to the residence in October of 2018, but started up again in January of 2019 when they moved out. The victim testified that after she moved back into her own room for the second time, the sexual abuse resumed with "mainly just the touching" on her chest, her private area, and her buttocks, and escalated to appellant putting his finger in her vagina and putting his penis on her buttocks in a "faster and harder" manner.

In June of 2019, the victim confronted appellant via text message, asking him "I still want to know why you did what you did." Appellant responded, "I told you I was being dumb. So I'm sorry. Like I said it'll never happen again. I promise you that." In response to the victim's subsequent text "I still don't know if i should tell mom or not," appellant responded that "[telling will] be a very bad," and that "I will lose you, your sisters, my life, my job, everything ... I am changing and acting different with all of you." The evidence at trial established that appellant deleted this particular portion of the text message string from

his iPhone, although it still existed on his Apple Watch.

When asked at trial about the text message exchange, appellant testified that it was pertaining to a "wedgie" that he had given the victim earlier that morning. Appellant's wife, however, testified that he gave the girls wedgies all the time, and laughed as she said that she would never report appellant over a wedgie. Appellant admitted deleting the exchange on his phone, but claimed that he was just deleting old texts in order to save space. Notably, however, there were multiple messages sent both before and after that were not deleted, and even as it pertained to this text string, appellant only deleted that specific portion in which he implored the victim not to say anything to her mother.

Although he testified at trial that he only sat on the victim's bed for five to seven seconds each morning before he left to say goodbye, in his initial interview with U.S. Army Criminal Investigation Command (CID) agents, appellant described how he got in bed with her for five to ten minutes every morning. Appellant also told CID that sometimes when he got into bed with the victim he had an erection, which he referred to as "morning wood."

At trial, the government also called several of the victim's teachers, who testified that during the relevant time period they noticed a marked change in the victim's demeanor, and observed that she had started wearing more baggy clothes. Likewise, several of the victim's friends testified that over the course of the year her personality changed from outgoing and happy to withdrawn.

The victim also testified that she felt a liquid coming from appellant's body every time he came into

her room after February of 2018. Although the victim's mother testified that she did not wash the sheets very often, there were no traces of semen evidence found on any of the victim's bedding.

LAW AND DISCUSSION

A. Appellant's Motion for Mistrial after the Military Judge's Substitution of a Panel Member

1. Additional Facts

Shortly after the government examined its last witness, one of the panel members fell ill and required immediate medical attention. After determining that the panel member would not be able to continue, and with the consent of both the government and the defense, the military judge excused the ill panel member for good cause under Rule for Courts-Martial (R.C.M.) 505(f).

As the excusal dropped the panel below the mandated one-third enlisted representation, defense counsel moved for a mistrial. Following extensive argument by the parties, the military judge denied the motion for mistrial and instead proceeded to impanel a new member detailed by the convening authority following the procedures set forth in Article 29, UCMJ, and R.C.M. 505, 805, and 912B.

Among other things, the military judge instructed the new member that he would recall any witnesses the member wished to question after hearing their testimony. Over the course of the next two days, and in the presence of the military judge, appellant and all counsel, the court reporter played the audio of the prior proceedings, and the new member viewed all of

the previously admitted exhibits.[3] After hearing the testimony of all of the government witnesses, the new member indicated that he had questions for the victim's mother and older sister, whom the military judge recalled for that purpose. After the military judge asked those questions in the presence of all the panel members, trial on the merits continued with the defense case.

Appellant now argues that because the new panel member was not able to observe the government witnesses as they testified, especially the victim, the military judge erred in denying his motion for a mistrial. Appellant does not directly address or raise a facial constitutional challenge to the statutory mechanisms that allow for the impaneling of a new member in the middle of trial. Given his focus on the Confrontation Clause, and his characterization of the trial as a "quintessential 'he said, she said' case involving alleged sexual abuse," we understand this assignment of error to be an "as applied" challenge to the constitutionality of Article 29, UCMJ, and the relevant Rules for Courts-Martial. As we discuss below, this claim is without merit.

2. Analysis

In pertinent part, R.C.M. 912B states that if a panel member is excused, there are no alternate members, and the number of enlisted members is reduced below one-third of the panel, "the court-martial may not proceed until the convening authority details sufficient additional new members." Likewise, R.C.M. 505(c)(2)(B) provides that if a member of the

3. It is not clear from the record whether the new member also listened to the prior Article 39(a), UCMJ, sessions. Given that neither counsel objected during the playing of testimony, we need not address this issue.

panel is excused for good cause, a new member may be detailed if the number of enlisted members is reduced below one-third of the total membership.

Once the new member is impaneled in the middle of the trial, R.C.M. 805(d) mandates that "trial may not proceed unless the testimony and evidence previously admitted on the merits, if recorded verbatim, is read to or played for the new member in the presence of the military judge, the accused, and counsel for both sides...." Along the same lines, Article 29(f), UCMJ, provides that if new members are impaneled after the commencement of the trial, "the trial may proceed with the new members present after the evidence previously introduced is read or, in the case of audiotape, videotape, or similar recording, is played, in the presence of the new members, the military judge, the accused, and counsel for both sides."

As described above, appellant now asserts that the military judge erred in seating the new member, and instead should have declared a mistrial following the stipulated excusal of the original panel member for good cause. The Court of Appeals for the Armed Forces (CAAF), however, has repeatedly emphasized that a mistrial is "an unusual and disfavored remedy," to be used only as a "last resort to protect the guarantee for a fair trial." *See, e.g., United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003) (citing *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993)). Accordingly, we will not reverse a military judge's ruling on a mistrial "absent clear evidence of an abuse of discretion." *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009) (citation omitted).

For the most part, appellant either ignores or gives short shrift to both the applicable rules and the seminal CAAF case on point, *United States v.*

Vazquez, 72 M.J. 13 (C.A.A.F. 2013), choosing instead to focus more broadly on the Confrontation Clause. While appellant is correct that one function of the Confrontation Clause is to ensure that "the finders of fact evaluate the demeanor of the witnesses," *United States v. Anderson*, 51 M.J. 145, 149 (C.A.A.F. 1999), the Supreme Court has also consistently held that the rights expressed in the Confrontation Clause are not absolute. *See, e.g. Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (holding the confrontation clause does not guarantee "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish"); *Cf. United States v. Beauge*, 82 M.J. 157, No. 21-0183, 2022 WL 627411 at *——, 2022 CAAF LEXIS 181 at *22-23 (C.A.A.F. 3 Mar. 2022) ("[O]nly rules which infringe upon a weighty interest of the accused *and* are arbitrary or disproportionate to the purposes they are designed to serve will be held the violate the right to present a complete defense.") (citing *Holmes v. South Carolina*, 547 U.S. 319, 324-25 (2006) (emphasis in original) (internal quotation marks and alterations omitted)). Moreover, there is no dispute that appellant, through counsel, was able to thoroughly cross-examine each and every witness who testified against him. *See Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) ("The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination*.") (citing 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940)) (emphasis in original).

As noted above, the CAAF addressed a similar situation in *Vazquez*, another child sexual abuse case. In that case, after five of the six government witnesses (including the victim) testified, the dismissal of one of the panel members left the panel below the minimum

required quorum. 72 M.J. at 15. After two new members were impaneled, the military judge had counsel read the transcripts of the testimony to them outside the presence of the other members. *Id*. at 16. Unlike defense counsel in the case at bar, however, defense counsel in *Vasquez* did not object to the seating of new members, and did not move for a mistrial. *Id*. at 15–16.

At the first level of appeal, the Air Force Court of Criminal Appeals held that the military judge erred by failing *sua sponte* to grant a mistrial on the grounds that the application of R.C.M. 805(d)(1) would result in a patently unfair trial. *Id*. Reversing the appellate court decision, the CAAF held:

> [G]iven that Appellee fails to establish that the procedures Congress determined were appropriate when a court-martial drops below quorum mid-trial in Article 29(b), UCMJ, are unconstitutional as applied to him, the military judge did not err, let alone abuse his discretion, in following those procedures in this case.

Id. at 16. Among other things, the CAAF rejected the lower court's determination that appellant had a "military due process" right to have panel members "who have all heard and seen the same material evidence," or a Sixth Amendment right to have all members view a witness's demeanor. *Id*. at 19.

In so ruling, the CAAF held that that "[t]he *Weiss* standard controls Appellee's claim that Article 29(b), UCMJ, and the procedures to implement it set forth in R.C.M. 805(d)(1) are unconstitutional as applied to him," and that "Appellee has the burden to demonstrate that Congress' determination should not be followed." *Id*. at 19. In *Weiss v. United States*, the Supreme Court held that when reviewing

Congressional determinations involving "the framework of the Military Establishment, including regulations, procedures, and remedies relating to military discipline," judicial deference "is at its apogee." 510 U.S. 163, 176–77 (1994) (internal quotations omitted). As such, a petitioner seeking to challenge the military justice framework established by Congress must show that "the factors militating in favor of [the petitioner's interest] are so extraordinarily weighty as to overcome the balance struck by Congress." *Id*. at 177–78.

Although the CAAF in *Vasquez* based its decision on part on the fact that defense counsel had not objected to seating the new members, it also held on the record before it that appellant had failed to meet his burden to show that Article 29, UCMJ, and R.C.M. 805(d)(1) were unconstitutional as applied to him. In concluding that this framework "sufficiently satisfies the central concern of the Confrontation Clause," the CAAF noted that: (1) each witness testified under oath and in the presence of four of the final panel members; (2) appellee had the opportunity to cross-examine each witness; (3) the verbatim transcript read to the two new panel members was subject "to rigorous testing in the context of an adversary proceeding"; and (4) the presentation of written witness testimony, to include the reading of a verbatim transcript, "without any of the members seeing the witness's demeanor, is both an accepted practice and constitutionally unremarkable." *Vasquez*, 72 M.J. at 20–21 (emphasis in original).

In this case, not only are the same factors relevant in *Vasquez* present, but appellant actually received more "process" than did the appellant in that case. For example, in this case the new panel member was able to listen to a recording of the testimony, as opposed to

just hearing counsel read the transcript. Likewise, where four of the six panel members in *Vasquez* were able to see all of the witnesses testify, in this case seven of the eight members saw the whole trial. Moreover, unlike *Vasquez*, in this case the new panel member was also able to submit questions to the witnesses, in the presence of all of the other panel members, after hearing their recorded testimony.

Appellant, however, argues that because the new panel member was not able to observe the victim as she testified, the military judge should have granted a mistrial. Specifically, appellant asserts that because this was a "quintessential 'he said, she said' case," the new panel member's failure to observe the victim as she testified renders Article 29, UCMJ/R.C.M. 505(b) unconstitutional as applied to his case. We disagree.

First, all of the deliberating panel members were able to examine the incriminating text message string in which appellant told the victim that if she told her mother what happened he would "lose you, your sisters, my life, my job, everything." In addition, all of the same panel members observed appellant's testimony, including his dubious explanation of the text messages, his reasons for deleting them, and his admission that in the morning he would sometimes lie down with the victim in her bed while he had an erection. *See United States v. Nicola*, 78 M.J. 223, 227 (C.A.A.F. 2019) ("But one risk of testifying, recognized long ago, is that the trier of fact may disbelieve the accused's testimony and then use the accused's statements as substantive evidence of guilt 'in connection with all the other circumstances of the case.'") (citing *Wilson v. United States*, 162 U.S. 613, 620–21 (1896)).

In addition, all members of the panel that ultimately rendered guilty verdicts observed the

government's rebuttal witnesses, to include a CID agent who testified that appellant admitted during his initial interview that he got in bed with the victim every morning for 5-10 minutes (impeaching his testimony at trial that it was only 5-7 seconds), and that he would sometimes go to her bed in just shorts or a robe after having sex with his wife. Finally, all of the panel members heard appellant's wife testify on rebuttal that she was aware that he gave his daughters wedgies, and saw her laughing as she stated that she would never report him for that conduct. Moreover, appellant's wife described how when she confronted appellant, he never said anything about a wedgie being the root cause of this incident.

As noted above, although we acknowledge that the holding in *Vasquez* relied in small measure on the fact that there was no objection at trial (which is not the case here), we nevertheless find that on balance, and for all of the reasons stated above, appellant has failed to show that the factors militating in favor of his interest "are so extraordinarily weighty" as to render the procedures and framework set forth in Article 29, UCMJ, and R.C.M. 805 unconstitutional as applied to his case. As such, because the military judge did not err in seating the new panel member, it follows that he also did not abuse his discretion in denying the defense request for a mistrial. *See Vasquez*, 72 M.J. at 16 ("[T]he military judge did not err, let alone abuse his discretion, in following those [Article 29(b), UCMJ] procedures in this case.").[4]

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4. We are cognizant that the standard of review for an alleged error depends on whether the appellant lodges an objection at trial. *Compare Vasquez*, 72 M.J. at 17 (stating the failure to object renders alleged error subject to plain error analysis) *with United States v. Tovarchavez*, 78 M.J. 458, 470

B. Military Rule of Evidence 412

1. Additional Facts

Prior to trial, the defense sought to introduce the following evidence pertaining to the victim's sexual behavior and predisposition under the "constitutional" exception of Military Rule of Evidence (Mil. R. Evid.) 412(b)(3): (1) she observed on her iPad an image of a naked male with an erection; and (2) an allegation that her fourth-grade classmate texted her a picture of his exposed penis. Appellant contended that this evidence would demonstrate that the victim "had a degree of understanding, engagement, and participation with sexual activity that may not be common for other children that are her age," thus lending "support to the Defense's theory that these allegations [were] fabricated." The defense further argued that excluding the evidence would "prevent the Defense from dispelling the factfinder of any misconceptions they may have about children and sexual knowledge, and from being able to present a defense that [the victim] fabricated these allegations."

In the first incident, while driving home from Arkansas, the victim's mother found a link to a website on the victim's iPad. The link appeared to be open to the welcome page of a pornographic website, which depicted a nude male with an erect penis. The victim acknowledged viewing the image, but said that her cousin used her iPad to access the page. As to this

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(C.A.A.F. 2019) ("[B]efore a federal constitutional error [for a preserved objection] can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt") (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). Given our finding that the military judge did not err in the first instance, however, we need not decide whether the alleged error was harmless.

incident, the military judge denied the motion, ruling that "observation of a nude male image, alone, would not be material, i.e. favorable or vital, to a rebuttal to the Government's theory particularly where the Defense materiality argument lacks further specificity."

As to the second incident, the victim's mother testified that she discovered text messages between the victim and a male, fourth-grade classmate in which the two used terms of endearment like "baby." Both the victim and her mother testified at a pretrial hearing that they did not see any inappropriate images on the victim's phone. Appellant's sister, however, testified that the victim's mother told her that she had found a "dick picture" on the victim's phone sent by the victim's fourth-grade "boyfriend." Appellant's sister did not, however, observe any such images on the victim's phone herself, and the victim's mother testified that she never told Appellant's sister about any such pictures on her daughter's phone.

In denying the motion to introduce evidence of the second incident, the trial court based its ruling solely on Mil. R. Evid. 401 relevance grounds:

> A reasonable factfinder would not conclude that the alleged victim received a nude image or a "dick picture" from her classmate. The only testimony suggesting otherwise was elicited from the Accused's sister.
>
> In fact, [appellant's sister] did not observe any such image but simply testified that [victim's mother] had represented to her that such an image had been exchanged. Even if the Court accepted the veracity of [appellant's sister's] testimony, this evidence merely supports what [victim's mother] may have told

> [appellant's sister] but does not otherwise materially contradict the testimony of [victim's mother] and [victim] that they did not observe such an image, [fn: To reach the necessary legal conclusion, the Court need not resolve this apparent testimonial contradiction as to what precisely [victim's mother] told [appellant's sister].] Either way, the evidence does not support a finding that the alleged victim actually received a sexually explicit image from a classmate. Based upon this dearth of evidence, the Court need not consider the remaining prongs of the MRE 412 analysis.

2. Law

Appellant now asserts that the military judge erred in finding that evidence of the victim's exposure to the two pornographic images was not admissible under Mil. R. Evid. 412's constitutional exception. We review a military judge's Mil. R. Evid. 412 ruling for abuse of discretion. *United States v. Erikson*, 76 M.J. 231, 234 (C.A.A.F. 2017). Military Rule of Evidence 412 limits the admissibility of specified forms of evidence in sexual offense cases. The rule serves "to protect victims of sexual offenses from the degrading and embarrassing disclosure of intimate details of their private lives while preserving the constitutional rights of the accused to present a defense." *United States v. Banker*, 60 M.J. 216, 219 (C.A.A.F. 2004). Military Rule of Evidence 412 provides that evidence offered to prove that the alleged victim engaged in other sexual behavior is not admissible in any proceeding involving an alleged sexual offense unless it falls within the rule's enumerated exceptions: (1) evidence that someone other than the accused committed the assault; (2) evidence of other sexual behavior between the accused and the victim; or (3)

exclusion of the evidence "would violate the accused's constitutional rights." Since Mil. R. Evid 412 is a rule of exclusion, the party seeking to introduce such evidence has the burden of establishing by a preponderance of the evidence the exception under which the evidence is admissible. *Banker*, 60 M.J. at 223; *Erikson*, 76 M.J. at 235. In analyzing admissibility, the military judge must first determine whether the evidence is relevant under Mil. R. Evid. 401, and then apply the balancing test under Mil. R. Evid. 412(c)(3). *See Banker*, 60 M.J. at 222.

As the CAAF stated in *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011), "evidence must be admitted within the ambit of M.R.E. 412(b)(1)(C). when the evidence is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice." If the evidence is relevant and material, the military judge applies the Mil. R. Evid. 412 balancing test to determine if the evidence if "favorable" or "vital" to the defense. *Id.* at 323. The final consideration is whether the evidence in the record supports the inference that the moving party is relying on. *Ellerbrock*, 70 M.J. at 319; *See also United States v. Gaddis*, 70 M.J. 248, 256 (C.A.A.F. 2011).

In *Banker*, the CAAF held that in applying the Mil. R. Evid. 412 balancing test the military judge "is not asked to make a determination if the proffered evidence is true; it is for the members to weigh the evidence and determine veracity." 60 M.J. at 224. In *United States v. Roberts*, 69 M.J. 23, 27 (C.A.A.F. 2010), the CAAF similarly held that the military judge abused his discretion and clearly erred in weighing and considering the credibility of the conflicting witnesses as part of his Mil. R. Evid. 412 balancing test. *See also United States v. Cuevas-Ibarra*, ARMY 20200146, 2021 WL 2168951, at *——, 2021 CCA

LEXIS 254, at *11 (Army Ct. Crim. App. 21 May 2021) (mem. op.) (finding error where "[t]he language of the military judge's ruling makes it apparent that he precluded appellant from presenting evidence regarding complainant's chlamydia because the military judge did not personally believe chlamydia was the source of complainant's pain.").

3. Analysis

With respect to the alleged image sent to the victim by her fourth-grade boyfriend, it appears that the military judge improperly considered witness credibility in conducting his Mil. R. Evid. 412 balancing test. Although the military judge's ruling included a footnote indicating that he did not resolve the "apparent testimonial contradiction as to what precisely [victim's mother] told [appellant's sister]," the military judge expressly found that "[a] reasonable factfinder would not conclude that the alleged victim received a nude image or a 'dick picture' from her classmate," and that "[e]ither way, the evidence does not support a finding that the alleged victim actually received a sexually explicit image from a classmate."

Assuming that the military judge erred in erroneously weighing witness credibility, the evidence nevertheless did not rationally support the defense fabrication theory. As a result, the military judge correctly excluded the evidence. *See United States v. Norwood*, 81 M.J. 12, 18 (C.A.A.F. 2021) ("[W]e affirm a military judge's ruling when 'the military judge reached the correct result, albeit for the wrong reason.'") (quoting *United States v. Bess*, 80 M.J. 1, 12 (C.A.A.F. 2020)). For the same reason, the military judge correctly excluded evidence that the victim observed an image of a nude male on her iPad.

As described above, appellant claims that, because both of the alleged incidents demonstrated the victim's prior knowledge of the types of sexual encounters she claimed to have suffered, they supported a fabrication defense. First, it is worth nothing that appellant did not offer any evidence, or even a theory, as to why the victim would have a motive to fabricate. Moreover, as we have previously held, simply stating a theory of relevance is not sufficient to make the evidence admissible under Mil. R. Evid. 412. Rather, the "proponent must demonstrate that the proffered evidence rationally supports the theory, and that the theory is significant to the outcome of the case ... [and] that the logical link between the proffered evidence and the conclusion the proponent wants the factfinder to draw is more than remote or speculative." *United States v. Lauture*, 46 M.J. 794, 809 (Army Ct. Crim. App. 1997) (citations omitted); *See also Ellerbock*, 70 M.J. at 319 (holding that the purported Mil. R. Evid. 412 evidence must support the inference on which the moving party is relying).

In this case, the fact that the victim may have seen one or two images of a naked adult male with an erection is far too speculative to support the premise that she had sufficient prior knowledge to fabricate her explicit descriptions of appellant's sexual assaults. Likewise, and for the same reason, this evidence does not rationally support the defense theory that the victim "had a degree of understanding, engagement, and participation with sexual activity that may not be common for other children that are her age." Finally, the evidence in question also fails to corroborate or otherwise make appellant's "wedgie" story more believable. *See United States v. Clarke*, NMCCA 201400416, 2015 WL 7720175, at *5, 2015

CCA LEXIS 533, at *17 (N.M. Ct. Crim. App. 30 Nov. 2015) ("Although the appellant's claim that [the victim] orally sodomized him against his wishes is certainly incredible, evidence his teenage victim privately masturbated, had watched some unspecified pornography, or was sexually active, does nothing to make his story more believable.").

As such, because appellant failed to meet his burden to show that the proffered evidence was admissible under Mil. R. Evid. 412, we affirm the military judge's ruling excluding this evidence. See *Roberts*, 69 M.J. at 27–28 ("Although we assume that [ ] testimony was true, its speculative nature when combined with the improbability of the underlying purpose for the admission of the evidence, leads us to conclude that the proffered testimony had minimal probative value.").

CONCLUSION

Having considered the entire record, the findings and sentence are **AFFIRMED**.

Senior Judge BROOKHART and Judge PENLAND concur.

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
WASHINGTON, D.C.

United States,
Appellee

v.

Nicholas J. Apgar,
Appellant

USCA Dkt. No. 22-0226/AR
Crim. App. No. 20200615

ORDER

On further consideration of the granted issue, 83 M.J. 21 (C.A.A.F. 2022), and in view of *United States v. Anderson*, 83 M.J. __ (C.A.A.F. 2023), it is, by the Court, this 18th day of July, 2023,

ORDERED:

That the decision of the United States Army Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ David A. Anderson
Deputy Clerk of the Court

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

Before WALKER, EWING, and PARKER
Appellate Military Judges

UNITED STATES, **Appellee**

v.

Private E1 NICHOLAS J. APGAR,
United States Army, Appellant

ARMY 20200615

Headquarters, Fort Drum
Teresa L. Raymond and James Barkei, Military Judges
Colonel Robert C. Insani, Staff Judge Advocate

For Appellant: Colonel Michael C. Friess, JA; Major Rachel P. Gordienko, JA; Captain Lauren M. Teel, JA (on brief); Lieutenant Colonel Dale C. McFeatters, JA; Captain Lauren M. Teel, JA; Captain Julia M. Farinas, JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess, J A; Lieutenant Colonel Craig J. Schapira, JA; Major Mark T. Robinson, JA; Captain Cynthia A. Hunter, JA (on brief).

10 May 2022

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

For the Court,

[signature]

JAMES W. HERRING, JR.
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
WASHINGTON, D.C.

United States,
Appellee

v.

Mitchell A. Bentley,
Appellant

USCA Dkt. No. 23-0038/AR
Crim. App. No. 20210181

ORDER

On further consideration of the granted issue, 83 M.J. 142 (C.A.A.F. 2022), and in view of *United States v. Anderson*, 83 M.J. __ (C.A.A.F. 2023), it is, by the Court, this 18th day of July, 2023,

ORDERED:

That the decision of the United States Army Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

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

UNITED STATES, **Appellee**

v.

Staff Sergeant Mitchell A. BENTLEY
United States Army, Appellant

ARMY 20210181

Headquarters, U.S. Army Africa/Southern European Task Force
Kenneth W. Shahan, Military Judge
Colonel Erik L. Christiansen, Staff Judge Advocate

For Appellant: Captain David D. Hamstra, JA; Peter Kageleiry, Jr. , Esquire (on brief); Peter Kageleiry, Jr., Esquire (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline J. DeGaine, JA; Captain Timothy R. Emmons, JA; Mr. Jackson B. Kitchin (on brief).

4 October 2022

DECISION

Per Curiam:

On consideration of the entire record, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

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

For the Court,

[signature]

JAMES W. HERRING, JR.
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
WASHINGTON, D.C.

United States,
Appellee

v.

Brian C. Docilet,
Appellant

USCA Dkt. No. 22-0284/AR
Crim. App. No. 20200358

ORDER

On further consideration of the granted issue, 83 M.J. 132 (C.A.A.F. 2022), and in view of *United States v. Anderson*, 83 M.J. __ (C.A.A.F. 2023), it is, by the Court, this 18th day of July, 2023,

ORDERED:

That the decision of the United States Army Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ David A. Anderson
Deputy Clerk of the Court

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

Before BROOKHART, PENLAND, and ARGUELLES*

Appellate Military Judges

UNITED STATES, **Appellee**

v.

Private First Class Brian C. DOCILET
United States Army, Appellant

ARMY 20200358

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

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

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

18 July 2022

DECISION

Per Curiam:

* Judge Arguelles decided this case while on active duty.

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

For the Court,

[signature]

JAMES W. HERRING, JR.
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
WASHINGTON, D.C.

United States,
Appellee

v.

Cory M. Garrett,
Appellant

USCA Dkt. No. 23-0050/AR
Crim. App. No. 20210298

ORDER

On further consideration of the granted issue, 83 M.J. 184 (C.A.A.F. 2022), and in view of *United States v. Anderson*, 83 M.J. __ (C.A.A.F. 2023), it is, by the Court, this 18th day of July, 2023,

ORDERED:

That the decision of the United States Army Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

U.S. ARMY COURT OF CRIMINAL APPEALS

UNITED STATES
Appellee

v.

Staff Sergeant Cory M. **GARRETT**,
United States Army, Appellant

ARMY 20210298

21 October 2022

Headquarters, U.S. Army Maneuver Center of Excellence, Trevor I. Barna, Military Judge, Colonel Javier E. Rivera, Staff Judge Advocate

For Appellant: Captain Ian P. Smith, JA; Michael B. Hanzel, Esquire; Philip D. Cave, Esquire (on brief and reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Captain R. Tristan De Vega, JA; Lieutenant Colonel Jaired D. Stallard, JA (on brief).

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

MEMORANDUM OPINION

BROOKHART, Judge:

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of assault consummated by a battery on a spouse, one specification of aggravated assault on a spouse, one specification of assault with a loaded firearm on a spouse, and one specification of communicating a threat, in violation of Articles 115

1. Judge Arguelles decided this case while on active duty.

and 128, Uniform Code of Military Justice, 10 U.S.C. 915 and 928 (2019) [UCMJ].

Appellant elected to be sentenced by a military judge who sentenced appellant to be reduced to the grade of E-1, to be confined for four years, and to be discharged from the service with a bad-conduct discharge. The convening authority took no action. Appellant raises one assignment of error before this court and personally asserts three further issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We grant no relief but find that one of the issues personally raised by appellant merits discussion.

BACKGROUND

Appellant met [Redacted] while they were both in high school and began dating in 2009 while appellant was in the Army pending deployment to Iraq. In March of 2011, appellant and [Redacted] were married over Skype while appellant was deployed. Unfortunately, their relationship became tumultuous almost as soon as appellant returned from the deployment. A violent interaction with appellant during this timeframe prompted [Redacted] to leave appellant and go to live with her parents in another state. Shortly after she left, [Redacted] learned that she was pregnant and agreed to move back with appellant at Fort Campbell, Kentucky.

Their daughter, [Redacted] was born at Fort Campbell in the spring of 2012. Despite the birth of their first child, the relationship remained volatile and was marked by further incidents of violence including one in which appellant waved a firearm around while arguing with [Redacted] in their car. Based on this incident, [Redacted] was granted an order of protection and again separated from

appellant. Sometime later, appellant and [Redacted] reunited and had a second child.

In March of 2018, [Redacted] purportedly found a receipt for condoms in appellant's car. An argument ensued which ended with appellant choking [Redacted] and pushing her to the floor. [Redacted] again left to stay with her parents, but the couple eventually got back together again and moved to Fort Benning, Georgia. On March 1, 2019, [Redacted] reportedly told appellant she was pregnant with a third child, however, appellant became upset because he did not believe he was the father due to their separation. Appellant allegedly punched [Redacted] in the neck and threatened to kill her while arguing about the pregnancy.[2]

Two days later on March 3, 2019, appellant was drinking and still upset about [Redacted] pregnancy because he believed she had had an affair. Appellant pushed [Redacted] up against wall with his hand on her throat. He then poked her in the chest with a loaded firearm and made threats to kill her. At some point during this assault, [Redacted] who was then approximately seven years old, came into the room and asked what was happening. Appellant ceased his conduct and [Redacted] left the room to put [Redacted] to bed.

[Redacted] then went into the master bedroom only to be followed by appellant. There appellant, still armed with a handgun, interrogated [Redacted] about her purported affair, demanding to know "her truths." When [Redacted] admitted to having an affair, appellant struck [Redacted] in the mouth with his

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2. Appellant was found not guilty of Specifications 1 and 2 of Charge II which encompassed these two incidents.

hand, causing her lip to bleed. [Redacted] again came into the room and interrupted the assault. [Redacted] then left the room to take care of the child and appellant's assault ended for good.

Following this assault, the couple separated one final time. Although separated, they frequently exchanged text messages and spoke on the phone. The text exchanges were often mutually friendly and many contained sexually suggestive content of the sort one might expect from a couple in a relationship. On one occasion while formally separated, they met in a hotel and had sexual intercourse, which [Redacted] later discussed favorably over text messages. During this timeframe, [Redacted] also recorded two phone conversations with appellant with the apparent purpose of securing evidence to aid her case in the divorce.

Despite their sometimes friendly interactions, [Redacted] moved forward with the divorce, citing appellant's abuse as the principal grounds. However, she never reported any of appellant's misconduct to law enforcement or appellant's chain of command. The criminal conduct only came to light when a civilian process server came on Fort Benning to serve the divorce papers on appellant. The process server was mistaken for a suspect in an unrelated arson investigation and detained by members of the Army Criminal Investigation Command (CID). The agents who detained the process server also went through the documents he was carrying. In reviewing the divorce documents filed by [Redacted] the investigators noted the allegations of physical abuse against appellant and initiated an investigation, eventually leading to the charges at issue.

At trial, [Redacted] was the primary witness for the government, describing her up and down

relationship with appellant and supplying the necessary details of the charged assaults. [Redacted] who was nine years old at the time of trial, also testified for the government. Although lacking in significant detail, [Redacted] described two occasions where she walked in on her parents fighting; one where she saw appellant hit [Redacted] and one where appellant had a gun and threatened to kill [Redacted] This testimony generally lined up with two of the incidents described by [Redacted] The government also introduced the recordings of the two phone calls between appellant and [Redacted] which contained admissions by appellant. Although the admissions were not specific to any particular event, they did provide evidence, by his own admission that he was physically abusive. Moreover, at no point during the recorded calls did appellant ever deny physically abusing [Redacted] even when directly accused. The government's only other witness of note was a mental health expert who testified generally about counterintuitive behaviors of victims of intimate partner abuse.

Appellant's defense relied mostly on cross-examination of [Redacted] attacking multiple inconsistencies in her prior statements and exploiting the text messages and other interactions suggesting she was not afraid of appellant. Defense also suggested that [Redacted]s testimony was manipulated by [Redacted] as part of her design to get custody of the children. Appellant testified on his own behalf and uniformly denied all of the accusations against him. He also provided innocuous explanations for the potentially damning admissions in the two recorded phone calls, although admitting at one point that he was mentally abusive. Appellant called the social worker who conducted a recorded forensic

interview of [Redacted] to lay the foundation for admitting the recording itself. The defense also called several witnesses to attest to [Redacted]s poor character for truthfulness. Finally, appellant's expert testified about child witnesses and how their testimony could be manipulated. The government did not present any rebuttal evidence.

Appellant was found guilty of three instances of assault against his spouse as well as communicating a threat. He elected to be sentenced by the military judge. Appellant submitted post-trial matters to the convening authority who granted no relief. In his lone assignment of error, appellant avers that all of his convictions are both legally and factually insufficient. We disagree.

LAW AND DISCUSSION

A. The Legal and Factual Sufficiency of the Charges

As appellant asserts, there were inconsistencies in [Redacted] testimony and also evidence that she at times interacted with appellant in ways that were counterintuitive for a victim of intimate partner abuse. Nonetheless, based on all the testimony and evidence taken in a light most favorable to the government, we are satisfied that a reasonable factfinder could have found [Redacted] testimony credible and likewise could have found all of the essential elements of each specification beyond a reasonable doubt. *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017). Moreover, consistent with our obligation pursuant to Article 66, UCMJ, we have weighed all of the evidence in the entire record of trial ourselves and having made the appropriate allowances for not having observed the witnesses, we are also convinced of appellant's guilt for each

specification beyond a reasonable doubt. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Accordingly, appellant's assignment of error is denied.

B. Unlawful Command Influence

1. Additional Facts

This, however, does not end our inquiry. Beyond any assigned errors, we are also obligated to review those matters personally submitted by appellant. *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We find one of those matters bears our comment, but no relief. In one of three personally raised errors, appellant avers that the disposition of charges against him was affected by unlawful command influence because LTC C, who served as accuser in appellant's case, had been previously exposed to a superior commander's opinion that a court-martial was appropriate.

The record revealed that at some point during the investigation, appellant's brigade commander, COL P, who served as the special court-martial convening authority, communicated with the lead investigator via an email and indicated that appellant would "receive courts Marshall [sic] depending if your specific findings include rape. Otherwise UCMJ." The email exchange was included in the case file. The agent also paraphrased the email exchange in the case agent notes indicating COL P "would seek a court[-]martial for the offenses against SSG Garrett." The entire case file was later presented to LTC C, appellant's battalion commander, to review along with a charge sheet and the trial counsel's recommendation to prefer charges to be tried at a general court-martial. Acting as accuser, LTC C then preferred charges against appellant.

After charges were preferred, appellant's case was reviewed by a preliminary hearing officer appointed by COL P pursuant to Article 32, UCMJ. The preliminary hearing officer determined probable cause existed for all of the charges and specifications. He also recommended trial by general court-martial for all of the charges and their specifications. Following the preliminary hearing, COL P also recommended referral of the charges to a general court-martial. The General Court-Martial Convening Authority, consistent with the recommendation of the preliminary hearing officer and the advice of his Staff Judge Advocate, referred all the charges and specifications to a general court-martial.

Prior to trial, appellant moved the judge to dismiss the charges and their specifications based upon unlawful command influence. Both parties submitted briefs on the issue and the military judge conducted an Article 39(a) session at which LTC C testified that he "read all the evidence that was presented to me" before preferring charges. He also testified that he could not recall every page. To that end, he denied noticing the disposition recommendations of COL P in the investigative file. He further denied, under oath, being influenced or pressured in any way to prefer charges against appellant and indicated that the decision to do so was his alone.

In making his ruling, the military judge issued detailed findings of fact, which we adopt. *See United States v Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999) (our superior court accepting the military judge's detailed findings of fact for their de novo analysis). The military judge found that LTC C credibly testified that he did not see the disposition information in the case file and therefore could not have been improperly influenced by it. He ruled that COL P's comments

about disposition, which found their way into the CID case file, were not directive, but rather indicated only a likely course of action dependent upon further information. As such, the military judge ruled that the disposition information in the file could not have constituted unlawful influence. Finally, the military judge ruled that even if LTC C had seen the disposition recommendation from COL P, appellant suffered no prejudice because the preliminary hearing officer made an intervening finding of probable cause and an independent recommendation to refer the case to a general court-martial. Accordingly, the military judge denied appellant's motion to dismiss for unlawful command influence.

2. A Brief History of Unlawful Command Influence

The military justice system by its nature serves both as a tool for commanders to promote good order and discipline, which is critical for fighting and winning the nation's wars, and also as a system of justice delivering the protections of due process to those servicemembers who encounter it. *Manual for Courts-Martial, United States* (2019 ed.) [MCM], Preamble. These two distinct purposes are often at odds because, in order to prepare for and successfully carry out their military mission, commanders must exercise near absolute authority over all aspects of their subordinates' lives. *Parker v. Levy*, 417 U.S. 733, 743-44 (1974) ("An army is not a deliberative body ... [i]ts law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." (quoting *In re Grimley*, 137 U.S. 147, 153 (1890)). However, when it comes to utilizing the military justice system, commanders must cede some measure of their authority to the rules, processes, and personnel

composing the system. *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (the rights of service members must be balanced against the necessity of discipline and duty); *see also A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearing on H.R 2498 Before the Subcomm. No. 1 of the H. Comm. on Armed Servs.*, 81st Cong. 606 (1949) [hereinafter House UMCJ Hearings] (statement of Prof. Edmund Morgan) ("We, therefore, aimed at providing functions for command and appropriate procedures for the administration of justice. We have done our best to strike a fair balance."). Accordingly, unlike most aspects of their commands, commanders cannot simply direct justice. Out of the inherent tension arises the threat of unlawful command influence, wherein a commander, or one possessing the mantle of command authority, improperly uses that authority to directly or indirectly manipulate the military justice system towards a particular result. *United States v. Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2017); *United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986) (citing *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986)) (a staff judge advocate generally has the mantle of command authority).

Unlawful command influence has long been recognized as the mortal enemy of military justice. *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). So dangerous is its impact that as early as 1948, Congress established a procedural bar through The Elston Act, directly prohibiting convening authorities from taking adverse action against a member of a court-martial for their participation in a court-martial, and also any attempts to coerce or

unlawfully influence members of a court or a reviewing authority. The Selective Service Act of 1948, Pub. L. No. 80-759, § 233, 62 Stat. 604, 639 (1948). With some additions, the same prohibition was later added to the Uniform Code of Military Justice as Article 37. Over time, our superior court expanded the legislative prohibition on unlawful command influence by creating a doctrine known as apparent unlawful command influence, which addresses those actions by commanders which by their appearance alone could cause the public to lose faith in the fairness of the military justice system regardless of whether the challenged action had any concrete impact on a given case. *See generally Boyce*, 76 M.J. at 247 (discussing the evolution of apparent unlawful command influence).

3. Congress Makes Changes to Unlawful Command Influence in 2020

In 2020, Congress significantly amended Article 37, UCMJ. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 532, 133 Stat. 1359-61 (2019). The amendments were effective at the time of appellant's court-martial and will be applied to our review. NDAA 2020 § 532(c). The revised statute maintains its predecessor's prohibition on censuring, reprimanding, or admonishing members of the court, as well as its ban on reflecting court-martial service or advocacy in a member's performance evaluations. NDAA 2020 § 532(a)(2). It also provides greater guidance on what actions commanders can take that do not constitute unlawful command influence, such as discussing crimes generally and discussing general matters to consider in disposing of cases. The new statute also allows subordinate commanders to seek non-directive guidance from their superiors on the disposition of specific cases with the

limitation that a superior commander cannot direct a particular disposition. These changes reflect permissible practices that have evolved overtime through case law interpreting the prior version of Article 37. *See generally* Colonel James F. Garrett, Colonel Mark "Max" Maxwell, Lieutenant Colonel Matthew A. Calarco, Major Franklin D. Rosenblatt, Article, *Lawful Command Emphasis: Talk Offense, Not Offender; Talk Process, Not Results*, The Army Lawyer, August 2014, at 4. However, not all of the changes to Article 37 were so innocuous; two appear to limit previously recognized protections against unlawful command influence.

Pertaining to actual unlawful command influence, section (a)(3) adds qualifying "attempt to" language to the existing prohibition on influencing the action of a court-martial.[3] The relevant section of Article 37 now reads, "[no] person subject to this chapter may attempt to coerce or, by any unauthorized means, attempt to influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case...." (emphasis added). The addition of the attempt language before "influence" may have been a legislative response to an interpretation of the former

3. "(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts." Article 37(a), UCMJ (2019).

version of Article 37 by our superior court which held that the "attempt to" language preceding "coerce" served as a scienter requirement, meaning that a commander had to intend to coerce the action of a court-martial. *United States v. Barry*, 78 M.J. 70, 78 (C.A.A.F. 2018). However, CAAF further held that the "attempt to" language did not apply to the following clause prohibiting "influence" such that a commander could violate the statute by unintentionally influencing the action of a court-martial. *Id.* at 78-9. The court then dismissed Barry's conviction with prejudice based upon the unintentional acts of a senior officer towards the convening authority over Barry's court-martial. *Id.* at 79. The language added by Congress would prohibit that result in future cases.

The second, and potentially more impactful, change pertains to apparent unlawful command influence, and is found in paragraph (c) of the new statute which states that "[n]o finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section unless the violation materially prejudices the substantial rights of the accused." This change significantly impacts the judicially created doctrine of apparent unlawful command influence which does not require a showing of prejudice in a given case as a prerequisite for relief. By premising relief on a demonstration of material prejudice to a substantial right of an accused, Congress has arguably eliminated apparent unlawful command influence as a potential source or relief.[4]

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4. *See Boyce*, 76 MJ at 250 fn. 8 (the right to a trial that is objectively seen as fair has constitutional dimensions); *see also* Rachel E. VanLandingham, *Ordering Injustice: Congress, Command Corruption of Courts-Martial, and the Constitution*, 49 Hofstra Law Rev. 211–40 (1 September 2020) (discussing

4. Analysis

Claims of unlawful command influence are reviewed de novo. *United States v Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013) (citing *United States v Harvey*, 64 M.J. 13, 19 (C.A.A.F. 2006); *United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999); *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994)). To make a claim of unlawful command influence, appellant must allege acts which, if true, would constitute unlawful command influence and that such acts have a logical connection to potential unfairness in the court-martial. *United States v. Reed*, 65 M.J. 487, 488 (C.A.A.F. 2008) (citing *United States v Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)). The burden then shifts to the government to demonstrate either that the facts as alleged are not true, the facts as alleged do not constitute unlawful command influence, or even if there was unlawful command influence, it did not result in materially prejudice to appellant. *Id.*; *Biagase* at 150.

In personally raising matters before this court, because appellant does not argue that the facts of his case constitute apparent unlawful command influence, that issue is not before us. It follows then that the question of whether apparent unlawful command influence survives Congresses' passing the amended version of Article 37 is also not before this court. Accordingly, the answer to that question will have to wait until another day.

With respect to his actual unlawful command influence claim, appellant alleged that LTC C, a subordinate convening authority, was improperly

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command influence and the interplay between military courts, congress, and the constitution).

influenced by being exposed to the disposition decision of his superior commander recorded in a law enforcement report. We agree that this constitutes a minimal showing of unlawful command influence necessary to shift the burden to the government. However, we find the government successfully rebutted the allegation by showing that the facts as alleged were simply not true. As noted by the military judge, the information in the CID file does not contain a final disposition decision by COL P. Rather, when taken together, the email and note recorded by the agent reflect only a possible course of action contingent upon further information. Moreover, LTC C testified that while he reviewed the majority of the CID file prior to recommending court-martial, he did not recall seeing either COL P's email or the related note made by the agent. Accordingly, we find that the evidence does not show that appellant's brigade commander directed his accuser to prefer charges or take any other action.

Even assuming the facts alleged by appellant are true, we would still find that they do not constitute unlawful command influence. While subparagraph (5)(B) prohibits a superior convening authority from directing a subordinate to make a particular disposition in a case, there is no evidence that such a direction occurred here. Colonel P expressed his thoughts on disposing of appellant's case depending on how the investigation developed. The written summary of those thoughts that ended up in a CID report did not constitute direction to LTC C or anyone else to take any particular action. At most, COL P's allowing his tentative disposition decision to appear in a report circulated to his subordinates might be viewed as a form of coercion or unauthorized influence, however, there is no evidence that COL P

intended them to be as such. As discussed above, unintentionally influencing a subordinate convening authority is no longer prohibited by Article 37. Accordingly, we find that even if the facts alleged by appellant were true, they would not constitute unlawful command influence under the applicable version of Article 37.

CONCLUSION

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

Judge PENLAND and Judge ARGUELLES concur.

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
WASHINGTON, D.C.

United States,
Appellee

v.

Darrick E. Johnson,
Appellant

USCA Dkt. No. 22-0227/AR
Crim. App. No. 2020382

ORDER

On further consideration of the granted issue, 83 M.J. __ (C.A.A.F. 2022), and in view of *United States v. Anderson*, 83 M.J. __ (C.A.A.F. 2023), it is, by the Court, this 18th day of July, 2023,

ORDERED:

That the decision of the United States Army Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ David A. Anderson
Deputy Clerk of the Court

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

Before FLEMING, HAYES, and PARKER
Appellate Military Judges

UNITED STATES, **Appellee**

v.

Specialist DARRICK E. JOHNSON
United States Army, Appellant

ARMY 20200382

Headquarters, 7th Army Training Command
Kenneth W. Shahan, Military Judge
Lieutenant Colonel John Merriam, Staff Judge Advocate

For Appellant: Colonel Michael C. Friess, JA; Jonathan F. Potter, Esquire; Major Joyce C. Liu, JA; Captain Andrew R. Britt, JA (on brief); Jonathan F. Potter, Esquire; Major Joyce C. Liu, JA; Captain Andrew R. Britt, JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Mark T. Robinson, JA; Captain Cynthia A. Hunter, JA (on brief).

13 April 2022

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

For the Court,

[signature]

JAMES W. HERRING, JR.
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
WASHINGTON, D.C.

United States,
Appellee

v.

George E. Lopez,
Appellant

USCA Dkt. No. 23-0164/AF
Crim. App. No. 40161

ORDER

On further consideration of the granted issue, 83 M.J. __ (C.A.A.F. 2022), and in view of *United States v. Anderson*, 83 M.J. __ (C.A.A.F. 2023), it is, by the Court, this 18th day of July, 2023,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

George E. LOPEZ,
Technical Sergeant (E-6),
U.S. Air Force,
Appellant

No. ACM 40161

Decided: March 7, 2023

Appeal from the United States Air Force Trial Judiciary

Military Judge: Shad R. Kidd.

Sentence: Sentence adjudged on 12 June 2021 by GCM convened at Joint Base San Antonio-Fort Sam Houston, Texas. Sentence entered by military judge on 21 July 2021 and reentered on 25 August 2021: Dishonorable discharge, confinement for 9 years and 6 months, and reduction to E-1.

For Appellant: Major Ryan S. Crnkovich, USAF; Major Alexandra K. Fleszar, USAF; Major Eshawn R. Rawlley, USAF; Captain Samantha P. Golseth, USAF; William E. Cassera, Esquire; Julie Caruso Haines, Esquire.

For Appellee: Lieutenant Colonel Thomas J. Alford, USAF; Major Morgan R. Christie, USAF; Major Allison R. Gish, USAF; Major John P. Patera, USAF;

Major Brittany M. Speirs, USAF; Mary Ellen Payne, Esquire.

Before KEY, ANNEXSTAD, and GRUEN, Appellate Military Judges.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

ANNEXSTAD, Judge:

At a general court-martial, a panel of officer and enlisted members convicted Appellant, contrary to his pleas, of five specifications of assault consummated by battery (Charge I); one specification of sexual assault (Charge II); and one specification of child endangerment and two specifications of kidnapping (Charge III), in violation of Articles 120, 128, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 928, 934.[1] Consistent with his pleas, Appellant was found not guilty of one specification of communicating a threat (Charge III), in violation of Article 134, UCMJ.[2] The panel sentenced Appellant to a dishonorable discharge, confinement for nine years

1. All references to the punitive articles of the UCMJ are to the *Manual for Courts-Martial, United States* (2016 ed.). Unless otherwise indicated, all other references to the UCMJ and the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

2. After findings, the military judge dismissed one specification of assault consummated by a battery (Specification 5 of Charge I), in violation of Article 128, UCMJ, as an unreasonable multiplication of charges, subject to Appellant's conviction for sexual assault (Specification of Charge II), in violation of Article 120, UCMJ, being affirmed after appellate review.

and six months, and reduction to the grade of E-1. The convening authority approved the sentence in its entirety.

Appellant raises eight issues which we have reordered and reworded: (1) whether Appellant's convictions for four specifications of assault consummated by battery (Specifications 1–4 of Charge I) and one specification of sexual assault (Specification of Charge II) are legally and factually sufficient; (2) whether the child endangerment specification (Specification 1 of Charge III) failed to state an offense; (3) whether the record of trial is substantially incomplete; (4) whether Appellant was denied the effective assistance of counsel under the Sixth Amendment;[3] (5) whether the confinement portion of Appellant's sentence is inappropriately severe; (6) whether the military judge abused his discretion by failing to give a partial lack of mental responsibility instruction with regard to the child endangerment specification; (7) whether the Government can prove beyond a reasonable doubt that the military judge's failure to instruct the panel that a guilty verdict must be unanimous was harmless; and (8) whether Appellant's conviction for child endangerment was legally and factually sufficient.[4] We also consider one additional issue: (9) whether Appellant is entitled to relief due to unreasonable post-trial delay.

With respect to issues (3), (6), (7), and (8), we have carefully considered Appellant's contentions and find they do not require discussion or warrant relief. *See*

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3. U.S. CONST. amend. VI.

4. Appellant personally raises the eighth assignment of error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987).

Finding no error that materially prejudiced a substantial right of Appellant, we affirm the findings and sentence.

I. BACKGROUND

Appellant met AC[5] in high school and the two married in 2008. Their sons GL and NL were born in 2009 and 2011, respectively. They were 8 and 6 years old at the time of the offenses. AC's adult sister, GP, lived with the family in a single-family house located in San Antonio, Texas. On the first floor were an office and two bedrooms, one bedroom for Appellant and AC and the other for GP. The boys' rooms and a loft were located on the second floor.

The events leading to Appellant's court-martial took place around 1 January 2018. At this time, Appellant and AC were having marital problems and were discussing divorce. AC testified that at the time of the incidents she considered her marriage to be a "business-type relationship -- very distant," in which she and Appellant "fought a lot" and "mentioned divorce a lot." The two had not shared a bed for a couple of days due to an argument they had on AC's birthday.

On New Year's Eve 2017, Appellant and AC continued to argue about her birthday and other matters. Later in the evening, Appellant and GL attended a New Year's Eve party at a neighbor's house, while AC remained at home with NL, who was not feeling well. Appellant and GL returned from the

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5. By the time of trial, Appellant and AC had divorced. This opinion uses her initials at the time of trial.

party around midnight and GL went upstairs to his bedroom. AC testified she was angry that Appellant had been drinking alcohol. AC explained:

We had made this agreement that if he was going to drink, I would be there because ... when he came back from Turkey, he started his [Post-Traumatic Stress Disorder (PTSD)] sessions, and he was put on restricted work because driving triggered his PTSD, as well as drinking. So, I was basically the one driving around everywhere, and as far as drinking goes, we had this pact where he would drink if I'm there.

AC then testified that she threw her wedding rings at Appellant and told him that she was "done" with the marriage. In response, Appellant left the house but returned around 0200 on 1 January 2018, at which point the couple continued to argue. AC testified she left the house and "took a drive around the block" as an attempt to deescalate the situation, but Appellant was gone when she returned home. AC described being worried because she did not know where Appellant was, so she attempted to find him by calling his phone, the neighbor's phone, looking around the house, and driving around the neighborhood. Appellant returned to the house around 0615. AC was still awake, GP had just left for work, and the boys were asleep. NL slept in AC's bedroom on the floor that night, as he was sick.

The couple continued to argue. Exhausted from being awake all night, AC stated she eventually went to her bedroom to try and get some sleep. Appellant came into the bedroom a short while later as AC was lying in bed and asked her for her cell phone. Appellant became upset because AC had changed the password to unlock her cell phone. She testified that Appellant started yelling at her "like a drill sergeant" and "the next thing [she] kn[e]w" he was on top of her

with "his legs wrapped around [her] so he was squeezing [her] with his legs" on her "abdomen" and "choking [her] with his arm" at the same time. AC explained that Appellant practiced ju-jitsu and likened the episode to a ju-jitsu "arm choke." AC stated she felt pain while this was happening because Appellant was squeezing her ribs with his legs and her throat with his arm, and she felt like she could not breathe. She described trying to gasp for air and being in disbelief that it was happening. AC testified Appellant finally stopped after approximately 15 seconds because NL woke up and started crying. Appellant told NL he was just "playing with mommy, and to go back to sleep," but instructed AC to stay on the bed.

Appellant also remained in the bedroom and said they were going to have a "family meeting," so AC could "feel and learn the pain [she has] caused him over the years." AC then described how Appellant began to order her around. She stated Appellant yelled at her to sit at various places in the room but if she did not move fast enough or go to the correct place, he would charge at her, grab her, and "body slam" her to the floor with his hands. She indicated that this happened multiple times. After some time, AC asked Appellant "why are you doing this," but their son GL entered the bedroom before Appellant could respond. After GL entered the room, Appellant locked the bedroom door and told GL that they were "having a family meeting." AC testified Appellant then answered her question, stating "that's a good question. I'm not really sure, but how does murder/suicide sound to you?" AC asked Appellant to consider the boys, but he replied "[O]h, it doesn't matter. They're little. They won't remember this anyway."

Appellant took AC's phone and the boys' iPads and moved the electronics to the first-floor office. AC testified Appellant pulled the Wi-Fi cord out of the wall while in the office. When Appellant returned, AC began to plead with him to leave, and reminded him that he was close to retirement. She stated it appeared that Appellant was going to leave, when suddenly he "snapped," pushed her to the bed, and strangled her from behind. AC described how GL, who was now crying, asked Appellant to stop. Appellant did, and then sat in the corner of the bedroom. AC then asked to go to the bathroom, but Appellant told her that she could "just pee on [her]self or pee on the bed and that it didn't matter because [she] w[as]n't going to make it out that day."

NL was able to escape the bedroom at some point, but Appellant ran after him, brought him back into the room, and warned him not to leave again or else he would get physical with him. AC testified that Appellant continued to order her around, telling her to "[s]it here. No, don't sit there. Sit there," and that he "body slammed" her when he thought she was not complying. She also stated Appellant continued to tell the boys that he was "playing with mom" but she pleaded with the boys to leave the room, openly disputing Appellant's statement by saying things like "[n]o, he's not playing with me. He's hurting mommy." Both boys fled the room and Appellant chased them—at which point AC escaped the room, went to the backyard in her pajamas, and screamed for help. AC testified that Appellant found her in the backyard, grabbed her hair, and shoved her towards the fence—causing her to hit the fence with the side of her face and fall to the ground. She then described how Appellant grabbed her, carried her to the living room,

punched her in the face twice, and directed her back to the bedroom.

Appellant then brought both boys back to the bedroom. AC stated that GL was "shaking and crying" while Appellant was drinking water and yelling at her not to tell the boys to leave or he would get physical with them. As Appellant was yelling at AC, he vomited on her and refused to allow her to change clothes. AC testified Appellant then told her that he was "suddenly curiously aroused," and told the boys to go into the closet. They complied.

After putting the boys in the closet, Appellant proceeded to get on top of AC and ordered her to kiss him. When she refused, he "slapp[ed her] around." AC testified she tried moving around to get Appellant off her but Appellant continued trying to kiss her and remove her pajama pants. AC testified that she told Appellant "[n]o" and "[y]ou don't have my permission." As she was trying to push Appellant off, he pinned her down and told her that if she kept fighting him, "he was going to start throwing punches again." She then described how Appellant got off her, took off his pants, and told her "[w]e're not going to have sex how we typically have sex." Appellant then pulled AC's pants off and unsuccessfully attempted to have anal sex with her, something they had never done before. She testified Appellant penetrated her vagina with his penis until he ejaculated in her vagina. After Appellant ejaculated, he dressed himself and AC. AC asked if she could take a shower but Appellant told her no.

AC testified at this point she was scared and really thought Appellant was going to kill her and himself. After being released from the closet by Appellant, the boys joined AC on the bed. According to AC, Appellant was frustrated the boys were asking questions and

kept referring to a "family meeting"—causing AC to fear that Appellant was going to harm them. AC then described trying to open the bedroom window to escape, but Appellant "smack[ed] her arms" and asked if she needed "a reminder again of who's in charge." Appellant then grabbed AC, threw her on the bed, and again strangled her with his arm in the same manner as he had earlier.

Appellant, AC, and the boys went to the kitchen around 1500 hours. AC's sister, GP, returned from work while Appellant was cooking food. Appellant asked for GP's cell phone as soon as she walked into the house. GP complied, and asked AC if something was wrong. Sensing something was not right, GP attempted to leave the house, but Appellant grabbed her and "body slammed" her to the floor before she could exit. AC stated that GP was "screaming," "in shock," and was "really emotional and scared." Appellant then instructed AC and GP to sit on bar stools in the kitchen. Appellant returned to cooking food and told GP that they were going to have a "family meeting." At Appellant's court-martial, AC explained that Appellant was holding a kitchen knife in his hand to cut meat and was "kind of taunting [them] with the knife." Over the next several hours, Appellant continued to mention a murder/suicide plan, restrict everyone's phone access, and refused to allow anyone to leave.

Around 1800 hours, Appellant began making phone calls to his mother and his brother, at which time he allowed GP to go upstairs with the boys. Shortly thereafter, Appellant took prescription muscle relaxers in a suicide attempt. Appellant told his mother "he had done some really bad things to [AC], and that he was probably going to jail." Appellant's brother, EL, testified that he received a phone call

from Appellant late that afternoon—Pacific Standard Time—during which Appellant talked about suicide and "going to jail for 20 years." EL also stated that AC interrupted the call and told Appellant to vomit; EL described hearing Appellant vomit. Appellant eventually gave AC her phone and she immediately called 911 at 1835 hours.

Deputy PM and Deputy DP of the Bexar County Sheriff's Office responded to the 911 call. When they arrived at Appellant's house they found him talking on his cell phone outside near his home. Deputy PM exited the patrol car, Appellant ended his phone call, and Deputy PM asked Appellant, "What's going on?" According to the deputies, Appellant stated he "did it" and he "did some cruel and unusual things." Deputy PM asked Appellant if he assaulted and sexually assaulted his wife to which Appellant replied "yes." After Deputy PM detained Appellant and placed him in the police car, he entered the house where he found AC "crying" and "terrified." Another law enforcement officer, Patrol Sergeant AV, testified that when she made contact with AC in the house she was "distraught, very emotional."

The deputies took photographs of AC's injuries. AC had a cut lip from being shoved into the fence earlier, her lip and eyes were slightly swollen, and she had a scratch on her foot from running in the backyard shoeless while calling for help. With regard to GP, the deputies observed her in obvious discomfort due to a leg injury. Deputy PM stated Appellant, AC, GP, and the boys were taken to a local medical center for evaluation.

While at the medical center, a sexual assault forensic examination was conducted on Appellant and on AC. During trial, an expert testified Appellant's DNA was found in and around AC's vagina and

underwear, and AC's DNA was found on Appellant's penis.

At trial, AC and both boys testified Appellant "locked" them in the bedroom. GL also testified he witnessed Appellant on top of AC, choke her in the bedroom, punch her, push her, "body slam" her, and vomit on her—all on the day relevant to the charged offenses. He described for the members that Appellant yelled and "cussed" at AC while this was happening. GL also remembered AC running to the backyard and Appellant chasing her down. He confirmed Appellant kept talking about a "family meeting" and that Appellant instructed both him and his brother to get in the closet. GL described being scared, shocked, and confused the entire day.

The Government also presented testimony from a digital forensics expert who reviewed AC's phone records. The expert described a complete lack of phone activity for the entire day on 1 January 2018, until AC made the 911 call at 1835. Additionally, the Government offered testimony and health records from the medical exams conducted on AC and GP following the incidents. The records detailed that AC had bruising on both arms, which was confirmed by testimony as consistent with being grabbed. The records also detailed that GP had bruising on her right outer hip and on the left side of her lower back. At trial, the Government also introduced interviews from both boys which were conducted by investigators of the local Texas Department of Family and Protective Services Agency (DFPS) within days of the incident. During one interview, GL told DFPS he saw Appellant "hitting, punching; cussing [his] mom out" and "[b]ody slamming her." During another interview, NL told DFPS that Appellant locked him, his brother, and AC in a room, and that the police came to the house

because Appellant "was almost going to kill [his] mom. Because [Appellant] was going to kill [his] mom."

The panel of officer and enlisted members found Appellant guilty of five specifications of assault consummated by a battery, one specification of sexual assault, one specification of child endangerment, and two specifications of kidnapping.

II. DISCUSSION

A. Legal and Factual Sufficiency

Appellant contends that the evidence is legally and factually insufficient to support the findings of guilty on the first four specifications of the assault charge and the sexual assault charge. Specifically, Appellant argues: (1) AC was not a credible witness; (2) AC gave inconsistent accounts of the incidents; (3) AC only agreed to testify after she learned "she could get money from the state government;" (4) the physical evidence did not support the findings; (5) Deputy DP did not hear Appellant say he did "cruel and unusual things" to AC; and (6) the investigation was flawed. We are not persuaded by any of Appellant's contentions and find that no relief is warranted.

1. Law

Issues of legal and factual sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "Our assessment of legal and factual sufficiency is limited to evidence produced at trial." *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citing *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993)), *rev. denied*, 82 M.J. 312 (C.A.A.F. 2022).

"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." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). "The term reasonable doubt, however, does not mean that the evidence must be free from conflict." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). As a result, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (alteration in original) (citation omitted), *cert. denied*, —— U.S. ——, 139 S. Ct. 1641 (2019). The test for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011) (internal quotation marks omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

"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,' [this] court is 'convinced of the [appellant]'s guilt beyond a reasonable doubt.' " *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a

presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *Wheeler*, 76 M.J. at 568 (alteration in original) (quoting *Washington*, 57 M.J. at 399). This court's review of the factual sufficiency of evidence for findings is limited to the evidence admitted at trial. *See* Article 66(d), UCMJ, 10 U.S.C. § 866(d); *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007) (citations omitted).

In order to find Appellant guilty of assault consummated by battery, in violation of Article 128, UCMJ, as alleged in Specifications 1 through 4 of Charge I, the panel members were required to find the following two elements beyond a reasonable doubt: (1) that Appellant did bodily harm to AC at or near San Antonio, Texas, on or about 1 January 2018; and (2) that the bodily harm was done with unlawful force or violence. *See Manual for Courts-Martial, United States* (2016 ed.) (2016 MCM), pt. IV, ¶ 54.b.(2). Specification 1 alleged that on divers occasions Appellant unlawfully strangled AC on the neck with his forearm.[6] Specification 2 alleged that Appellant unlawfully grabbed and pushed AC down to the ground with his hands. Specification 3 alleged that Appellant unlawfully pushed AC on the head with his hand. Specification 4 alleged that, on divers occasions, Appellant unlawfully struck AC in the face with his hand.

In order to find Appellant guilty of sexual assault, in violation of Article 120, UCMJ, as alleged, the panel members were required to find the following beyond a

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6. The panel members excepted the word "forearm" and substituted the words "upper extremity" and found Appellant not guilty of the excepted word and guilty of the substituted words.

reasonable doubt: (1) that at or near San Antonio, Texas, on or about 1 January 2018, Appellant committed a sexual act upon AC by penetrating AC's vulva with his penis; and (2) that Appellant did so by causing bodily harm to AC by penetrating AC's vulva with his penis without AC's consent. *See* 2016 MCM, pt. IV, ¶ 45.b.(3)(b).

Article 120, UCMJ, explains consent as:

> a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social [relationship] ... by itself ... shall not constitute consent.

10 U.S.C. § 920(g)(8)(A).

2. Analysis

Our review finds that the Government introduced convincing evidence for a rational factfinder to find Appellant guilty of assaulting and sexually assaulting AC beyond a reasonable doubt. Most significant was the testimony of AC who described with clarity the almost 12-hour incident on 1 January 2018. She described, in detail, how Appellant used a ju-jitsu "arm choke" to strangle her on three occasions, grabbed her, "body slammed" her to the floor, and pushed her on her head with his hands. AC also testified that Appellant forcefully penetrated her vulva with his penis without her consent until he ejaculated. We find AC's testimony sufficient, without additional evidence, to support the charged offenses. As an evidentiary standard, proof beyond a reasonable

doubt does not require more than one witness to credibly testify. *See United States v. Rodriguez-Rivera*, 63 M.J. 372, 383 (C.A.A.F. 2006) (explaining testimony of a single witness may satisfy the Government's burden to prove every element of a charged offense beyond a reasonable doubt).

That stated, we also find that AC's testimony was sufficiently supported by the physical evidence introduced at trial. First, we note evidence showed Appellant's DNA was present in and around AC's vagina and her underwear, and AC's DNA was present on Appellant's penis. This evidence specifically supports AC's testimony that she was sexually assaulted. Second, the Government presented the medical records from the exams conducted on both AC and GP following the events on 1 January 2018. These medical reports detail numerous injuries on both women that were consistent with the assaults described by AC and GP at trial. Furthermore, the Government supported AC's testimony with phone records that showed that AC did not use her phone from approximately 0600 hours until she called 911 at 1835 hours on the day of the incident. Finally, we note that the testimony from GL, NL, and GP corroborated most, if not all, of the testimony provided by AC.

We also note that Appellant's own inculpatory statements to the deputies, and his expressions of consciousness of guilt to his mother and brother, generally support AC's testimony at trial. Here the record details that Appellant told the detectives he "did it," and he "did cruel and unusual things" while confirming to the detectives that he assaulted and sexually assaulted AC. Furthermore, the record also demonstrated that Appellant told his mother "he had done some really bad things to [AC], and that he was

probably going to jail." Finally, Appellant's brother testified Appellant told him that he was "going to jail for 20 years."

As at trial, Appellant again questions AC's credibility and motives, and highlights a number of inconsistencies in her description of the assaults during the subsequent investigation. We address Appellant's most significant arguments below.

First, Appellant argues that AC was not a credible witness because she continued to carry on a relationship with Appellant for months following the events of 1 January 2018. Appellant contends because of this she must have fabricated the allegations. AC addressed her post-assault decisions during trial, and explained that in the nine years leading up to 1 January 2018, Appellant was never abusive to her and that she tried to reconcile with Appellant out of love and the family that they created together. We find that a rational factfinder could reasonably conclude AC's decision to continue a relationship with her husband despite the physical and sexual abuse did not materially undermine her trial testimony.

As for her motives to testify, Appellant contends AC only agreed to testify against Appellant after she learned that she could be compensated for participating in Appellant's trial through a state crime-victim compensation program. We again find a rational factfinder could reasonably conclude that this potential motive did not materially undermine AC's trial testimony. Specifically, we note there was evidence presented at trial that demonstrated AC immediately called 911 when she had the chance and immediately identified Appellant as the perpetrator. Furthermore, the record demonstrates that AC was "distraught," "very emotional," "crying," and "frantic" when the detectives arrived at the house.

Finally, Appellant argues that AC's trial testimony differed from what she told the police and the family advocacy personnel. For example, Appellant contends that AC gave different accounts about where she was when Appellant took her cell phone, about where Appellant placed her phone and the boys' devices, and about where she was when the sexual assault occurred. We find that a rational factfinder could reasonably find that the examples cited by Appellant were relatively insignificant, especially when considered in conjunction with AC's detailed testimony, the testimony from other eyewitnesses, including GL, NL, and GP, the physical evidence presented at trial, and Appellant's own admissions which all generally corroborate AC's testimony.

We conclude that viewing the evidence produced at trial in the light most favorable to the Prosecution, a rational trier of fact could have found the essential elements of assault consummated by battery and sexual assault beyond a reasonable doubt. *See Robinson*, 77 M.J. at 297–98. Furthermore, after weighing all the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced of Appellant's guilt beyond a reasonable doubt. *See Reed*, 54 M.J. at 41.

B. Failure to State an Offense

Appellant contends that the child endangerment specification failed to state an offense. Specifically, Appellant argues the specification, as drafted, did not specify whether the alleged child endangerment was by design or culpable negligence. Appellant asks that we dismiss the specification and reassess his sentence. We find no prejudice to Appellant and conclude that no relief is warranted.

1. Additional Background

Specification 1 of Charge III alleged a child endangerment offense in violation of Article 134, UCMJ. The specification reads that Appellant,

> at or near San Antonio, Texas, on or about 1 January 2018, was responsible for the care of his two sons, [GL] and [NL], children under the age of 16 years, and did endanger their welfare by locking them in a room while he assaulted their mother, [AC], in their presence, and that such conduct was of a nature to bring discredit upon the armed forces.

In order to find Appellant guilty of child endangerment, in violation of Article 134, UCMJ, as alleged, the panel members were required to find the following four elements beyond a reasonable doubt: (1) that at or near San Antonio, Texas, on or about 1 January 2018, Appellant had a duty for the care of his two sons, GL and NL; (2) that GL and NL were under the age of 16 years; (3) that Appellant endangered GL and NL's welfare through culpable negligence by locking them in a room while he assaulted AC, in their presence; and (4) that under the circumstances, such conduct was of a nature to bring discredit upon the armed forces. *See* 2016 MCM, pt. IV, ¶ 68a.b.

On 14 January 2021, Appellant's trial defense counsel requested a bill of particulars from the Government seeking clarification on, inter alia, "[w]hen is the alleged child endangerment in relation to the alleged sexual assault?" The Government provided the following:

> The child endangerment begins when [Appellant] puts the children in the bedroom and keeps them their [sic] against their will. This is evidenced by [GL]'s fear and desire to

> call 911 and [NL]'s action of running outside to the neighbors to get help. The child endangerment continued through to when [Appellant] put the boys in the closet while he sexually assaulted AC. It continued during Charge I, Spec[ification] 6, when [Appellant] grabbed and pushed [GP] to the ground in front of the boys.

In response to another question in the bill of particulars request positing "[w]hat act or acts of assault are alleged as part of effectuating the charged child endangerment," the Government responded, "Charge I, Specifications 1, 2, 4, and 5."

The Government provided proposed instructions to the Defense on 31 May 2021 pursuant to the military judge's scheduling order. Appellant's trial defense counsel returned the proposed instructions to the Government with "thoughts and edits." The proposed instructions made clear the Government believed that Appellant's offense was a culpable negligence crime and not a crime by design. The Government then filed the proposed instructions with the military judge. During an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session on 7 June 2021, Appellant's trial defense counsel objected to the proposed instructions and moved to dismiss the child endangerment specification for failure to state an offense because the specification did not specifically allege a mens rea. The Defense argued that the specification failed to provide proper notice to Appellant as to whether he needed to defend against a mens rea under a culpable negligence theory or to defend against a mens rea under a "by design" theory. Appellant's trial defense counsel further argued the mens rea is an element of the offense that must be specifically charged, and the Government's omission of the element prejudiced

Appellant insofar as it raised double jeopardy concerns. In essence, the Defense argued that by not specifically charging Appellant with committing the offense by culpable negligence, he could be tried at some future date for the same offense under a "by design" theory.

The Government opposed the motion, arguing both the Government's answer to the Defense's bill of particulars request and the proposed instructions made clear that the Government was proceeding on the mens rea of culpable negligence. The Government added there was no prejudice to Appellant because the maximum sentence for child endangerment by culpable negligence was much lower than the maximum sentence for child endangerment by design. Finally, the Government argued that child endangerment by culpable negligence is a general intent crime and, therefore, the mens rea was necessarily implied.

The military judge denied Appellant's motion to dismiss the specification for failure to state an offense. The military judge concluded that the child endangerment specification: (1) alleged every element of the offense "expressly or by necessary implication;" (2) "include[d] the essential elements of the offense;" (3) provided notice of the offense; and (4) protected Appellant "against double jeopardy for child endangerment by culpable negligence against his sons by assaulting their mother in their presence." Trial defense counsel did not request reconsideration, and conceded, "I think culpable negligence would seem to be the appropriate mens rea."

Subsequently, the military judge instructed the members that the third element of child endangerment, in violation of Article 134, UCMJ, was that Appellant "endangered [GL's and NL's] welfare

through culpable negligence by locking them in a room while he assaulted their mother, [AC], in their presence." The military judge also provided a definition of culpable negligence.

2. Law

Whether a specification states an offense is a question of law that we review de novo. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012).

The Sixth Amendment requires that an accused "be informed of the nature and cause of the accusation against him." *United States v. Turner*, 79 M.J. 401, 403 (C.A.A.F. 2020) (internal quotation marks omitted) (quoting U.S. CONST. amend. VI).

"[T]he Fifth Amendment[7] provides that no person shall be deprived of life, liberty, or property, without due process of law, and no person shall be subject for the same offen[s]e to be twice put in jeopardy." *Id.* (internal quotation marks omitted) (quoting U.S. CONST. amend. V).

> [W]hen an accused servicemember is charged with an offense at court-martial, each specification will be found constitutionally sufficient only if it alleges, either expressly or by necessary implication, every element of the offense, so as to give the accused notice [of the charge against which he must defend] and protect him against double jeopardy.

Id. (second alteration in original) (internal quotation marks omitted) (quoting *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)).

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7. U.S. CONST. amend. V.

"[W]hen [a] charge and specification are first challenged at trial we read the wording ... narrowly and will only adopt interpretations that hew closely to the plain text." *Id.* (alterations and omission in original) (emphasis omitted) (quoting *United States v. Fosler*, 70 M.J. 225, 230 (C.A.A.F. 2011)). Therefore, "we will consider only the language contained in the specification when deciding whether it properly states the offense." *Id.* (citing *United States v. Sutton*, 68 M.J. 455 (C.A.A.F. 2010)).

"If a specification fails to state an offense, the appropriate remedy is dismissal of that specification unless the Government can demonstrate that this constitutional error was harmless beyond a reasonable doubt." *Id.* at 403–04 (citing *United States v. Humphries*, 71 M.J. 209, 213 n.5 (C.A.A.F. 2012)).

3. Analysis

We need not determine whether the child endangerment specification at issue failed to state an offense because Appellant did not suffer any prejudice—"even when the stringent constitutional standard of harmlessness beyond a reasonable doubt is applied." *Id.* at 407 (citing *Humphries*, 71 M.J. at 213 n.5).

Here, the record demonstrates that trial defense counsel requested a bill of particulars on the same day charges were preferred. Specifically concerning the offense of child endangerment, trial defense counsel did not seek clarification on whether the Government charged Appellant with child endangerment by culpable negligence or design. On the contrary, the only information trial defense counsel requested with respect to this charge concerned the "act or acts" that constituted the offense. The record shows trial defense

counsel did not raise the issue of mens rea until just prior to Appellant's entry of pleas.

The record also demonstrates Appellant was on actual notice of the Government's mens rea theory of culpable negligence as early as 31 May 2021. Here, the Government's proposed instructions, which were submitted seven days before the start of the trial, clearly indicated that the Government was pursuing the mens rea of culpable negligence. Subsequently, the Government reiterated its position that it believed "this is a culpable negligence crime and not a crime by design" on the first day of trial and prior to the entry of pleas. The trial counsel also later confirmed: "The [G]overnment views this and anticipates the facts will present themselves as a culpable negligent [sic] theory, and the [G]overnment does not have any evidence that this was the greater offense of by design." We note that after trial defense counsel moved to dismiss the specification for failure to state an offense, they did not request a ruling from the military judge on the motion prior to presentation of evidence or disagree with Government's assertion. Accordingly, the military judge issued his ruling after the Government had rested their case on the fourth day of trial. We also note that after the military judge issued his ruling, trial defense counsel did not request reconsideration, and conceded, "I think culpable negligence would seem to be the appropriate mens rea."

Additionally, we note the military judge provided findings instructions which informed the members that the third element of the child endangerment specification was Appellant "endangered [GL's and NL's] welfare through culpable negligence by locking them in a room while he assaulted their mother, [AC], in their presence." The military judge then provided

the members with a definition of culpable negligence. The record also demonstrates trial counsel argued Appellant's culpable disregard for his sons' welfare during closing argument:

> He endangered their welfare through culpable negligence by locking them in a room and assaulting their mother within their presence. They told you about needing to get out and get help. They even told you about running to get help. They knew it was not right.... This is child endangerment.

We find the record void of any instance where trial defense counsel appears misled, or discussed, presented, or argued to the members the specific intent offense of child endangerment by design.

When we consider the facts of this case, we find no basis to conclude Appellant would have handled his defense any differently, the result of the court-martial would have been different, or that Appellant would have been provided any additional protection against double jeopardy if the Government had specifically listed "culpable negligence" in the specification on the charge sheet. In fact, Appellant did not allege in his assignments of error brief to this court that he would have done anything differently, has not pointed to any alterations in strategy or to different defenses he would have raised, and did not suggest it affected the way the Defense approached his case. Finally, we conclude that Appellant was sufficiently protected against double jeopardy for two reasons: (1) the gravamen of the child endangerment is already captured by Appellant's conviction; and (2) Appellant cannot be tried again for the same conduct because child endangerment by culpable negligence is a lesser-included offense of child endangerment by design. *See United States v. Rice*, 80 M.J. 36, 44 (C.A.A.F. 2020)

("Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense."); *see also United States v. Hudson*, 59 M.J. 357, 358 (C.A.A.F. 2004) ("The Fifth Amendment protection against double jeopardy provides that an accused cannot be convicted of both an offense and a lesser-included offense." (Citations omitted).). Accordingly, we find Appellant suffered no prejudice and conclude that any error in the drafting of the specification was harmless beyond a reasonable doubt.

C. Claim of Ineffective Assistance of Counsel

Appellant contends he received ineffective assistance from his trial defense counsel. Specifically, Appellant asserts his counsel were deficient in that they: (1) failed to retain an expert consultant in PTSD and failed to offer any evidence of Appellant's PTSD diagnosis either during trial or sentencing proceedings; (2) failed to investigate and litigate whether AC waived her attorney-client privilege with her special victims' counsel (SVC); (3) failed to argue for an instruction on partial lack of mental responsibility, and therefore waived it; and (4) failed to present evidence during sentencing proceedings of Appellant's loss of retirement.[8] Appellant requests

8. Appellant also advances a cumulative error argument and cites to a memorandum from one of Appellant's trial defense counsel, Captain (Capt) TO, which was included with Appellant's clemency submission. In the memorandum, Capt TO suggested that some of her decisions might now be viewed as "deficient" and "prejudicial" to Appellant. We do not read this clemency submission as an admission of deficient performance, but rather an introspective look on the trial itself, which as she wrote are always "ripe for reflection." We note this conclusion is supported by declarations submitted by both trial defense counsel to this

that we set aside and dismiss the findings. We disagree with Appellant's contention that he received ineffective assistance of counsel and find no relief is warranted.

1. Additional Background

On 21 December 2022, we ordered Appellant's trial defense counsel, Major (Maj) AA and Captain (Capt) TO, to provide responsive declarations to address Appellant's ineffective assistance of counsel claims.[9] We have also considered whether a post-trial evidentiary hearing is required to resolve any factual disputes between Appellant's assertions and his trial defense team's assertions. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997); *United States v. DuBay*, 37 C.M.R. 411, 413 (C.M.A. 1967) (per curiam). We find a hearing unnecessary to resolve Appellant's claims.

2. Law

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001). In assessing the effectiveness of counsel, we apply the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and begin with the presumption of competence announced in *United States v. Cronic*, 466 U.S. 648, 658 (1984). *See Gilley*, 56 M.J. at 124 (citing *United States v. Grigoruk*, 52 M.J. 312, 315

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court which rebut Appellant's claims that they were ineffective and provided deficient performance. Therefore, Appellant is not entitled to any relief under the cumulative error argument.

9. Because the issue was raised in the record but was not fully resolvable by those materials, we may consider the declarations submitted by trial defense counsel consistent with *United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020).

(C.A.A.F. 2000)). We review allegations of ineffective assistance de novo. *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009)).

We utilize the following three-part test to determine whether the presumption of competence has been overcome:

> 1. Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> 2. If the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance ... [ordinarily expected] of fallible lawyers"?
>
> 3. If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

Id. (alterations in original) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)). The burden is on an appellant to demonstrate both deficient performance and prejudice. *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (citation omitted). An appellant overcomes the presumption of competence only when he shows there were "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

"Defense counsel do not perform deficiently when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so." *Datavs*, 71 M.J. at 424 (citing Gooch, 69 M.J. at 362–63) (additional citation omitted). In reviewing the decisions and actions of

trial defense counsel, this court does not second guess strategic or tactical decisions. *See United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993) (citations omitted). It is only in those limited circumstances where a purported "strategic" or "deliberate" decision is unreasonable or based on inadequate investigation that it can provide the foundation for a finding of ineffective assistance. *See United States v. Davis*, 60 M.J. 469, 474 (C.A.A.F. 2005).

This court does "not measure deficiency based on the success of a trial defense counsel's strategy, but instead examine[s] 'whether counsel made an objectively reasonable choice in strategy' from the available alternatives." *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015) (quoting *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001)). For this reason, defense counsel receive wide latitude in making tactical decisions. *Cullen v. Pinholster*, 563 U.S. 170, 195 (2011) (citing *Strickland*, 466 U.S. at 689). This also applies to trial defense counsel's strategic decisions. *Morgan*, 37 M.J. at 410. "[S]trategic choices made by trial defense counsel are virtually unchallengeable after thorough investigation of the law and the facts relevant to the plausible options." *Akbar*, 74 M.J. at 371 (internal quotation marks and citation omitted.)

In making this determination, courts must be "highly deferential" to trial defense counsel and make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Moreover, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (citation omitted).

3. Analysis

a. PTSD

Appellant first claims that his trial defense counsel were ineffective by failing to retain an expert consultant in PTSD. We find Appellant's contention is not supported by the record. On 14 January 2021, trial defense counsel requested the convening authority appoint Dr. KG, a board-certified forensic psychologist. Maj AA's declaration stated that request specifically identified Appellant's "severe PTSD and combat[-]related mental health issues" as bases for the expert request. Subsequently, the convening authority approved the request. Maj AA provided that Dr. KG "spoke fluently" on the topic of PTSD. Since this portion of Appellant's claim is not supported by the record, we find no basis to support Appellant's claim that his trial defense counsel were ineffective for failing to retain an expert consultant in PTSD.

Next, Appellant argues his trial defense counsel were deficient for not introducing evidence of his PTSD in findings "to rebut evidence that Appellant had the specific intent necessary for the child endangerment specification." Here, Appellant was charged with child endangerment by culpable negligence, which is a general intent offense. Therefore, as charged, the defense of partial mental responsibility was not available to Appellant. *See United States v. Handy*, 48 M.J. 590, 593 (A.F. Ct. Crim. App. 1998) ("As for partial mental responsibility, appellant's absence offense was only a general intent crime. Consequently, the concept of partial mental responsibility was not a player for that offense.").

However, even if it were an available defense, Appellant's trial defense counsel provided reasonable

explanations for their decision not to present evidence concerning Appellant's PTSD. Maj AA stated in his declaration that they were aware of Appellant's PTSD and had reviewed 1,664 pages of Appellant's mental health records. He also stated he had access to and reviewed the "long form" report concerning Appellant's formal inquiry into his mental capacity or mental responsibility under Rule for Courts-Martial 706. Maj AA also described multiple discussions with Dr. KG between 12 March 2020 and 12 January 2021 regarding the possibility of introducing evidence of Appellant's PTSD during trial. He stated Dr. KG firmly advised him to "avoid introducing evidence that would result in production of [Appellant]'s mental health records to the [P]rosecution." Maj AA also discussed that on 27 April 2021, a second inquiry concerning Appellant's mental capacity and mental responsibility was conducted at his request, and that he also shared those results with Dr. KG and asked for Dr. KG's advice and recommendation with regard to the results. According to Maj AA, Dr. KG responded consistently with her advice to avoid introducing evidence of Appellant's PTSD at trial:

> I want to reiterate I do not recommend doing anything that would place [Appellant's] mental health records in the [G]overnment's hands. Aside from uncharged conduct and inconsistent statements in general; he provided some inconsistent statements upon which the PTSD diagnosis was based. Whether he has PTSD or not, his records/diagnosis does not explain or mitigate sexual assault or the alleged violence.

Maj AA confirmed that Dr. KG's advice informed the Defense's trial strategy to which Capt TO agreed, particularly with the decision to not introduce evidence of Appellant's PTSD.

We find Appellant has failed to either meet his burden of showing deficient performance or overcome the strong presumption that his trial defense counsel's performance was within the wide range of reasonable professional assistance. Both trial defense counsel provided reasonable explanations for their actions, and their individual and combined level of advocacy on Appellant's behalf was not "measurably below the performance ordinarily expected of fallible lawyers." *Polk*, 32 M.J. at 153. Furthermore, we find both trial defense counsel have articulated strategic reasons for their decisions concerning evidence of Appellant's PTSD. We will not second guess their defense strategy and note that we evaluate defense counsel's performance not by the success of their strategy, "but rather whether counsel made ... objectively reasonable choice[s] in strategy from the alternatives available at the [trial]." *See Dewrell*, 55 M.J. at 136 (quoting *United States v. Hughes*, 48 M.J. 700, 718 (A.F. Ct. Crim. App. 1998)). The declarations submitted by Appellant's trial defense counsel make clear that the defense team sought to shape the facts and narrative in the light most favorable to Appellant. Based on our review of the record, to include evidence and the declarations of defense counsel, the defense team was somewhat successful in this regard.

Next Appellant claims his trial defense counsel were deficient for failing to introduce evidence of his PTSD in sentencing. We find this claim is also not supported by the record. The record shows Appellant adequately addressed his PTSD in his unsworn statement. He vividly detailed his time in Iraq, where he witnessed and experienced improvised explosive device explosions and other "traumatic" events while deployed. Appellant also discussed his "deep sadness," "nightmares," crying, and a suicide attempt resulting

from his post-deployment struggles. Thus, the record clearly shows Appellant's PTSD was introduced during sentencing.

Additionally, the declarations submitted by Appellant's trial defense counsel show that their decision not to present evidence through expert testimony or mental health records was an objectively reasonable, strategic decision. Presenting such evidence would have enabled the Government to rebut Appellant's diagnosis with potentially damaging inconsistent statements with regard to his PTSD, as well as open the door to uncharged misconduct. We find trial defense counsel's strategic approach leveraged the potential mitigation of Appellant's traumatic experiences, including his post-deployment mental health struggles, while mitigating the possibility that the Government would put on evidence which could have severely undermined Appellant's credibility, claims of PTSD, and remorse. Therefore, we find these strategic decisions to be reasonable.

b. AC's Attorney-Client Privilege

Appellant argues trial defense counsel were deficient by failing to investigate and litigate AC's potential waiver of attorney-client privilege with her SVC. In support of this claim, Appellant highlights the following portion of the record where trial defense counsel questioned AC on an admission that Appellant potentially made concerning the charged offenses:

> [Trial Defense Counsel (TDC)]: Okay. And when you got divorced, you hadn't shared those admissions by [Appellant] with any prosecutors or law enforcement representatives, is that correct?

[AC]: When I got divorced?

[TDC]: Yeah.

[AC]: I did.

[TDC]: Oh you did. Who?

[AC]: I believe it was my SVC.

Appellant claims his trial defense counsel were deficient for not seeking to have AC's SVC testify about her conversations with AC. Appellant now speculates if the military judge agreed that AC waived the privilege, then the SVC's testimony might have been inconsistent with AC's testimony and, if it was inconsistent, it could have weakened AC's credibility.

In response to this claim, Maj AA's declaration provided that he did not attempt to pierce AC's attorney-client privilege by having her SVC testify for two guiding reasons. First, Maj AA did not know how AC's SVC would testify. He was concerned that if the SVC was called as a witness and confirmed the conversation, it would be another consistent statement—bolstering AC's testimony and strengthening the Government's case. Second, he explained that his strategy on cross-examining AC on this topic was "to undermine the weight of [Appellant's] admissions by making them appear to be a fabrication tied to [AC's] motive to fabricate" after she had moved on to another relationship.

"[O]ur scrutiny of a trial defense counsel's performance is 'highly deferential,' and we make 'every effort ... to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate conduct from counsel's perspective at the time.'" *Akbar*, 74 M.J. at 379 (omission in original) (quoting *Strickland*, 466 U.S. at 689). Again, we do not find Appellant has

overcome the presumption of competence. Appellant has not demonstrated that testimony from AC's SVC would have been helpful. In fact, we find that Appellant's argument on appeal is built on nothing more than supposition. As we have discussed, supra, Appellant's trial defense counsel generally attacked AC's credibility throughout trial. Maj AA's strategy with regard to his cross-examination of AC was reasonable, as was his decision to not challenge AC's attorney-client privilege with her SVC. Trial defense counsel's performance was not measurably below the performance ordinarily expected of fallible defense counsel. *See Polk*, 32 M.J. at 153.

c. Partial Mental Responsibility Instruction

Appellant further asserts that trial defense counsel were deficient for failing to argue for an instruction on partial mental responsibility, and therefore waiving it. The record reflects both parties were asked, during a discussion on potential instructions, whether an instruction on lack of partial mental responsibly was applicable to Appellant's court-martial. Trial counsel argued the instruction did not apply because the instruction is only applicable to specific intent crimes and Appellant was charged with general intent offenses. Trial defense counsel, as he stated in his declaration, did not believe he had "a colorable legal argument" for the instruction after reviewing relevant case law. Trial defense counsel also stated he wanted the court to "make its own determination" and he desired to "maintain candor with the [c]ourt."

Ultimately, the military judge did not provide an instruction on partial mental responsibility. The record shows the military judge and counsel for both sides engaged in a discussion about potential instructions, all parties discussed relevant law as

related to the facts of Appellant's case, and the military judge determined such an instruction was not warranted. The law does not require counsel to make futile arguments to avoid a later claim of ineffectiveness. We therefore conclude Appellant has failed to demonstrate he was entitled to the instruction or that his trial defense counsel's performance was deficient by not objecting to the proposed instructions absent a colorable argument for requesting such. We conclude that trial defense counsel's decision to waive the instruction was not measurably below the standard of fallible defense counsel. *See Polk*, 32 M.J. at 153.

d. Loss of Retirement Benefits

Appellant asserts his counsel were ineffective for failing to present evidence of Appellant's loss of retirement benefits. Maj AA explained the Defense's decision to focus Appellant's sentencing case on emotional growth as opposed to financial loss:

> One decision that was brought up on the record was the [D]efense's decision to not introduce evidence related to retirement. The defense strategy for sentencing was to focus the trier of fact on (a) [Appellant]'s rehabilitative potential, as evinced by opinions and statements about his good deeds and duty performance, (b) his desire for a health[y] relationship with his children, and (c) his desire to get healthy. The latter was addressed, in part, by the reference to Department of Veterans Affairs in his unsworn statement. In my assessment, focusing the members on how little money and benefits [Appellant] would have in the event of his mandatory dishonorable discharge would orient the members on him being selfish, lacking

> perspective on the heinous acts of which he was convicted, and yield the moral high ground that we were otherwise endeavoring to keep compared to the patently selfish conduct for which we impeached [AC] throughout the trial.

(Third alteration in original).

We also note Appellant's trial defense counsel articulated on the record during presentencing that it was a deliberate choice to forego evidence specific to loss of retirement benefits. Trial defense counsel explained to the military judge there was already evidence before the members concerning Appellant's service history and that his length of service "clearly" demonstrated how "extremely close to retirement" Appellant was. Trial defense counsel then requested the military judge to provide the members an instruction concerning Appellant's loss of retirement benefits, which he did. We find the reasons given by trial defense counsel were well reasoned, well articulated, and not "conclusory, self-serving[, or] inadequate." *Polk*, 32 M.J. at 153. We conclude it was within the realm of reasonable choices to focus defense efforts highlighting Appellant's emotional growth to potentially reduce his exposure to confinement instead of the financial fallout from a punitive discharge—especially considering, as his trial defense counsel acknowledged, Appellant was not retirement eligible, he did not have an approved retirement date, Appellant's term of service had expired by the date of his court-martial, and, most compelling, a dishonorable discharge was mandatory for the offenses of which Appellant was convicted.

In conclusion, after applying the framework to address claims of ineffective assistance of counsel, we conclude that Appellant has not overcome the presumption of competence and has failed to

demonstrate either deficient performance or prejudice. We find no relief is warranted.

D. Sentence Severity

Appellant argues his sentence to nine years and six months of confinement is inappropriately severe. Specifically, Appellant contends his sentence failed to take into account his PTSD, his strong service record, his strong rehabilitative potential, the nature and seriousness of the offenses, and all the matters contained in the record. We are not persuaded by Appellant's arguments and find that the sentence is not inappropriately severe.

During presentencing the Government offered the testimony of AC's close friend, who described the effects Appellant's crimes had on AC and GL. The Government also admitted Appellant's personal data sheet, enlisted performance reports, excerpts from AC's medical records regarding treatment she received after 1 January 2018, and three pictures of GL and NL together.

The members also received unsworn victim impact statements from AC, GP, and GL. In AC's oral and written statement, she described how Appellant's actions have significantly and negatively impacted her and her sons. GP's written statement discussed how Appellant's crimes negatively affected her life. Finally, in a short 27-second video statement, GL discussed being shocked by Appellant's crimes and asked why it happened.

Appellant's robust sentencing case consisted of: (1) testimony from Appellant's first sergeant, a retired senior master sergeant, who discussed Appellant's excellent duty performance following the incident; (2) a short video of Appellant discussing his duties for certain pandemic-related measures; (3) Appellant's

written unsworn statement; (4) Appellant's verbal unsworn statement; (5) character letters from colleagues and friends; (6) documentation of Appellant's awards, certificates, and achievements; and (7) photos from Appellant's time in the military. We note Appellant had served in the Air Force for over 19 years, had eight overseas tours, and had earned numerous awards and decorations during his service. We also note Appellant's sentencing case portrayed him as a capable noncommissioned officer who routinely exceeded his leadership's expectations.

In addition to a mandatory dishonorable discharge, the maximum punishment Appellant faced as a result of his convictions included, inter alia, confinement for life without the eligibility of parole, forfeiture of all pay and allowances, and reduction to the grade of E-1. With regard to confinement, the Government argued for ten years, and the Defense argued for no more than three years if the members determined confinement was necessary.

We review sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2016) (citation omitted). We may affirm only as much of the sentence as we find correct in law and fact and determine should be approved on the basis of the entire record. Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc) (per curiam) (alteration in original) (quoting *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (per curiam)). While we have discretion in determining whether a particular sentence is appropriate, we are not

authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010).

We have considered the nature and seriousness of the offenses and have given individualized consideration to Appellant, including his record of service and all matters contained in the record. We find that nine years and six months' confinement is not an inappropriately severe punishment for physically and sexually assaulting his wife, physically assaulting his wife's sister, and endangering the welfare of his sons. Although Appellant's adjudged sentence included a significant period of incarceration, it is far less than the maximum authorized—confinement for life—and was also less than the amount of confinement that the Government argued was appropriate. Although we have broad discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. Id. After careful consideration of the above and the matters contained in the record of trial, we conclude the sentence is not inappropriately severe.

E. Appellate Review Delay

Appellant's court-martial concluded on 12 June 2021, and the record of trial was not docketed with this court until 1 September 2021. This court is issuing its opinion in 18 months and about one week after docketing.

"We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citations omitted). In *Moreno*, the United States Court of Appeals for the Armed Forces (CAAF) established a presumption of facially unreasonable delay where the Court of

Criminal Appeals does not issue its decision within 18 months of docketing. Where there is such a facially unreasonable delay, we consider the four factors identified in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), to assess whether Appellant's due process right to timely post-trial and appellate review has been violated: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Moreno*, 63 M.J. at 135 (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004) (per curiam)).

However, where there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). In *Moreno*, the CAAF identified three interests protected by an appellant's due process right to timely post-trial review: (1) preventing oppressive incarceration; (2) minimizing anxiety and concern; and (3) avoiding impairment of the appellant's grounds for appeal and ability to present a defense at a rehearing. 63 M.J. at 138–39 (citations omitted).

The delay between docketing at this court and the issuance of this opinion exceeds *Moreno*'s 18-month threshold for a facially unreasonable appellate delay. Id. However, Appellant has not claimed prejudice from the delay, and in light of *Moreno* we find none. Where the appellant does not prevail on the substantive grounds of his appeal, as in this case, there is no oppressive incarceration. *Id.* at 139. We discern no impairment to Appellant's grounds for appeal, and where an appellant's substantive appeal

fails, his ability to present a defense at a rehearing is not impaired. *Id*. at 140. With regard to anxiety and concern, "the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Id*. Appellant has made no such showing of particularized anxiety, and we perceive none.

Accordingly, the question becomes whether the delays in this case were so egregious as to adversely affect the public's perception of the military justice system. *Toohey*, 63 M.J. at 362. We conclude it was not. Here, the facially unreasonable appellate delay was relatively slight—just about one week.

Finally, recognizing our authority under Article 66(d), UCMJ, 10 U.S.C. § 866(d), we have also considered whether relief for excessive post-trial delay is appropriate in this case even in the absence of a due process violation. *See United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). After considering the factors enumerated in *United States v. Gay*, 74 M.J. 736, 742 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016), we conclude no such relief is warranted.

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.

Judge ANNEXSTAD delivered the opinion of the court, in which Senior Judge KEY and Judge GRUEN joined.

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
WASHINGTON, D.C.

United States,
Appellee

v.

Joshua D. McCameron,
Appellant

USCA Dkt. No. 23-0083/AF
Crim. App. No. 40089

ORDER

On further consideration of the granted issue, 83 M.J. __ (C.A.A.F. 2022), and in view of *United States v. Anderson*, 83 M.J. __ (C.A.A.F. 2023), it is, by the Court, this 18th day of July, 2023,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Joshua D. McCAMERON,
Senior Airman (E-4),
U.S. Air Force,
Appellant

No. ACM 40089

Decided: 17 November 2022

Appeal from the United States Air Force Trial Judiciary

Military Judge: Charles G. Warren

Sentence: Sentence adjudged on 23 January 2021 by GCM convened at Barksdale Air Force Base, Louisiana. Sentence entered by military judge on 23 February 2021: Dishonorable discharge, confinement for 27 months, reduction to E-1, $600.00 fine, and a reprimand.

For Appellant: Major Sara J. Hickmon, USAF; Major Eshawn R. Rawlley, USAF.

For Appellee: Lieutenant Colonel Thomas J. Alford, USAF; Major Morgan R. Christie, USAF; Major John P. Patera, USAF; Captain Jocelyn Q. Wright, USAF; Mary Ellen Payne, Esquire.

Before KEY, ANNEXSTAD, and GRUEN, Appellate Military Judges.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

ANNEXSTAD, Judge:

A military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas, of two specifications of damaging non-military property[1] and one specification of assault consummated by a battery, in violation of Articles 109 and 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 909, 928.[2] Also, consistent with his pleas, a panel of officer members found Appellant not guilty of one specification of aggravated assault with a dangerous weapon, but contrary to his pleas, guilty of the lesser included offense of simple assault with an unloaded firearm, in violation Article 128, UCMJ, 10 U.S.C. § 928. Appellant elected to be sentenced by the military judge, who sentenced Appellant to a dishonorable discharge, confinement for 27 months, reduction to the grade of E-1, a $600.00 fine, and a reprimand. The convening authority took no action on the findings or sentence.[3]

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1. Specification 1 of Charge I concerned damage to a wall in Appellant's residence. Specification 2 of Charge I concerned damage to a cell phone owned by Appellant's spouse.

2. All references to the UCMJ and the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

3. On 10 February 2021 the convening authority deferred Appellant's reduction in grade until the date the military judge signed the entry of judgment and waived all automatic forfeitures for a period of six months for the benefit of Appellant's dependents.

Appellant raises eight issues which we have reworded: (1) whether the court-martial lacked jurisdiction because Specification 1 of Charge I alleging damage to the wall in Appellant's residence failed to state an offense, and consequently whether the military judge erred in accepting Appellant's guilty plea to this specification; (2) whether the military judge abused his discretion by admitting character evidence under Mil R. Evid. 404(b); (3) whether Appellant was denied the effective assistance of counsel under the Sixth Amendment[4] for alleged deficiencies in the performance of his trial defense counsel; (4) whether the military judge erred in instructing members on the lesser included offense of simple assault with an unloaded firearm; (5) whether trial counsel committed prosecutorial misconduct during his findings argument; (6) whether Appellant's trial defense counsel were ineffective in not objecting to trial counsel's findings argument; (7) whether the military judge erred by considering improper rebuttal and aggravation evidence during sentencing; and (8) whether the military judge erred by denying a defense motion requesting that the military judge instruct the panel that a guilty verdict must be unanimous.[5]

With respect to issues (2), (4), (7), and (8) we have carefully considered Appellant's contentions and find they do not require further discussion or warrant

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4. U.S. CONST. amend. VI.

5. Appellant also raises an issue with the entry of judgment (EoJ). Specifically, Appellant highlights that the summary of the offenses on the EoJ fails to state the location where the offenses occurred. Appellant does not allege prejudice, but requests that this court modify the EoJ to include the location of the offenses. We find this particular omission to be immaterial under the law. We have considered whether to exercise our discretion to modify the EoJ ourselves, and we decline to do so.

relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987). We consider issues (3) and (6) together because both allege that Appellant's trial defense counsel rendered ineffective assistance. We agree with Appellant that his guilty plea to Specification 1 of Charge I is not provident. Accordingly, we set aside the finding of guilty as to that specification. We reassess Appellant's sentence to a dishonorable discharge, confinement for 27 months, reduction to the grade of E-1, a $500.00 fine, and a reprimand. Finding no other error that materially prejudiced a substantial right of Appellant, we affirm the remaining findings of guilty and the sentence as reassessed.

I. BACKGROUND

Appellant enlisted in the United States Air Force in April 2017. At the time of his enlistment, Appellant was married to FM and the couple had one child. The family lived together in privatized housing (a rental home) on Barksdale Air Force Base (AFB), Louisiana, where Appellant worked as a munition specialist. In October 2017, the couple welcomed their second child.

In June 2019, Appellant and FM decided to separate. FM moved to Indiana with their children and Appellant remained at Barksdale AFB.[6] At some point after their separation, the two decided to divorce. The couple continued to speak to one another over the telephone, often arguing about each other's romantic interests. FM testified that during one phone call, Appellant become upset that FM was dating another man. She described that Appellant

6. Appellant also had a son from a previous relationship who continued to live with him at Barksdale AFB.

was screaming, punching, and throwing things during the call.

Later that day, Appellant and FM spoke over FaceTime.[7] During this call, Appellant told FM that he loved her and wanted to "fix things" between them. FM stated her ambivalence about reuniting. FM testified that after she made these statements, Appellant put a handgun to his head and threatened suicide if she did not return to Louisiana. The following day, FM drove to Barksdale AFB from Indiana with her two children. She arrived at Appellant's house that evening. Shortly thereafter, Appellant and FM retired to the master bedroom, where Appellant surprised FM with flowers, candy, and a card. FM then stated that she became upset over the fact that Appellant had "had another woman" in their bed, which prompted an argument over perceived mutual marital infidelities. Later that night, she and Appellant had sex. Soon thereafter, Appellant began looking at FM's phone and scrolled through messages that she had exchanged with other people. Appellant then became upset by a message he saw between FM and another man, and smashed her phone into her face, causing the phone to strike her in the nose and forehead. The impact of the phone left a cut on FM's nose, caused her nose to bleed, and left a bruise on her forehead. During his guilty plea inquiry, Appellant described how he then grabbed FM's phone and threw it at the floor of the bedroom. He further explained to the military judge that when the phone hit the floor, it separated from the case and the case became lodged in the wall.

FM testified that as she recovered from the blow to her face, Appellant left the room and retrieved his

7. FaceTime is a video-teleconferencing application.

handgun. FM then stated that she went to the bathroom to wipe "the blood off [her] nose and kinda get[ ] [her]self together." FM stated that while she was in the bathroom, she heard Appellant load the gun. She then described that when she exited the bathroom, Appellant pointed the gun at her and told her to "get on [her] f[**]king knees." Appellant then demanded to know if FM had been with other men while they were separated. Eventually, Appellant turned the gun on himself, and then asked FM whether she would help him "fix" his "demons." FM promised to support Appellant.

FM testified that Appellant eventually calmed down, stowed the gun in a holster, and tucked the holster in his waistband. FM stated that she then told Appellant that she was going to go to the shoppette on base and buy an energy drink. She testified that after she left the house, she went to the nearby house of a friend, BN. She stated that after she told BN what had happened, BN called 9-1-1. A few minutes later, security forces personnel arrived at Appellant's house and found him in the backyard. Security forces personnel searched Appellant's home and recovered a handgun in a holster from a six-and-a-half-foot high cabinet in Appellant's laundry room. At trial, FM identified the handgun as the same one Appellant had pointed at her.

II. DISCUSSION

A. Providence of Appellant's Plea

On appeal, Appellant attacks the validity of his guilty plea to Specification 1 of Charge I, a violation of Article 109, UCMJ, 10 U.S.C. § 909, which alleged Appellant had damaged the wall of his rental home. As discussed below, Appellant essentially argues the Government charged Appellant with damaging

personal property when he should have been charged with wasting or spoiling real property. Based upon this theory, he variously alleges the perceived defect means the specification failed to state an offense, his plea was improvident, the military judge erred in accepting his plea, and the court-martial never had jurisdiction over the offense in the first place. Appellant further contends that his guilty plea did not operate to waive the above issues by asserting that the President of the United States exceeded his power under Article 36(a), UCMJ, 10 U.S.C. § 836(a), when he amended Rule for Courts-Martial (R.C.M.) 907 and made failure to state an offense a waivable objection. We agree with Appellant that there is a substantial basis in law and fact to question Appellant's plea of guilty to Specification 1 of Charge I, and we grant relief in our decretal paragraph.

1. Additional Background

At trial, Appellant's counsel entered a plea of guilty for Appellant to Specification 1 of Charge I, a violation of Article 109, UCMJ. When describing the charge, the military judge told Appellant:

> In Specification 1 of Charge I, you are charged with the offense of Damaging Non-Military Property, in violation of Article 109, Uniform Code of Military Justice. By pleading guilty to this offense, you are admitting that the following elements are true and accurately describe what you did:
>
> One, that at or near Barksdale Air Force Base, Louisiana, on or about 4 September 2019, you willfully and wrongfully damaged certain *personal property*, that is the wall of your rental home by throwing a cell phone at the wall and thereby damaging the wall;

> Second, that the property belonged to Hunt Military Housing Shared Services, LLC (Limited Liability Corporation); and
>
> Three, that the damage was less than $1,000.

(Emphasis added).

The military judge subsequently advised Appellant, "Damage consists of any physical injury to the property." During the guilty plea inquiry with the military judge, Appellant admitted to damaging the wall of his rental home, which he called "private property." Appellant also testified that he had repaired the damage himself and that when he vacated the rental property at the termination of his lease period, the move-out inspector noted no damage to the wall. No evidence was presented during findings tending to prove beyond a reasonable doubt that the wall in question was permanently damaged.

2. Law

We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Blouin*, 74 M.J. 247, 251 (C.A.A.F. 2015) (citation omitted). "A military judge abuses this discretion if he fails to obtain from the accused an adequate factual basis to support the plea -- an area in which we afford significant deference." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (citation omitted).

"The test for an abuse of discretion in accepting a guilty plea is whether the record shows a substantial basis in law or fact for questioning the plea." *United States v. Moon*, 73 M.J. 382, 386 (C.A.A.F. 2014) (citation omitted). An appellant bears the "burden to demonstrate a substantial basis in law and fact for questioning the plea." *United States v. Finch*, 73 M.J.

144, 148 (C.A.A.F. 2014) (quoting *United States v. Negron*, 60 M.J. 136, 141 (C.A.A.F. 2004)).

"[W]hen a plea of guilty is attacked for the first time on appeal, the facts will be viewed in the light most favorable to the [G]overnment." *United States v. Arnold*, 40 M.J. 744, 745 (A.F.C.M.R. 1994) (citation omitted).

"The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea." R.C.M. 910(e). When entering a guilty plea, the accused should understand the law in relation to the facts. *United States v. Care*, 40 C.M.R. 247, 251 (C.M.A. 1969). "An essential aspect of informing [an appellant] of the nature of the offense is a correct definition of legal concepts. The judge's failure to do so may render the plea improvident." *Negron*, 60 M.J. at 141 (citations omitted).

The record of trial must show that the military judge "questioned the accused about what he did or did not do, and what he intended." *Care*, 40 C.M.R. at 253. This is to make clear to the military judge whether the accused's acts or omissions constitute the offense to which he is pleading guilty. *Id*. "If an accused sets up matter inconsistent with the plea at any time during the proceeding, the military judge must either resolve the apparent inconsistency or reject the plea." *United States v. Hines*, 73 M.J. 119, 124 (C.A.A.F. 2014) (internal quotation marks and citation omitted).

"This court must find a substantial conflict between the plea and the accused's statements or other evidence in order to set aside a guilty plea. The mere possibility of a conflict is not sufficient." *Id*. (internal quotation marks and citation omitted). We

apply a "substantial basis" test by determining "whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." *Inabinette*, 66 M.J. at 322.

In reviewing the providence of an appellant's guilty pleas, "we consider his colloquy with the military judge, as well any inferences that may reasonably be drawn from it." *United States v. Timsuren*, 72 M.J. 823, 828 (A.F. Ct. Crim. App. 2013) (quoting *United States v. Carr*, 65 M.J. 39, 41 (C.A.A.F. 2007)).

Article 109, UCMJ states: "Any person subject to this chapter who willfully or recklessly wastes, spoils, or otherwise willfully and wrongfully destroys or damages any property other than military property of the United States shall be punished as a court-martial may direct." 10 U.S.C. § 909.

The specification for which the military judge found Appellant guilty states that Appellant

> did, at or near Barksdale Air Force Base, Louisiana, on or about 4 September 2019, willfully and wrongfully damage the wall of his rental home by throwing a cell phone, at the floor of his rental home, the amount of said damage being in the sum of less than $1,000[.00], the property of Hunt Military Housing Shared Services LLC.

"Article 109 proscribes willful or reckless waste or spoilation of the real property of another. The terms 'wastes' and 'spoils' as used in this article refer to such wrongful acts of voluntary *destruction of or permanent damage to* real property...." *Manual for Courts-Martial, United States* (2019 ed.) (2019 MCM), pt. IV, ¶ 45.c.(1) (emphasis added).

Article 109 also "proscribes the willful and wrongful *destruction or damage* of the personal property of another. To be destroyed, the property need not be completely demolished or annihilated, but must be sufficiently injured to be useless for its intended purpose. Damage consists of any physical injury to the property." 2019 MCM, pt. IV, ¶ 45.c.(2) (emphasis added).

3. Analysis

As a panel of our sister service court recognized in *United States v. Dentice*, ARMY 20130591, 2014 CCA LEXIS 589, 2014 WL 7228122 (A. Ct. Crim. App. 15 Aug. 2014) (unpub. op.), the root cause of the problem in Appellant's case

> is the fact that Article 109, UCMJ, proscribes two related but different offenses.... One offense relates to the willful or reckless waste or spoilation of the real property of another. The other offense relates to the willful and wrongful destruction of the personal property of another.

Id. at *4 (omission in original) (quoting *United States v. Weaver*, 48 C.M.R. 856, 856 (A.C.M.R. 1974)); *see also United States v. Bernacki*, 33 C.M.R. 173, 175 (C.M.A. 1963) (analysis of Article 109, UCMJ, "indicates two offenses are denounced: the waste or spoilation of real property[ ] and destruction or damage to personalty"); *United States v. Jeter*, 74 M.J. 772, 775 (A.F. Ct. Crim. App. 1 Jul. 2015) (finding the President created "two offenses within the ambit of Article 109, UCMJ, based on the type of the property at issue: the wasting or spoiling of real property and the destroying or damaging of personal property"). Therefore, we read Article 109, UCMJ, as providing for two distinct theories of liability, "each dependent

on the nature of the property at issue: real property or personal property." *Dentice*, 2014 CCA LEXIS 589, at *5, 2014 WL 7228122.

We find that the military judge erred by instructing Appellant that he was pleading guilty to damaging "personal property" when the wall of his residence was real, not personal, property. *Id*. at *6 (finding that the interior wall of onpost quarters is real, not personal, property). Additionally, we find that the military judge erred when he instructed Appellant that the damage to the wall must only consist of physical injury to the property to be convicted—as opposed to the destruction or permanent damage required when the damage is to real property. Lastly, we find that the military judge's failure to correctly define the damage required for real property set up a substantial conflict between the plea and the accused's statements. Here, Appellant's statements during the plea colloquy clearly indicated that the damage to the wall of his residence was easily repaired and that there was no permanent damage to the wall. As a result of these errors, we are not confident Appellant understood the nature of the offense of which he was charged and pleaded guilty. We therefore find a substantial basis in law and fact to question Appellant's guilty plea to Specification 1 of Charge I. Consistent with this assessment, we set aside the finding as to Specification 1 of Charge I.

4. Sentence Reassessment

Because we are setting aside Appellant's conviction for the first specification of Charge I, we must determine whether we should remand his case for a new hearing on sentence or exercise our "broad discretion" and reassess the sentence ourselves. *See United States v. Winckelmann*, 73 M.J. 11, 13 (C.A.A.F. 2013). If we determine to our satisfaction

"that, absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of prejudicial effects of error...." *Id.* at 15 (omission in original) (quoting *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986)). In making this determination, we consider whether: (1) there were dramatic changes in the penalty landscape; (2) Appellant was sentenced by members or a military judge; (3) the remaining charges "capture the gravamen" of the originally charged conduct; and (4) we are familiar with the remaining offenses such that we can reasonably determine what sentence would have been imposed at trial. *Id.* at 15–16.

Here, Appellant elected under R.C.M. 1002(b)(1) to be sentenced by the military judge. The military judge, in accordance with R.C.M. 1002(d)(2), specified the following segmented sentence for confinement and fines: a $100.00 fine for damaging the wall; a $500.00 fine for damaging the phone; 3 months of confinement for striking FM; and 24 months of confinement for assaulting FM with an unloaded firearm. The military judge determined that all periods of confinement were to run consecutively. Additionally, the military judge sentenced Appellant to a dishonorable discharge, reduction to the grade of E-1, and a reprimand.

Applying the *Winckelmann* factors, we determine that Appellant was sentenced by a military judge, and that the remaining offenses substantially capture the scope of the original charged offenses. We also find that there is not a dramatic change in the penalty landscape. It is worth noting here that we also have the benefit of the military judge's segmented sentence in this case. It is clear from the record, and the adjudged sentence, that the military judge viewed both of the assault specifications under Charge II as

significantly more serious than the damaging property specifications of Charge I. This is evidenced by the fact that the military judge only adjudged fines for the specifications of Charge I, and that all adjudged periods of confinement applied to the specifications of Charge II. Furthermore, we find the convening authority's reprimand is probative on this issue as it only reprimands Appellant for the assaults he committed against FM. Finally, we are very familiar with the remaining offenses in this case, and we can reliably determine the sentence which would have been imposed for those offenses in the absence of the walldamage specification. We determine Appellant's sentence for just the remaining specifications would have been no less than a dishonorable discharge, confinement for 27 months, reduction to the grade of E-1, a $500.00 fine, and a reprimand.

B. Trial Counsel's Findings Argument

Appellant argues that several comments made by trial counsel during findings and rebuttal argument constitute improper argument and prosecutorial misconduct. Appellant claims that trial counsel's findings and rebuttal argument included facts not in evidence, that trial counsel expressed his personal opinion on the strength of the Government's case, and that trial counsel vouched for the credibility of FM. We conclude Appellant was not prejudiced by trial counsel's argument and is therefore not entitled to relief.

1. Additional Background

Before trial counsel began his findings argument, the military judge provided the panel with the following instructions:

> At this time, members, you will hear arguments by counsel. You'll hear an exposition of the facts by counsel for both sides as they view them. Bear in mind that the arguments of counsel are not themselves evidence. Argument is made by counsel to assist you in understanding and evaluating the evidence, but you must base your determination of the issues in this case on the evidence as you remember it and apply the law as I have given it to you.
>
> In general, I will allow the counsel to provide you with their views and interpretations of the evidence and leave it to your recollection as to what the evidence did or did not show. If counsel appear to you to be mischaracterizing the evidence, you may consider that matter and the amount of credence you decide to give to any arguments by counsel.

During trial counsel's closing argument, he discussed the elements of the lesser included offense of simple assault. After reviewing the first two elements, trial counsel discussed the third element that the "offer was done with unlawful force or violence." Trial counsel argued,

> I can't imagine in the context of this how anyone could argue this wasn't done with force or violence. Immediately preceded by a battery, immediately preceded by property destruction, and immediately preceded by racking the slide and pointing the gun followed by "Get on your f[**]king knees" was absolutely done with force and violence.

Later during trial counsel's closing argument, he described the manner in which Appellant threw FM's phone at her, and made the statement that Appellant threw the phone with his left hand. Trial counsel then argued that Appellant was left-handed because, inter alia, "he has a left-handed holster." During her closing argument trial defense counsel rebutted trial counsel's assertion that Appellant was left-handed, saying, "[T]ake a look at my client. He's been writing with his right hand. He is not left-handed." In sustaining trial counsel's objection for facts not in evidence, the military judge instructed the members:

> [B]y the same measure, like trial counsel's earlier note about whether the accused is right or left-handed ... it is up to you to look at the holster to determine whether or not that is left-handed or not. The non-testimony and actions of [Appellant] in taking notes and whatnot, are not facts in evidence here and are to be disregarded by the members.

In his rebuttal argument, trial counsel then argued,

> Now, members, I made a mistake. I said it was a left-handed holster.... I'm not a gun guy. I don't know a lot about it, but I can tell you after looking at it, it's an inside the waistband holster which, again, is independent corroboration of [FM]'s testimony that the accused took the firearm, holstered it, and tucked it inside of his pants. Because it is an inside the pants, concealed carry instrument.

Also during his rebuttal argument, trial counsel addressed trial defense counsel's argument that investigators' failure to dust the firearm for fingerprints amounted to reasonable doubt. Trial

counsel directly addressed the panel member who twice asked about fingerprints, saying:

> Let's talk about red herrings first. Fingerprints. Now Captain [NM], I had the same questions you did when I first got this case. Did they test the gun for fingerprints, right? That might tell us who touched the gun, who was in possession of it, who manipulated it, but you would expect a gun in the possession of the accused, his property in his home to have his fingerprints. That does not make it more or less likely that he pointed it at his wife. The mere fact that his hands were on it doesn't make it more likely that he committed an assault, and that's why testing of fingerprints has no probative value. It doesn't matter. It wouldn't exculpate him, it wouldn't incriminate him. So, the fingerprints [are] a complete red herring to the facts of this case.

During his rebuttal argument, trial counsel also addressed trial defense counsel's argument that it was reasonably possible that FM, not Appellant, placed the firearm in the six-and-a-half-foot high cabinet in the laundry room prior to it being discovered by security forces. Trial defense counsel had claimed that the Government failed to introduce evidence—such as FM's height—that would rule out such a possibility. Trial counsel argued:

> Now, defense [counsel] said you have no idea how tall [FM] is, but you can absolutely observe demeanor and the appearance of witnesses as they come before this court-martial, and you did that. You saw her come from the gallery and come sit here, and you saw exactly how tall she is. She's about 5' tall. This argument that you

simply have no idea is simply false. You saw how tall she is.

Finally, during his rebuttal argument, trial counsel addressed the Defense's contention that FM lacked credibility because, inter alia, she lied under oath during a child custody hearing. While offering an explanation for FM's motivation during that hearing, trial counsel argued:

> Now, it's true [FM] did lie under oath at a child custody hearing for her child, as she testified, [Z]. The first child that taught her how to be a mother, and not all lies are created equal. You have to judge for yourself the moral implications of this lie. She explained to you exactly why she did it, because [Z] may have gone to a home with a drug using mother [and] an absent father, and she thought that she could provide a better more stable home for him. She lied for a child, and I would submit to you that if we were in that situation and you had to make the choice between the welfare of someone you loved such as a child, it wouldn't be such an easy choice. And the question about it, and this is significant, in this courtroom today, she admitted she told the truth.
>
> A liar, as the defense has characterized her, would continue to lie, would have denied it, would have sought to explain it in a less-credible way, would have continued the lie and presumably even [been] caught in the lie. She admitted it. She [owned] up to it, and that is worthy of your consideration of judging her credibility and the testimony in this court.

Defense counsel did not object to the above referenced portions of trial counsel's argument and rebuttal argument.

2. Law

"We review prosecutorial misconduct and improper argument de novo and where ... no objection is made, we review for plain error." *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citing *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018)).

"Plain error occurs when (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. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (citation omitted). The burden of proof under a plain error review is on the appellant. *See United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006) (citation omitted).

"Improper argument is one facet of prosecutorial misconduct." *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (citation omitted). Prosecutorial misconduct occurs when trial counsel "oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *Fletcher*, 62 M.J. at 178 (quoting *Berger v. United States*, 295 U.S. 78, 84 (1935)). Such conduct "can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014) (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)).

Trial counsel are to limit arguments to evidence in the record and reasonable inferences that can be drawn from that evidence. *United States v. Baer*, 53

M.J. 235, 237 (C.A.A.F. 2000). While a trial counsel "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Fletcher*, 62 M.J. at 179 (quoting *Berger*, 295 U.S. at 88).

"[I]t is error for trial counsel to make arguments that 'unduly ... inflame the passions or prejudices of the court members.' " *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007) (omission in original) (quoting *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983)). Trial counsel are also prohibited from injecting into argument irrelevant matters, such as facts not in evidence or personal opinions about the truth or falsity of testimony or evidence. *See id.* at 58; *Fletcher*, 62 M.J. at 179; R.C.M. 919(b), Discussion. To that end, courts have struggled to draw the "exceedingly fine line which distinguishes permissible advocacy from impermissible excess." *Fletcher*, 62 M.J. at 183 (quoting *United States v. White*, 486 F.2d 204, 207 (2d Cir. 1973)).

"[A]rgument by a trial counsel must be viewed within the context of the entire court-martial. The focus of [the] inquiry should not be on words in isolation, but on the argument as 'viewed in context.'" *Baer*, 53 M.J. at 238 (quoting *United States v. Young*, 470 U.S. 1, 16, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)). "[I]t is improper to 'surgically carve' out a portion of the argument with no regard to its context." *Id.*

"When a trial counsel makes an improper argument during findings, 'reversal is warranted only when the trial counsel's comments taken as a whole were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone.'" *United States v. Norwood*, 81 M.J.

12, 19 (C.A.A.F. 2021) (quoting *Andrews*, 77 M.J. at 401–02). "We weigh three factors to determine whether trial counsel's improper arguments were prejudicial: '(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction.' " *Andrews*, 77 M.J. at 402 (quoting *Fletcher*, 62 M.J. at 184) These factors are commonly referred to as the "*Fletcher* factors."

"[T]he lack of a defense objection is 'some measure of the minimal impact of a prosecutor's improper comment.'" *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001) (quoting *United States v. Carpenter*, 51 M.J. 393, 397 (C.A.A.F. 1999)) (additional internal quotation marks omitted). In sum, "reversal is warranted only 'when the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone.'" *Sewell*, 76 M.J. at 18 (quoting *Hornback*, 73 M.J. at 160).

3. Analysis

We need not reach the issue of whether any of trial counsel's findings argument constituted prosecutorial misconduct, because "[e]ven were we to conclude that prosecutorial misconduct occurred, relief is merited only if that misconduct 'actually impacted on a substantial right of accused (i.e., resulted in prejudice).'" *United States v. Pabelona*, 76 M.J. 9, 12 (C.A.A.F. 2017) (quoting *Fletcher*, 62 M.J. at 178). Here, we find Appellant has failed to establish any material prejudice to his substantial right to a fair trial.

Our analysis of the first *Fletcher* factor demonstrates that the severity of trial counsel's statements was low and did not permeate the entire

trial. Rather, most of the statements highlighted by Appellant were limited to a few isolated comments during the rebuttal portion of trial counsel's findings argument—an argument that spanned over 25 pages of the transcript and took over 60 minutes to deliver during trial. Moreover, to the extent that trial counsel's argument was improper—if at all—it resulted from trial counsel's inartful attempt to emphasize reasonable inferences from the evidence. We also note that trial defense counsel's failure to object to any of the above-mentioned statements is "some measure of the minimal impact" of the impact of trial counsel's argument. *Gilley*, 56 M.J. at 123. Therefore, we find this factor weighs in the Government's favor.

The second *Fletcher* factor considers the measures adopted to cure the misconduct. On this point, we note that trial defense counsel did not object to any portion of trial counsel's argument and that the only curative instruction given to the panel came as a result of an objection by trial counsel. Furthermore, we see no evidence in the record to suggest that the panel disregarded the military judge's instructions regarding arguments by counsel. Therefore, we find this factor benefits neither party in this case.

The final *Fletcher* factor we consider is the weight of the evidence supporting the conviction. Here we find the Government's case, although primarily based upon the testimony of FM, was reasonably strong when taken as a whole. FM reported the assault the same night it happened and testified consistently with her initial report. Additionally, pictures taken of FM on the night of the assault showed injuries to her face and nose which were consistent with her initial report and testimony. Her testimony was also corroborated by other evidence showing that her phone was broken,

that there was damage to Appellant's residence, and most importantly, that a weapon in a holster matching the description she provided was found in Appellant's house. We acknowledge that some evidence was presented during trial questioning FM's trustworthiness, specifically, that FM had made false statements during a child custody hearing. However, we also note the lack of any evidence to suggest that FM had a motive to fabricate the firearm aspect of the assault. We therefore find the third factor also weighs in favor of the Government.

In conclusion, we are confident in the members' ability to adhere to the military judge's final instructions and to put trial counsel's argument in the proper context. We are furthermore confident that the members convicted Appellant "on the basis of the evidence alone." *See Sewell*, 76 M.J. at 18.

C. Ineffective Assistance of Counsel

Appellant contends that he received ineffective assistance from his trial defense counsel. Specifically, Appellant asserts that his counsel were deficient by (1) "opening the door" and failing to object to evidence of Appellant's uncharged misconduct, and (2) failing to object to trial counsel's improper findings argument. Appellant requests that we set aside the findings and reassess his sentence. We disagree with Appellant's contentions and find no relief is warranted.

1. Additional Background

During trial, the military judge allowed testimony of Appellant's controlling behavior towards FM. In particular, the military judge, over defense objection, allowed FM to testify concerning two statements Appellant made to her prior to night of the offenses. The statements were: "I'm going to ruin your life" and

"I will destroy everything you love." These statements as admitted did not differ from the statements on which the Government provided notice prior to trial. Nor did these statements differ from the way FM relayed them during her motions and findings testimony. However, during her findings testimony, FM testified about another time when Appellant made similar comments:

> He had asked me why I agreed to sign the divorce papers and I mean I wasn't gonna tell him that I started seeing somebody simply because I wanted to avoid an argument. He said, "if I find out you are seeing somebody, I will destroy everything you love. I hope you know that. And when I find out who it is, I will kill them."

Defense counsel did not object to this testimony.

Before findings, the Government also sought to elicit testimony that Appellant withheld FM's access to their money and would not let her leave the house with a credit card. However, the military judge precluded admission of these statements, finding the "probative value of this [evidence was] marginal and [was] outweighed by a danger of unfair prejudice." During direct examination, FM testified consistent with the military judge's ruling and did not discuss these matters. However, during cross-examination, trial defense counsel elicited testimony that Appellant provided FM with money to support her hobbies. After cross-examination, the Government moved for reconsideration of the earlier ruling concerning FM's claims that Appellant controlled her money. The military judge granted the Government's motion for reconsideration and ruled the evidence was admissible. Highlighting the evidence elicited by the Defense that Appellant provided FM money and

bought items to support her hobbies, the military judge stated, "Because the defense has used this as a shield and a sword, the door has been opened." On redirect examination, the Government elicited testimony about Appellant withholding FM's access to money by, among other matters, cutting her debit card in half and making her request money from Appellant whenever she wanted to purchase something.

On 5 August 2022, this court ordered Appellant's trial defense counsel, Major (Maj) KR and Captain (Capt) MR, to provide responsive declarations. We have considered whether a post-trial evidentiary hearing is required to resolve any factual disputes between Appellant's assertions and his trial defense team's assertions. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997); *United States v. DuBay*, 37 C.M.R. 411, 413 (C.M.A. 1967). We find a hearing unnecessary to resolve Appellant's claims.

In their declarations to this court, both of Appellant's trial defense counsel stated that they argued against the admission of an "enormous amount of character evidence" concerning Appellant's controlling behavior toward FM. In response to the Government being allowed to elicit testimony concerning Appellant's controlling behavior, Maj KR stated that the Defense team made a strategic decision to elicit testimony from FM during cross-examination that Appellant "had been supportive of [FM]'s employment outside of the home and employment inside of the home with her home crafting business." Both defense counsel stated that it was important to challenge the Government's "controlling behavior" argument. Both trial defense counsel maintained that they attempted to be careful to not open the door to other evidence, and that they

argued vigorously against the Government's contention they had opened the door.

Additionally, Maj KR provided that they did not object to Appellant's "I will kill them" statement because FM had provided multiple iterations of the conversations, and they wanted to allow the witness to provide inconsistent statements on direct examination. Trial defense counsel intended to use these inconsistencies "as ammunition during cross-examination to show how [FM] [was] 'making up' new statements exaggerating her former testimony in order to expose to the panel members that the witness [was] not being truthful." In the end, Maj KR provided that they decided not to "highlight" FM's statement on cross-examination out of concern that it would further emphasize her testimony.

Concerning Appellant's contention that failing to object to trial counsel's findings and rebuttal argument constituted deficient performance, both trial defense counsel again stated they made reasonable strategic decisions not to object to trial counsel's findings and rebuttal argument. Specifically, Maj KR stated that they did not object for several reasons. First, both trial defense counsel believed, having observed the entire court-martial, that trial counsel was overselling both her case and the evidence during her closing argument. Capt MR explained that she did not object to trial counsel's argument because she wanted to highlight trial counsel's statements during her own closing argument, and "use those statements against the prosecutor as overselling the case to the panel members." Secondly, both trial defense counsel stated that they decided not to object to some questionable statements by trial counsel during argument in a considered effort not to further highlight what were

otherwise brief statements in lengthy argument and rebuttal argument. Capt MR explained that in her opinion, any objection may solidify for the members that the statement itself was important and one to be remembered during deliberations. Finally, Capt MR provided that she knew the military judge would be providing a standard instruction to the panel regarding "closing argument" not being evidence but rather the attorney's reasonable inferences from the evidence presented, which would bolster her above-mentioned strategy.

2. Law

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. *Gilley*, 56 M.J. at 124. In assessing the effectiveness of counsel, we apply the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and begin with the presumption of competence announced in *United States v. Cronic*, 466 U.S. 648, 658 (1984). *See Gilley*, 56 M.J. at 124 (citing *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000)). We review allegations of ineffective assistance de novo. *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009)).

We utilize the following three-part test to determine whether the presumption of competence has been overcome:

> 1. Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> 2. If the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance ... [ordinarily expected] of fallible lawyers"?

> 3. If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

Id. (alterations in original) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)). The burden is on an appellant to demonstrate both deficient performance and prejudice. *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (citation omitted).

"Defense counsel do not perform deficiently when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so." *Id.* at 424 (citing *Gooch*, 69 M.J. at 362–63) (additional citation omitted). In reviewing the decisions and actions of trial defense counsel, this court does not second-guess strategic or tactical decisions. *See United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993) (citations omitted). It is only in those limited circumstances where a purported "strategic" or "deliberate" decision is unreasonable or based on inadequate investigation that it can provide the foundation for a finding of ineffective assistance. *See United States v. Davis*, 60 M.J. 469, 474 (C.A.A.F. 2005).

This court does "not measure deficiency based on the success of a trial defense counsel's strategy, but instead examine[s] 'whether counsel made an objectively reasonable choice in strategy' from the available alternatives." *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015) (quoting *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001)). For this reason, defense counsel receive wide latitude in making tactical decisions. *Cullen v. Pinholster*, 563 U.S. 170, 195 (2011) (citing *Strickland*, 466 U.S. at 689). This also applies to trial defense counsel's strategic decisions. *Morgan*, 37 M.J. at 410. "Strategic

choices made by counsel after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Akbar*, 74 M.J. at 371 (alterations, internal quotation marks, and citation omitted).

In making this determination, courts must be "highly deferential" to trial defense counsel and make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Moreover, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (citation omitted).

3. Analysis

We find that Appellant has failed to meet his burden of showing deficient performance and has also failed to overcome the strong presumption that his trial defense counsel's performance was within the wide range of reasonable professional assistance. Both trial defense counsel provided reasonable explanations for their actions, and their individual and combined level of advocacy on Appellant's behalf was not "measurably below the performance ordinarily expected of fallible lawyers." *Polk*, 32 M.J. at 153. Furthermore, we find that both counsel have also articulated multiple strategic reasons for their decisions, concerning both the character evidence and their decision not to object during trial counsel's argument, that are objectively reasonable. We will not second-guess their defense strategy. We also note that we evaluate defense counsel's performance not by the success of their strategy, "but rather whether counsel made ... objectively reasonable choice[s] in strategy

from the alternatives available at the [trial]." *See Dewrell*, 55 M.J. at 136 (quoting *United States v. Hughes*, 48 M.J. 700, 718 (A.F. Ct. Crim. App. 1998), *aff'd*, 52 M.J. 278 (C.A.A.F. 2000)). The declarations submitted by Appellant's defense counsel make clear that the defense team sought to shape the facts and narrative in the light most favorable to Appellant. Based on our review of the record, to include evidence and the declarations of defense counsel, the defense team was somewhat successful in this regard.

III. CONCLUSION

The finding of guilty as to Specification 1 of Charge I is SET ASIDE and Specification 1 of Charge I is DISMISSED. We reassess Appellant's sentence to a dishonorable discharge, confinement for 27 months, reduction to the grade of E-1, a $500.00 fine, and a reprimand. The remaining findings and the sentence as reassessed are correct in law and fact, and no additional error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the remaining findings and the sentence as reassessed are **AFFIRMED**.

Judge ANNEXSTAD delivered the opinion of the court, in which Senior Judge KEY and Judge GRUEN joined.

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
WASHINGTON, D.C.

United States,
Appellee

v.

Margarito Miramontes,
Appellant

USCA Dkt. No. 22-0233/AR
Crim. App. No. 20200476

ORDER

On further consideration of the granted issue, 83 M.J. 47 (C.A.A.F. 2022), and in view of *United States v. Anderson*, 83 M.J. __ (C.A.A.F. 2023), it is, by the Court, this 18th day of July, 2023,

ORDERED:

That the decision of the United States Army Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ David A. Anderson
Deputy Clerk of the Court

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

Before WALKER, EWING, and PARKER
Appellate Military Judges

UNITED STATES, **Appellee**

v.

Specialist MARGARITO MIRAMONTES,
United States Army, Appellant

ARMY 20200476

Headquarters, 8th Army
Robert L. Shuck and Christopher E. Martin, Military Judges
Colonel Dean L. Whitford, Staff Judge Advocate

For Appellant: Colonel Michael C. Friess, JA; Major Rachel P. Gordienko, JA; Captain Julia M. Farinas, JA (on brief) ; Lieutenant Colonel Dale C. Mcfeatters, JA; Captain Lauren M. Teel, JA; Captain Julia M. Farinas, JA (on reply brief).

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

20 May 2022

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

For the Court,

[signature]

JAMES W. HERRING, JR.
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
WASHINGTON, D.C.

United States,
Appellee

v.

Jose A. MunozGarcia,
Appellant

USCA Dkt. No. 23-0053/AR
Crim. App. No. 20200550

ORDER

On further consideration of the granted issue, 83 M.J. __ (C.A.A.F. 2022), and in view of *United States v. Anderson*, 83 M.J. __ (C.A.A.F. 2023), it is, by the Court, this 18th day of July, 2023,

ORDERED:

That the decision of the United States Army Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ David A. Anderson
Deputy Clerk of the Court

U.S. ARMY COURT OF CRIMINAL APPEALS

UNITED STATES
Appellee

v.

Specialist Jose A. **MunozGarcia**,
United States Army, Appellant

ARMY 20200550

28 April 2022

Headquarters, 1st Cavalry Division, Douglas K. Watkins, Lanny J. Acosta, Jr., and Jessica Conn, Military Judges, Lieutenant Colonel Shay Stanford, Acting Staff Judge Advocate (pretrial), Colonel Howard T. Matthews, Jr., Staff Judge Advocate (post-trial)

For Appellant: Colonel Michael C. Friess, JA; Jonathan F. Potter, Esquire; Major Joyce C. Liu, JA; Captain Andrew R. Britt, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Joyce C. Liu, JA; Captain Andrew R. Britt, JA (on reply brief).

For Appellee: Lieutenant Colonel Craig J. Schapira, JA; Major Mark T. Robinson, JA; Captain Jennifer A. Sundook, JA (on brief).

Before FLEMING, HAYES, and PARKER, Appellate Military Judges

SUMMARY DISPOSITION

FLEMING, Senior Judge:

Appellant asserts he was denied his right to submit matters under Rule for Courts-Martial (R.C.M.) 1106 because the convening authority took action prior to the submission deadline. As explained

below, we agree, and return the case to the convening authority for a new action.

BACKGROUND

A panel comprised of officer and enlisted members sitting as a general court-martial convicted appellant, contrary to his plea, of two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920. The military judge sentenced appellant to a dishonorable discharge and confinement for six months. The convening authority took no action on the findings and sentence.

LAW AND DISCUSSION

Additional Facts

Appellant's court-martial adjourned on 30 September 2020. On 6 October 2020, defense counsel requested an extension to file post-trial matters under Rule for Courts-Martial (R.C.M.) 1106 until 29 October 2020. The Chief, Military Justice, approved the extension.[1] The Staff Judge Advocate (SJA) signed the SJA advice form on 15 October 2020, annotating appellant had submitted matters for the convening authority's review. On 16 October 2020, the convening authority signed the Convening Authority Action form, taking no action on the findings or sentence. On

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1. We note the Chief, Military Justice, may have exceeded the scope of his authority by granting the extension request, given the limitations in R.C.M. 1106. *See* R.C.M. 1106(d)(4)(A) ("If, within the period described in paragraph (1) or (2), the accused shows that additional time is required for the accused to submit matters, the *convening authority* may, for good cause, extend the period for not more than 20 days.") (emphasis added). However, for the purposes of this case, we find appellant could reasonably rely on the Chief of Military Justice's correspondence purporting to grant the extension.

30 October 2020, after the deadline approved by the Chief, Military Justice, appellant submitted R.C.M. 1106 matters.

Rule for Courts-Martial 1106 Submissions

"After a sentence is announced in a court-martial, the accused may submit matters to the convening authority for consideration in the exercise of the convening authority's powers under R.C.M. 1109 or 1110." R.C.M. 1106(a). An accused must submit matters under this rule within ten days after the sentence is announced. R.C.M. 1106(d)(1).

In this case, the convening authority was authorized to act on the sentence pursuant to R.C.M. 1107(3): "The commander of the accused who has the authority to convene a court-martial of the type that imposed the sentence on the accused may remit any unexecuted part of the sentence, except a sentence of death, dishonorable discharge, bad-conduct discharge, dismissal, or confinement for more than six months." Further, the limitation on a convening authority's power to act on a sentence for Article 120, UCMJ, offenses applies to "a term of confinement of more than six months." R.C.M. 1109(c)(2). "Before taking or declining to take any action on the sentence under this rule, the convening authority *shall* consider matters timely submitted under R.C.M. 1106 and 1106A, if any, by the accused and any crime victim." R.C.M. 1109(d)(3)(A) (emphasis added).

The convening authority action on 16 October 2020 violated the requirement of R.C.M. 1109(d)(3)(A). There is no indication the convening authority considered appellant's matters prior to deciding what action, if any, to take on appellant's sentence. Appellant's court-martial adjourned on 30 September 2020, and his R.C.M. 1106 matters were due by 9

October 2020. Before this deadline, appellant requested an extension, and the putative approval authority granted the extension. By taking action without allowing appellant to file timely R.C.M. 1106 matters before the proscribed deadline, the convening authority erred.[2]

We will not speculate on what action the convening authority would or would not have taken after reviewing appellant's matters. It is enough that in this case, the convening authority had the power to modify appellant's sentence with regard to the length of confinement, but acted before the allotted time elapsed for the submission of matters. Therefore, we remand the case for a new convening authority action.

CONCLUSION

The convening authority's action, dated 16 October 2020, is SET ASIDE. Pursuant to R.C.M. 1111(c)(3), we remand this case to the military judge for a modification of the entry of judgment upon completion of the SJA's corrected clemency advice and the convening authority's new action.

Judge HAYES and Judge PARKER concur.

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2. We recognize appellant may have failed to submit his matters within the proscribed timeline from the approved extension. If so, waiver could have applied. *See* R.C.M. 1106(f) ("Failure to submit matters within the time prescribed by this rule waives the right to submit such matters."). However, the facts regarding a potential waiver of the right to submit matters are not fully developed, the government does not assert waiver in their brief, and regardless, the convening authority acted well before waiver could have applied given the granted extension.

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
WASHINGTON, D.C.

United States,
Appellee

v.

Brendon D. Rubirivera,
Appellant

USCA Dkt. No. 23-0130/AR
Crim. App. No. 20200628

ORDER

On further consideration of the granted issue, 83 M.J. __ (C.A.A.F. 2022), and in view of *United States v. Anderson*, 83 M.J. __ (C.A.A.F. 2023), it is, by the Court, this 18th day of July, 2023,

ORDERED:

That the decision of the United States Army Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ David A. Anderson
Deputy Clerk of the Court

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

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

UNITED STATES, **Appellee**

v.

Private E1 BRENDON D. RUBIRIVERA,
United States Army, Appellant

ARMY 20200628

Headquarters, Fort Stewart
G. Bret Batdorff, Military Judge
Lieutenant Colonel Nicole L. Fish, Acting Staff Judge Advocate

For Appellant: Major Thomas J. Travers, JA; William E. Cassara, Esquire (on brief); Captain Tumentugs D. Armstrong, JA; William E. Cassara, Esquire (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Major Mark T. Robinson, JA; Captain Cynthia A. Hunter, JA (on brief).

26 January 2023

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law

1. Judge EWING decided this case while on active duty.

and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.[2]

For the Court,

[signature]

JAMES W. HERRING, JR.
Clerk of Court

2. We have given full and fair consideration to appellant's ineffective assistance of counsel (IAC) claim and find it to be without merit. Having considered the record and our superior court's guidance in *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997), we find ourselves capable of resolving appellant's IAC claim without ordering affidavits from counsel or a post-trial evidentiary hearing.

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
WASHINGTON, D.C.

United States,
Appellee

v.

Antoine M. Tarnowski,
Appellant

USCA Dkt. No. 23-0075/AF
Crim. App. No. 40110

ORDER

On further consideration of the granted issue, 83 M.J. __ (C.A.A.F. 2022), and in view of *United States v. Anderson*, 83 M.J. __ (C.A.A.F. 2023), it is, by the Court, this 18th day of July, 2023,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Antoine M. TARNOWSKI
Senior Airman (E-4)
U.S. Air Force,
Appellant

No. ACM 40110

Decided: 4 November 2022

Appeal from the United States Air Force Trial Judiciary

Military Judge: Shad R. Kidd.

Sentence: Sentence adjudged on 28 January 2021 by GCM convened at Buckley Air Force Base, Colorado. Sentence entered by military judge on 24 February 2021: Bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to the grade of E-1.

For Appellant: Major Alexandra K. Fleszar, USAF.

For Appellee: Lieutenant Colonel Thomas J. Alford, USAF; Lieutenant Colonel Matthew J. Neil, USAF; Major Jay S. Peer, USAF; Mary Ellen Payne, Esquire.

Before KEY, ANNEXSTAD, and GRUEN, Appellate Military Judges.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

KEY, Senior Judge:

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification each of simple assault and drunk and disorderly conduct in violation of Articles 128 and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 928, 934.[1] Pursuant to his guilty plea, Appellant was convicted of one specification of unlawfully carrying a concealed weapon on divers occasions in violation of Article 114, UCMJ, 10 U.S.C. § 914.[2] The members sentenced Appellant to a bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to the grade of E-1.

Appellant raises seven issues on appeal: (1) whether the military judge erred by neither releasing Appellant from pretrial confinement nor granting him additional credit due to conditions of that confinement; (2) whether the military judge erred by admitting testimony under the excited utterance hearsay exception; (3) whether trial counsel made improper findings and sentencing arguments; (4) whether trial counsel's reading of the victim's unsworn statement amounted to plain error; (5)

1. Unless otherwise noted, all references in this opinion to the UCMJ, Military Rules of Evidence, and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

2. Appellant admitted that his carrying of the concealed weapons was unlawful, as he violated a Colorado statute prohibiting the carrying of firearms while intoxicated.

whether the military judge's instruction on a lesser included offense was erroneous; (6) whether Appellant's sentence is inappropriately severe; and (7) whether, in light of *Ramos v. Louisiana*, —— U.S. —— –, 140 S. Ct. 1390 (2020), the military judge was required to instruct the court members that a guilty verdict must be unanimous.[3] We have carefully considered issue (7) and find it does not require discussion or warrant relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987). We find no error materially prejudicial to Appellant's substantial rights, and we affirm the findings and sentence.

I. BACKGROUND

A. Appellant's Nonjudicial Punishment

In late 2019, Appellant was under investigation for mishandling a firearm while intoxicated as well as being drunk and disorderly—an episode which culminated in Appellant passing out in his front yard with his pants down, genitals exposed—conduct allegedly committed between February and July of 2019. During this investigation, allegations arose that Appellant had sexually assaulted a woman. In December 2019—while the sexual assault allegations were being investigated—Appellant's commander, Lieutenant Colonel (Lt Col) JM, offered Appellant nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, for the firearm and drunk and disorderly offenses. Appellant agreed to these proceedings, and Lt Col JM subsequently imposed punishment consisting of forfeitures, a reprimand, and a suspended reduction in grade from E-5 to E-4.

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3. Except for issues (3) and (7), Appellant personally raises each issue pursuant to *United States v. Grostefon*, 12 M.J. 431, 435 (C.M.A. 1982).

B. Assault and Inpatient Treatment

On 15 February 2020, JC—an Airman in Appellant's unit—reported to his leadership that he was at a dinner party earlier in the evening. The host of the party, Staff Sergeant (SSgt) TN, was also in the same unit. Although SSgt TN's wife was not at the house during the party, his three-year-old daughter was. The other attendees included another co-worker along with that co-worker's wife, sister, and young daughter.

Appellant had also been invited, and he arrived—already intoxicated—via a ridesharing service. He continued to drink at the party from a bottle of vodka he had brought with him while SSgt TN prepared dinner. No one else at the party was drinking. After some time passed, Appellant went outside and sat on the front porch. A short while later, JC went outside to talk to Appellant, and Appellant started "venting" about being under investigation for sexual assault. Appellant then began talking about how much he disliked their commander and how he told the commander during a meeting, "You're what[']s wrong with the f[**]king military." JC gave Appellant a cigarette, which Appellant had difficulty lighting.

According to the statement JC gave to military investigators, Appellant "all of the sudden [ ] sat up and started glaring at him ... for a few moments and [Appellant] looked like he was trying to undo his pants." Appellant told JC, "Say what you want to f[**]king say" and then pulled a loaded pistol from inside his waistband and pointed it at JC. Fearing for his life, JC slapped the gun out of Appellant's hand and retrieved the dropped firearm before Appellant could. JC removed the magazine as well as the round in the gun's chamber and started walking back towards the front door to the house. Appellant put his

hand on JC's chest and said, "give it f[**]king back." Afraid Appellant had a knife or otherwise intended to harm him, JC gave the empty gun back to Appellant. JC kept the magazine and the additional round and went into the house.

The following day, Lt Col JM ordered Appellant to undergo a mental health evaluation, and Appellant was voluntarily admitted later that same day to Denver Springs for inpatient treatment for alcoholism and addiction. On 19 February 2020—three days after Appellant was admitted—Lt Col JM provided Appellant notice that he intended to vacate the suspended reduction in grade from the earlier nonjudicial punishment based upon Appellant pointing the firearm at JC as well as being drunk and disorderly at the time. Lt Col JM ultimately vacated the suspended punishment on 2 March 2020.

While Appellant was in treatment at Denver Springs, a civilian detective obtained a search warrant for Appellant's house to look for firearms and ammunition based upon JC's report in addition to a variety of other interactions the local police had had with Appellant. Parts of weapons and ammunition were found in Appellant's house, but the authorities did not locate any functioning firearms. During the search, however, a neighbor approached some of the agents standing outside and explained he had Appellant's firearms.[4] The neighbor subsequently turned over approximately 12 firearms, including the pistol Appellant had pointed at JC.

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4. Investigators later determined Appellant had asked the neighbor to retrieve the firearms from Appellant's house for safekeeping after beginning his inpatient treatment at Denver Springs.

C. Pretrial Confinement

Appellant was released from Denver Springs on 23 March 2020 and ordered directly into pretrial confinement by Lt Col JM. Pursuant to this order, Appellant was placed into confinement at the Douglas County Detention Facility ("Douglas County") in Castle Rock, Colorado. Two days later, a social worker at Denver Springs signed a six-line memorandum which states Appellant had received treatment there, was an active participant, was the leader of a cohort, supported other members in the program, followed all the rules, and was respectful of the staff. The memorandum also states, "At the time of discharge, the treatment team does not believe that [Appellant] is a threat to himself or the community."

According to a "discharge medication summary" he received from Denver Springs, Appellant had active prescriptions for ten medications. That facility's personnel had also annotated Alcoholics Anonymous and individual therapy as "continued treatment needs" on the discharge plan they gave Appellant. Shortly after his arrival at Douglas County, Appellant filed a formal complaint based upon his assertion he was not receiving all of his prescribed medications. Douglas County staff responded that they would not dispense some of those medications to Appellant based on their policy of not providing narcotics to confinees.

A pretrial confinement reviewing officer, Lt Col MS, reviewed Lt Col JM's order. She considered JC's allegations, along with the 2019 nonjudicial punishment and subsequent vacation of the suspended portion of the punishment. She also considered nonjudicial punishment Appellant received in 2017 for breaching the peace by "wrongfully shouting and destroying furniture in an

apartment complex" while intoxicated, in addition to the fact that a portion of that punishment was later set aside. The Government presented a statement from Appellant's former roommate, dated 13 July 2019, who said Appellant would drink daily and that when Appellant was drunk, he would become belligerent and threatening, to include pointing a firearm at her face on one occasion. She also described Appellant shooting a shotgun in his suburban back-yard while intoxicated, making statements such as how it would be easy to "snap necks" or make someone "disappear," and threatening and harassing her after she moved out. According to other documents provided to Lt Col MS, Appellant's former roommate eventually obtained a protective order against Appellant. A statement from Appellant's first sergeant was also offered in which the first sergeant recounted the initial notification of the civilian authorities. According to the statement, the police officers told the first sergeant they would not attempt to enter Appellant's residence to look for him "because the risk for their safety was too great" due to their prior experiences with Appellant and "his hatred towards law enforcement."

Lt Col JM testified at the hearing that he ordered Appellant into pretrial confinement based on his concerns for Appellant's safety and the safety of the public. He expressed apprehension that Appellant might have access to other firearms and that lesser means of restraint would not prevent Appellant from obtaining and abusing alcohol, especially in light of the fact that prior disciplinary actions had not prevented Appellant's misconduct. An Air Force Office of Special Investigations (AFOSI) special agent also testified about her office's investigation into another episode in which Appellant was drunk at a restaurant

while carrying a concealed weapon, a violation of Colorado law. JC testified as well, telling Lt Col MS that the experience was traumatic, that he was receiving mental health care as a result, and that he was afraid Appellant would seek revenge if released from confinement.

At the hearing, Appellant's counsel submitted the memorandum from Denver Springs and a memorandum from the Douglas County Sheriff's Office explaining the risk-mitigation measures in place at the confinement facility as a result of the coronavirus (COVID-19) spread. One of these measures involved the cessation of a number of programs, to include Alcoholics Anonymous meetings. Appellant also submitted a statement in which he explained how beneficial the Denver Springs program had been for him, but that he was not able to participate in any rehabilitation programs at Douglas County. He also noted that he was not receiving all the medications he had been prescribed, but he did not specify which medications were at issue or how this was impacting him. Appellant added that all of his firearms had been seized by the police and that he had no intention of buying additional ones.

Lt Col MS concluded Appellant should remain in confinement, determining Appellant would engage in serious criminal misconduct if not confined, due to his "lengthy history of alcohol-related criminal behavior" and "the minimal impact, if any, discipline has had upon [Appellant's] predilection toward mishandling firearms while inebriated." She also concluded that lesser forms of restraint were inadequate as "there is no way to ensure that [Appellant] does not have access to firearms or alcohol."

D. Appellant's Motion Related to his Pretrial Confinement

In April 2020, Lt Col JM preferred six specifications against Appellant: two specifications of sexual assault (both arising from a single episode), unlawful carrying of a concealed weapon on divers occasions, obstruction of justice (by causing the movement of his firearms), assaulting JC by pointing a loaded firearm at him, and being drunk and disorderly when pointing the firearm. The last two of these specifications addressed the same conduct upon which Lt Col JM had based his decision to vacate Appellant's suspended nonjudicial punishment. After a preliminary hearing conducted pursuant to Article 32, UCMJ, 10 U.S.C. § 832, the obstruction of justice specification was dismissed.

Meanwhile, Appellant—through his counsel—continued to seek assistance in obtaining access to the prescribed medications Douglas County was withholding from him. In response, trial counsel produced a memorandum from a staff psychiatrist at Buckley Air Force Base who had determined Appellant did not need two medications prescribed to aid Appellant in sleeping—Trazodone and Doxepin—as they were considered to be "comfort medications." The psychiatrist further noted, "the medical professionals at Douglas County Jail also informed me that it is standard practice for confinement facilities to not allow narcotics in their facilities and I agree."[5] Appellant was transferred from Douglas County to the confinement facility at F.E. Warren Air Force Base, Wyoming, in early June 2020. One impetus for the transfer was Appellant's complaints about his medications, and once Appellant was in the military

5. Appellant was also not receiving a third anxiety-related medication, but the psychiatrist concluded Appellant was receiving a different medication for that disorder.

facility, he was allowed to obtain all his prescribed medications.

On 7 December 2020, Appellant submitted a motion to the military judge asking that he be awarded additional credit for the confinement he served at Douglas County as well as to be released from pretrial confinement. The military judge heard evidence and argument on the motion when Appellant was arraigned on 17 December 2020. Trial defense counsel argued Appellant had been subjected to illegal pretrial punishment based upon the denial of his medications and his inability to participate in either Alcoholics Anonymous or therapy while he was at Douglas County. The Defense further argued the pretrial confinement reviewing officer had abused her discretion in ordering Appellant to remain confined in the first place because—according to the Defense—there was inadequate evidence indicating Appellant was likely to commit further misconduct. On this latter point, the Defense focused on the fact Appellant's firearms had been seized and his successful completion of treatment at Denver Springs.

In rebuttal to these claims, the Government submitted transcripts of some of Appellant's phone calls from Douglas County with his mother in which Appellant occasionally complained about not receiving his medications, although he also mentioned that even though he had trouble falling asleep at night, he was sleeping for a good portion of the days.[6] During one call, Appellant told his mother that the Government was seeking to have him moved to the confinement facility at F.E. Warren Air Force Base so that he could

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6. At the start of each call an automated message told the parties on the line that the call was "subject to recording and monitoring."

receive his medications, but that he preferred to stay at Douglas County since he would be required to wear his uniform at the military facility and would be allowed less telephone time. "I'd rather f[**]king be here," he told her.

Appellant also talked about his unit leadership shortly after the pretrial confinement reviewing officer determined he should remain confined, telling his mother,

> I'm sick of my f[**]king commander and shirt coming here just to pretend to give a f[**]k. And sit there and oh, is there anything we can do? I'm like, get the f[**]k out of here.... I'm going to ask them to stop f[**]king visiting me.... They're the f[**]king reason I'm in here. One hundred percent. You could be like all right, yeah, let's let him out, and then I'm not in here. So why the f[**]k would you even show up just to be a d[**]k about it?

As for JC, the Airman whom Appellant threatened with the firearm, Appellant said on the same call,

> Like the f[**]king—the p[**]sy that this happened to, like the alleged offenses happened to, f[**]king made a statement of, "Oh, I'm living my life in fear forever. The only way I'll be able to cope with life is knowing that he's in jail, because if I knew he was out, I'd be worried for my life at any moment, at all times." ... It was like you piece of f[**]king s[**]t p[**]sy b[**]ch.... Like, it's not even f[**]king serious. You didn't even get hurt at all.... So that p[**]sed me the f[**]k off.

The Government also submitted a memorandum from the F.E. Warren confinement facility which explained, inter alia, that Appellant had never asked

to participate in Alcoholics Anonymous and that, although Appellant was offered mental health care, he said his trial defense counsel had advised him not to speak to the mental health providers. In response to Appellant's motion, trial counsel argued that the opinion of the Denver Springs staff was not determinative on the question of whether Appellant would commit further misconduct because Appellant had no access to alcohol during his treatment there, so the staff was not well equipped to understand how Appellant would act should he relapse.

The military judge concluded the pretrial confinement reviewing officer had not abused her discretion in continuing Appellant's pretrial confinement due to Appellant's history of alcohol abuse, mishandling of firearms, and violent behavior, the most recent episode of which occurred while Appellant was under investigation for sexual assault. The military judge also determined that it was reasonable for the reviewing officer to conclude lesser forms of restraint would not be effective because other forms of moral restraint, such as the threat of having his suspended punishment vacated, were insufficient to prevent Appellant from engaging in misconduct. With respect to Appellant's inability to obtain all his medications, the military judge found Appellant had failed to assert this caused him any negative effects, health or otherwise, and that Appellant told his mother he was sleeping during the day. Thus, the military judge found no violation of Article 13, UCMJ, 10 U.S.C. § 813. Noting that Rule for Courts-Martial (R.C.M.) 305(k) seemed to have a lower bar ("unusually harsh circumstances"), the military judge concluded Appellant's pretrial confinement had not met that standard, either, and he declined to order Appellant's release.

Three days before Appellant's court-martial resumed on 25 January 2021, the convening authority withdrew the charge with the two specifications alleging sexual assault, leaving Appellant charged with unlawfully carrying a firearm on divers occasions, committing aggravated assault on JC, and being drunk and disorderly on the same day as the aggravated assault. During his providence inquiry for the firearm specification, Appellant admitted to carrying a firearm while intoxicated on two occasions: when he went to the restaurant and the night he assaulted JC.

II. DISCUSSION

A. Appellant's Pretrial Confinement

On appeal, Appellant asserts the military judge erred by not releasing him from pretrial confinement and for not awarding him additional credit for his pretrial confinement conditions at Douglas County. As a remedy, he asks us to set aside his punitive discharge. We conclude the military judge did not err on either count, and we decline to grant any remedy.

1. Law

Article 13, UCMJ, prohibits the pretrial punishment of an accused who is awaiting trial, as well as the imposition of confinement conditions "more rigorous than necessary to secure [an accused's] presence for trial." *United States v. Palmiter*, 20 M.J. 90, 93 (C.M.A. 1985). A military judge may also grant credit for pretrial confinement that involves "unusually harsh circumstances," under R.C.M. 305(k).

Whether an appellant is entitled to sentence relief due to a violation of Article 13, UCMJ, is a mixed question of law and fact. *See United States v. Savoy*,

65 M.J. 854, 858 (A.F. Ct. Crim. App. 2007) (citing *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997)). The burden of establishing entitlement to such relief is on the appellant. *See United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002) (citation omitted). We will not overturn a military judge's findings of fact, including a finding regarding intent to punish, unless those findings are clearly erroneous. *Id*. (citing *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000)). Whether Appellant is entitled to relief for a violation of Article 13, UCMJ, is reviewed de novo. *Id*.

Article 13, UCMJ, prohibits: (1) pretrial punishment, and (2) unduly rigorous pretrial confinement conditions. *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005). Under the first prohibition, we examine the intent of the confinement officials and the purposes of the restrictions or conditions at issue. *Id*. (citations omitted). Under the second, we consider whether the conditions were "sufficiently egregious [to] give rise to a permissive inference that an accused is being punished, or the conditions ... [were] so excessive as to constitute punishment." *Id*. at 227–28 (citations omitted). In the face of Article 13, UCMJ, violations, we have discretion to provide relief in the form of disapproving a punitive discharge. *See United States v. Zarbatany*, 70 M.J. 169, 175 (C.A.A.F. 2011).

2. Analysis

On appeal, Appellant points to several aspects of his pretrial confinement which he argues warrant relief. First, he argues "no reviewing official ... appropriately factored [Appellant's] treatment [at Denver Springs] into their considerations" regarding whether or not Appellant should be confined. Second, Appellant argues he was "deprived of certain prescribed medications" while at Douglas County. Third, Appellant was unable to either obtain

individualized therapy or participate in Alcoholics Anonymous.

Appellant's claims fail for a number of reasons. Regarding his first claim, Appellant argues that he had never received adequate treatment for his alcoholism until he was treated at Denver Springs. His theory seems to be that once he received that treatment, pretrial confinement was no longer warranted because he would not drink—and if he was not drinking, then he would not engage in any further misconduct. The only factual basis Appellant has offered on this point is the six-line memorandum from the Denver Springs social worker noting the treatment team's assessment that Appellant was not a threat to himself or the community at the time of discharge. The memorandum makes no reference to Appellant's assault on JC or his past misconduct, nor does it reflect an opinion as to whether Appellant was likely to commit further misconduct. Appellant has offered no evidence his treatment team was aware of the scope of his misconduct or the allegations against him, much less the evidence investigators had amassed in their months-long investigation. Appellant similarly offered no evidence to support his contention that he would not consume alcohol once released from treatment nor did he assert he was not at risk of relapse.

Although Appellant does not precisely delineate his legal theory on this point, we assume he is alleging the military judge and the pretrial confinement reviewing officer abused their discretion in determining continued pretrial confinement was warranted. Under R.C.M. 305(j), a military judge may review the pretrial confinement reviewing officer's determination and "shall order release from pretrial confinement only if" that officer's decision was an

abuse of discretion, and "there is not sufficient information presented to the military judge justifying continuation of pretrial confinement" under R.C.M. 305(h)(2)(B). Pretrial confinement is permitted upon a belief "upon probable cause, that is, upon reasonable grounds" that: an offense triable by court-martial was committed by the confinee; it is foreseeable that the confinee will engage in serious criminal misconduct; and less severe forms of restraint are inadequate. R.C.M. 305(h)(2)(B). The provision further clarifies that "serious criminal misconduct" includes, inter alia, conduct "pos[ing] a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command." *Id.*

Here, the pretrial confinement reviewing officer was presented with evidence of Appellant's past history of violence and alcohol abuse, culminating in Appellant drunkenly pulling a loaded pistol on one of his co-workers in the close vicinity of other co-workers and their family members, to include two small children. The reviewing officer referred to the Denver Springs memorandum in her report and included it as an attachment. She concluded, "Ultimately, I find no persuasive evidence that [Appellant's] treatment in [Denver Springs] has a significant rehabilitative effect to outweigh his lengthy history of alcohol and firearms abuse, which stretches back to 2017 and includes no fewer than six (6) occasions upon which [Appellant] mishandled firearms while inebriated." Thus, contrary to Appellant's claims, the reviewing officer did consider Appellant's treatment and the Denver Springs staff's perspective, but simply did not give those matters the weight Appellant thinks she should have.[7] This is not a case of abuse of discretion, but

7. The military judge also considered the Denver Springs memorandum, noting in his ruling, "While participation in

rather a difference of opinion. Based upon our review of the evidence, the reviewing officer's decision was well-grounded in the evidence before her, and we agree the single statement in the Denver Springs memorandum does not necessarily offset Appellant's history of egregious misconduct.

The military judge's decision not to release Appellant has even more support in the record, as the military judge had new information available—namely Appellant's prison phone calls. In those calls, Appellant demonstrated neither remorse for his conduct nor a commitment to lawful conduct. Instead, he unleashed an expletive-laden tirade against his leadership who had been taking the time to visit him, and profanely debased JC, the Airman Appellant had victimized. One could easily conclude that rather than having been completely rehabilitated during his Denver Springs treatment, Appellant was simply adept at conforming his conduct to expectations when needed. Even then, Appellant was aware his phone calls with his mother were subject to monitoring and recording, yet he was unable to control his anger when talking about JC, his commander, and his first sergeant. Thus, we conclude the military judge did not abuse his discretion in declining to release Appellant from pretrial confinement.

Appellant's second and third points, relating to his medications and his inability to participate in counseling and Alcoholics Anonymous, seem to be alleging violations of the Article 13, UCMJ, prohibitions against pretrial punishment and unduly rigorous conditions as well as the R.C.M. 305(k)

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treatment is commendable, it was also very recent with no indication of how [Appellant] would act without the constant supervision and over-sight he received while at Denver Springs."

prohibition of unusually harsh conditions. The military judge suggested there might be a difference between these two standards. Indeed, the United States Court of Appeals for the Armed Forces (CAAF) has concluded that Article 13, UCMJ, and R.C.M. 305(k) offer independent bases for granting sentencing credit based upon pretrial confinement conditions. *See United States v. Adcock*, 65 M.J. 18, 24 (C.A.A.F. 2007). The CAAF, however, has not precisely indicated how these two standards diverge, save to explain that an R.C.M. 305(k) violation may be found when confinement officials fail to abide by regulatory requirements. *See, e.g.*, *United States v. Williams*, 68 M.J. 252, 257 (C.A.A.F. 2010) (finding that a failure to follow regulations related to a confinee's suicide-watch status warranted credit under R.C.M. 305(k), but not Article 13, UCMJ). We need not delineate the specific boundaries of these two standards here, because the evidence does not establish a violation under either one.

With regards to Appellant's medication, what little information there is in the record indicates that Appellant was denied certain sleep aids based upon Douglas County's general prohibition of providing narcotics to inmates. There is no evidence this policy was applied with any intent to punish Appellant, that it was applied indiscriminately, or that it contravened any laws or regulations. There is an inadequate basis in the record to conclude the denial of these medications rendered Appellant's pretrial detention equivalent to punishment. Instead, the record indicates that while Appellant may have had difficulty falling asleep at night, he was permitted to sleep during the daytime. Appellant has alleged no other impact to his health or his wellbeing. Moreover, when Appellant discovered he might be transferred to a

military confinement facility where he would be provided the medications, Appellant told his mother he would rather stay at Douglas County in order to avoid having to wear a uniform and having his telephone time reduced. If Appellant prioritized those issues over receiving his medications, it is difficult to see how not having the medications amounted to a serious deprivation of any sort. Under these facts, Appellant's claim fails.

Similarly, Douglas County's termination of inmates' access to programs such as Alcoholics Anonymous was due to efforts to stem the tide of a global pandemic. Such termination was not targeted at Appellant, nor is there any indication military authorities elected to house him at Douglas County for the purpose of depriving him of access to the program or other therapy. Given the widespread impacts of the COVID-19 pandemic, it can hardly be argued that efforts to limit gatherings of inmates were arbitrary or otherwise an abuse of discretion. Although Appellant asserts on appeal that he did not have the opportunity to obtain individualized counseling, there is nothing in the record indicating Appellant ever sought such counseling, much less that Douglas County officials denied him the opportunity to obtain it out of some punitive intent. Notably, once Appellant was transferred to the military facility where he did have access to both Alcoholics Anonymous and counseling, Appellant never inquired about the former and affirmatively declined the latter, apparently on the advice of counsel. Appellant has not offered any indication that the lack of access to Alcoholics Anonymous while he was at Douglas County had any negative impact on him—whether while he was there or since the date of his transfer—sharply undercutting his claim that the conditions of his

confinement were so rigorous as to warrant relief. Based upon the record before us, we conclude Appellant is not entitled to additional credit under either Article 13, UCMJ, or R.C.M. 305(k).

B. JC's Out of Court Statement

1. Additional Background

Appellant's assault specification alleged he pointed a loaded firearm "at or near" JC. When he testified, JC said that Appellant "pulled a gun" on him. JC later explained that Appellant pulled the firearm out from his waistband and "was lifting [it] towards me." When JC said that, trial counsel explained that JC had "moved his arm upwards and outwards, to gesture as if [Appellant] was pointing a weapon." JC added that the gun "was coming towards [him]" and was "headed towards [his] throat and [his] face." Although not entirely clear from JC's testimony, it seems that the gun was pointing in the vicinity of JC's shoulder when JC slapped the gun out of Appellant's hand.

After JC gave the gun back to Appellant and took the bullets inside the house, SSgt TN arranged for a rideshare company to take Appellant home. The rest of the people at the house sat down for dinner once Appellant was gone. JC testified, "I was just trying to calm down. I wanted to act normal. I wanted to talk. I couldn't stop shaking. Like I said, my adrenaline was just through the roof.... I couldn't really eat. I kind of [ ] felt like I wanted to be sick." Afterwards, JC drove to his dormitory room, accompanied by his other co-worker from the party. Later in the evening, JC wrote out an initial statement regarding the assault. He testified that when doing so, he "couldn't stop shaking."

During the drive from the party to his room, JC called his immediate supervisor, Sergeant (Sgt) AE.[8] Sgt AE explained that he had seen JC "stressed" and "anxious" in the past, and at the time of the phone call he sounded "emotional" and was "talking fast" and did not sound like his "normal self." Trial counsel asked Sgt AE what JC told him, leading to a hearsay objection from trial defense counsel. The military judge overruled the Defense's objection, concluding the statements JC made to Sgt AE fell under the excited utterance hearsay exception. The military judge also said he had determined there was no unfair prejudice to Appellant in admitting the evidence. Sgt AE then testified, "So [JC] called me and told me that [Appellant] had pulled a gun on him and pointed it at him, and that he took it away from him, basically."

2. Law

Military judges' decisions regarding the admissibility of evidence are reviewed for an abuse of discretion. *United States v. Norwood*, 81 M.J. 12, 17 (C.A.A.F. 2021) (citations omitted). A decision amounts to an abuse of discretion if a military judge's "findings of fact are clearly erroneous," a military judge's decision was "influenced by an erroneous view of the law," or the decision was "outside the range of choices reasonably arising from the applicable facts and the law." *Id.* (internal quotation marks omitted) (quoting *United States v. Finch*, 79 M.J. 389, 394 (C.A.A.F. 2020)).

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8. At some point after the incident, Sergeant AE was commissioned as an officer and was a second lieutenant when he testified at Appellant's court-martial. The record does not provide any further detail regarding his grade at the time of the incident.

An out of court statement offered for the truth of the matter asserted in the statement by someone other than the declarant is hearsay and inadmissible unless otherwise provided by the Military Rules of Evidence. Mil. R. Evid. 801(c), 802. The so-called "excited utterance" exception permits the admission of such hearsay statements if they "relat[e] to a startling event or condition" and are "made while the declarant was under the stress of excitement that [the event or condition] caused." Mil. R. Evid. 803(2). In determining whether the declarant was under such stress, we consider the totality of the circumstances, which include the declarant's mental and physical condition and the amount of time between the event and the statement. *United States v. Henry*, 81 M.J. 91, 96 (C.A.A.F. 2021). The "implicit premise underlying the excited utterance exception is that a person who reacts to a startling event or condition while under the stress of excitement caused thereby will speak truthfully because of the lack of opportunity to fabricate." *United States v. Donaldson*, 58 M.J. 477, 483 (C.A.A.F. 2003) (internal quotation marks omitted) (quoting *United States v. Jones*, 30 M.J. 127, 129 (C.M.A. 1990)).

3. Analysis

Appellant argues the military judge abused his discretion by admitting Sgt AE's testimony as to what JC told him because too much time had passed between the assault and JC's phone call. Appellant secondarily argues Sgt AE's testimony was cumulative and served solely to bolster JC's testimony. Appellant, however, concedes the Defense did not impeach JC's testimony with respect to Appellant pulling out the gun and lifting it towards JC's head.

The military judge did not abuse his discretion. JC testified about the stress he was under both during dinner—that is, before his call to Sgt AE—and when he was writing his statement after the call. From the record, it appears JC spoke with Sgt AE within two hours of the assault, and Sgt AE testified that he could tell JC did not sound like his normal self, based on his familiarity with how JC behaves during stressful situations. Appellant does not point to any indication JC was no longer under the stress of the excitement caused by the assault other than that some time had passed. This sole factor is inadequate to counter the totality of the circumstances which strongly demonstrates JC was still under that stress when he recounted the assault to Sgt AE. Therefore, we conclude the military judge did not abuse his discretion by determining JC's statement to Sgt AE fell within the excited utterance hearsay exception.

We further conclude the military judge did not abuse his discretion in not excluding the evidence based upon Mil. R. Evid. 403 considerations. Appellant concedes Sgt AE's recollection of JC's statement was virtually identical to JC's unimpeached testimony. At the very most, Sgt AE's statement was cumulative to JC's testimony. While Mil. R. Evid. 403 simply permits a military judge to exclude otherwise admissible but cumulative evidence, the rule does not require the blanket exclusion of such evidence. Given the uncontested nature of the evidence, in addition to its brevity, we reject Appellant's secondary theory regarding this issue.

C. Trial Counsel Argument

Appellant alleges trial counsel made a number of improper arguments during both the Government's findings and sentencing arguments—all without

objection from the trial defense team—and he asks us to set aside his bad-conduct discharge as a remedy. We do not find the arguments to be improper, and we decline to grant Appellant's requested relief.

1. Law

We review claims of prosecutorial misconduct and improper argument de novo; when no objection is made at trial, the error is forfeited, and we review for plain error. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citation omitted). Under the plain error standard, such error occurs "when (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. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (citation omitted).

"A prosecutor proffers an improper argument amounting to prosecutorial misconduct when the argument 'oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.' " *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021) (quoting *Fletcher*, 62 M.J. at 178) (additional citations omitted).

In presenting argument, trial counsel may "argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) (citation omitted). Trial counsel may strike hard but fair blows, but may not "inject ... personal opinion into the panel's deliberations, inflame the members' passions or prejudices, or ask them to convict the accused on the basis of criminal predisposition." *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (citations omitted). "Golden Rule" arguments, in which the members are asked to "put themselves in

the victim's place," are prohibited. *Baer*, 53 M.J. at 237.

In determining whether trial counsel's comments were fair, we examine them in the context in which they were made. *United States v. Gilley*, 56 M.J. 113, 121 (C.A.A.F. 2001). We do not "surgically carve out a portion of the argument with no regard to its context." *United States v. Baer*, 53 M.J. at 238 (internal quotation marks omitted).

When we find error with respect to the Government's findings argument, we assess for material prejudice and only reverse "when the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone." *Sewell*, 76 M.J. at 18 (citation omitted).

With respect to sentencing arguments, we must be confident an appellant "was sentenced on the basis of the evidence alone." *United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014) (quoting *United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013)). In assessing the impact of improper sentencing argument on an appellant's substantial rights in the absence of an objection, we ask whether the outcome would have been different without the error. *Norwood*, 81 M.J. at 19–20.

2. Additional Background and Analysis

a. Likening Appellant to a "Loose Cannon"

During his testimony, JC described being assaulted by Appellant:

> You know, he's talking. He's tell [sic] his stories. He's kind of teary-eyed. And then at one

> point, he leans back and he just starts like kind of glaring at me.
>
> ....
>
> And that's kind of when he said, you know, "Say what you want to f[**]king say." ... And he's just making this eye contact with me with [his] teary, like just rage-filled eyes. And then, that's when he decided to pull the firearm on me.
>
> ....
>
> You know, it was just this kind of switch of anger at me. And I don't know what I did to direct that anger.

Trial counsel began the Government's opening statement by calling Appellant "a loose cannon with a short fuse." The trial counsel who gave the closing argument returned to this theme, explaining that Appellant "drank alcohol, chose to carry his loaded firearm before he left the house, proceeded to a party, and then he blew up." At the end of the argument, he said, "That's the heart of the [G]overnment's case. The loose cannon with the short fuse." The phrase was mentioned once during the Government's sentencing argument when trial counsel said, "You have been firmly convinced that [Appellant] is a loose cannon. And now it's time to [rein in] that cannon, and we do that through punishment."

Appellant contends this "loose cannon" theme amounted to an ad hominem attack on Appellant. He likens his case to that of *Voorhees*, in which the CAAF found trial counsel's references to the accused as a "pig," "a pervert," and "a joke of an officer" to fall outside "the norms of fair comment." 79 M.J. at 14 n.7. We, however, perceive a wide gulf between trial

counsel's argument here and the coarse disparagement at issue in *Voorhees*. In that case, trial counsel used highly derogatory terms to demean the accused. In Appellant's case, however, trial counsel employed the metaphor of a loose cannon with a short fuse to characterize Appellant's conduct. Given JC's description of Appellant's abrupt shift from simply talking to being intense and combative, trial counsel's metaphor was rather apt in as much as it portrayed Appellant as being likely to randomly create combustible situations and unexpectedly explode after only the slightest provocation. On appeal, Appellant attempts to characterize trial counsel's metaphor as a comment on Appellant's alcoholism and other mental health issues, but we see no indication trial counsel intended such commentary, and we will not read that nuance into trial counsel's straightforward theme.

b. Asking the Members to Reflect on "Common Experience"

During the Government's findings argument, trial counsel argued JC's fear was reasonable based not just on his testimony that he feared for his life, but also that he could not eat dinner afterwards, could not "get his adrenaline to turn off," and that he was "numb" afterwards. Trial counsel told the members,

> And you know from your common experience you've ever had about anxiety, ever had any kind of panic, or if you've ever been confronted with something like, you know, see the red light in the rear view, hopefully not, but you have an adrenaline experience. It's hard for that turn off. [sic] This stuck with him. And he was still under that effect throughout dinner and reported it immediately. Which again, lends credibility to his report.

Appellant argues that by asking the members to reflect on their "common experience," that trial counsel was committing a "Golden Rule" violation under the theory that trial counsel essentially asked the members to put themselves in JC's shoes. Context, of course, is key. At this point in the argument, trial counsel was arguing that JC had a reasonable apprehension of receiving immediate bodily harm, and that the post-assault physiological symptoms JC felt corroborated his testimony that he feared for his life when Appellant pulled his gun out. Being in a stressful situation is hardly an extraordinary experience, and we see nothing improper or legally erroneous with trial counsel asking the members to reflect on such a common phenomenon in their analysis of JC's credibility. *See, e.g., Fletcher*, 62 M.J. at 183 (noting trial counsel may comment on common knowledge, which includes matters upon which people "in general have a common fund of experience and knowledge").

c. Comments About the Seizure of Appellant's Weapons

Appellant points to other comments made by trial counsel during the Government's sentencing argument as amounting to error. We are not convinced.

The subject of the seizure of Appellant's firearms by law enforcement personnel was discussed in detail during Appellant's pretrial confinement hearing as well as in pretrial motions, but the members heard very little testimony about this. Essentially, the members learned that AFOSI special agents partnered with civilian law enforcement to search for the firearm with which Appellant assaulted JC. During testimony on that point, an AFOSI special agent explained Appellant's neighbor notified the

agents that he had Appellant's firearms, and the agents then "coordinated to arrange picking up those firearms." The special agent testified that his understanding was that Appellant had asked his neighbor to safeguard his firearms to "keep anyone from stealing them" while Appellant was "away," and that the neighbor turned over the weapons because he did not want to be involved in the investigation. The agent also explained that the weapon used in the assault on JC was provided to AFOSI, but there was no testimony as to what, if anything, became of the other weapons.

As part of the Government's sentencing case, trial counsel called SSgt SW to testify about the first instance of Appellant unlawfully carrying a firearm. SSgt SW told the members that he was having dinner at a local restaurant with his wife and six-month-old daughter along with SSgt TN, his wife, and their daughter. Appellant had also been invited, and he showed up drunk and continued to drink once there, ultimately confronting diners at a nearby table by "aggressively" asking them, "Who the f[**]k are you looking at?" and telling them, "You don't know who the f[**]k I am." While SSgt SW and SSgt TN defused the situation with the other diners, Appellant began slouching in his seat and drooling. This led SSgt SW and SSgt TN to drag Appellant outside the restaurant. Appellant then began yelling profanities at passers-by until Appellant fell down, face-first. When that happened, Appellant's shirt came up and SSgt SW saw Appellant was armed with a pistol and a knife. SSgt SW took both the weapons from Appellant and unloaded the firearm. At the time, SSgt SW's and SSgt TN's families were in the parking lot within sight of the disturbance, approximately 75 yards away.

During the Government's sentencing argument, Trial counsel recounted Appellant's conduct at the restaurant and then his assault on JC. Trial counsel said of the latter, "This incident resulted in a call to local law enforcement, and a seizure of [Appellant's] weapons, again." Before us, Appellant claims trial counsel suggested to the members that his firearms had been seized on more than one occasion, while law enforcement authorities only seized his firearms one time. What Appellant overlooks is that his weapons were seized on another occasion—namely the evening at the restaurant when SSgt SW took Appellant's gun and knife from him. Therefore, contrary to his argument on appeal, Appellant's weapons were seized more than once. The members heard about Appellant's weapons being taken away from him both by SSgt SW and JC, as well as being turned over to law enforcement by his neighbor. Appellant's argument on this point is without merit.

d. Comments About Appellant's Unsworn Statement

In Appellant's unsworn statement, he told the members he was "sorry to have caused distress and suffering to anybody" and that he was "deeply remorseful for the pain that [he had] caused." Near the end of that statement, Appellant said, "I assure you, the Air Force, [JC], and my friends and family, that I will continue my journey of self-improvement and sobriety so that nothing like this court-martial ever happens again." Trial counsel argued Appellant, when delivering his unsworn statement, did not apologize to JC, saying to the members, "Did you hear [JC's] name? No, you didn't. The first thing out of his mouth should have been an apology to [JC]. But what does he do[ ]? He blames alcohol, and he blames [ ] his family issues."

Appellant takes issue with trial counsel's comments, arguing Appellant had, in fact, offered his apologies. However, once a convicted servicemember testifies or makes an unsworn statement and "either expressed no remorse or his expressions of remorse can be arguably construed as being shallow, artificial, or contrived," the sentencing authority may consider such with respect to that servicemember's rehabilitation potential, and trial counsel may comment on it in argument. *United States v. Edwards*, 35 M.J. 351, 355 (C.M.A. 1992). Here, trial counsel was partially correct—Appellant did not squarely apologize to JC; instead, Appellant promised to JC and others that he would remain sober and not re-offend. Trial counsel was incorrect when he claimed the members did not hear JC's name, as Appellant did refer to JC by name. In the end, Appellant's unsworn statement was subject to trial counsel's fair comment, and we do not see trial counsel's erroneous claim regarding JC's name as rising to the level of prosecutorial misconduct. We also have no reason to believe that singular comment led Appellant to be sentenced on anything other than the evidence presented to the members.

e. Comments About Appellant's "Profits"

Trial counsel argued at one point during sentencing, "The [G]overnment concedes that yes, a dishonorable discharge is harsh. But there's no other way for the Air Force to disassociate itself from [A]irmen the [sic] risk the lives of other [A]irmen. [Appellant] profited long from his actions; and he should not benefit from his actions." During the Defense's sentencing argument, trial defense counsel responded,

> [T]he [G]overnment mentioned that [Appellant] shouldn't be here to profit from his

> actions. That sitting in jail for the 311 days awaiting a trial date, of working on yourself, profiting from his actions? Well, he might be profiting from working on himself, but he certainly didn't get a benefit to doing any of this.

Like the Defense, we are somewhat puzzled by trial counsel's argument that Appellant "profited long from his actions." We are unclear if trial counsel misspoke or was making some metaphorical point which has eluded us, as no evidence was offered that Appellant received any benefit from his conduct, financially or otherwise. Without any such evidence, the comment is confusing, if not meaningless, and trial defense counsel adeptly pointed that out to the members. In any event, we easily conclude that whatever can be said of this statement, it did not persuade the members, as they rejected trial counsel's recommendation they sentence Appellant to a dishonorable discharge—a recommendation directly tied to the "profited long" comment. Thus, any error on this point warrants no relief.

Although not raised by Appellant, we pause to note our concern with trial counsel's comment that there was "no other way for the Air Force to disassociate itself from [A]irmen" who risk others' lives other than via a dishonorable discharge. To the extent trial counsel was arguing that the members should adjudge a dishonorable discharge for the sole purpose of removing Appellant from the military, such would be improper, as a punitive discharge is "not intended to be a vehicle to make an administrative decision about whether an accused should be retained or separated." *United States v. Ohrt*, 28 M.J. 301, 306 (C.M.A. 1989). Despite this problematic comment, we see no prejudice to Appellant, as this comment was isolated,

not repeated, and not part of any running theme or theory in trial counsel's argument. As noted above, the members did not sentence Appellant to a dishonorable discharge, which is strong evidence of the lack of impression the comment left on them.

D. Trial Counsel's Reading of JC's Unsworn Statement

JC prepared a written unsworn statement to the court-martial. When the Government rested its sentencing case, trial counsel told the military judge that JC "is offering an unsworn impact statement. And we would propose—the victim has requested that it be read on his behalf. Trial counsel is prepared to read it." The military judge then asked, "Defense, do you have any objections either to the substance or to the manner of presentation?" Trial defense counsel replied, "No, Your Honor. Not at all." Trial counsel proceeded to read the statement to the members.

In JC's statement, he explained that after the assault, he had difficulties sleeping and "felt anxious for quite a while," leading him to remove himself from his duty section in order to work at the base chapel where he was able to receive mental health treatment. JC wrote that he initially "had a hard time forgiving [Appellant] but time heals" and that he did not believe Appellant was "a bad man," but rather "a guy that had some bad things to deal with, but didn't deal with it in a good way." He also wrote that he hoped "the best" for Appellant and that Appellant "heals from the trauma in his life and leans on the help he's received, and hopefully continues to receive in the future." Although JC found Appellant's conduct the night of the assault "completely unacceptable," he characterized Appellant as being "just in a dark place at the time."

Shortly thereafter, the military judge asked the parties their positions on whether JC's written statement would be provided to the members. Trial counsel said they were not making a request to give the members the statement, but they also had no objection to doing so. Trial defense counsel said, "Your Honor, we're fine it if goes back with them." The military judge then asked whether either party was actually requesting that the members be given the statement, and trial defense counsel said, "Your Honor, we would request that it goes back with them," leading the military judge to tell trial counsel to publish the exhibit to the members.

On appeal, Appellant argues it was error for the military judge to allow trial counsel to read JC's statement to the members. Under R.C.M. 1001(c)(5)(A), in effect at the time of Appellant's court-martial (as well as this opinion), "*The crime victim* may make an unsworn statement." (Emphasis added). R.C.M. 1001(c)(5)(B) further provides that if good cause is shown, a military judge may allow *a victim's counsel* to deliver the statement. Appellant, however, waived this issue by virtue of trial defense counsel stating they had no objection "at all" to the manner of presenting the statement after being squarely asked by the military judge. Thus, Appellant intentionally relinquished or abandoned a known right. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). When an appellant affirmatively states he or she has no objection to the admission of evidence, the issue is ordinarily waived and his or her right to complain about its admission on appeal is extinguished.[9] *United States v. Ahern*, 76 M.J. 194, 198 (C.A.A.F. 2017)

9. Victim unsworn statements are not evidence, but we see no reason to apply a different standard of waiver.

(citing *United States v. Campos*, 67 M.J. 330, 332–33 (C.A.A.F. 2009)). Our assessment that Appellant waived this issue rather than merely forfeited it is bolstered by the fact it was the Defense which asked for the written version of JC's statement to be given to the members. This is a strong indication Appellant wanted JC's statement before the members, regardless of form or delivery.

The CAAF has made clear that the Courts of Criminal Appeals have discretion, in the exercise of their authority under Article 66, UCMJ, 10 U.S.C. § 866, to determine whether to apply waiver or to pierce that waiver in order to correct a legal error. *See United States v. Hardy*, 77 M.J. 438, 442–43 (C.A.A.F. 2018); *United States v. Chin*, 75 M.J. 220, 222–23 (C.A.A.F. 2016) (discussing our ability to correct error despite waiver). We decline to pierce Appellant's waiver, in large part due to the fact JC's statement was conciliatory in tone and dovetailed with the Defense's general theme—that is, that Appellant was not inherently criminal, but rather someone whose life had been derailed by alcohol addiction.

E. Lesser Included Offense of Simple Assault

Appellant was charged with committing aggravated assault with a dangerous weapon when he pointed his gun at JC. As charged, this offense required the Government to prove, inter alia, that Appellant had pointed a loaded firearm at JC with the intent to do bodily harm to JC. The military judge instructed the members on the elements of this offense and also advised the members that simple assault was a lesser included offense, the elements of which included Appellant offering to do bodily harm to JC by unlawfully pointing a firearm at him "with force or violence." Further, the military judge explained that an offer to do bodily harm is "a

demonstration of violence ... which created in the mind of the victim a reasonable apprehension of receiving immediate bodily harm," and that the combination of threatening words and a menacing act or gesture constitutes a demonstration of violence. Finally, the military judge told the members the defense of voluntary intoxication applied to the aggravated assault charge if Appellant's intoxication created reasonable doubt as to Appellant's intent, but that no such defense was available for the lesser included offense of simple assault.

Early in Appellant's court-martial, before the members had been called, the military judge noted on the record that the parties had agreed that simple assault was potentially a lesser included offense of the aggravated assault charge, but that they would discuss the matter further when it came time to prepare instructions. After the Defense rested, the military judge discussed his proposed instructions with the parties and then recessed the court-martial in order to finalize those instructions. Once back on the record, the military judge said, "Over the break I got emails from both parties indicating that they didn't have objections or additional input for either the findings worksheet or the findings instructions. Is that still the parties' positions?" Trial counsel answered, "That's correct, Your Honor," and trial defense counsel answered, "Yes, Your Honor." After the military judge read his instructions to the members, he asked whether counsel objected to the instructions he had given or requested additional instructions. Trial counsel and trial defense counsel both replied, "No, Your Honor."

Appellant argues the military judge committed plain error by instructing the members on the lesser included offense of simple assault. His premise is that

because he was intoxicated at the time, the evidence did not raise that offense. He bases this theory on *United States v. Bean*, 62 M.J. 264 (C.A.A.F. 2005). Bean, however, is not analogous to Appellant's case because *Bean* involved an earlier formulation of Article 128, UCMJ. In *Bean*, the appellant had drunkenly threatened others with a knife and then with a loaded gun, although there was dispute over whether the gun's safety was engaged or not. Under the version of Article 128, UCMJ, in effect at the time, a conviction of aggravated assault required proof that, inter alia, the assault was carried out in a manner likely to produce death or grievous bodily harm. See *Manual for Courts-Martial, United States* (2000 ed.), ¶ 54.b.(4)(a). The CAAF held that because the appellant had threatened others with a loaded firearm, simple assault was not reasonably raised, regardless of whether the safety was engaged. *Bean*, 62 M.J. at 267. The current version of Article 128, UCMJ, omits the "manner" element and includes a new element requiring the specific intent to do bodily harm. *See Manual for Courts-Martial, United States* (2019 ed.), ¶ 77.b.(4)(a). Given Appellant's level of intoxication, in addition to the wholly circumstantial evidence of his intent at the time he pulled out his gun, the specific-intent element was at issue, giving rise to the lesser included offense of simple assault which does not include the element.

Moreover, Appellant waived this issue when his trial defense counsel stated the Defense had no objections to the instructions, which included the lesser included offense instruction. *See United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (concluding that when an accused states he or she has no objection to a military judge's instructions, such amounts to "expressly and unequivocally acquiescing" to those

instructions, thereby waiving any error for appeal); but see *United States v. Schmidt*, 82 M.J. 68, 72–73 (C.A.A.F. 2022) (finding no waiver where there is a new rule of law and the law is unsettled on the point in issue). We will not pierce Appellant's waiver, primarily due to his failure to advance a colorable theory of a legal error.

F. Sentence Severity

Appellant contends his sentence is inappropriately severe. In the Government's sentencing case, trial counsel elicited testimony about the restaurant incident and how the assault on JC impacted not only JC himself, but JC's unit. Appellant, meanwhile, introduced character letters as well as documents related to his inpatient treatment indicating he had taken responsibility for his conduct and was remorseful for what he had done. In his unsworn statement, Appellant told the members about being raised by his alcoholic mother until he and his brothers moved in with their father in Colorado. Appellant said he turned to alcohol as a coping mechanism when his older brother committed suicide in 2016. Appellant also described his duties during his deployment which involved plotting and watching "hundreds of kills" as well as "oversee[ing] the sorting of bodies and body parts." In rebuttal to the suggestion that Appellant had taken responsibility while he was in treatment at Denver Springs, the Government admitted a portion of one of Appellant's prison phone calls in which Appellant demeaned JC.

After the military judge merged the assault and drunk and disorderly offenses for sentencing purposes pursuant to a defense motion, he instructed the members that Appellant faced a maximum sentence of a dishonorable discharge, reduction to the grade of E-1, forfeiture of all pay and allowances, a reprimand,

and confinement for 18 months. Instead of a dishonorable discharge as trial counsel recommended, the members sentenced Appellant to a bad-conduct discharge; the members also declined to sentence Appellant to be reprimanded.[10] Otherwise, Appellant received the maximum authorized punishment identified by the military judge.

We review issues of sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006) (citation omitted). Our authority to determine sentence appropriateness "reflects the unique history and attributes of the military justice system, [and] includes but is not limited to considerations of uniformity and evenhandedness of sentencing decisions." *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (citations omitted). We may affirm only as much of the sentence as we find correct in law and fact and determine should be approved on the basis of the entire record. Article 66(d), UCMJ, 10 U.S.C. § 866(d). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (per curiam) (citations omitted). Although we have great discretion to determine whether a sentence is appropriate, we

10. When the military judge initially advised the members of the maximum punishment, he omitted the possibility of a reprimand. However, later in his instructions, the military judge told the members a reprimand was an option, and such an option appeared on the members' sentencing worksheet. Trial counsel did not recommend the members sentence Appellant to a reprimand.

have no power to grant mercy. *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted).

On appeal, Appellant concedes "[t]he nature and seriousness of the offenses are not minimal or insignificant," but argues his duty performance, personal tragedies, mental health issues, alcoholism, and remorsefulness render his sentence inappropriately severe, and he asks us to set aside his punitive discharge. The justifications raised by Appellant amount to a request for clemency, which we have no authority to grant. We are also mindful that Appellant pulled a loaded firearm on a fellow Airman while intoxicated, creating the risk of grave injury or death, and that this was not Appellant's first time carrying a concealed firearm while drunk. We have carefully considered Appellant, his record of service, his personal circumstances, and the entirety of his record of trial, and we conclude Appellant's adjudged sentence is not inappropriately severe.

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.

Senior Judge KEY delivered the opinion of the court, in which Judge ANNEXSTAD and Judge GRUEN joined.

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
WASHINGTON, D.C.

United States,
Appellee

v.

Eric N. Vance,
Appellant

USCA Dkt. No. 22-0294/MC
Crim. App. No. 202100024

ORDER

On further consideration of the granted issue, 83 M.J. 184 (C.A.A.F. 2023), and in view of *United States v. Anderson*, 83 M.J. __ (C.A.A.F. 2023), it is, by the Court, this 18th day of July, 2023,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Eric N. VANCE,
Lance Corporal (E-3),
U.S. Marine Corps,
Appellant

No. 202100024

Decided: 22 June 2022

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judges: Wilbur Lee (arraignment), Melanie J. Mann (motions), Ann K. Minami (motions, trial)

Sentence adjudged 29 October 2020 by a general court-martial convened at Marine Corps Base Hawaii, consisting of officer and enlisted members. Sentence in the Entry of Judgment: reduction to E-1, confinement for 15 months, and a dishonorable discharge.

For Appellant: Lieutenant Commander Michael W. Wester, JAGC, USN

For Appellee: Captain Tyler W. Blair, USMC, Lieutenant Commander Gabriel K. Bradley, JAGC, USN, Major Kerry E. Friedewald, USMC

Before GASTON, HOUTZ, and MYERS, Appellate Military Judges.

HOUTZ, Senior Judge:

Appellant was convicted, contrary to his pleas, of attempted sexual assault of a child, attempted sexual abuse of a child, and attempted extramarital sexual conduct, in violation of Article 80, Uniform Code of Military Justice [UCMJ],[1] for communicating indecent language to and attempting to have sex with a person Appellant believed was 13-years-old.

Appellant asserts 10 assignments of error [AOEs]: (1) the military judge abused her discretion by removing two members over defense objection and not granting a defense implied-bias challenge to another member; (2) the panel was improperly constituted where at least one member was solicited and volunteered; (3) the military judge erred by denying production of Officer Sierra,[2] the undercover law enforcement agent who had pretended to be the underage girl on the phone; (4) the military judge erred by not allowing the Defense to argue in closing that the Government had to prove Appellant's predisposition to commit the offense beyond a reasonable doubt; (5) the military judge erred by failing to issue a tailored entrapment instruction; (6) the military judge erred by admitting Appellant's communications with others to show propensity; (7) the record of trial is incomplete;[3] (8) the evidence is

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1. 10 U.S.C. § 880.

2. All names in this opinion, other than those of Appellant, the judges, and appellate counsel, are pseudonyms.

3. The alleged missing items were either in the record already (Appellate Ex. LVII was incorrectly referenced by the military judge as Appellate Ex. XXV, R. at 178), not required to be included in the record of trial (discovery documents relating to the case activity summary referenced in Appellate Ex. XXXIX), or subsequently attached to the record after Appellant's initial

legally and factually insufficient to sustain Appellant's convictions; (9) the findings and sentence should be set aside for cumulative error;[4] and (10) Appellant was denied due process when the military judge denied his motion for a unanimous verdict instruction. We find no prejudicial error and affirm.

I. BACKGROUND

Appellant's convictions arise from his online and telephonic conversations in which he made sexual advances to an individual who he believed was a 13-year-old girl, but was actually a law enforcement agent. Appellant, who was married, then drove to the purported minor's home with a box of condoms, parked his car, walked to the house, and was apprehended when he went in the front door. Additional facts are included as needed within their respective AOEs.

II. DISCUSSION

A. Excusal of Panel Members for Good Cause and Implied Bias

Appellant asserts the military judge erred in granting two Government challenges for cause and denying a Defense challenge. We review a military judge's rulings on challenges for cause for an abuse of discretion.[5] While rulings based on actual bias are

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brief (the military judge's original ruling regarding officer Sierra's production as a witness referenced in Appellate Ex. XXXIII), rendering this AOE moot. *See United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987).

4. As we do not find error in the individual AOEs, we find Appellant's assertion of cumulative error to be without merit. *See Matias*, 25 M.J. at 363.

5. *United States v. Woods*, 74 M.J. 238, 243 (C.A.A.F. 2015).

afforded a high degree of deference, we review "implied bias challenges pursuant to a standard that is less deferential than abuse of discretion, but more deferential than de novo review."[6] "We will afford a military judge less deference if an analysis of the implied bias challenge on the record is not provided."[7] While we do not "expect record dissertations from the military judge's decision on implied bias," we do "require a clear signal that the military judge applied the right law" which generally extends beyond mere "[i]ncantation of the legal test without analysis" in close cases.[8]

Panel members "shall be excused for cause whenever it appears that a member ... [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[9] However, "not every contretemps during voir dire rises to the level of a constitutionally unfair trial" and "[r]esponses to voir dire need not be pristine to satisfy the constitutional minimum of a fair trial ... or even [Rule for Courts-Martial] R.C.M. 912's requirement that a court-martial appear fair to the observing public."[10] Courts have consistently used "an objective standard in

6. *United States v. Hennis*, 79 M.J. 370, 385 (C.A.A.F. 2020) (internal citation omitted).

7. *United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015).

8. *Id.*

9. R.C.M. 912(f).

10. *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (internal quotation marks and citations omitted).

determining whether implied bias exists" that looks at "the totality of the circumstances."[11] That is,

> we test for implied bias not on the subjective qualities of the panel member, but on the effect that panel member's presence will have on the public's perception of whether the appellant's trial was fair. Thus, although a panel member's good character can contribute to a perception of fairness, it is but one factor that must be considered in the context of the other issues raised concerning that individual's panel membership.[12]

"While cast as a question of public perception, this test may well reflect how members of the armed forces, and indeed the accused, perceive the procedural fairness of the trial as well."[13]

For challenges by the Defense, "[m]ilitary judges apply a liberal-grant mandate in ruling on challenges for cause," which "recognizes the unique nature of military courts-martial panels, particularly that those bodies are detailed by convening authorities and that the accused has only one peremptory challenge."[14]

1. The Excusal of Staff Sergeant John for Health and Distraction Concerns

Military judges are required to "[e]nsure that the dignity and decorum of the proceedings are

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11. *Peters*, 74 M.J. at 34 (internal quotation marks and citation omitted).

12. *Id*. at 35.

13. *Id*. at 34.

14. *United States v. Campbell*, 76 M.J. 644, 659 (C.A.A.F. 2017) (internal quotation marks and citations omitted).

maintained."[15] "Courts-martial should be conducted in an atmosphere which is conducive to calm and detached deliberation and determination of the issues presented and which reflects the seriousness of the proceedings."[16] Even after assembly, the military judge may excuse members for good cause, which includes "physical disability, military exigency, and other extraordinary circumstances which render the member, counsel, or military judge or military magistrate unable to proceed with the court-martial within a reasonable time."[17]

The Government challenged Staff Sergeant John due to his persistent cough. When questioned during voir dire, he stated that he was awaiting COVID-19 test results, that he was asymptomatic with regard to COVID-19 except for the cough, and that the cough was due to being outside in the heat then coming inside to a cooler area.[18] Trial defense counsel objected to the Government's challenge, arguing among other things that Staff Sergeant John was the "only member on this panel who is African American ... [s]o if he is kicked, there will be no member as a result who reflects the race of [Appellant]."[19] The military judge excused Staff Sergeant John, noting that his cough was distracting, that it was a "productive" cough as opposed to a dry cough, and that he himself was concerned enough to be tested for COVID-19.[20]

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15. R.C.M. 801(2).

16. R.C.M. 801(2) Discussion.

17. R.C.M. 505(c)(2), R.C.M. 505(f).

18. R. at 396.

19. *Id*. at 400.

20. *Id*. at 401.

Under these circumstances, we hold that the military judge did not err in granting the challenge for cause. Excusing Staff Sergeant John for his distracting cough and pending COVID-19 test in a time period where COVID-19 was having a global impact on health meets the definition of extraordinary circumstances and satisfies good cause as defined in R.C.M. 505(f). Further, as held by our superior Court, we decline to apply *Batson v. Kentucky* to non-peremptory challenges.[21] Even if *Batson* challenges were so applied, the fact that Staff Sergeant John, who was the only African-American on the panel, was distractedly coughing and pending a COVID-19 test is a race-neutral reason for his excusal, and we are convinced that he was excused for the race-neutral reasons of coughing and a pending COVID-19 test. We are also convinced that the public has enough understanding of the COVID-19 pandemic and the precautions surrounding it that his excusal did not create an overriding appearance of unfairness in Appellant's court-martial.

2. The Defense's Implied Bias Challenge Against Sergeant Juliet

The Defense's implied bias challenge against Sergeant Juliet revolved around his answers to questions regarding adultery charges.[22] Specifically, he indicated in group voir dire that he had "strong beliefs in favor of the military's criminalization of adultery,"[23] although he also gave a negative response to the question, "[w]ould any member form a strong

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21. *See United States v. Bess*, 80 M.J. 1, 8 (C.A.A.F. 2020) (citing *Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986)).

22. R. at 466.

23. *Id*. at 413-14.

negative opinion against a person accused of attempting to cheat on his spouse?"[24] During individual voir dire, he stated,

> I feel like an NJP for cheating on your wife or your husband is proper considering – I mean, we work together and we're here like – let me think. We're defending our nation and we're, like, setting our own standards and we're supposed to be better than, like, civilians and stuff like that. So you promised your life to them and if you're out there cheating on them, then how are we supposed to trust you at work if you can't uphold the simple police [sic] of that?[25]

Sergeant Juliet stated his belief that the "standard should be upheld and you should be punished if you break those standards."[26] However, in clarifying his remarks, Sergeant Juliet said that he would "[a]bsolutely" be able to consider someone accused of adultery innocent until proven guilty, and that he would be able to set aside his judgment until guilt was proven beyond a reasonable doubt, because he "[felt] like that's what our nation's based off of, like, part of our constitutional rights and everything. Like, because if we didn't have reasonable doubt, then anybody could just get pulled in for anything ... So I feel like it's good – a good form of justice."[27] Sergeant Juliet also indicated that "you get the punishment and you go on, but I don't think anybody should be seen

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24. *Id*. at 413.

25. *Id*. at 461-62.

26. *Id*. at 466.

27. *Id*. at 461-63.

differently because of that"[28] and indicated he would be able to follow the military judge's instructions.[29]

The military judge analyzed the Defense's implied bias challenge on the record, stating that Sergeant Juliet "appeared to take seriously this duty that he is presented with," "did not express any sort of agenda," gave "firm, but not inelastic" responses, and indicated he "believe[d] in reasonable doubt," such that the military judge was "confident that the public would not doubt the fairness of this proceeding by having Sergeant [Juliet] on the panel."[30] She therefore denied the Defense challenge.

We find no error with the military judge's analysis, which we afford more deference because it is documented in the record.[31] While her observations of the member's demeanor are normally used to assess actual bias, our superior court has found they are "also relevant to an objective observer's consideration" in addressing questions of implied bias.[32] Sergeant Juliet appeared willing to follow the military judge's instructions and apply the law to the specific facts of the case in order to determine whether or not the beyond-a-reasonable-doubt standard was met. He indicated that he agreed to consider all possible sentences and remain open-minded until closed-session deliberations.[33] And as we discuss further

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28. *Id*. at 466-67.

29. *Id*. at 389-90.

30. *Id*. at 490-91.

31. *See Peters*, 74 M.J. at 34.

32. *United States v. Downing*, 56 M.J. 419, 423 (C.A.A.F. 2002).

33. R. at 390.

below, we find no merit to Appellant's argument that Sergeant Juliet's volunteering evidenced a differing mentality that gave rise to implied bias. Therefore, we agree with the military judge's conclusion that, even in light of the liberal grant mandate, Sergeant Juliet was not subject to exclusion because his presence on the panel did not negatively impact the public's perception of the fairness of Appellant's court-martial.

3. The Government's Challenge Against Master Sergeant Day

Master Sergeant Day was personally accused of sexual assault in 2004 and was investigated by the San Diego police department. He reported on his questionnaire that he believed he would be unable to sit a "sexual assault" trial "without clear evidence" because of the previous accusation against him.[34] When asked about the show "To Catch a Predator," he said the show "does ... make you feel angry at the individual because they definitely seem guilty from the beginning."[35] In clarifying his answer, he stated, "[I]n general, the crime itself is repulsive," but also stated that the individual was "innocent until proven guilty and ... gets a fair trial."[36] However, he stated that he would "just weigh differently" and would "need more evidence" than circumstantial evidence in a sexual assault case with two adults because there was "probably some bias on [his] end."[37]

The military judge granted the Government's challenge against Master Sergeant Day for actual and

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34. *Id*. at 422-24.

35. *Id*. at 425.

36. *Id*. at 426.

37. *Id*. at 424.

implied bias.[38] Because of the lack of clarity in the record as to whether the excusal was due to implied bias or actual bias, we test for implied bias and give the military judge less deference.[39] That said, even without deference, we agree with the military judge's ruling. To allow someone who had been previously accused of and investigated for sexual assault and was admittedly still harboring "some bias" due to that experience would certainly call into question whether the court-martial would be free from substantial doubt as to its "legality, fairness, and impartiality."[40] We therefore find the military judge did not err in excusing Master Sergeant Day.

B. The "Volunteer" on Appellant's Court-Martial Panel

We review the issue of improperly selected members under a forfeiture standard if the moving party fails to make a timely motion.[41] A motion for improper selection is timely if it is "[b]efore the examination of members ... or at the next session after a party discovered or could have discovered by the exercise of diligence, the grounds therefore, whichever is earlier."[42] Allegations of improper exclusion of qualified personnel from the selection process that were not forfeited are reviewed de novo.[43]

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38. *Id*. at 479.

39. *See Peters*, 74 M.J. at 34.

40. R.C.M. 912(f).

41. R.C.M. 912(b)(3).

42. R.C.M. 912(b)(1).

43. *See United States v. Bartee*, 76 M.J. 141, 143 (C.A.A.F. 2017).

We "will not speculate as to what sort of biases will be reflected in a jury chosen on the basis of its members' willingness to depart from their daily business and serve as jurors," but "condemn the practice of soliciting only volunteers for the panel pool" because volunteerism is an "irrelevant variable injected into the selection of the panel pool."[44] Where "error in preliminarily screening the members was not merely an 'administrative mistake,' " the government "has the burden to demonstrate that the error did not 'materially prejudice the substantial rights of the accused.'"[45] We conduct a three-part test in evaluating potentially deficient member selection by evaluating "the motive of those involved in the preliminary screening of panel members, the nature of the preliminary screening variable of volunteerism, and its impact on the selection of the members."[46] However, generally, "the preliminary screening variable of volunteerism is irrelevant" if "[t]here is no showing that this variable operated to exclude a discernable group or to diminish the representative nature of the pool."[47]

Here, when asked whether he volunteered or was assigned to the court-martial panel, Sergeant Juliet stated during individual voir dire that he was "asked ... and I volunteered for it."[48] He confirmed that he

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44. *United States v. Dowty*, 60 M.J. 163, 173 (C.A.A.F. 2004) (quoting *United States v. Kennedy*, 548 F.2d 608, 609 (5th Cir. 1977)) (internal quotation marks omitted).

45. *Id.* (citing Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2000)).

46. *Id.*

47. *Id.*

48. R. at 464.

was one of two sergeants in his division who were asked separately whether they wanted to be a member on a court-martial and that the other sergeant did not want to do it.[49] Sergeant Juliet further explained that he wanted to be a court-martial member "[j]ust to see what it was," that he did not know what he would be doing as a member, and that he did not have a passion for the law or military justice, but that he believed "in our law system—our judicial system within the Marine Corps."[50]

The Defense challenged Sergeant Juliet's volunteerism at the conclusion of voir dire, stating Sergeant Juliet was "pulled into a room and asked whether he wanted to volunteer for this court-martial" and that he "volunteered for this because he wanted the experience."[51] While the challenge was framed only as an implied-bias challenge, and not necessarily as an improper member selection under Article 25, UCMJ, we find that "[t]o require more from the Defense would needlessly elevate form over substance and frustrate modern practice."[52] We therefore review the issue de novo.[53]

The nature of Sergeant Juliet's volunteering, the fact that he was the only member who volunteered, and the responses that he gave in both individual and group voir dire do not lead to a conclusion that there was any improper motive in soliciting or accepting Sergeant Juliet's volunteering or that his

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49. *Id*. at 465.

50. *Id*. at 466.

51. *Id*. at 488.

52. *United States v. Ayalacruz*, 79 M.J. 747, 749 (N-M. Ct. Crim. App. 2020).

53. *See Bartee*, 76 M.J. at 143.

volunteering had any discernable impact on the convening authority's selection of members. There is nothing to suggest that the fact that Sergeant Juliet volunteered when asked by his direct supervisor was communicated to, much less used by, the convening authority in selecting him as opposed to the factors in Article 25, UCMJ. Due to the specific factors surrounding Sergeant Juliet, we "find that there is no appearance of unfairness arising from the service of any ... volunteer member[ ] in this case."[54]

C. Denial of the Defense Motion to Produce Agent Sierra

A military judge's decision to produce or deny production of a witness is reviewed for abuse of discretion.[55] The denial of a requested witness will not be overturned unless there is a "definite and firm conviction" that there was a "clear error of judgment in the conclusion it reached upon a weighing of the relevant factors."[56]

Parties are "entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary."[57] There are several factors

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54. *Dowty*, 60 M.J. at 175. However, we reiterate the condemnation of soliciting volunteers for the panel pool: while generally it is an irrelevant variable, it is a needless variable nonetheless, and there are cases where soliciting and selecting volunteers for service on a court-martial panel will result in error. The fact that this is not one of those cases does not serve as an endorsement to the practice.

55. *United States v. Rockwood*, 52 M.J. 98, 104 (C.A.A.F. 1999).

56. *Hennis*, 79 M.J. at 381.

57. R.C.M. 703(b)(1).

that have been outlined to analyze whether or not a witness must be granted, including: "the issues involved in the case and the importance of the requested witness as to those issues; whether the witness' testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness, such as deposition, interrogatories, or previous testimony."[58] However, "[t]he Court has never fashioned an inelastic rule to determine whether an accused is entitled to the personal attendance of a witness."[59]

Here, the Government initially granted Appellant's request to produce as a witness the law enforcement officer who posed as the underage victim, Agent Sierra. However, after an email describing Agent Sierra's reticence to travel due to COVID-19 health concerns and financial hardship, the Government rescinded its grant of Agent Sierra as a witness. The military judge thereafter denied the Defense's motion to produce Agent Sierra and its subsequent motion for reconsideration of same.

We find no abuse discretion in the denial of Agent Sierra as a witness. The online and telephonic conversations she had with Appellant were all recorded, produced in discovery, and admitted into evidence for the members' consideration.[60] Thus, the members could see Agent Sierra's exact expressions in her photos and hear the exact words and inflection in her voice in the audio recordings when determining issues such as whether the Government induced Appellant to commit these offenses. In addition,

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58. *United States v. Tangpuz*, 5 M.J. 426, 429 (C.M.A. 1978).

59. *Id*.

60. Pros. Exs. 3-6.

another law enforcement agent who testified, Agent Bravo, had extensive personal knowledge of the circumstances surrounding the conversations, as she had participated in, observed, or listened in on each of the conversations as they occurred.[61] Agent Sierra's testimony was cumulative of this other testimony and evidence.

D. Limitation of the Defense's Closing Argument on Entrapment

Rulings limiting closing argument are reviewed for abuse of discretion.[62] Entrapment is an affirmative defense that "the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense."[63] The pertinent R.C.M. provides:

The defense has the initial burden of going forward to show that a government agent originated the suggestion to commit the crime. Once the defense has come forward, the burden then shifts to the [g]overnment to prove beyond a reasonable doubt that the criminal design did not originate with the [g]overnment or that the accused had a predisposition to commit the offense.[64]

Government origination, or inducement, occurs when a government actor "creates substantial risk that an undisposed person or otherwise law-abiding

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61. R. at 569-70.

62. *United States v. Bess*, 75 M.J. 70, 75 (C.A.A.F. 2016).

63. R.C.M. 916(g).

64. *United States v. Hall*, 56 M.J. 432, 436 (C.A.A.F. 2002) (quoting *United States v. Whittle*, 34 M.J. 206, 208 (C.M.A. 1992)).

citizen would commit the offense."[65] It includes "pressure, assurances that a person is not doing anything wrong, persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship."[66] Inducement does not include government actors "merely provid[ing] the opportunity or facilities to commit the crime or use artifice or stratagem."[67] Generally, even repeated requests "do not in and of themselves constitute the required inducement."[68]

Here, the following exchange occurred between the military judge and Appellant's trial defense counsel [TDC] regarding the Defense's closing argument on the issue of entrapment:

> MJ: I do not want the defense in their argument to state that the government must prove predisposition beyond a reasonable doubt. Taking that conflicts with the law that I am reading them, which is that the government must prove beyond a reasonable doubt that the accused was not entrapped.
>
> TDC: Ma'am, the defense would just argue that, that conflicts with case law governing entrapment saying that the government needs to prove that the accused was not entrapped beyond a reasonable doubt ... And the Court of Appeals for the Armed Forces, explicitly states

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65. *Id.* (quoting *United States v. Howell*, 36 M.J. 354, 359–60 (C.M.A. 1993)).

66. *Id.*

67. *Id.*

68. *Id.* (internal quotation marks omitted).

> that once the defense has raised the use of entrapment by showing some inducement, the burden then shifts to the government to prove predisposition.[69]

Appellant's position on appeal, as at trial, is that the military judge's view during this exchange is a misstatement of the law. We disagree. While the burden does shift to the government after the defense shows some evidence that the suggestion to commit the crime originated with the government, the government must then prove beyond a reasonable doubt either "that the criminal design did not originate with the [g]overnment or that the accused had a predisposition to commit the offense."[70] In other words, the burden shifts to the government to prove beyond a reasonable doubt that, one way or the other, the accused was not entrapped. That is exactly what the military judge instructed the members in this case and exactly what the military judge allowed the Defense to argue during closing argument. The military judge did not abuse her discretion in limiting Defense's closing argument to restating the entrapment defense's proper elements and burden shifting.

E. Instructions on the Defense of Entrapment

"When deciding whether the military judge properly instructed a panel, this Court uses a de novo

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69. R. at 861-62.

70. *Hall*, 56 M.J. at 436 (quoting *Whittle*, 34 M.J. at 208) (emphasis added). *See also Jacobson v. United States*, 503 U.S. 540, 548–49 (1992) ("[T]he prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents" only "where the Government has induced an individual to break the law and the defense of entrapment is at issue.").

standard of review."[71] However, a military judge's decision regarding tailored instructions is reviewed for abuse of discretion.[72] To assist in determining whether the military judge abused her discretion in denying a requested instruction, we apply the following three-part test from *United States v. Carruthers*: (1) Is the requested instruction correct? (2) Does the main instruction substantially cover the requested material? (3) Does the instruction cover a point that is so vital that failure to give it deprived Appellant "of a defense or seriously impaired its effective presentation"?[73] "All three prongs must be satisfied for there to be error."[74]

Here, the military judge provided the following entrapment instruction to the members drawn verbatim from the Military Judges' Benchbook:[75]

> The evidence raised the issue of entrapment in relation to the offense of attempt.
>
> "Entrapment" is a defense when the government agents, or people cooperating with them, cause an innocent person to commit a crime which otherwise would not have occurred. The accused cannot be convicted of the offense of attempt if he was entrapped.

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71. *United States v. Bailey*, 77 M.J. 11, 14 (C.A.A.F. 2017) (citing *United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F. 2007)).

72. *Id*. at 14.

73. *Id*. (citing *United States v. Carruthers*, 64 M.J. 340, 346 (C.A.A.F. 2007)).

74. *Id*. (citing *United States v. Barnett*, 71 M.J. 248, 253 (C.A.A.F. 2012)).

75. Dep't of the Army Pam. 27-9, Legal Services: Military Judges' Benchbook para. 5-6 (Feb. 29, 2020) [Benchbook].

An "innocent person" is one who is not predisposed or inclined to readily accept the opportunity furnished by someone else to commit the offense charged. It means that the accused must have committed the offense charged only because of inducements, enticement, or urging by representatives of the government. You should carefully note that if a person has a predisposition, inclination, or intent to commit an offense or is already involved in unlawful activity, which the government is trying to uncover, the fact that an agent provides opportunities or facilities or assists in the commission does not amount to entrapment. You should be aware that law enforcement agents can engage in trickery and provide opportunities for criminals to commit an offense, but they cannot create criminal intent in otherwise innocent persons and thereby cause criminal conduct.

The defense of entrapment exists if the original suggestion and initiative to commit the offense originated with the government, not the accused, and the accused was not predisposed or inclined to commit the offenses. Thus, you must balance the accused's resistance to temptation against the amount of government inducement. The focus is on the accused's latent predisposition, if any, to commit the offense, which is triggered by the government inducement.

In deciding whether the accused was entrapped, you should consider all evidence presented on this matter. The prosecution's burden of proof to establish the guilt of the accused applies to the elements of the offenses

> but also to the issue of entrapment. In order to find the accused guilty, you must be convinced beyond a reasonable doubt that the accused was not entrapped.[76]

The Defense's requested instruction, on the other hand, included the following additional language:

> Thus, the prosecution must prove beyond a reasonable doubt that the accused was disposed to commit the criminal act prior to first being approached by Government agents.
>
> [T]he Government must prove beyond a reasonable doubt that the accused was predisposed to commit the offenses of sexual assault of a child, sexual abuse of a child, or extramarital sexual conduct, prior to being approached by law enforcement, and independent of any inducement.[77]

This additional instructional language requested by the Defense fails the first prong of the Caruthers test because it is incorrect or, at the very least, misleading. As previously discussed, once the defense makes a prima facie showing of inducement and raises the entrapment defense, the burden shifts to the government to prove beyond a reasonable doubt either that inducement by the government did not occur or that the accused was predisposed to commit the offense. Moreover, while the Benchbook's entrapment instruction could perhaps benefit from a more robust discussion of inducement, predisposition, and burden shifting, it does substantially cover the requested material. Nor do we find that the military judge's

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76. Appellate Ex. LXVII at 5.

77. Appellate Ex. XXXII at 3.

decision to use the Benchbook instruction alone deprived Appellant of a defense or seriously impaired the Defense's effective presentation of his case. Accordingly, our analysis under the Caruthers tests leads us to conclude that the military judge did not abuse her discretion in declining to provide Appellant's proposed instruction.

F. Admission of Evidence to Show Propensity

We review a military judge's decision to admit evidence for an abuse of discretion.[78] Generally, Military Rule of Evidence [Mil. R. Evid.] 404(b) prohibits "[e]vidence of a crime, wrong, or other act ... to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[79] Put another way, "evidence which is offered simply to prove that an accused is a bad person is not admissible."[80] However, the same evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[81] In addition, "[w]hen the defense of entrapment is raised, evidence of uncharged misconduct by the accused of a nature similar to that charged is admissible to show predisposition."[82]

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78. *United States v. Harrow*, 65 M.J. 190, 199 (C.A.A.F. 2007).

79. Mil. R. Evid. 404(b)(1).

80. *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989).

81. Mil. R. Evid. 404(b)(2).

82. R.C.M. 916(g), Discussion (citing Mil. R. Evid. 404(b)); *see also United States v. Hunter*, 21 M.J. 240, 242 (C.M.A. 1986).

Even when meeting an exception to Mil. R. Evid. 404(b), to be admissible the evidence must pass a three-part test under *United States v. Reynolds*:

> (1) Does the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs or acts?
>
> (2) What fact of consequence is made more or less probable by the existence of this evidence?
>
> (3) Is the probative value substantially outweighed by the danger of unfair prejudice?[83]

In conducting part three of this test—the Mil. R. Evid. 403 balancing test—the following non-exclusive factors should be considered:

> the srength of the proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence; the possible distraction of the fact-finder; the time needed to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties.[84]

Here, Appellant sent messages to two other online personas on the same night as the charged offenses.[85] To one of the personas, Appellant expressed that he was using the social media application because he was "looking for chicks."[86] The second additional persona

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83. *Reynolds*, 29 M.J. at 109.

84. *United States v. Berry*, 61 M.J. 91, 95 (C.A.A.F. 2005) (citing *United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2000)).

85. Appellate Ex. XXIII at 2.

86. *Id.*

was, like the persona for the charged offenses, an undercover agent posing as a 13 year-old girl. To this persona Appellant communicated that "we can f[***]," that he was "cool" with her statement that she would be turning 14 in two weeks, and that the persona's age would not bother Appellant "as long as you don't tell me your age."[87]

The military judge ruled Appellant's statements to these additional personas admissible under Mil. R. Evid. 404(b). She concluded that Appellant's statement that he was "looking for chicks" on the night of the charged offense was admissible for the limited purpose of proving Appellant's intent and plan in exchanging messages on the social media platform. We agree, although we do not go so far as to agree with the military judge that a married service member "looking for chicks" on social media should not be considered "[e]vidence of a crime, wrong, or other act" for purposes of Mil. R. Evid. 404(b). However, we do find that the evidence is independently relevant because it shows Appellant's intent or plan with respect to being on the social media application. Further, in weighing the *Wright* factors above, we find that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. The military judge did not abuse her discretion in admitting Appellant's statement that he was "looking for chicks" on social media on the night of his charged conduct.

The military judge also admitted Appellant's sexually-charged conversations with the second undercover agent posing as a different 13-year-old girl for the limited purposes of proving Appellant's intent, motive, plan, and awareness of his guilt or

87. *Id*. at 3.

wrongfulness of his actions. We find these conversations, which also took place on the same night as his charged misconduct, to be highly probative in this regard. The conversations occurred nearly simultaneously with the charged conduct, with another purported 13-year-old girl, and covered much of the same sexual subject matter. This is also very strong predisposition evidence, which is allowed to be admitted once an accused raises the entrapment defense, as Appellant did here. Further, in weighing the *Wright* factors above, we do not find that the probative value of these statements is substantially outweighed by the danger of unfair prejudice. Accordingly, the military judge did not abuse her discretion in admitting these conversations.

G. Legal and Factual Sufficiency

Appellant further asserts that the evidence is legally and factually insufficient to support his convictions. We review legal and factual sufficiency de novo.[88]

Legal sufficiency requires us to consider the evidence in the light most favorable to the government and determine whether "a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt."[89] In doing so, we "draw every reasonable inference from the evidence of record in favor of the prosecution."[90]

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88. Art. 66(d), UCMJ; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

89. *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

90. *United States v. Gutierrez*, 74 M.J. 61, 65 (C.A.A.F. 2015).

Factual sufficiency, on the other hand, requires that we weigh the evidence in the record of trial, make allowances for not having observed and heard the witnesses, then ask whether we are independently convinced of the appellant's guilt beyond a reasonable doubt.[91] In doing so, we apply "neither a presumption of innocence or a presumption of guilt."[92] "Reasonable doubt, however, does not mean the evidence must be free from conflict."[93]

The entirety of Appellant's argument rests on the assertion that the evidence is insufficient to prove beyond a reasonable doubt that he was not entrapped. We disagree. We find the evidence proves beyond a reasonable doubt that Appellant traveled to a residence in an attempt to engage in extramarital sexual conduct with a person he thought was 13 years old and to whom he had been communicating indecent language online. We further find the evidence proves beyond a reasonable doubt that Appellant was not entrapped—specifically, that he was not induced and that he was predisposed to commit these offenses.

1. Attempted Sexual Assault of a Child.

To sustain the conviction for attempted sexual assault of a child in violation of Article 80, UCMJ, the Government must have proven beyond a reasonable doubt: (1) that Appellant did a certain overt act; (2) that the act was done with the specific intent to commit sexual assault of a child under Article 120b, UCMJ; (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to

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91. *Turner*, 25 M.J. at 325.

92. *Washington*, 57 M.J. at 399.

93. *United States v. Rankin*, 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006).

effect the commission of the intended offense.[94] The elements of the target offense of sexual assault of a child under Article 120b are that (1) Appellant committed a sexual act upon a child; and (2) the child had attained the age of 12 years, but had not attained the age of 16 years.[95]

In order for an act to amount to more than mere preparation, it must be "conduct strongly corroborative of the firmness of the defendant's criminal intent," or a "substantial step" towards completing the offense.[96] To be a substantial step, the conduct "must unequivocally demonstrate that the crime will take place unless interrupted by independent circumstances."[97] "Online dialogue must be analyzed to distinguish hot air and nebulous comments from more concrete conversation that might include making arrangements for meeting the supposed minor, agreeing on a time and place for a meeting, making a hotel reservation ... or traveling to a rendezvous point."[98] Travel generally constitutes a substantial step for child sex offenses, but "is not a sine qua non of finding a substantial step."[99]

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94. *Manual for Courts-Martial, United States* [MCM], pt. IV, para. 4.b. (2019 ed.).

95. MCM, pt. IV, paras. 60.a.(g), 62.b.(2)(a).

96. *United States v. Winckelmann*, 70 M.J. 403, 407 (C.A.A.F. 2011).

97. *Id*. (internal citations and quotation marks omitted).

98. *Id*. at 408 (internal citations and quotation marks omitted).

99. *Id*. at 407. *See also United States v. Olaya*, No. 201900211, 2020 WL 6707356 at *——, 2020 CCA LEXIS 413 at *5 (N-M. Ct. Crim. App. Nov. 16, 2020) (unpublished).

We are convinced beyond a reasonable doubt that Appellant attempted to sexually assault a child. After a sexually-charged conversation in which he indicated to a person he thought was a 13-year-old girl that he wanted to "do" her, he drove with a box of condoms to the location the fictitious underage persona said was her home.[100] Having reviewed the entirety of the record and after weighing the evidence anew, we find the evidence legally and factually sufficient to support his conviction of attempted sexual assault of a child.

2. Attempted Sexual Abuse of a Child

In order to sustain the conviction for attempted sexual abuse of a child in violation of Article 80, UCMJ, the Government must have proven beyond a reasonable doubt: (1) that Appellant did a certain overt act; (2) that the act was done with the specific intent to commit sexual abuse of a child under Article 120b, UCMJ; (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to effect the commission of the intended offense.[101] The elements of the target offense of sexual abuse of a child under Article 120b are that (1) Appellant committed a lewd act upon a child by intentionally communicating to her indecent language, to wit: discussing sexual desires;[102] (2) at the time, the child had not attained the age of 16 years; and (3) Appellant did so with the intent to

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100. Pros. Ex. 4 at 2. That Appellant actually stated he wanted to "do" the persona prior to being told her age is negated by the fact that, after being told her age (13), Appellant asked if she was ready to do what "we already established." Pros. Ex. 6.

101. MCM, pt. IV para. 4.b.

102. The words "Sending a picture of a box of condoms" were excepted from the Specification and Appellant was found Not Guilty of them.

arouse or gratify the sexual desire of any person.[103] "Indecent language" is language that is

> grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards.[104]

Here, we find that discussing sexual desires through phrases including that Appellant wanted to "do" someone he believed was a 13-year-old girl is grossly offensive to modesty, shocks the moral sense, violates community standards, and is filthy, vulgar, and disgusting in nature. Having reviewed the entirety of the record and after weighing the evidence anew, we find the evidence legally and factually sufficient to support his conviction.

3. Attempted Extra-Marital Sexual Conduct

In order to sustain the conviction for attempted extramarital sexual conduct in violation of Article 80, UCMJ, the Government must have proven beyond a reasonable doubt: (1) that Appellant did a certain overt act; (2) that the act was done with the specific intent to commit extramarital sexual conduct under Article 134, UCMJ; (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to effect the commission of the intended offense.[105] The elements of the target offense

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103. MCM, pt. IV paras. 62.a.(h)(5)(C), 62.b.(3).

104. MCM, pt. IV para. 104.c.

105. MCM, pt. IV para. 4.b.

of extramarital sexual conduct, in violation of Article 134, UCMJ, are that: (1) Appellant wrongfully engaged in extramarital conduct with a person; (2) that at the time Appellant knew that he was married to someone else; and (3) that under the circumstances Appellant's conduct was of a nature to bring discredit upon the armed forces.[106] "Extramarital conduct" includes genital to genital, oral to genital, anal to genital, and oral to anal sexual intercourse.[107]

As discussed above, we find beyond a reasonable doubt that Appellant's actions constituted a substantial step to engage in extramarital sexual conduct with someone he knew was not his wife, which under the circumstances was conduct of a nature to bring discredit upon the armed forces. Having reviewed the entirety of the record and after weighing the evidence anew, we find the evidence legally and factually sufficient to support his conviction.

4. Entrapment

As discussed above, entrapment is an affirmative defense that "the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense."[108]

The defense has the initial burden of going forward to show that a government agent originated the suggestion to commit the crime. Once the defense has come forward, the burden then shifts to the [g]overnment to prove beyond a reasonable doubt that the criminal design did not originate with the

106. MCM, pt. IV para. 99.b.

107. MCM, pt. IV para. 99.c.2.

108. R.C.M. 916(g).

[g]overnment or that the accused had a predisposition to commit the offense.[109]

Government origination, or inducement, occurs when a government actor "creates substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense."[110] It includes "pressure, assurances that a person is not doing anything wrong, persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship."[111] Inducement does not include government actors "merely provid[ing] the opportunity or facilities to commit the crime or use artifice or stratagem."[112] Further, generally, repeated requests "do not in and of themselves constitute the required inducement."[113]

After reviewing the record of trial, we find that Appellant met his initial burden to show that contact originated with the Government, providing some evidence of inducement, but that the Government ultimately proved beyond a reasonable doubt that Appellant was not induced, that he was predisposed to commit the offenses, and that he was, therefore, not entrapped.

a. Inducement

First, we address inducement. Here, the government originated the contact with Appellant through a social media post that did not convey that it

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109. *Hall*, 56 M.J. at 436 (quoting *Whittle*, 34 M.J. at 208).

110. *Id*. (quoting *Howell*, 36 M.J. at 359–60).

111. *Id*. (internal quotation marks omitted).

112. *Id*. (quoting *Howell*, 36 M.J. at 359–60).

113. *Id*. (internal quotation marks omitted).

was from an underage female, to which Appellant initially responded. After transferring the communication from social media to text messaging, the undercover agent stated she was not looking to go downtown or see a movie. When Appellant asked what she was looking for, the agent responded "u know lol" with emojis of hear-no-evil and see-no-evil monkeys—covering their ears and eyes, respectively.

Appellant was the first to turn the conversation overtly sexual, stating that he wanted to take the persona to his place to "do" her.[114] When the undercover agent disclosed that she was 13 years old, Appellant initially broke contact, saying "[never mind] I'm good," and "Sorry," to which the agent replied, "dam I was takin pics 4u but watevs" and sent him a filtered picture of "herself" with her middle finger up.[115] Within one minute, Appellant re-engaged by asking if she had other social media, saying he did not "want to risk anything," and renewing his request for pictures.[116] The agent then asked, "so u still wanna do me or wat?" Appellant responded, "What's the address?"[117]

After Appellant received the address—and several messages about exactly where and how to meet—he drove to the address with a box of condoms, parked his car, and walked to the house where he believed a 13-year-old girl waited inside for him. During the drive to the house, Appellant and the agent spoke on the phone. They discussed whether they should meet at a gas station down the street from the house, and the

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114. Pros. Ex. 4 at 2.

115. *Id*. at 3.

116. *Id*.

117. *Id*. at 3.

agent persisted that he should come to the residence. Once Appellant arrived on base it was a fait accompli that Appellant would be arrested. However, due to safety concerns, the agents wanted to make the arrest at the house. Once at the residence, when Appellant expressed reservations about actually going inside, the Agent assured him there was no one else there. During the call, the agent asked Appellant what they were going to do when he picked her up, and he replied, "we already established that."[118]

Appellant was not pressured, assured that he was not doing anything wrong, threatened, coerced, harassed, promised reward, or answering a plea based on need, sympathy, or friendship.[119] While he may have been persuaded or been provided false information, we find beyond a reasonable doubt that under these circumstances, Appellant was not induced because the entirety of law enforcement's actions constituted "merely provid[ing] the opportunities or facilities to commit the crime ... [and] us[ed] artifice or stratagem" via "repeated requests."[120]

b. Predisposition

Second, we address predisposition. Appellant points to his hesitancy to actually go into the house after driving there as lack of predisposition and also to his brother's testimony that he had never expressed interest in underage girls before. However, significant predisposition evidence was properly admitted that included Appellant's additional sexual conversations

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118. Pros. Ex. 6; Appellate Ex. LV at 2.

119. *See Hall*, 56 M.J. at 436 (quoting *Howell*, 36 M.J. at 359–60) (internal quotation marks omitted).

120. *Id*. (quoting *Howell*, 36 M.J. at 359–60).

with another undercover agent, also pretending to be a 13-year-old, in which he stated her age would not bother him "as long as you don't tell me your age."[121] This statement, which came after the undercover agent had already disclosed that she was turning 14 soon and after a discussion on the topic of sex, occurred the same night as the charged offenses.

Finally, we address Appellant's hesitancy to actually enter the house and the multiple conversations with the undercover agent where she refused to come out of the house and asked Appellant to come in. We find that Appellant's "hesitancy about continuing [in his criminality] appears not to have resulted from a reluctance to commit [ ] offenses but, instead, from a fear of apprehension; and we do not equate such a fear to lack of predisposition."[122]

In conversations with both undercover agents posing as the same 13-year-old girl, Appellant expressed a fear of apprehension, stating that he "cant [sic] get busted,"[123] had "more to lose" in talking to them,[124] and that he did not "want to risk anything."[125] There was other evidence that clearly indicated Appellant's hesitancy resulted from fear of apprehension rather than lack of predisposition. The search history on Appellant's phone, which was admitted into evidence, reveals that between conversations with the agents, Appellant conducted internet searches using terms such as, "How to Catch

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121. Pros. Ex. 8.

122. *United States v. Clark*, 28 M.J. 401, 406 (C.M.A. 1989).

123. Pros. Ex. 4 at 6.

124. Pros. Ex. 7 at 9.

125. Pros. Ex. 4 at 3.

a Predator Sex Sting Operations" and whether police could be "predatory and lure you into doing something when charging you."[126] For these reasons, we find beyond a reasonable doubt that Appellant was predisposed to commit these offenses.

Having reviewed the entirety of the record and after weighing the evidence anew, making allowances for not having personally observed the witnesses, we find the evidence legally and factually sufficient to prove that Appellant was not entrapped.

H. Unanimous Verdict Instruction.

We granted Appellant's Motion to File a Supplemental Assignment of Error for the denial of his trial-level motion seeking an instruction that the members' findings must be unanimous. The Supreme court held in *Ramos v. Louisiana* that the Fourteenth Amendment, incorporating the Sixth Amendment's right to a trial by an impartial jury, provides a right to unanimous verdicts in state criminal trials for serious offenses.[127] In *United States v. Causey*, we analyzed the effect of *Ramos* on Article 52, UCMJ.[128] In *Causey* we held that the "Sixth Amendment right to trial by an impartial jury of the State and district wherein the crime shall have been committed is one of the safeguards that does not apply to courts-martial and that "the law regarding the impartiality of court-

126. Pros. Ex. 10.

127. 140 S. Ct. 1390 (2020).

128. Article 52, UCMJ, provides that in a general or special courts-martial with members, the concurrence of at least three-fourths of the members present when the vote is taken is required to reach guilty findings and a sentence, except in capital cases, in which unanimity is required for both the findings and the sentence.

martial panels generally derives from R.C.M. 912 and Articles 25 and 41, UCMJ, not the Sixth Amendment."[129] In so holding, we determined that *Ramos*'s unanimous verdict requirement did not reach military courts and that "it is the prerogative of our superior court, not this one, to overturn its own precedents," a sentiment we echo here.[130]

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.[131]

The findings and sentence are AFFIRMED.

Judge HOUTZ delivered the opinion of the Court, in which Senior Judge GASTON and Judge MYERS joined.

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129. *United States v. Causey*, 82 M.J. 574, *——, (N-M. Ct. Crim. App. 2022) (internal quotation marks and citations omitted) (emphasis in original).

130. *Id*. at *28.

131. Articles 59 & 66, UCMJ.

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
WASHINGTON, D.C.

United States,
Appellee

v.

Andrew Y. Veerathanongdech,
Appellant

USCA Dkt. No. 22-0205/AF
Crim. App. No. 40005

ORDER

On further consideration of the granted issue, 82 M.J. 441 (C.A.A.F. 2022), and in view of *United States v. Anderson*, 83 M.J. __ (C.A.A.F. 2023), it is, by the Court, this 18th day of July, 2023,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Andrew Y. VEERATHANONGDECH
Captain (O-3)
U.S. Air Force,
Appellant

No. ACM 40005

Decided: 12 April 2022

Appeal from the United States Air Force Trial Judiciary

Military Judge: Andrew R. Norton.

Sentence: Sentence adjudged 25 September 2020 by GCM convened at Travis Air Force Base, California. Sentence entered by military judge on 16 October 2020: Dismissal and confinement for 30 days.

For Appellant: Major Alexander A. Navarro, USAF; Captain Alexandra K. Fleszar, USAF; Mark C. Bruegger, Esquire.

For Appellee: Lieutenant Colonel Matthew J. Neil, USAF; Major Cortland T. Bobczynski, USAF; Mary Ellen Payne, Esquire.

Before KEY, ANNEXSTAD, and MEGINLEY Appellate Military Judges.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

ANNEXSTAD, Senior Judge:

A general court-martial composed of officer members convicted Appellant, contrary to his pleas, of one specification each of wrongful use of a controlled substance (3,4-methylenedioxymethamphetamine (MDMA)), solicitation of others to provide him a controlled substance (Percocet), and obstruction of justice in violation of Articles 112a and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 912a, 934, Manual for Courts-Martial, United States (2016 ed.) (MCM).[1] The court-martial sentenced Appellant to a dismissal and 30 days of confinement.

On appeal, Appellant raises one issue through his appellate defense counsel: (1) whether the convening authority's failure to take action on the sentence warrants a remand for proper post-trial processing. Appellant personally raises six additional issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), which we have reworded: (2) whether his conviction for wrongful use of MDMA is legally and factually sufficient; (3) whether his conviction for obstruction of justice is legally and factually sufficient; (4) whether the military judge abused his discretion in denying the Defense's motion to suppress evidence derived from the search and seizure of

1. Appellant was also acquitted of one specification each of conspiracy, wrongful use of cocaine, conduct unbecoming of an officer and a gentleman, and solicitation of others to provide him with a controlled substance (Adderall) in violation of Articles 81, 112a, 133, and 134, UCMJ, 10 U.S.C. §§ 881, 912a, 933, 934, *Manual for Courts-Martial, United States* (2016 ed.).

Appellant's phone; (5) whether the military judge erred in finding the order given to Appellant to biometrically unlock his cell phone with his thumbprint was lawful; (6) whether the military judge erred by allowing a witness to answer a question of law; and (7) whether the military judge erred by failing to instruct the panel that a unanimous verdict was required to convict Appellant. With respect to issues (4), (6),[2] and (7),[3] we have carefully considered Appellant's contentions and find they do not re-quire further discussion or warrant relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

With respect to issue (1), on 5 October 2020 Appellant submitted his clemency matters wherein he requested the convening authority disapprove his remaining period of confinement. In his Decision on Action memorandum, dated 13 October 2020, the convening authority stated that he took "no action" on Appellant's case and that "upon completion of the sentence to confinement" Appellant was "required ... to take leave pending completion of appellate review."

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2. The record indicates that the witness answered the question in issue at the specific request of Appellant's trial defense counsel. We therefore find that Appellant intentionally waived this issue during trial and therefore conclude it is extinguished and cannot be raised on appeal. *See United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). We have further considered our discretion to exercise our authority to pierce Appellant's waiver to correct a legal error, and we decline to do so. *See United States v. Hardy*, 77 M.J. 438, 442–43 (C.A.A.F. 2018); *United States v. Chin*, 75 M.J. 220, 222–23 (C.A.A.F. 2016) (discussing our ability to correct an error despite an accused's waiver).

3. *See United States v. Anderson*, No. ACM 39969, 2022 WL 884314 at *16, 2022 CCA LEXIS 181 at *57 (A.F. Ct. Crim. App. 25 Mar. 2022) (finding unanimous court-martial verdicts not required).

The military judge signed the entry of judgment and entered the adjudged sentence without modification on 16 October 2020. Since all of Appellant's offenses occurred prior to 1 January 2019, we find the convening authority made a procedural error when he failed to take action on the sentence—consistent with our superior court's decision in *United States v. Brubaker-Escobar*, 81 M.J. 471 (C.A.A.F. 2021) (per curiam). However, after testing the error for "material prejudice to a substantial right" of Appellant, we determine that Appellant is not entitled to relief. See *United States v. Alexander*, 61 M.J. 266, 269 (C.A.A.F. 2005).

We are satisfied based on the facts of this case that the convening authority did not intend to provide any relief with regards to the confinement portion of Appellant's sentence and consequently that the convening authority's failure to approve Appellant's sentence is harmless. We base these conclusions on the language used by the convening authority in his Decision on Action memorandum, where he placed Appellant on leave "upon completion" of his term of confinement. Likewise and consistent with our superior court's decision in *United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020), we also considered the post-trial declaration submitted to this court on 16 February 2022 by the convening authority's legal advisor, who provided that the convening authority in "taking no action" on Appellant's sentence intended to provide "no relief on the findings or sentence." *See United States v. Harrington*, No. ACM 39825, 2021 WL 4807174 at *33, 2021 CCA LEXIS 524 at *32 (A.F. Ct. Crim. App. 14 Oct. 2021) (unpub. op.) (finding no material prejudice when convening authority's intent to approve sentence was declared on appeal), *pet.*

granted, No. 22-0100/AF, 2022 WL 1224736, 2022 CAAF LEXIS 201 (C.A.A.F. 14 Mar. 2022).

These conclusions are also bolstered by the fact that the convening authority did not have the ability to grant clemency with respect to the punitive discharge, and even if we assume the facts most favorable to Appellant, the convening authority's ability to provide meaningful relief on Appellant's confinement term was limited—in that Appellant only had approximately one week of confinement remaining. Finally, we think it is unlikely that the convening authority would have provided relief from Appellant's already short sentence to confinement. In testing for prejudice, we have examined the convening authority's decision on action and find Appellant suffered no material prejudice to a substantial right.

With respect to issue (5), as discussed further in the background section below, Air Force Office of Special Investigations (AFOSI) agents ordered Appellant to biometrically unlock his cell phone by using his thumbprint. Appellant argues that he is entitled to relief based on the theory that the military judge erred in finding this order was lawful. The record, however, demonstrates that Appellant did not actually biometrically unlock his cell phone. Instead, the agents seized his locked phone and sent it to the Defense Cyber Crimes Center Cyber Forensics Laboratory (DC3/CFL) where it was subsequently unlocked and analyzed. As a result, the question of whether the initial thumbprint order was lawful is of no moment, because no evidence was obtained as a result of the order. Accordingly, we find no merit to Appellant's argument on this point and determine no relief is warranted.

Finding no error that materially prejudiced a substantial right of Appellant, we affirm the findings and sentence.

I. BACKGROUND

On 23 April 2018, AFOSI opened an investigation into Appellant after receiving and viewing text messages between Appellant and another military member, Major (Maj) JD, who was a subject of a separate investigation. Those text messages showed that Appellant requested contact information for Maj JD's drug dealer.

Later that day, AFOSI agents brought Appellant into a room for a video recorded interview. AFOSI agents read Appellant his Article 31, UCMJ, 10 U.S.C. § 831, rights, and Appellant requested counsel. The interview was subsequently terminated. AFOSI agents then informed Appellant that they had authorization to seize and search Appellant's cell phone. After some discussion, Appellant refused to biometrically unlock his phone without a direct order from his commander. When the agents left the interview room to seek such an order, Appellant immediately began to aggressively scratch, suck, and rub his thumbs for approximately 15 to 20 minutes. When agents reentered the room with Appellant's commander, Appellant immediately stopped the above-mentioned behavior. However, despite Appellant receiving a direct order from his commander to unlock his phone via thumbprint, AFOSI's multiple attempts to have Appellant unlock his phone still failed due to the distortion of his thumbprint. The agents seized Appellant's still-locked phone.

The agents subsequently sent Appellant's phone to DC3/CFL where digital forensic examiners unlocked

and analyzed data on Appellant's phone. Extractions from the phone identified multiple conversations in reference to the charged offenses that took place in April 2018 while Appellant was vacationing with Captain (Capt) DF and Maj TT in Mexico. Specifically, the texts related to Appellant's wrongful use of MDMA and solicitation of Percocet.

II. DISCUSSION

A. Legal and Factual Sufficiency

Appellant contends that his conviction for wrongfully using MDMA is legally and factually insufficient (issue (2)). Specifically, Appellant contends there was no direct evidence presented that Appellant used MDMA, and that the Government misinterpreted Appellant's "very dark humor" and took his text messages out of context. Additionally, Appellant contends that his conviction for obstruction of justice was legally and factually insufficient (issue (3)). Specifically, Appellant alleges that the Government failed to prove that Appellant intended to impede an investigation. We are not persuaded by Appellant's arguments and determine that no relief is warranted.

1. Additional Background

At trial, Maj JD was called as a government witness and testified that Appellant sought the contact information for Maj JD's "plug" before the Mexico trip. Subsequent testimony established that "plug" was a slang term for a drug dealer. A review of the text messages between Appellant and Maj JD showed that both individuals used "street terms" for drugs, such as "8-ball" and "G" which was later used as evidence to show that they were both familiar with drugs and drug transactions. Additionally, in the text

messages between Appellant and Maj JD, Appellant discussed wanting to purchase and consume drugs.

At trial, the Government presented testimony from Mr. EH, a digital forensic examiner from DC3/CFL. Mr. EH testified that his review of Appellant's phone uncovered multiple text message exchanges between Appellant and other individuals relating to the charged offenses. On 10 April 2018, Appellant began a group text message with Capt DF and Maj TT by texting, "MEXICO LEAVE APPROVED."[4,5] The messages also showed Appellant, Capt DF, and Maj TT stayed at a resort in Mexico from 14 to 23 April 2018, and they regularly texted each other throughout their stay.

On 14 April 2018, Appellant told Capt DF and Maj TT that he forgot his Pepcid. Maj TT responded, "It's OK I've got molly." Based on his experience with previous criminal investigations, Mr. EH testified that "molly" typically refers to MDMA. That same night, Appellant discussed using Percocet with Capt DF and Maj TT while they were in Mexico. The following text exchange ensued:

> [Appellant:] How many percs[6] ya got?? Or how much of every-thing you got as well and how much per. Don't wanna tryna do it all the first couple of days

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4. Appellant had leave scheduled for 16–20 April 2018 in Mexico.

5. Text message exchanges in this opinion are taken verbatim from evidence in the record of trial and introduced at trial and include misspellings and punctuation errors where not corrected.

6. Mr. EH testified "percs" is common shorthand for the prescription drug "Percocet."

[Maj TT:] Okay relax[.] Was gonna just gonna take a perc first chill vibes.... I've got about 15 perc I think

...

[Appellant:] No[.] Perc[.] Tonight

[Maj TT:] I didn't count

[Appellant:] ?

...

[Maj TT:] I'm bringing 3 with[.] Okay ill bring 5

...

[Capt DF:] I'm cummin

...

[Maj TT:] Fondo and I took in Nashville, good stuff

[Appellant:] Wtf[.] When[?] Gimme[.] Or lemme get another perc[.] Pleas and thank you

[Maj TT:] Alright

The next day, Appellant texted Capt DF and Maj TT, "Wanna roll tonight? After dinna?? Hmmm???" Maj TT responded, "Well never sleep." Appellant said "F[.] Small dose[.] Half dose[.] Or whatevs." Later that night, Maj TT texted Appellant and Capt DF, "..... Perc," to which Appellant responded, "Yes[.] Please." The following day, Appellant texted, "Molly tonight?"

The next day Appellant texted with Capt DF, Maj TT, along with a newly added individual identified as "Azn" about "Molly":

[Maj TT:] I'm about to take Molly

[Appellant:] FINALLY[.] hahaha[.] I'll bring the pepcid and speakers.... You guys take it already?

[Maj TT:] Nope[.] Waiting for u

[Appellant:] Kk, I'm heading there now and telling mags to meet me when she's ready

[Maj TT:] Good[.] Ok[.] Mines slowly creeping in

[Appellant:] MINE HIT ME WALKING TO CHECK ON MAGS[.] [S]low creep tho[.] It's getting how ya doin right now[?] I 100% admire how you guys can do daddy duties while F[**]KED up on Molly

[Azn:] That just means they haven't taken enough molly haha jk

[Appellant:] Gaga[.] Same as me and I Mexican screamed in front of 100 people

[Azn:] V, u have taken enough

[Appellant:] Never enough

Later that night, Maj TT texted the group and said that Appellant "[g]ot smacked by the Molly" and "[t]ripped d[**]k in front of everyone." In response, Appellant admitted he "WAS F[**]KED UP." The next morning, Appellant said he "still ha[d] no appetite" and was "[f]orcing food down." He also said, "I've pooped water twice today, [w]tf was in those pills."

2. Law

This court reviews issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v.*

Dykes, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

"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." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). While we must find evidence is sufficient beyond a reasonable doubt, it "does not mean that the evidence must be free of conflict." *United States v. Galchick*, 52 M.J. 815, 818 (A.F. Ct. Crim. App. 2000) (citation omitted).

"In resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). As a result, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (alteration in original) (citation omitted).

"The test for factual sufficiency 'is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses,' [we are ourselves] 'convinced of the accused's guilt beyond a reasonable doubt.'" *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler*, 76 M.J. 564, 568

(A.F. Ct. Crim. App. 2017) (alteration in original) (quoting *Washington*, 57 M.J. at 399).

3. Analysis

a. Wrongful Use of MDMA

In order for Appellant to be found guilty of wrongful use of a controlled substance in violation of Article 112a, UCMJ, the Government was required to prove beyond a reasonable doubt that (1) Appellant used a controlled substance, specifically MDMA, and (2) his use was wrongful. *See* MCM, pt. IV, ¶ 37.b.(2).

Use "means to inject, ingest, inhale, or otherwise introduce into the human body, any controlled substance." MCM, pt. IV, ¶ 37.c.(10). "Knowledge of the presence of the controlled substance is a required component of use." *Id*. Knowledge of the presence of the controlled substance may be inferred from the presence of the substance in the accused's body or from other circumstantial evidence." *Id*. A permissive inference can be sufficient to "satisfy the government's burden of proof as to knowledge." *Id*.

We find the evidence is legally and factually sufficient to support Appellant's conviction. Here, Appellant's text conversations with Capt DF and Maj TT showed that Appellant consumed MDMA during his vacation to Mexico. In particular, the evidence presented at trial established that Appellant was on leave from 14 to 20 April 2018 and that he was in Mexico with Capt DF and Maj TT. Appellant's own leave statement establishes that he was in Mexico during the charged time period, and Maj JD testified that Appellant was seeking contact information for a drug dealer prior to the trip. Additionally, we find pertinent and compelling the constant back-and-forth text messaging that took place during the entire trip between the Appellant and Capt DF and Maj TT.

These messages, when read together, sufficiently demonstrate that they were all in on the illegal drug use together, and Maj JD's testimony tends to corroborate Appellant's general interest in obtaining illicit drugs, if not his intent to use such drugs while in Mexico. The group text messages discussed things like how much and what drugs they had with them, how they were going to space out their drug use, how they compared the effects of the drugs, and also pondered how the drugs impacted normal day-to-day functions (e.g., "daddy duties"). We would not expect this type of exchange except in the case of actual illegal drug use. We also find relevant, as discussed in greater detail below, that an innocent person would not ordinarily feel the need to obstruct justice, by attempting to prevent access to these text messages. Therefore, we find ample indicia of reliability in Appellant's group text messages. *See United States vs. Hansen*, 36 M.J. 599, 607 (A.F.C.M.R. 1992) (factoring surrounding circumstances of an appellant's admission to determine whether there was an indicia of reliability under Mil. R. Evid. 803(24)).

Ultimately, after reviewing the text messages in context, we find they provide sufficient evidence to support that Appellant consumed MDMA while in Mexico. Appellant's own text messages not only discussed the fact that Maj TT had "Molly," but also clearly described that Appellant consumed, and shortly thereafter felt the effects of, the drug, stating, inter alia, "MINE HIT ME WALKING TO CHECK ON MAGS[.] [S]low creep tho[.] It's getting how ya doing right now." Furthermore, Appellant's text message the next morning where he stated "Wtf was in those pills" confirmed that he had in fact been under the effects of "Molly" the night before.

We are not persuaded by Appellant's argument that he could have been under the influence of any number of intoxicants other than "Molly" including tequila, Adderall, or Percocet, as his argument fails to recognize the fact that Appellant specifically mentioned "Molly" and taking pills the night prior, and that the following day his friend, Maj TT, described Appellant as getting "smacked by the Molly" and "[t]rip[ping] d[**]k in front of everyone." Presumably, had Appellant not been "smacked by the Molly" he would have denied or corrected Maj TT in the group chat. Instead, Appellant affirmed Maj TT's statement by responding with, "Hahaaa, I WAS F[**]KED UP."

Finally, as to Appellant's argument concerning the lack of direct evidence that he consumed MDMA, we find that the Government can meet its burden of proof with circumstantial evidence. *See King*, 78 M.J. at 221; *see also United States v. Long*, 81 M.J. 362, 368 (C.A.A.F. 2021) (holding that the findings at trial "may be based on direct or circumstantial evidence"). We also note that "[c]ircumstantial evidence ... is intrinsically no different from testimonial evidence." *Holland v. United States*, 348 U.S. 121, 140 (1954). The trier of fact is free "to draw reasonable inferences from basic facts to ultimate facts." *Long*, 81 M.J. at 368 (citation omitted).

Accordingly, in assessing the legal sufficiency, we are limited to the evidence produced at trial and are required to consider it in the light most favorable to the Government. We conclude that a rational factfinder could have found beyond a reasonable doubt all of the essential elements of Appellant's convicted offense. Furthermore, in assessing factual sufficiency, after weighing all the evidence in the record of trial and having made allowances for not having personally

observed the witnesses, we are ourselves convinced of Appellant's guilt beyond a reasonable doubt. Therefore, we find Appellant's conviction for wrongful use of MDMA is legally and factually sufficient.

b. Obstruction of Justice

In order for Appellant to be found guilty of obstruction of justice, in violation of Article 134, UCMJ, the Government must prove beyond a reasonable doubt four elements: (1) Appellant did a certain act; (2) Appellant did so in a case of a certain person against whom Appellant had reason to believe there were or would be criminal proceedings pending; (3) the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice; and (4) under the circumstances, Appellant's conduct was to the prejudice of good order and discipline in the armed forces. *See* MCM, pt. IV, ¶ 96.b.

As charged, Specification 3 of Charge IV alleged that, on or about 23 April 2018, Appellant wrongfully endeavored to impede an investigation in his own case, by sucking and rubbing his thumb to prevent law enforcement officers from using his thumbprint to unlock his cellular phone, and that said conduct was to the prejudice of good order and discipline in the armed forces.

"This offense may be based on conduct that occurred before preferral of charges." MCM, pt. IV, ¶ 96.c. "Actual obstruction of justice is not an element of this offense." *Id*. The Manual for Courts-Martial also provides:

> "Examples of obstruction of justice include ... preventing communication of information relating to a violation of any criminal statute of the United States to a person authorized by a

> department, agency, or armed force of the United States to conduct or engage in investigations or prosecutions of such offenses; or endeavoring to do so."

MCM, pt. IV, ¶ 96.c.

Appellant contends the Government failed to prove that Appellant had the specific intent to prevent law enforcement officers from using his thumbprint to unlock his phone when he sucked and rubbed his thumbs. We disagree with Appellant's argument and find that the Government presented sufficient circumstantial evidence to show the requisite intent for obstruction of justice. *See United States v. Finsel*, 36 M.J. 441 (C.M.A. 1993) (holding the totality of the circumstances was sufficient for finding, beyond a reasonable doubt, the requisite intent for an obstruction of justice offense). Here the Government presented video footage of Appellant's behavior while at AFOSI. This video showed Appellant's conduct both before AFOSI directed him to biometrically unlock his phone with his thumbs—when he was not rubbing, sucking, or scratching his thumbs—and Appellant's conduct after AFOSI agents left the interview room when Appellant immediately and repeatedly rubbed, sucked, and scratched his thumbs for 15 to 20 minutes. We find this stark contrast in Appellant's behavior is a sufficient basis for a reasonable factfinder to conclude that Appellant began to rub and suck his thumbs for the sole purpose of preventing AFOSI from getting a clear thumbprint to biometrically unlock the phone. Importantly, Appellant had a strong motive to prevent access to his phone, considering the phone contained numerous incriminating text messages between Appellant and his fellow drug users, and documented his drug-filled vacation from start to finish.

Appellant also suggests the Government did not prove beyond a reasonable doubt that Appellant tried to impede AFOSI's access to his phone by "sucking and rubbing" his thumb, because trial counsel repeatedly argued that Appellant "scraped" his thumbs. But Appellant's argument misses the mark for two reasons. First, trial counsel's argument is not evidence. *See United States v. Sewell*, 76 M.J. 14, 19 (C.A.A.F. 2017). Second, as mentioned above, the video evidence of Appellant's behavior while at AFOSI was compelling evidence that demonstrated Appellant sucked and rubbed his thumbs in furtherance of his attempt to obstruct justice. The members saw this evidence, and the video is part of the record which we ourselves have reviewed.

Considering only the evidence produced at trial, in the light most favorable to the Government, we conclude that a rational factfinder could have found beyond a reasonable doubt all essential elements for obstruction of justice. Furthermore, after weighing all evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are ourselves convinced of Appellant's guilt beyond a reasonable doubt. Therefore, we find Appellant's conviction for obstruction of justice is both legally and factually sufficient.

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d), *Manual for Courts-Martial, United States* (2019 ed.). Accordingly, the findings and the sentence are **AFFIRMED**.

Judge ANNEXSTAD delivered the opinion of the court, in which Senior Judge KEY joined. Judge MEGINLEY filed a separate opinion dissenting in the result.

MEGINLEY, Judge (dissenting in the result):

Appellant filed a pretrial motion requesting the military judge instruct the members that their verdict be unanimous; this motion was denied. For the reasons I articulated in *United States v. Westcott*, No. ACM 39936, 2022 WL 807944, 2022 CCA LEXIS 156 (A.F. Ct. Crim. App. 17 Mar. 2022) (Meginley, J., dissenting) (unpub. op.), I would find Appellant was denied equal protection under the law and would set aside the findings without prejudice. Notwithstanding this, I agree with the majority's resolution of issues (1)–(6).

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
WASHINGTON, D.C.

United States,
Appellee

v.

Samuel H. Zimmer,
Appellant

USCA Dkt. No. 23-0090/AR
Crim. App. No. 20200671

ORDER

On further consideration of the granted issue, 83 M.J. __ (C.A.A.F. 2022), and in view of *United States v. Anderson*, 83 M.J. __ (C.A.A.F. 2023), it is, by the Court, this 18th day of July, 2023,

ORDERED:

That the decision of the United States Army Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ David A. Anderson
Deputy Clerk of the Court

U.S. ARMY COURT OF CRIMINAL APPEALS

UNITED STATES
Appellee

v.

Chief Warrant Officer Two Samuel H. **ZIMMER**,
United States Army, Appellant

ARMY 20200671

4 January 2023

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).

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

MEMORANDUM OPINION

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-

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, [Redacted] and appellant's wife, [Redacted]

Appellant was convicted of nine specifications related to [Redacted] 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. [Redacted] dated appellant for about six months beginning in September 2018. In January of 2019, appellant and [Redacted] went to a bar, had a few drinks, and appellant began asking [Redacted] to point out men in the bar with whom she had a previous relationship. This conversation escalated into an argument, with appellant calling [Redacted] names, [Redacted] crying, and the bouncer asking appellant to leave the bar.

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

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

threatening to kill her, her parents, and her dog. Once back in the vehicle, appellant continued to hit [Redacted] and prevented [Redacted] from again trying to jump from the vehicle.

[Redacted] 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, [Redacted] who was covered in visible injuries, told the bartender to call the police because appellant had assaulted her. Upon arrival, the police photographed [Redacted] s injuries and transported her to the hospital. While in the hospital, appellant texted [Redacted] to not speak to law enforcement and apologized but then accused [Redacted] of ruining his life and the lives of his three children. The government introduced pictures of [Redacted] injuries along with her statements to police. During one of her interviews with police, [Redacted] 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 [Redacted] in the hospital, she recanted all allegations and reunited with appellant.

Around March of 2019, after reuniting with appellant, [Redacted] and appellant began arguing again. During one argument, appellant pushed [Redacted] 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 [Redacted] hitting the wall above her head, denting the wall. [Redacted] eventually left appellant in April of 2019.

Appellant was convicted of nine specifications related to [Redacted] 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, [Redacted] had recanted her allegations, reconciled with appellant, and was a non-cooperating government witness.

On the night of 6 December 2019, [Redacted] and appellant were involved in an argument while out at a restaurant. After the argument, [Redacted] started walking toward her truck outside and appellant followed. Appellant grabbed [Redacted] phone and threw it to the ground, then grabbed her wallet and threw the contents into the street. [Redacted] walked away and got into her truck, then drove back to appellant and asked to take him home. Appellant responded by reaching into [Redacted] truck, pulling the keys out of the ignition, pulling the truck door handle off the truck, and then pulling [Redacted] through the window of the driver seat. Appellant then picked up [Redacted] and threw her over a barbed wire fence into a field. Appellant came through the fence, used vulgar language toward [Redacted] while telling her to get up, and when she did not, he began dragging her to the center of the field. [Redacted] sat in the middle of the field with appellant while asking repeatedly to go home, to which appellant replied "no." [Redacted] 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." [Redacted] 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 [Redacted] convinced appellant to return home so they walked back to her truck. Once there, [Redacted] hit a button on her Apple watch, activating her OnStar system. Appellant saw [Redacted] watch light up, then grabbed it off her wrist and threw it. [Redacted] told him she would not call the police nor tell anyone what happened. On the way home, appellant asked [Redacted] "what happens next," and she responded she didn't know, which resulted in appellant hitting [Redacted] with the open palm of his left hand on her right cheek, pushing her against the truck s driver-side window.

Once home, [Redacted] 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. [Redacted] acted calm, started walking downstairs as if to turn off the SOS button, and then began screaming for help. [Redacted] 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 [Redacted] that night, and that [Redacted] 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 [Redacted] 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, [Redacted] 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 [Redacted] 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 [Redacted] about her prior history with appellant, [Redacted] disclosed that appellant had strangled or choked her in August 2019.

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

[Redacted] testified at trial and provided a different version of events than what she reported to Officer VR. [Redacted] 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 [Redacted] questioned appellant about the message, appellant grabbed [Redacted] iPhone and threw it, breaking the device. [Redacted] 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. [Redacted] 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]

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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.

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, [Redacted] 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 [Redacted] 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.

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 [Redacted] and a military protective Order (MPO) was issued prohibiting appellant from contacting [Redacted]

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

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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.").

United States v. Lazauskas, 62 M.J. 39, 41-42 (C.A.A.F. 2005)).

"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[6] of Additional Charge III, battery upon an intimate partner involving [Redacted] is legally and factually insufficient because it is based solely on sparse residual hearsay concerning an event occurring four months prior to when [Redacted] 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

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 [Redacted] 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."

"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).

Although not directly raised by the parties, we also find the military judge's decision to admit [Redacted] 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

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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.

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, [Redacted] I had reconciled with appellant and was a noncooperating government witness. The military judge granted the government's motion to admit [Redacted] oral statement to Officer VR on 6 December 2019 as residual hearsay under Mil R. Evid. 807. Officer VR testified that he interviewed [Redacted] following her 911 call on the night of 6 December 2019. He testified that in addition to questioning [Redacted] about the events of that night, he completed a family violence form with [Redacted] and documented on the form what [Redacted] told him, which was in addition to the written statement [Redacted] 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 [Redacted] replied that appellant had strangled her in August of 2019. [Redacted] statement about appellant strangling or choking her in August 2019 was captured in the body camera footage that was played to the panel. In the body camera footage, [Redacted] 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.

[Redacted] provided different testimony during trial than what she provided to Officer VR. At trial, [Redacted] | 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. [Redacted] testified that the incident in August 2019 involved appellant flipping over a mattress [Redacted] was sitting on, causing her to fall off the bed and hit the wall. [Redacted] stated she believed it was an accident, as appellant was looking for a cat under the bed. [Redacted] 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 [Redacted] statement to Officer VR was admissible under Mil. R. Evid. 807 and that the panel could weigh [Redacted] in court testimony against her statement to Officer VR and make their own credibility determination of [Redacted]. 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 [Redacted] 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 [Redacted] 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 [Redacted] 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 [Redacted]s statement served the purpose of the rules and the interests of justice, given the statement [Redacted] made to Officer VR was the only evidence against appellant and to exclude it would, as stated by the military judge, unjustly allow [Redacted]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 [Redacted] 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 [Redacted] 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 [Redacted]s response failed to elicit whether she had consented or not. Additionally, appellant argues that [Redacted] 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 [Redacted] 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, [Redacted] 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 [Redacted] provided to Officer VR stated every element of the offense: that appellant did bodily harm to [Redacted] 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 [Redacted] 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. [Redacted] statement satisfies us that this conviction is factually sufficient, as it describes from [Redacted] the actions of appellant in August 2019. While [Redacted] provided a different description of these events at trial, we find [Redacted] 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, [Redacted] was a noncooperating witness who had recanted. We therefore find [Redacted] 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 [Redacted] 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

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.

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 1.03 (quoting *United States v. Quick*, 59 M.J. 383, 386-87 (C.A.A.F. 2004)).

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 [Redacted] 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 [Redacted]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 [Redacted] could have been caused by appellant as [Redacted] 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 [Redacted] 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 [Redacted] 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]

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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

Senior Judge WALKER and Judge EWING concur.

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."