26 June 2014

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,	)	FINAL BRIEF ON BEHALF OF
Appellee,	)	THE UNITED STATES
	)	
v.	)	USCA Dkt. No. 12-0501/AF
	)	
Airman First Class (E-3),	)	Crim. App. No. 37438
JESSICA E. MCFADDEN, USAF,	)	
Appellant.	)	

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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JESSICA E. MCFADDEN, USAF,	)	
Appellant.	)	

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

ISSUES PRESENTED

I.

WHETHER THE AFCCA ERRED WHEN IT HELD THAT THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY FAILING TO EXCUSE FOR CAUSE A COURT MEMBER WHO ACCUSED APPELLANT OF LYING BY OMISSION BY EXERCISING HER ARTICLE 31(b), UCMJ, RIGHT TO REMAIN SILENT.

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING DEFENSE COUNSEL'S REQUEST FOR A MISTRIAL AFTER A COURT MEMBER ACCUSED APPELLANT OF LYING BY OMISSION BY EXERCISING HER ARTICLE 31(b), UCMJ, RIGHT TO REMAIN SILENT.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, 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 generally accepted.

STATEMENT OF FACTS

On 18 February 2009, Appellant pled not guilty to two specifications of desertion in violation of Article 85, UCMJ, one specification of conspiracy to commit desertion in violation of Article 81, UCMJ, and one specification of making a false official statement in violation of Article 107, UCMJ. (J.A. at 23-24.) With regard to the two specifications charged under Article 85, UCMJ, Appellant pled guilty to the lesser included offenses of absence without leave (AWOL). (J.A. at 23.)

During the military judge's preliminary instructions to the members, he stated the following:

> You must determine whether the accused is guilty or not guilty based solely upon the evidence presented here in court and upon the instructions I will give you.
>
> Because you cannot properly make that determination until you have heard all the evidence and received the instructions, it is of vital importance that you keep an open mind until all the evidence has been presented and the instructions have been given. I will instruct you fully before you begin your deliberations. In so doing, I may repeat some of the instructions which I will now give you or possibly during the trial. Bear in mind that all of these instructions are designed to help you perform your duties as court members.
>
> The final determination as to the weight of the evidence and the credibility of the witnesses in this case rests solely upon you. You have the duty to determine the believability of the witnesses. In performing this duty, you must consider each

> witness’ intelligence and ability to observe and accurately remember, in addition to the witness’ sincerity and conduct in court, friendships, prejudices, and character for truthfulness. 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 a discrepancy by a witness or between witnesses you should consider whether it 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. The believability of each witness’ testimony should be your guide in evaluating testimony, rather than the number of witnesses called.

(J.A. at 27-28.)

The military judge further instructed the members that they would be given the opportunity to question all witnesses “[w]hen counsel have finished,” but informed them that all questions from members, “like questions of counsel, are subject to objection.” (J.A. at 30.)

During the government’s case in chief, trial defense counsel requested an Article 39(a) session to discuss the content of Appellant’s pretrial statement, which the defense correctly anticipated would be offered into evidence by the government. (J.A. at 35.) Essentially, trial defense counsel wanted to ensure the government had redacted “the last two Q and

As on the [AF Form 1168],"[1] which he believed recorded that Appellant had "exercised her right to remain silent." (Id.) In its entirety, the post-narrative question-and-answer exchange was as follows:

> Question - How long was your guard gone before you left?
>
> Answer - About five minets (sic)
>
> Question - Did you ever plan on turning yourself in?
>
> Answer - Refused to answer.
>
> Question - Where did you plan on going after tonight?
>
> Answer - Refused to answer.

(J.A. at 127.) Ultimately, a version of the statement with the final two questions and answers redacted was admitted into evidence as Prosecution Exhibit 6. (J.A. at 122-25.)

During the defense's case in chief, Appellant took the stand and testified on her own behalf.[2] With regard to the time period at issue in Specification 1 of Charge I, Appellant testified that she left the confines of the base on 22 August 2008, went to a "hookah bar" with two friends, and stayed the night at an off-base hotel. (J.A. at 38-39.) She said that the

---

[1] The two questions referenced by trial defense counsel appeared on the third page of Appellant's AF Form 1168, after Appellant had written the narrative portion of her statement.

[2] The government called ten witnesses during findings, to include Investigator Sean Garrettson, SrA David Acree, and Investigator Steven Vaughan, who were directly involved in Appellant's investigation and her subsequent interview. (R. at 303, 323, 333.)

following day, her friend took out a loan, which they used to go on "a little shopping spree" before staying in San Antonio, Texas. (J.A. at 40-41.) After spending yet another day away from her unit, Appellant indicated she did intend to "go back" to her duty station, although she confirmed that rather than doing so, she "got a loan from the bank" and headed to Georgia. (J.A. at 41-42.) Still, Appellant alleged she always intended to turn herself in. (J.A. at 43.)

With regard to the time period at issue in Specification 2 of Charge I, Appellant and trial defense counsel engaged in the following colloquy:

> Q. Did you ever say that you wanted to run away from the Air Force forever?
>
> A. No, sir.
>
> Q. Did you want to run away from the Air Force forever at that time?
>
> A. No, sir.
>
> Q. Have you ever wanted to run away from the Air Force forever?
>
> A. No, sir.
>
> Q. Did you ever communicate any plan with Michael Krana?
>
> A. No, sir.
>
> Q. Specifically, did you communicate with Michael Krana any plan or desire to run away from the Air Force permanently?
>
> A. No, sir.

(J.A. at 50-51.) Appellant then went on to describe the events of 9 October 2008, when she asked her supervision if she "could get an escort to go to the emergency room," and subsequently left the hospital without permission. (J.A. at 52-55.)

During cross-examination, Appellant confirmed she initially asked to go to the emergency room because she was having painful "bleeding and cramping," and conceded that she stated "on the ER form...the reason for the visit was headache." (J.A. at 62.) She also stated she "never talked to" her fiance's father, Michael Krana, before being escorted to the hospital in an attempt to "set up" transportation from the hospital to the off-base hotel, even though Mr. Krana had "made statements that he, in fact, did talk to [Appellant] on the phone" beforehand. (J.A. at 64.) She also confirmed that she was apprehended by law enforcement personnel while at the hotel, and that she subsequently provided the written statement entered into evidence as Prosecution Exhibit 6. (J.A. at 65-67, 122-24.)

On redirect, trial defense counsel and Appellant attempted to explain statements that suggested Appellant had no intention of returning to her duty station after she first left base in August 2008,[3] and Appellant clarified that the first day of her

[3] The statements were purportedly made to Ms. Katherine Dover during a phone conversation. (J.A. at 59.)

absence was 22 August 2008 rather than 23 August 2008. (J.A. at 68-69.)

The military judge then engaged in the following question-and-answer with Appellant:

> Q. [Appellant], how many different investigators did you talk to about your absence?
>
> A. Two, sir.
>
> Q. Do you remember the names of those?
>
> A. It was Investigator Vaughn and Garrettson, sir. Oh I'm sorry. It was Detective Vaughn and Garrettson.
>
> Q. Did you ever tell either of them that you were intending to come back?
>
> A. I'm sorry? That I was not intending to come back?
>
> Q. No. That you were intending to come back.
>
> A. Oh. I don't believe they ever asked.
>
> Q. So, you didn't tell them?
>
> A. No, sir, I didn't tell them one way or the other.

(J.A. at 69-70.)

Trial Counsel asked additional questions of Appellant, and the following exchange took place:

> Q. [Appellant], I just want to make it perfectly clear. Detective Vaughn and Investigator Garrettson, during their interviews with you, they did they (sic) ask

> you whether you intended to come back or not, didn't they?
>
> A. No, sir, those two did not.
>
> Q. Did Senior Airman Acree ask you if you intended to come back?
>
> SDC: Objection, Your Honor, beyond the scope.
>
> MJ: Overruled.
>
> A. Yes, sir, but I used my right to remain silent at the time.

(J.A. at 70.)

On redirect, trial defense counsel immediately asked Appellant whether she, "at any point during any of [her] absences," ever formed "the intent to remain away permanently." (J.A. at 71.) In response, Appellant testified she had not. (Id.)

Major Cereste was the first court member to indicate she had questions for Appellant. (J.A. at 71.) The following exchange took place:

> Q. Good morning.
>
> A. Good morning.
>
> Q. Major Cereste. I have two questions for you. The first one is: Why did you join the Air Force?
>
> A. I joined the Air Force simply because I wanted to help people. I had a big military family and we always grew up to respect them. And it just seemed like a good experience in life.

> Q. Well, I have another question after this, but do you find it respectful to leave the Air Force and not obey the rules?
>
> A. No, ma'am, I do not.
>
> Q. My next question is: You testified today on numerous accounts of overt deception, and to me you seem to have a heightened intuition of other people's motives. For example, you were aware that perhaps Airman Dover might tell people X, Y, and Z, so you told her certain things. Have you also heard of lying by omission -- so -- exercising your right to remain silent. So, how is your testimony today regarding never intending to desert the Air Force permanently different from your previous pattern of deception?
>
> A. Because, before, I had never formed the intent to remain away permanently. And I've already admitted to going AWOL, which I take responsibility for, but I don't want people to think that my intent was to never come back.

(J.A. at 71-72.)

After the above exchange took place, additional court members questioned Appellant, as did the military judge and trial counsel. (J.A. at 73-86.) During an ensuing Article 39(a) session, called for the purpose of determining how the defense planned to handle a piece of documentary evidence that had not been published, trial defense counsel said the following:

> SDC: Well, there is one issue, Your Honor, since the members are out. There was a line of questioning that took place during the

> cross-examination -- I think the subsequent cross-examination of [Appellant] that had to do with a statement about her exercising her right to remain silent...As a direct result of that line of questioning, Major Cereste, in the back row, accused [Appellant] of lying by omission by exercise of her right to remain silent.
>
> At this time, pursuant to R.C.M. 915, we believe it's manifestly necessary in the interest of justice because of her response to a court member, to declare a mistrial based on the government's attempt to get that statement -- that comment on her right to remain silent on the record and into the members' ears.

(J.A. at 92-93.)

After entertaining comments from both sides on the issue, the military judge denied the motion for a mistrial, but indicated he would consider "giving the members a cautionary instruction." (J.A. at 93-95.) The military judge then crafted a curative instruction after specifically asking trial defense counsel for input and confirming that the proposed instruction was acceptable to the defense.[4] (J.A. at 96.)

After being recalled and instructed by the military judge, one of the court members questioned Appellant as follows:

> Q. What was -- when you left the second time, your intent was not to remain away, correct?
>
> A. No, ma'am, it was not.

---

[4] The curative instruction provided was as follows: "You may not consider the accused's exercise of her right to remain silent in any way adverse to the accused. You may not consider such exercise as lying by omission." (J.A. at 97.)

> Q. What was your intent?
>
> A. I had wanted to see Mark just because of everything that had happened. And I just needed a sense of security, I guess.

(J.A. at 98.)

After all evidence was presented, the military judge provided the members with appropriate instructions, reminding them that it was their "duty to determine the believability of the witnesses," and instructed them that Appellant "is presumed to be innocent until her guilt is established by legal and competent evidence beyond a reasonable doubt." (J.A. at 115-117.)

SUMMARY OF THE ARGUMENT

The question Maj Cereste asked Appellant was not objected to by defense and did not indicate she had prematurely formed an opinion as to the guilt or innocence of Appellant, when Appellant testified on her own behalf and admitted to being untruthful on numerous occasions. Rather, it was clearly aimed at assessing Appellant's sincerity and credibility. In any event, the military judge correctly denied Appellant's subsequent motion for a mistrial, and appropriately instructed the members that they could not use Appellant's exercising of her right to remain silent against her in any way. Even if this Court were to conclude the military judge had an obligation to

sua sponte excuse Maj Cereste in the absence of an express challenge by the defense, Appellant is entitled to no relief because any error was clearly harmless beyond a reasonable doubt.

ARGUMENT

I.

THE AFCCA CORRECTLY CONCLUDED THAT THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE DID NOT SUA SPONTE EXCUSE A COURT MEMBER WHO QUESTIONED APPELLANT REGARDING HER CREDIBILITY AFTER APPELLANT TESTIFIED THAT SHE "USED HER RIGHT TO REMAING SILENT AT THE TIME" SHE SPOKE TO INVESTIGATORS.

Standard of Review

A military judge's decision whether or not to excuse a member *sua sponte* is reviewed for an abuse of discretion. United States v. Strand, 59 M.J. 455, 458 (C.A.A.F. 2004) (referencing United States v. Downing, 56 M.J. 419, 422 (C.A.A.F. 2002)). When the issue involves actual bias, appellate courts give the military judge "great deference...because it is a question of fact, and the judge has observed the demeanor of the challenged member." Strand, 59 M.J. at 458 (C.A.A.F. 2004) (quoting United States v. Napolitano, 53 M.J. 162, 166 (C.A.A.F. 2000)). In making judgments regarding implied bias, this Court looks at the totality of the factual circumstances, using a "standard less deferential than abuse of discretion but more deferential than

de novo." Strand, 59 M.J. at 458-59 (quoting United States v. Miles, 58 M.J. 192, 195 (C.A.A.F. 2001)).

Law and Analysis

In the present case, Appellant incorrectly argues that "AFCCA decided this issue in a manner that is inconsistent with this Honorable Court's decision" in United States v. Nash, 71 M.J. 83 (C.A.A.F. 2012). (App. Br. at 7.) In reaching this erroneous conclusion, Appellant wrongly argues that Maj Cereste's question of Appellant indicated she had "prematurely formed an opinion that Appellant was guilty of the contested issues" and that the military judge was somehow required to *sua sponte* excuse her as a result of what Appellant implies was actual bias, even though trial defense counsel did not object to Maj Cereste's question when it was asked and answered and did not challenge the member or make such a request at trial.[5] (App. Br. at 10.)

Despite Appellant's argument to the contrary, AFCCA was well aware of its mandate from this Court when it issued its opinion in her case. (App. Br. at 7.) In fact, after distinguishing Appellant's case from the facts and circumstances of Nash, AFCCA stated the following:

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[5] As correctly pointed out by the AFCCA in its 26 September 2013 opinion, "the court member in Nash was specifically challenged for cause and the defense asked that the individual be removed from the panel," whereas in the present case trial defense counsel instead "requested a mistrial." (J.A. at 14) (citing Nash, 71 M.J. at 86).

> Despite these differences our mandate from the CAAF is clear: to determine whether the military judge abused his discretion for failing to excuse for cause a court member who appeared to accuse the appellant of lying by omission by exercising her right to remain silent.

(J.A. at 14.) Because Appellant and her trial defense counsel did not specifically challenge the member or indicate they wanted the member excused, the Court of Criminal Appeals properly noted that its task was to "determine whether the military judge abused his discretion by not removing the court member *sua sponte*." (Id.) The Court then went on to note that while "the court member in question had concluded that asserting one's Fifth Amendment right equated to lying by omission," the record in Appellant's case did not indicate that the court member had "disregarded a duty or instruction." (J.A. at 14-15.) Moreover, AFCCA noted that "once the issue became apparent, curative instructions were given not only to the court member who asked the question, but to all of the court members." (J.A. at 15.) The Court correctly noted that "[a]bsent evidence to the contrary, [AFCCA] may presume that court members follow the military judge's instructions." (Id.) (internal citations omitted). Accordingly, the Court correctly concluded the military judge had not abused his discretion. (Id.)

The military judge's decision in this case, as well as that of the Court of Criminal Appeals, is sound both factually and

legally. First and foremost, it cannot be overstated that the issue of actual bias was before this Court in Nash because the military judge denied trial defense counsel's express request to excuse a member who submitted a question to ask the accused's wife whether she thought "a pedophile can be rehabilitated." Nash, 71 M.J. at 85. This express challenge occurred after the trial defense counsel requested that the military judge voir dire the member, and after the member had, in fact, been questioned regarding his reasons for asking the question. Id. at 85-86.

However, in the present case trial defense counsel did not object to the member's question, request individual voir dire of the member, or request that the member be excused. As a result, Appellant has failed to meet his burden on appeal of establishing that factual grounds for challenge existed against Maj Cereste. *See* United States v. Downing, 56 M.J. 419, 422 (C.A.A.F. 2002) (concluding appellant had not met his burden of establishing grounds for a challenge despite having "had the opportunity to make his case"). Accordingly, the military judge should be given substantial deference when reviewing how he handled the situation, and this Court should determine Appellant is entitled to no relief after applying the plain error test.[6] *See* United States v. Knapp, 73 M.J. 33, 36 (C.A.A.F 2014)

[6] The government asserts the issue was forfeited when trial defense counsel failed to make a timely and specific objection to the member's question.

(noting that failure to lodge a timely objection results in plain error review, which places the burden on an appellant to establish "(1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights") (internal citations omitted)).

Unlike a situation where an accused ***did not*** take the stand to testify, yet confessions or admissions of the accused remained at issue, here Appellant chose to testify and subject herself to questions from her own counsel, opposing counsel, the court members, and the military judge. *See* United States v. Kindler, 34 C.M.R. 174, 178 (C.M.A. 1964) ("An accused, like any other witness, is subject to cross-examination and to impeachment of his credibility"). Accordingly, Appellant voluntarily made her own credibility an issue to be considered by the members when she made the informed decision of testifying on her own behalf. Moreover, Appellant had the opportunity to explain anything she thought might be taken out of context or misunderstood by her chosen fact-finders.[7]

Maj Cereste's questions were aimed squarely at determining the credibility and sincerity of Appellant, rather than an expression of a preformed opinion regarding her guilt or innocence. While the final question may have made reference to

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[7] It should be noted that on numerous occasions, Appellant expressly disagreed with assertions of trial counsel during cross-examination and subsequent re-cross. (J.A. at 60, 61, 62, 63, 64, 65, 84, 85.)

Appellant's "right to remain silent," the most important part of her question was the question itself: "So, how is your testimony today regarding never intending to desert the Air Force permanently different from your previous pattern of deception?" (J.A. at 72.) That question, unlike the question asked in Nash, provided Appellant the legitimate opportunity to explain why she was not guilty.

Even if this Court determines the military judge should have taken it upon himself to excuse Maj Cereste despite the fact trial defense counsel failed to make such a request, any such error was harmless beyond a reasonable doubt. An impartial review of the record clearly shows the members simply did not find Appellant to be a credible witness. If they did find her to be credible, they would certainly have taken her testimony at face value and believed her when she unequivocally stated that she had never intended to remain away from her duty station permanently in October 2008 when she made arrangements to leave base and meet up with her fiancé. Instead, nearly all of the members seemed troubled by certain aspects of Appellant's questionable and clearly self-serving testimony, as evidenced by the questions posed to Appellant by the members.[8] Simply put, Appellant cannot choose to testify and put her own actions and

[8] During her testimony, Appellant was asked thoughtful and probing questions by seven different court members - Maj Cereste, Colonel Murchland, Lieutenant Carlson, Lieutenant Colonel Lee, Colonel Robinson, and Lieutenant Herbranson, and Lieutenant Colonel Clements. (J.A. at 71, 73, 76, 78, 80, 82, 87.)

credibility at issue, and then cry foul on appeal when a panel of attentive and engaged members weigh all of the evidence presented and find her guilty.

In sum, after Maj Cereste asked Appellant a question directly relating to her credibility that was not objected to by defense counsel, the military judge appropriately instructed the members that they could not consider Appellant's "exercise of her right to remain silent in any way adverse to [Appellant]" and that they could not "consider such exercise as lying by omission." (J.A. at 97.) He had no duty to *sua sponte* excuse the member for cause, as the member's question did not indicate she had already formed an impermissible opinion as to the guilt or innocence of the accused. Accordingly, AFCCA correctly concluded the military judge did not abuse his discretion.

II.

THE MILITARY JUDGE CORRECTLY DENIED TRIAL DEFENSE COUNSEL'S REQUEST FOR A MISTRIAL AND APPROPRIATELY PROVIDED ALL MEMBERS WITH A CURATIVE INSTRUCTION AFTER APPELLANT VOLUNTARILY TESTIFIED ON HER OWN BEHALF AND STATED SHE HAD EXERCISED HER "RIGHT TO REMAIN SILENT" WHEN SPEAKING TO INVESTIGATORS.

Standard of Review

The decision to grant a mistrial lies within the discretion of the military judge. United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000). This Court "will not reverse a military

judge's determination 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) (citing United States v. Rushatz, 31 M.J. 450, 456 (C.M.A. 1990)).

Law and Analysis

R.C.M. 915(a) states that the "military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which case substantial doubt upon the fairness of the proceedings." However, declaring a mistrial is a drastic remedy that should be "reserved for only those situations where the military judge must intervene to prevent a miscarriage of justice." United States v. Garces, 32 M.J. 345, 349 (C.M.A. 1991). "Because of the extraordinary nature of a mistrial, military judges should explore the option of taking other remedial action, such as giving curative instructions." United States v. Ashby, 68 M.J. 108, 122 (C.A.A.F. 2009) (citing United States v. Fisiorek, 43 M.J. 244, 247 (C.A.A.F. 1995) and United States v. Evans, 27 M.J 34, 39 (C.M.A. 1988)). In fact, a "curative instruction is the 'preferred' remedy for correcting error...as long as the instruction is adequate to avoid prejudice to the accused." United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000).

In the present case, Appellant's trial defense counsel requested the military judge declare a mistrial based on "a line of questioning" that had to do with Appellant's "exercising her right to remain silent," even though trial defense counsel did not properly object to the questions at the time they were asked or answered.[9] (J.A. at 70-72, 92.) Trial defense counsel argued that as "a direct result of that line of questioning, Major Cereste, in the back row, accused [Appellant] of lying by omission by exercise (sic) of her right to remain silent." (J.A. at 93.) Ultimately, the military judge disagreed with trial defense counsel's argument and denied the motion for a mistrial, although he did provide a cautionary instruction to the members regarding Appellant's right to remain silent.

The military judge's curative instruction appropriately addressed the concern raised by trial defense counsel, as it plainly and unequivocally informed the members that they could not consider Appellant's purported silence as "lying by omission" or in any other way that was adverse to Appellant. (J.A. at 97.) It is also important to point out that the military judge sought input from trial defense counsel when

[9] When Appellant was asked by trial counsel whether SrA Acree asked her if she "intended to come back," trial defense counsel objected based on the question being "beyond the scope." (J.A. at 70.) Trial defense counsel did not object at all when Maj Cereste's questions were asked or answered. (J.A. at 71-72.) Accordingly, Appellant forfeited the issue. *See* United States v. Payne, 73 M.J. 19, 23-24 (C.A.A.F. 2014) (noting a "generalized objection" to a military judge's instruction was insufficient to preserve a specific objection on appeal absent plain error).

crafting the instruction, provided the agreed upon instruction to the members in a timely manner, and that no member indicated they had any questions regarding the clear and unambiguous instruction. (J.A. at 95-97); *see also* United States v. Ashby, 68 M.J. 108, 122 (C.A.A.F. 2009) ("Absent evidence to the contrary, the members are presumed to follow the military judge's instructions") (citing United States v. Jenkins, 54 M.J. 12, 20 (C.A.A.F. 2000)).

In any event, even if this Court concludes the military judge committed error, it can be confident that any error was harmless beyond a reasonable doubt. *See* Ashby, 68 M.J. at 122 (concluding it was error for trial counsel to comment on an accused's exercise of his constitutional right to remain silent, but holding the error was harmless beyond a reasonable doubt). When analyzing the question of harmlessness, the Court must ask "whether there is a reasonable possibility that the evidence [or error] complained of might have contributed to the conviction." Id. (quoting United States v. Paige, 67 M.J. 442, 451 (C.A.A.F. 2009) (internal citation omitted)). "The question is not whether the members were 'totally unaware' of the error; rather, the essence of a harmless error is that it was 'unimportant in relation to everything else the jury considered on the issue in question.'" Id. (quoting United States v. Moran, 65 M.J. 178, 187 (C.A.A.F. 2007) (internal citation omitted)).

While the government does not concede error in this case, it is clear that any conceivable error was "unimportant" in relation to everything else considered by the members. In an attempt to avoid being convicted of the charged offenses, Appellant and her counsel took advantage of every opportunity available to an accused in the context of a trial, to include the cross-examination of government witnesses and the calling of defense witnesses, including Appellant herself. The fact Appellant voluntarily chose to testify, and had ample opportunity to explain why she believed she was not guilty of the charged offenses, severely undermines her claim on appeal that she was somehow prejudiced at trial. (App. Br. at 14.) Appellant's misguided claim that "the military judge allowed Maj Cereste to express her skepticism and belief of Appellant's guilt in front of the other court members" is entirely without merit. (App. Br. at 14-15.) Given the fact six other members questioned Appellant after Maj Cereste asked the question at issue, and in light of the nature of those questions, it is obvious that no member was negatively influenced by what Appellant refers to as Maj Cereste's "skepticism." (J.A. at 71-87; App. Br. at 14.) In short, Maj Cereste's question clearly did not unfairly influence the thought process of the other members, and Appellant was convicted by an attentive and fair panel that relied upon the overwhelming evidence of Appellant's

guilt. Accordingly, this Honorable Court should affirm the findings and sentence adjudged.

CONCLUSION

WHEREFORE the government respectfully requests that this Honorable Court should 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 26 June 2014.

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1. This brief complies with the type-volume limitation of Rule 24(d) because:

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/s/

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