15 October 2013

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	USCA Dkt. No. 13-0512/AF
Airman First Class (E-3), MICHAEL L. KNAPP II, USAF, *Appellant*.	)	Crim. App. No. 37718

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

ISSUE PRESENTED

WHETHER THE MILITARY JUDGE (1) PLAINLY ERRED BY INITIALLY ALLOWING "HUMAN LIE DETECTOR" TESTIMONY, (2) ABUSED HIS DISCRETION BY ALLOWING FURTHER ADMISSION OF "HUMAN LIE DETECTOR" TESTIMONY OVER DEFENSE OBJECTION, AND (3) ERRED BY NOT PROVIDING A CURATIVE INSTRUCTION ON THE "HUMAN LIE DETECTOR" TESTIMONY.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(c), UCMJ. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is accepted.

STATEMENT OF FACTS

On the evening of 16 December 2009, A1C ELS agreed to go with other Security Forces Squadron personnel, including Appellant, to a local nightclub after work. (J.A. at 22-23.) A1C ELS, A1C MS, and Appellant met in A1C ELS's dormitory room

and then went to the nightclub around 1230, where they met three other Airmen from their squadron. (J.A. at 23-26.) Shortly after arriving at the nightclub, A1C ELS began drinking. (J.A. at 27-28.) She drank three Bud Light beers during the group's 90-minute visit. (J.A. at 28-29.)

At around 0200, A1C ELS agreed to go to the apartment of one of the Airmen in the group for more socializing. (J.A. at 30-31.) While there, both A1C ELS and Appellant drank three shots of liquor, the last shot being given to her by Appellant. (J.A. at 33-34, 201.) After drinking her last drink, A1C ELS engaged in a conversation with the party's host and remembered A1C MS approaching her and saying he was ready to leave. (J.A. at 36.) At that time, she checked her watch and saw it was 0313 hours. (Id.) A1C ELS and the party's host asked A1C MS to "give us five more minutes to end our conversation." (Id.) After this memory, A1C ELS testified that she had no memory of anything that occurred over the next eight hours. (Id.)

According to the testimony of both A1C MS and Appellant, A1C ELS began slurring her speech after drinking the shots and, by the time the three left the apartment, she was "pretty drunk" and "staggering." (J.A. at 140-41, 202-03.) Because she could not walk well, A1C MS and Appellant had to carry her down the stairs to the car, which they were all using to travel back to the dorms on base. (J.A. at 141-42, 204.) Appellant admitted

on cross-examination that, as they were leaving, A1C ELS was "leaning up against [him] trying to keep her[self] stable." (J.A. at 204.) He also testified that, while sitting in the back seat of the car, A1C ELS leaned her head against him and appeared limp. (J.A. at 205.) Both men testified that, upon arriving at the dormitory, they had to get A1C ELS out of the car and carry her to her room since she was stumbling. (J.A. at 142, 206-07.) By then, she appeared "really drunk" to A1C MS. (J.A. at 143.)

After A1C MS unlocked her door, they laid A1C ELS down on the bed and she began to vomit. (J.A. at 143-44.) Appellant testified that he gave her a trashcan to vomit into. (J.A. at 209.) A1C MS testified that they cleaned her face because she could not do it herself. (J.A. at 144.) Appellant said he would stay with A1C ELS, and A1C MS left the room. (J.A. at 145.) As A1C MS left the room, he saw A1C ELS asleep under her bed covers. (J.A. at 146.) Also, by the time A1C MS left the room, Appellant testified that A1C ELS was not moving or talking. (J.A. at 210.) Appellant further testified that after A1C MS left A1C ELS's room, she began to throw up again. (J.A. at 211.) According to Appellant, A1C ELS began rubbing his crotch at some point after her vomiting. (J.A. at 212.) Appellant then began digitally penetrating A1C ELS, and eventually had sexual intercourse with her. (J.A. at 213.)

Appellant acknowledged during his testimony that he had originally made a statement to the Air Force Office of Special Investigations (AFOSI) that he had "stopped and put a condom on and when [he] turned around [A1C ELS] was unconscious." (J.A. at 228, 279.) He also told AFOSI that he was "on top of her and start[ed] having sex with her and when a couple of minutes [went] by [he] stopped because [he] thought about what [he] was doing and it was wrong." (Id.) At the end of his cross-examination, Appellant was asked by trial counsel whether he had a reason to lie to the members by saying the sex was consensual, and Appellant unequivocally answered, "[y]es, sir." (J.A. at 232.)

A1C SP was A1C ELS's next door neighbor. (J.A. at 249.) He was awakened early in the morning by the loud sound of a door closing. (J.A. at 250.) He heard two male voices and then saw one man walk past his window and leave. (J.A. at 259.) A1C SP heard a female making moaning sounds that sounded as if sexual activity was "possibly . . . going on." (J.A. at 251.) It was a monotone sound that continued for a few minutes and, when it stopped, he heard a male voice say several times "are you okay, are you awake?" (J.A. at 252.)

A1C ELS testified that she awoke in her dormitory room at 1100 hours, fully-clothed, and lying on top of her bed covers with Appellant sleeping next to her, also fully-clothed. (J.A.

at 45-46.) She soon realized her belt was undone and her underwear was on sideways. (Id.) A1C ELS told Appellant she did not feel well and did not remember leaving the apartment or returning to base. (J.A. at 47.) She testified Appellant told her she was drunk and "pretty out of it" the previous night and needed to be carried into her dormitory room. (Id.) Appellant did not tell A1C ELS that they had sex. (J.A. at 48, 55.)

Five minutes after A1C ELS woke up, Appellant left, taking the bag from her trashcan with him which, unbeknownst to her at the time, contained a used condom. (J.A. at 49.) A1C ELS soon discovered an open condom wrapper on the floor, which she found confusing since it did not belong to her, and she did not remember any sexual encounter. (J.A. at 50.)

A1C ELS and A1C MS were posted together on sentry duty later that day and discussed how drunk she had been the night before. (J.A. at 56-57.) During the shift, A1C ELS took a phone call and, after hanging up, A1C MS testified that A1C ELS was very upset and crying. (J.A. at 135.) A1C ELS eventually told him her neighbor had heard noises coming from her room the night before. (J.A. 136.) A1C ELS also told A1C MS that she had found an empty condom wrapper in her room. (Id.) After reporting the incident that day, A1C ELS was taken to the base hospital where evidence was gathered that later confirmed Appellant's semen was found inside her vagina. (J.A. at 58.)

Two agents from AFOSI interviewed Appellant, and SA DP acted as the lead interviewer. (J.A. at 79.) After being read his rights under Article 31, UCMJ, and advised of their suspicion of rape, Appellant agreed to undergo a physical examination and to be questioned. (J.A. at 80-82.) His initial statement was that he and A1C ELS had kissed and touched each other in her dormitory room after A1C MS left, followed by consensual sexual intercourse. (J.A. at 87.) By the end of the multi-hour interview, however, Appellant admitted that A1C ELS was unconscious when he began the sexual intercourse.[1] (Id.) At the conclusion of the interview, after admitting that he deliberately "got rid of the evidence the following morning because [he] didn't want [A1C ELS] to know" about the rape, Appellant admitted that he was feeling "shame." (J.A. at 129.)

---

[1] Far from being "byzantine," the following straightforward exchange took place between Appellant and SA DP during his subject interview:

> Q: -- whatever you did, put the condom on. You said you went over to her, got on top of her, started having sex with her.
>
> A: Um-hmm.
>
> Q: That's when you realized she wasn't moving –
>
> A: -- she wasn't moving, she wasn't doing nothing.
>
> ...
>
> Q: The entire time you were having sex with her, she wasn't moving, she wasn't talking?
>
> A: For two minutes, two-to-three minutes, yeah, she didn't do nothing . . . .

(J.A. at 282-83.)

SUMMARY OF THE ARGUMENT

SA DP's testimony on direct examination was not objected to at trial by Appellant, and the military judge did not commit plain error in admitting the testimony since the testimony did not constitute "human lie detector testimony." Even if this Court were to find an error, however, and that error was both plain and obvious, Appellant fails to establish any prejudice as a result of the short exchange during SA DP's direct examination. This is especially true considering Appellant testified, and the defense elected to admit the entirety of Appellant's videotaped confession, which contained several references to Appellant's demeanor and credibility already.

The military judge did not abuse his discretion in permitting SA DP's testimony on re-direct examination. SA DP merely made a general comment about Appellant's appearance during the interview. Without any inference of truth or falsity, this statement does not constitute "human lie detector" testimony. Moreover, the defense itself invited the witness's answer by the in-depth cross-examination regarding interview protocol. Appellant raised the issue of SA DP's interrogation tactics as a trial strategy, opening the door to testimony regarding Appellant's demeanor and the voluntariness of his statement. As such, he is not entitled to relief for any legal error he created.

The military judge cured any error by giving the panel an instruction that re-iterated that only the members are allowed to make credibility determinations.

ARGUMENT

I.

THE MILITARY JUDGE DID NOT ERR OR ABUSE HIS DISCRETION IN ADMITTING THE AGENT'S TESTIMONY; MOREOVER, EVEN IF ERROR WERE FOUND, IT DID NOT MATERIALLY PREJUDICE APPELLANT'S RIGHTS.

Standard of Review

Appellant asserts the military judge 1) committed plain error by failing to stop "human lie detector testimony"; 2) abused his discretion by overruling the defense's objection to additional "human lie detector testimony"; and 3) erred by failing to issue a cautionary instruction to the members regarding the testimony at issue. (App. Br. at 1.) Each of these issues has a separate standard of review discussed below.

Failure to make a timely objection to testimony constitutes waiver in the absence of plain error. Mil. R. Evid. 103; *see* United States v. Williams, 50 M.J. 397, 400 (C.A.A.F. 1999) (failure to object to a witness); *see also* United States v. Datz, 61 M.J. 37, 41-42 (C.A.A.F. 2005) (failure to object to admission of evidence). The burden is entirely on Appellant to demonstrate plain error. *See* United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005).

To establish plain error, Appellant must show all of the following: (1) There was error; (2) such error was "plain," "clear," or "obvious;" and (3) the error materially prejudiced a substantial right. United States v. Powell, 49 M.J. 460 (C.A.A.F. 1998) (citing United States v. Olano, 507 U.S. 725, 732-35 (1993)). In order to prove "material prejudice to a substantial right" in a plain error scenario, Appellant must prove that the error was "so significant as to influence the outcome of the trial." United States v. Boyd, 52 M.J. 758, 762 (A.F. Ct. Crim. App. 2000) (citing Powell, 49 M.J. at 465; United States v. Fisher, 21 M.J. 327, 328 (C.M.A. 1986)). Appellant, not the Government, bears the sole burden of persuasion to show prejudice. Olano, 507 U.S. at 734 ("It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice."). Once these first three criteria are met, an appellate court may exercise its discretion to notice a forfeited error only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. United States v. Roberson, 46 M.J. 826, 828 (A.F. Ct. Crim. App. 1997) (citing Johnson v. United States, 520 U.S. 461, 117 S. Ct. 1544, 1549 (1997)); *but see* United States v. Humphries, 71 M.J. 209 (C.A.A.F. 2012).

This Court reviews "a military judge's decision to admit evidence for an abuse of discretion." United States v. Kasper,

58 M.J. 314, 318 (C.A.A.F. 2003) (citations omitted). "A military judge abuses his discretion when: (1) The findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." Id. A reviewing court cannot set aside a discretionary decision by a military judge unless the court has a "definite and firm conviction" that the military judge committed a "clear error of judgment" in the conclusion he reached when reviewing the relevant factors. Id.; *see also* United States v. Sanchez, 65 M.J. 145, 148 (C.A.A.F. 2007).

The question of whether the members were properly instructed is a question of law reviewed *de novo*. Kasper, 58 M.J. at 318 (citing United States v. McDonald, 57 M.J. 18, 20 (C.A.A.F. 2002)). Absent a timely objection, however, certain errors in instructions are forfeited unless the errors rise to the level of plain error. United States v. Griffin, 25 M.J. 423 (C.M.A. 1988), *cert. denied*, 487 U.S. 1206 (1988).

Law and Analysis

Under Mil. R. Evid. 608, a party may introduce evidence regarding the character of a person for truthfulness. "The authority to introduce such opinion evidence, however, does not extend to 'human lie detector' testimony--that is, an opinion as

to whether the person was truthful in making a specific statement regarding a fact at issue in the case." United States v. Kasper, 58 M.J. 314, 315 (C.A.A.F. 2003) (citing United States v. Whitney, 55 M.J. 413, 415 (C.A.A.F. 2001)); *see also* United States v. Brooks, 64 M.J. 325, 326 (C.A.A.F. 2007); United States v. Cacy, 43 M.J. 214, 217 (C.A.A.F. 2005).

No litmus test exists for determining whether a witness has offered "human lie detector" evidence. United States v. Jones, 60 M.J. 964, 969 (A.F. Ct. Crim. App. 2005). The Air Force Court of Criminal Appeals concluded in Jones that there exist several, nonexclusive factors germane to the assessment of whether "human lie detector" testimony has occurred and, if so, whether it has a prejudicial impact. Id. The factors the Jones court highlighted include: (1) The role of the government counsel in initiating or furthering objectionable testimony; (2) the role of defense counsel, particularly if it appears the defense initiated the testimony for strategic reasons; (3) the defense's failure to object or request cautionary instructions; (4) whether the witness has been asked for specific conclusions or their opinion about the truth or falsity of another's statements or allegations, or about whether a crime occurred; (5) whether the testimony in question is on a central or peripheral matter; (6) whether the trial was before members or by military judge alone; and (7) the remedial action, if any,

taken by the military judge. Id.; *see also* Kasper, 58 M.J. at 319 (discussing, although not enumerating, similar factors).

Admission of human lie detector testimony does not require automatic reversal. The testimony must have had "a substantial influence on the findings." Whitney, 55 M.J. at 416 (citing Kotteakos v. United States, 328 U.S. 750 (1946)). Moreover, a witness may testify to "those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." Mil R. Evid. 701.

A. SA DP's testimony on direct examination was not objected to at trial by Appellant, and the military judge did not commit plain error in admitting the testimony.

Trial defense counsel did not object to SA DP's testimony on direct examination regarding Appellant's nonverbal cues during his interview. (J.A. at 90.) The relevant testimony of SA DP at issue is as follows:

> Q: Now, you said he nodded his head. Did he give other nonverbal cues during the interview?
>
> A: Several.
>
> Q: What were those?
>
> A: Early on in the interview--we are trained to pick up on nonverbal discrepancies, if you will. Early on in the interview the accused would not make eye contact with me when we were talking about the sexual intercourse portion.

> Q: Why is that important to you?
>
> A: That is indicating to me that there is some form of deception going on. Prior to the intercourse, the accused was very detailed, very detail oriented, would look me in the eye, talk to me, and as soon as we got to the intercourse he would look away, look at the wall, look at the floor, not look at myself . . . and then immediately after the sexual intercourse timeframe he would kind of come back to us and be, once again, extremely detailed.

(Id.) Trial defense counsel's failure to make a timely objection to SA DP's testimony on direct examination constitutes forfeiture in the absence of plain error. Williams, 50 M.J. at 400. Further, admission of SA DP's testimony was not plain error and did not materially prejudice any of Appellant's substantial rights.

SA DP was simply testifying about his recollection of the statements made by Appellant during the OSI interview, describing Appellant's demeanor during the interview,[2] and explaining why the questioning continued and Appellant was asked to tell his version of the story multiple times. (J.A. at 90.) The record indicates this testimony was raised to clarify the various and conflicting stories Appellant told during the OSI

[2] In Salinas v. Texas, 133 S. Ct. 2174 (2013), the Supreme Court held that the prosecution's use of an accused's failure to answer questions in a non-custodial interview was permissible where the accused did not expressly invoke his right to remain silent or counsel. At trial, the prosecution, over defense objection, was allowed to use the accused's demeanor during the interview as evidence of guilt, including the fact that the accused "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up" when questioned. 133 S. Ct. at 2178.

interview. (J.A. at 86-90.) In fact, trial defense counsel initially raised the issue of coercive interrogation during both voir dire and his opening statement, which was unmistakably a defense theme and strategy. (J.A. at 17-19.) Spanning three pages of the opening statement, trial defense counsel challenged the members to consider why Appellant gave two different conflicting stories, asserting that OSI "broke him. They broke him." (Id.) By raising the possibility of a coerced, involuntary confession, trial defense counsel opened the door for trial counsel to address the issue of the voluntariness of his confession. *See* Kasper, 58 M.J. at 320 (Crawford, C.J., dissenting) ("the testimony elicited through the Government's direct and redirect of [the agent] was proper rebuttal of the defense's allegation of a coerced confession."); *see generally* Lego v. Twomey, 404 U.S. 477, 489 (1972). Further, the defense elected to admit the entirety of Appellant's videotaped confession, which revealed his gestures, and contained several specific references to Appellant's demeanor and credibility.

Moreover, not only did Appellant not object at trial to this portion of the direct examination, but trial defense counsel raised the very same issue during the cross-examination of SA DP. (J.A. at 105.) Trial defense counsel's purpose appears to be an effort to demonstrate that SA DP's tactics were coercive. (Id.) Trial defense counsel's cross-examination

focused on the length of the interview, the number of times Appellant was asked to tell his story, whether SA DP lied to Appellant during the interview, and SA DP's behavior at the time Appellant formulated the written statement. (J.A. at 100-09.)

Unlike the facts of Kasper, where the special agent compared the truthfulness of two statements made during the subject interview, the agent here was only explaining why he continued the interview despite Appellant's initial exculpatory statements. Also unlike Kasper, the panel here did not have any questions regarding Appellant's truthfulness based on the agent's testimony, nor did they have questions after the military judge read the findings instructions. Moreover, trial counsel chose not mention Appellant's demeanor or the agent's opinion at all during his closing argument.

Using the factors outlined by the Air Force Court in Jones, the testimony at issue does not constitute "human lie detector" testimony. The second Jones factor leans strongly in favor of the government because Appellant raised the issue of SA DP's interrogation tactics as a trial strategy, opening the door to testimony regarding Appellant's demeanor and the voluntariness of his statement. Also, Appellant elected to play the entirety of his confession, which contained evidence of Appellant's physical behavior and the agents' reactions to him, including the agents asking Appellant why his face was red, directing

Appellant to make eye contact while he was relaying his story and confronting him with their belief that his lack of detail indicated he was not being truthful. (J.A. at 5-6.)

The third Jones factor also leans heavily in the government's favor because trial defense counsel failed to object or request cautionary instructions. Also, under the fourth Jones factor, SA DP was not testifying as to the truthfulness of a specific statement regarding a fact at issue in the case; rather, SA DP was testifying generally about Appellant's demeanor and behavior during the interview. Finally, the military judge's general instructions constituted adequate remedial action under the seventh Jones factor, discussed further below.

Even if this Court finds error, a determination that an error was committed does not decide the question of whether the error was both plain and obvious. United States v. Burton, 67 M.J. 150, 153 (C.A.A.F. 2009). "An error is not plain and obvious if, in the context of the entire trial, the accused fails to show the military judge should be faulted for taking no action even without an objection." Id. (internal quotation and citations omitted). The lack of plain and obvious error in this case is highlighted by the fact that Appellant did not object to SA DP's testimony on direct examination (but intentionally did on re-direct) on the grounds of "human lie detector" evidence.

If counsel was not clear at trial in his own mind what the legal error was or should be, it necessarily follows that the issue would not be sufficiently clear for the military judge.

Finally, even if this Court were to find that the error was both plain and obvious, Appellant fails to establish any prejudice as a result of this short exchange during SA DP's direct examination. Prejudice results when the error has an "undue influence on a jury's role in determining the ultimate facts in the case." United States v. Mullins, 69 M.J. 113, 117 (C.A.A.F. 2010) (quoting United States v. Birdsall, 47 M.J. 404, 411 (C.A.A.F. 1998)). A reviewing court is to consider the erroneous testimony in context of the entire trial, and context includes elements such as the instructions given, the military judge's questions, and the strength of the government's case. Id. (citing United States v. Eggen, 51 M.J. 159 (C.A.A.F. 1999)); *see also* Jones, 60 M.J. at 970 (finding no material prejudice based on the circumstances of the agent's testimony, the appellant's "false confession" theory, the totality of the evidence, and the standard instructions given).

The case *sub judice* is unlike Brooks, where this Court found prejudice due to the impermissible testimony in light of "no other direct witness, no confession and no physical evidence to corroborate the victim's sometimes inconsistent testimony." Brooks, 64 M.J. at 330. Here, on the other hand, compelling

evidence supports the finding of guilty beyond a reasonable doubt: 1) A1C ELS testified that she did not remember what happened in her room that night, but awoke to find a condom wrapper on the floor and her underwear was on incorrectly; 2) corroborating DNA evidence existed; 3) the government presented substantial circumstantial evidence, including eyewitness testimony of A1C MS who testified that A1C ELS's state of intoxication was high, and, most tellingly, that A1C ELS was asleep on the bed at the time he left her alone with Appellant; and 4) Appellant's own admissions during the OSI interview and the members' ability to assess his credibility during Appellant's testimony during the trial.

B. The military judge did not abuse his discretion in permitting SA DP's testimony on re-direct examination.

The military judge did not abuse his discretion by overruling trial defense counsel's objection to SA DP's testimony during re-direct examination where SA DP described the large red sun blotches on Appellant's face during the OSI interview. (J.A. at 112-13.) SA DP was not asked to draw any conclusions or inferences from the fact that Appellant would get large sun blotches on his face when he would speak about the incident. (Id.) Trial counsel correctly stated to the military judge, "we're not asking if he's lying or not, we're just noticing different responses." (J.A. at 113.) SA DP's

testimony was not a definite opinion as to whether Appellant was truthful in making a specific statement regarding a fact at issue in the case, and, therefore, was not definite enough to constitute "human lie detector" testimony. *See* Kasper, 58 M.J. at 315. SA DP merely made a general comment about Appellant's appearance. Without any inference of truth or falsity, this statement does not constitute "human lie detector" testimony under the fourth Jones factor. Thus, it was not error for the military judge to allow SA DP's testimony.

Moreover, the defense itself invited the witness's answer by the in-depth cross-examination regarding interview protocol; thus, Appellant is poorly positioned to complain about it now. *See* United States v. Eggen, 51 M.J. 159, 162 (C.A.A.F. 1999) (explaining the invited error doctrine). Appellant invited any error by raising the issue of a coerced confession during voir dire and his opening statement, and then opened the door even wider during cross-examination of SA DP. By raising the theory of a coerced confession, Appellant's demeanor and behavior during the interview with SA DP became all the more relevant. Appellant's assertion of error now results in no entitlement to relief. "Appellant cannot create error and then take advantage of a situation of his own making. Invited error does not provide a basis for relief." United States v. Raya, 45 M.J.

251, 254 (C.A.A.F. 1996); *see also* United States v. Dinges, 55 M.J. 308, 311 (C.A.A.F. 2001).

Under the second factor outlined in Jones, Appellant raised the issue of SA DP's interrogation tactics as a trial strategy, opening the door to testimony regarding Appellant's demeanor and the voluntariness of his statement. As such, he is not entitled to relief for any legal error he created. Jones factors three and seven also lean in favor of the government because trial defense counsel did not request cautionary instructions and the military judge's general instructions constituted adequate remedial action under the seventh Jones factor.

Ultimately, this testimony during re-direct examination as to Appellant's demeanor during the interview clearly did not exercise a substantial independent influence on the findings. Considering the circumstances of SA DP's testimony and Appellant's theory of the case, clearly no error existed. To the extent, *arguendo*, this Court finds SA DP's statement was "human lie detector" testimony, neither the statement, nor trial counsel's reference to it substantially influenced the findings in light of the government's overpowering case. Moreover, SA DP's statements neither affected Appellant's substantial rights, nor did they seriously affect the fairness, integrity, or public reputation of the proceedings in light of the compelling and

considerable evidence supporting the charge. *See* Olano, 507 U.S. at 732-35.

C. The military judge cured any error by giving the panel an instruction that re-iterated that only the members are allowed to make credibility determinations.

Although the military judge did not provide a tailored cautionary instruction specifically on "human lie detector" testimony because no such testimony was presented and because Appellant never requested such an irrelevant instruction, the military judge properly instructed the members on their responsibilities. During the reading of the findings instructions, the military judge instructed the members regarding coerced confessions. The military judge specifically stated:

> The defense has introduced evidence that the accused's statements, in that regard, may have been obtained through the use of coercion. You must decide the weight or significance, if any, such statements deserved under all the circumstances. In deciding what weight or significance, if any to give to the accused's statements, you should consider the specific evidence offered on the matter, such as the length of the interview, the tactics of the interviewing agents, as well as the accused's training as a law enforcement officer, your own common sense and knowledge of human nature and the nature of any corroborating evidence, as well as other evidence in this trial.

(J.A. at 267-77.) The military judge also instructed the members as follows with regard to credibility of witnesses:

> You have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness' intelligence, ability to observe and accurately remember, sincerity and conduct in court, friendships and prejudices. Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with either side; and how each witness might be affected by the verdict. In weighing discrepancies between witnesses, you should consider whether they resulted from an innocent mistake or a deliberate lie. Taking all these matters into account, you should then consider the probability of each witness' testimony and the inclination of the witness to tell the truth.

(J.A. at 268-69.) In the absence of evidence to the contrary, the members are presumed to follow the military judge's instructions. Jones, 60 M.J. at 971 (citing United States v. Holt, 33 M.J. 400, 408 (C.M.A. 1991)). Appellant has not offered any evidence that the members did not follow this or other instructions, or that they were at all confused with their duty as instructed by the military judge.

Recalling the factors provided in Jones, based on Appellant's coerced confession theory, the totality of the evidence, and the instructions given by the military judge, the failure to give a specific cautionary instruction did not materially prejudice the substantial rights of Appellant. *See* Jones, 60 M.J. at 971. As such, Appellant is entitled to no relief.

CONCLUSION

WHEREFORE the government respectfully requests that this Honorable Court affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 15 October 2013.

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