IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,		
Appellee	)	APPELLEE RESPONSE TO
	)	SUPPLEMENT TO PETITION FOR
	)	GRANT OF REVIEW
v.	)	
	)	
Private First Class (E-3)	)	
ERICK VARGAS,	)	
United States Army,	)	Crim. App. Dkt. No. ARMY MISC
Appellant	)	20220168
	)	USCA Dkt. No. 22-0259/AR

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	)	SUPPLEMENT TO PETITION FOR
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United States Army,	)	20220168
Appellant	)	
	)	USCA Dkt. No. 22-0259/AR

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

Issue Presented

WHETHER THE ARMY COURT ERRED IN ITS ABUSE OF DISCRETION ANALYSIS BY REQUIRING THE MILITARY JUDGE TO CRAFT THE LEAST DRASTIC REMEDY TO CURE THE DISCOVERY VIOLATION.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this case pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. §862 (2018) [UCMJ]. This Honorable Court has jurisdiction pursuant to Article 67(a)(3), UCMJ, which mandates review in all cases reviewed by a Court of

Criminal Appeals in which, upon petition of the accused and on good cause shown, this Court grants review.

Statement of the Case

On April 6, 2021, the government charged Appellant with two specifications of sexual assault and four specifications of abusive sexual contact, in violation of Article 120, UCMJ. (Charge Sheet). On June 30, 2021, the convening authority referred Appellant's case to a general court-martial. (Charge Sheet). On March 7, 2022, the government dismissed one specification of sexual assault and one specification of abusive sexual contact with prejudice. (R. at 147). On March 9, 2022, the military judge granted defense's request to dismiss the charge and its remaining specifications with prejudice. (R. at 626). The United States appealed the ruling of the military judge granting the defense request to dismiss the charge and specifications with prejudice. (App. Ex. XXXVII).

On June 16, 2022, the Army Court vacated the military judge's oral ruling dismissing the case with prejudice and returned the record of trial to the military judge for proceedings not inconsistent with its decision. *United States v. Vargas*, ARMY MISC 20220168, 2022 CCA LEXIS 365 (Army Ct. Crim. App. Jun. 16, 2022) (mem. op.). On August 12, 2022, Appellant filed his petition for grant of review and supplement to the petition for grant of review.[1]

[1] Appellant did not request reconsideration of the Army Court's decision.

Statement of Facts

Appellant was charged with violating Article 120, UCMJ, for penetrating Specialist (SPC) HS's vulva with his finger without her consent, for touching SPC HS's breast without her consent when Appellant knew or reasonably should have known that SPC HS was asleep, and for touching SPC HS's buttocks without her consent. (Charge Sheet). On March 7, 2022, the parties conducted pretrial litigation regarding Mil. R. Evid. 404(b), Mil. R. Evid. 412, and Appellant's motion for appropriate relief requesting a requirement for unanimous verdict. (R. at 153, 243). The military judged ruled that the government could introduce the accused's statements "that he has not had sex in a while, that he was in a relationship," and that he moved closer to SPC HS while he talked with her under Mil. R. Evid. 404(b). (App. Ex. XXXI). On March 8, 2022, Appellant's court-martial began with voir dire and opening statements. (R. at 258, 526).

A. Pretrial interviews of SPC HS.

On March 4, 2022 in the days leading up to scheduled pretrial litigation, trial counsel met with SPC HS for another interview. (R. at 602). The paralegal took a page of notes during the course of the interview. (App. Ex. XXXVII). During this interview, SPC HS said Appellant called her a "beauty queen" and kissed her on the forehead "3–4 times" on the porch prior to the sexual assault. (App. Ex. XXXVII). This was the first time SPC HS described these facts, and the

government did not disclose them to defense. (R. at 601). The government did not amend its Mil. R. Evid. 404(b) notice to include these statements, nor did the government elicit these statements during the Article 39(a), UCMJ, hearing concerning this motion on March 7, 2022.

The first morning of trial, SPC HS informed trial counsel that her command twice counseled her for being late. (R. at 694). Trial counsel immediately disclosed this to defense. (R. at 604). It was unclear whether these were "written [or] verbal" counseling statements. (R. at 607). Then, defense notified the military judge during the morning's R.C.M. 802 session that "they were interested in getting her [personnel] file to see if those [counseling statements] existed." (R. at 604). As the day unfolded, trial counsel actively tried to find these counseling statements and turn them over to defense counsel. (R. at 604).

B. The government's direct examination of SPC HS at trial.

During trial, the government called SPC HS to the witness stand. (R. at 542). The government asked contextual questions leading up to the offense, including, "What was his level [of] intoxication at this time?" (R. at 595), and "What did you think when he started moving his knees closer to you? How did that make you feel?" (R. at 595). Specialist HS explained that she began to feel uncomfortable. (R. at 596).

Trial counsel asked SPC HS, "What did you decide at that point?" (R. at 596). In a somewhat nonresponsive manner, SPC HS responded: "Well, after he had already been that close and he started grabbing my head and kissing my foreh[ead], telling me I was a beauty queen[.]" (R. at 596). Defense objected, requested an Article 39(a), UCMJ, session outside the presence of the members, and asked the witness to leave the courtroom for the hearing. (R. at 596–97).

C. The Article 39(a), UCMJ, session after SPC HS's testimony.

Defense counsel said, "this is the first time we have ever heard this testimony." (R. at 597). Specifically, they "received no disclosure from the government about some sort of kissing on the forehead on the porch; him calling her a beauty queen." (R. at 597). The military judge turned to the trial counsel and asked for an explanation. (R. at 598).

Trial counsel acknowledged they did not disclose the information. (R. at 598). At first, trial counsel said they learned of the information "two days ago" on March 7, 2022, although that was later corrected to March 4, 2022. (R. at 601–02).[2] Trial counsel explained they did not intend "to elicit that particular statement," and proposed an instruction to the members "to disregard that

[2] Initially, trial counsel mistakenly believed SPC HS disclosed this information during an interview after "the 412 hearing." (R. at 608–09). Upon review of the paralegal's notes, however, SPC HS actually disclosed this information prior to the hearing on March 4, 2022. (R. at 618; App. Ex. XXXVII).

particular portion of the testimony" as a remedy. (R. at 598–99). Defense countered that the issue was not whether trial counsel intended to elicit the information, but whether they "knew about it and they didn't disclose it to the defense." (R. at 600).

During the Article 39(a), UCMJ, session, the trial counsel explained this was not an intentional "ambush[],"[3] but an oversight:

> Your honor, at that time, I did not—we did not recognize the significance of it. That was an oversight. I did—we did not believe that it rose to the level of anything inconsistent from it was an oversight. We did not deliberately say this is disclosure and decided not to. It was an oversight on us, the—like, the potential significance. We did not believe it negated any guilt. Certainly now, it's impeachment or an inconsistent statement, but at the time we did not recognize its—the—obviously its value.

(R. at 606).

By way of remedy, defense first asked for dismissal with prejudice, claiming this "was not an accident." (R. at 609). Alternatively, defense wished to (1) cross examine SPC HS in an Article 39(a), UCMJ, session to learn "the extent" of her testimony; and (2) cross examine her on this omission. (R. at 610–11). Defense also requested the government "be forbidden from making any argument,

[3] Civilian defense counsel argued that the evidence "could be helpful to us, it could be hurtful to us. We don't know because we just got ambushed with it at trial." (R. at 600).

inferential or otherwise, that this alleged conduct form[ed] the basis for some sort of motive or specific intent." (R. at 612).

D. The military judge's response.

After sorting through a range of options, the military judge took a lunchtime recess in preparation for "a hearing on whether or not dismissal is the appropriate remedy." (R. at 615). Before the recess, the military judge "excused from further participation [in the] court-martial" the trial counsel and assistant trial counsel detailed to the case. (R. at 615). This was without request from the defense, and without citing authority for this action. (R. at 615). She informed them, "if the SJA wants to send new trial counsel to participate and to make this argument, so be it." (R. at 615).

After this recess, two new trial counsel appeared on the record and announced their detailing and qualifications. (R. at 616). The new trial counsel provided a copy of the paralegal's notes from the pretrial interview with SPC HS. (R. at 617). These notes clarified that the interview actually occurred on March 4, 2022, and it noted that SPC HS stated that the accused kissed her on the forehead and told her she was a beauty queen. (R. at 618; App. Ex. XXXVII). The new trial counsel explained that this was not "something that was crafted and then intentionally hidden after the Court's [404(b)] ruling," and agreed the defense

could impeach SPC HS with this new information, ask for a continuance, or be granted a limiting instruction. (R. at 619–20).

After the military judge concluded that a discovery violation occurred, she wanted to ensure that the government did not "benefit from . . . having some other bite at the apple at this." (R. at 621). The military judge was not convinced that dismissing the trial counsel or the other remedies was "enough." (R. at 621–22). Then, the military judge orally issued her findings of fact. (R. at 622). She found: 1) Specialist HS told the government on March 4, 2022 that the accused kissed her on the forehead and called her a beauty queen; 2) the court held a Military Rule of Evidence 412 and 404(b) hearing on March 7, 2022 that dealt with events that occurred at the same time as the kisses and beauty queen comment; 3) the government originally told the court that they learned of these comments on March 7, 2022 after the Article 39(a), UCMJ, session; and 4) the government counsel disclosed that SPC HS was counseled twice for failure to report on March 9, 2022. (R. at 622–23).

The military judge did "not find willful misconduct in this case." (R. at 624). She noted that Rule for Courts-Martial [R.C.M.] 701(g)(3) governs the sanctioning of discovery violations, and that willfulness is not required before ruling that charges are dismissed without prejudice. (R. at 624). The military judge continued:

When considering discovery violations, we look at the following: injury to an accused's right to a fair trial; whether the delayed disclosure hampered or foreclosed a strategic option. I do find that the delay in disclosing this hampered or foreclosed a strategic option for the defense; whether the delay disclosure hampered the ability to prepare a defense. I do find that a delayed disclosure hampered the ability to prepare a defense. There are a number of things the defense could have done. They could have prepared a different direct examination or cross-examination of her. They could have crafted a new theory. They could have if they felt that that evidence was overwhelming, sought a pretrial agreement to some or all of the offenses, or pled without the benefit of a pretrial agreement to some or all the offenses if that was a consideration for them. The non-disclosure of that information foreclosed them from considering that strategy. Whether the non-disclosure would have allowed the defense to rebut evidence more effectively. Had they had that information earlier, they could have used that information in their opening statement, in their *voir dire.*

This Court is required to craft the least drastic remedy to obtain a desired result. I have considered the number of remedies. I have already dismissed the original trial counsel. I have considered not allowing any additional direct examination of the victim, but, of course, would result in -- that has no -- that is an absurd result. There is no evidence presented. I have considered allowing a delay. I don't think a delay cures the issue. I've considered bringing the alleged victim back in here to allow the defense to fully cross-examine her on that issue, and then putting her back on in front of the panel members. That does not cure the issue. It doesn't cure what I previously stated with respect to a strategic option, with what they could have done with that information ahead of time. I've considered a curative instruction, but you cannot unring that bell, not when you consider the government's opening statement. I've considered precluding the government from being able to argue

> anything about linking a basis of the kiss on the forehead. But that doesn't cure the issue, which is non-disclosure, failure to allow them to prepare, and foreclosing the ability to create a strategic option. So the fact is, there is not another remedy.

(R. at 625–26).

The military judge dismissed the case with prejudice. (R. at 626). After taking a seven-minute recess, the military judge came back on the record during a two-minute Article 39(a), UCMJ, session and stated she "considered a mistrial under [] R.C.M. 915" but found that a mistrial is inappropriate given "the gravity of the government's discovery violation." (R. at 627).

The new trial counsel made several requests, all of which were denied by the military judge:

> TC: Your Honor, if I may be heard?
> MJ: Yep.
> TC: The government would move under 905 -- R.C.M. 905(f) for reconsideration, but would ----
> MJ: Denied
> TC: ---- would also ask for the victim to be heard on this matter under her Article 6(b) rights, her reasonable right to be heard.
> MJ: I've already ruled.
> TC: Yes, Your Honor. The government moves for reconsideration under R.C.M. 905(f). And if the Court would allow, it also requests a continuance, breaking for the day, to file a written response.
> MJ: No. Denied

(R. at 627). The military judge called the members and informed them she "granted a motion that terminates these proceedings." (R. at 628).

Summary of Argument

The law regarding remedies for discovery violations is settled. The Army Court correctly applied the law and found the military judge abused her discretion when she dismissed this case with prejudice without considering a lesser remedial measure—a mistrial. The standard to impose the least drastic remedy follows from R.C.M. 701's requirement that other remedies be "just under the circumstances." Federal circuit courts are in agreement with military courts that prejudice to the accused is required before the judge may order the harsh remedy of a dismissal. Finally, this Court should decline Appellant's implied invitation to modify this settled law.

WHETHER THE ARMY COURT ERRED IN ITS ABUSE OF DISCRETION ANALYSIS BY REQUIRING THE MILITARY JUDGE TO CRAFT THE LEAST DRASTIC REMEDY TO CURE THE DISCOVERY VIOLATION.

Standard of Review

For Article 62, UCMJ appeals, this court reviews the evidence in the light most favorable to the prevailing party and is bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous. *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017). This court reviews conclusions of law de novo. *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014).

This court reviews a military judge's discovery rulings for an abuse of discretion. *United States v. Stellato,* 74 M.J. 473, 480 (C.A.A.F. 2015) (citing *United States v. Jones*, 69 M.J. 294, 298 (C.A.A.F. 2011)). The same abuse of discretion applies to a military judge's determination of a remedy for a discovery violation. *Stellato,* 74 M.J. at 480 (citing *United States v. Trimper*, 28 M.J. 460, 461–62 (C.M.A. 1989)). "The abuse of discretion standard calls for more than a mere difference of opinion." *Wicks*, 73 M.J. at 98 (internal quotation marks omitted). A military judge abuses her discretion when her ruling is based on findings of fact that are not supported by the record, she uses incorrect legal principles, she applies correct legal principles to the facts in a way that is clearly unreasonable, or she fails to consider important facts. *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017).

Law and Argument

A. The Army Court correctly applied the law requiring military judges to impose the least drastic remedy.

It is well settled that the law requires military judges to impose the least drastic remedy. *United States v. Stellato*, 74 M.J. 473, 490 (C.A.A.F. 2015) (recognizing military judges are required "to craft the least drastic remedy to obtain the desired result"). Even the military judge—who the Army Court of Criminal Appeals (ACCA) found abused her discretion when she dismissed this

case with prejudice—recognized her obligation to impose the least drastic remedy. (R. at 625) ("This Court is required to craft the least drastic remedy to obtain a desired result"). Contrary to Appellant's position, this Court has already determined that "the law *requires* military judges to impose the 'least drastic remedy.'" (Appellant's Br. 3) (emphasis in original); *Stellato*, 74 M.J. at 490; *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) ("We have long held that dismissal is a drastic remedy and courts must look to see whether alternative remedies are available") (citing *United States v. Cooper*, 35 M.J. 417, 422 (C.M.A. 1992); *United States v. Pinson*, 56 M.J. 489, 493 (C.A.A.F. 2002); and *United States v. M*orrison, 449 U.S. 361, 364 (1981) (finding any action taken must be "tailored to the injury suffered"); *see also United States v. Harrington,* No. ACM 39825, 2021 CCA LEXIS 524, *63 (A.F. Ct. Crim. App. Oct. 14, 2021) (finding the remedy of dismissal with prejudice was not warranted because less drastic remedial measures were available); and *United States v. Cabrera*, No. 201800327, 2020 CCA LEXIS 155, *22-23 (N.M. Ct. Crim. App. May 12, 2020) ("Dismissal is a remedy of last resort that is not appropriate if an error can be rendered harmless by other corrective actions") (internal citations omitted).

The ACCA found the military judge erred when she failed to adequately consider a mistrial as a less stringent remedial measure. *Vargas*, 2022 CCA LEXIS 365 at *10. A mistrial would cure all the harms the military judge

identified by allowing the defense—if so desired—to: craft a new theory, seek a pretrial agreement, plead guilty, or prepare different voir dire, opening statement, and direct and cross-examination. *Id.* Appellant's allegation that this remedy would in fact harm him "by allowing the Government to be more prepared for a second trial," (Appellant's Br. 16), is purely speculative. In fact, it is clear this remedy would allow Appellant to be more prepared by giving him the opportunity to retool his case with the knowledge of the victim's testimony about his "two-word statement and one act" before the sexual assault. *Vargas*, 2022 CCA LEXIS 365 at *12. Furthermore, the circumstances of this case are starkly distinct from *United States v. Chapman,* the persuasive authority cited by Appellant. (Appellant's Br. 20). In *Chapman*, several government witnesses had been impeached with inconsistent prior statements on cross-examination and implicated individuals other than the defendants. 524 F.3d 1073, 1087 (9th Cir. 2008). In *Chapman,* it was not speculative that the government would gain an advantage from a retrial. Thus, the court found "that a dismissal was the only means of avoiding prejudice to the Defendants." *Id*.

Unlike *Stellato*, the trial counsel in this case did not completely abdicate their duties of discovery. *See Stellato*, 74 M.J. at 489. Indeed, the trial counsel searched for discovery material for the defense on the morning of trial. (R. at 604). Further, the military judge explicitly found the discovery violation was not willful

misconduct. (R. at 624). The trial counsel's "repeated false statements," (Appellant's Br. 19), were not deliberate lies, but innocent mistakes. Nor did this conduct rise to the level of gross negligence. As the trial counsel explained, the government did not originally "recognize the significance of [the testimony]" or "believe that it rose to the level of anything inconsistent" that would require disclosure. (R. at 606). Even if the government did commit gross negligence, this is still not sufficient for the draconian remedy of dismissal with prejudice. *Stellato*, 74 M.J. at 490 (recognizing that "Article III courts have held the proper inquiry is whether there was injury to the right to a fair trial") (internal citations omitted); *see Chapman,* 524 F.3d at 1085 (indicating that gross negligence may not be sufficient for dismissal with prejudice). No evidence was lost like in *Stellato*, which "call[ed] into serious question whether the Accused [could] ever receive a fair trial." *Stellato*, 74 M.J. at 489. The ACCA correctly applied the law and the facts to reach the conclusion that "the military judge abused her discretion by dismissing the case with prejudice when she failed to exhaust lesser reasonable remedies." *Vargas*, 2022 CCA LEXIS 365 at *12.

B. The requirement to impose the least drastic remedy does not conflict with R.C.M. 701.

The requirement that a remedy be the least drastic to cure the error is consistent with R.C.M. 701. Rule for Courts-Martial 701(e)(3)(D) allows the military judge to "[e]nter such other order as is just under the circumstances," when a party has

failed to comply with discovery. The mandate to craft the least drastic remedy follows from R.C.M. 701's requirement that the military judge take action "as is just under the circumstances." R.C.M. 701(e)(3)(D). If a military judge excessively sanctions a party for a discovery violation when a lesser remedy would cure the error, then her action is not just under the circumstances. This is exactly why the military judge abused her discretion in this case. As the ACCA correctly found: "lesser sufficient remedial remedies were available to cure any harm to the defense caused by the government's disclosure failure." *Vargas*, 2022 CCA LEXIS 365 at *12.

C. There is no need for this Court to look to the federal circuit courts, especially when they are overwhelmingly consistent with military case law on this issue.

The federal circuit courts are persuasive, not binding, authority on this court. *See United States v. McPherson*, 73 M.J. 393, 399 (C.A.A.F. 2014) (recognizing the United States Court of Appeals for the District of Columbia Circuit as "no more than persuasive authority"). Regardless, the federal court cases cited by Appellant align with military jurisprudence and require the least drastic remedy before ordering dismissal with prejudice. *Chapman*, 524 F.3d at 1087 (recognizing "[a] court may dismiss an indictment under its supervisory powers only when the defendant suffers substantial prejudice . . . and where no lesser remedial action is

available . . .") (internal citations omitted));[4] *United States v. Wellborn*, 849 F.2d 980, 985 (5th Cir. 1988) (finding "[a] district court exceeds the proper bounds of its power to order dismissal of an indictment with prejudice when it fails to consider whether less extreme sanctions might maintain the integrity of the court without punishing the United States for a prosecutor's misconduct") (internal citations omitted));[5] and *Virgin Islands v. Fahie*, 419 F.3d 249, 259 (3rd Cir. 2005) (finding the trial judge abused his discretion when he dismissed the case with prejudice because the "[p]rejudice to Fahie could be corrected with the lesser remedy of a mistrial").[6]

Other cases cited by Appellant concern the exclusion of evidence as a remedy, not dismissal with prejudice, and would be inapposite for this court to consider. *United States v. Johnson*, 970 F.2d 907 (D.C. Cir. 1992) (excluding a defense witness); *United States v. Wicker*, 848 F.2d 1059 (10th Cir. 1988) (excluding a lab report). Notably, *Johnson*'s approval of the judge's remedy of excluding a defense witness conflicts with the discussion to R.C.M. 701 upon which Appellant so heavily relies.[7] (Appellant Br. 12). The discussion section discourages the

[4] Cited at Appellant's Br. 14.
[5] Cited at Appellant's Br. 16.
[6] Cited at Appellant's Br. 15–16.
[7] The discussion section to the R.C.M. are non-binding and serve only as guidance. *United States v. Chandler*, 80 M.J. 425, n.2 (C.A.A.F. 2021) (citing

sanction of excluding a defense witness unless the defense counsel's failure to comply with discovery was willful and to a nefarious end. R.C.M. 701(g)(3) discussion. In *Johnson*, the court found counsel had acted in good faith, though suspected Johnson himself may not have. *Johnson*, 970 F.2d at 910. As *Johnson*'s remedy is incongruous to this case and the spirit of R.C.M. 701, it presents an inappropriate model for this court to adopt.

D. This Court should decline Appellant's implied invitation to modify *Stellato.*

Case law is clear: prejudice is the appropriate analysis. *See Stellato,* 74 M.J. at 488 ("We also underscore that if 'an error can be rendered harmless, dismissal is not an appropriate remedy'") (citing *Gore,* 60 M.J. at 187). As dismissal with prejudice was the remedy at issue in this case, this court should conduct its review narrowly without treading into a broad analysis of all possible remedies. Under the established, binding precedent, dismissal is a drastic remedy and is inappropriate without some injury to the accused—even if the government's conduct is egregious. *See id.*; *Gore*, 60 M.J. at 187 ("[D]ismissal of charges is permissible when necessary to avoid prejudice against the accused . . ."); *United States v. Mechanik*, 475 U.S. 66, 75 (1986) ("The Federal Rules dictate that dismissal is

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United States v. New, 55 M.J. 95, 113 (C.A.A.F. 2001) (Effron, J., concurring) and Manual for Courts-Martial, United States (MCM) pt. 1, para. 4, Discussion (2016 ed.)).

appropriate only when a violation has impaired the substantial rights of the accused"); and *United States v. Green*, 4 M.J. 203, 204 (C.M.A. 1978) ("A dismissal is appropriate only where an accused would be either prejudiced in the presentation of his case at a rehearing or . . . no useful purpose would otherwise be served by continuing the proceedings") (internal citations omitted).

Requiring the least drastic remedy does not "bind[] the hands of military judges." (Appellant's Br. 17). A military judge's ruling and remedy is reviewed for abuse of discretion. *Stellato*, 74 M.J. at 480. The abuse of discretion standard allows reasonable minds to disagree. *See id.* ("The abuse of discretion standard calls for more than a mere difference of opinion") (citing *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014). As long as the military judge's decision is within "the range of choices reasonable arising from the applicable facts and the law," and the military judge's view of the law and findings of fact are not clearly erroneous, then the remedy will be appropriate. *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008). The military judge is therefore not restricted: a range of reasonable choice is always available. In this case, the military judge did not adequately consider other less drastic remedies before she ordered dismissal with prejudice. As a mistrial would cure every harm to Appellant she identified, the military judge failed to consider a less stringent remedial measure, and thus abused her discretion.

Conclusion

WHEREFORE, the United States respectfully requests this Honorable Court affirm the Army court's decision vacating the military judge's ruling.

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CERTIFICATE OF COMPLIANCE WITH RULE 21

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 5,333 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

JENNIFER A. SUNDOOK
Major, Judge Advocate
Attorney for Appellee
August 19, 2022

APPENDIX

United States v. Cabrera

United States Navy-Marine Corps Court of Criminal Appeals

May 12, 2020, Decided

No. 201800327

Reporter
2020 CCA LEXIS 155 *

UNITED STATES, Appellee v. Guillermo CABRERA, Lance Corporal (E-3), U.S. Marine Corps, Appellant

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF APPELLATE PROCEDURE 30.2.

Subsequent History: Motion granted by *United States v. Cabrera, 2020 CAAF LEXIS 392 (C.A.A.F., July 13, 2020)*

Motion granted by *United States v. Cabrera, 2020 CAAF LEXIS 451 (C.A.A.F., July 29, 2020)*

Motion granted by *United States v. Cabrera, 2020 CAAF LEXIS 511, 2020 WL 5941616 (C.A.A.F., Sept. 17, 2020)*

Review granted by, Motion granted by, Remanded by, in part *MC. U.S. v. Cabrera, 2020 CAAF LEXIS 596 (C.A.A.F., Oct. 28, 2020)*

Prior History: [*1] Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judges: Brian E. Kasprzyk (mistrial), John L. Ferriter (arraignment), Mark D. Sameit (motions), Matthew J. Kent (motions, trial). Sentence adjudged 8 March 2018 by a general court-martial convened at Marine Corps Air Station Miramar, California, consisting of officer and enlisted members. Sentence approved by the convening authority: reduction to E-1, confinement for seven years, forfeiture of all pay and allowances, and a dishonorable discharge.

Counsel: For Appellant: Catherine M. Cherkasky, Esq., Captain Nicholas S. Mote, USMC.

For Appellee: Lieutenant George R. Lewis, JAGC, USN, Lieutenant Kimberly Rios, JAGC, USN.

Judges: Before TANG, LAWRENCE, and STEPHENS, Appellate Military Judges. Judges LAWRENCE and STEPHENS concur.

Opinion by: TANG

Opinion

TANG, Senior Judge:

Appellant was convicted, contrary to his pleas, of two specifications of *Article 120, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920 (2012)*. Specification 1 alleged he committed a sexual act against the victim by bodily harm; Specification 2 alleged he committed a sexual act against the victim while he knew or reasonably should have known she was asleep. After findings, the military judge **[*2]** merged both specifications into a single specification.[1]

Appellant asserts two assignments of error [AOEs]: (1) the Government was barred from trying Appellant after his first trial resulted in a mistrial; and (2) Specification 1 of the Charge fails to state an offense.[2] We find no

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[1] The Specification alleges Appellant did "commit a sexual act upon [LCpl Romeo—a pseudonym we have adopted for the victim], to wit: penetration of her vulva by the said Lance Corporal Cabrera's penis, by causing bodily harm to her, to wit: any offensive touching of the said [LCpl Romeo], however slight, including any non-consensual sexual act and non-consensual sexual contact; and penetration of the said [LCpl Romeo's] vulva by the said Lance Corporal Cabrera's penis, when he knew or should reasonably have known that she was asleep." Appellate Exhibit LXIV.

[2] This AOE is raised pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*. As originally drafted, Specification 1 alleged Appellant caused bodily harm by "any non-consensual sexual act *or* non-consensual sexual contact." The military judge amended the disjunctive "or" to a conjunctive "and" and also instructed the members on the judicially-created element of lack of consent by LCpl Romeo. We have considered this AOE and find it to be without merit. *See* *United States v. Matias, 25 M.J. 356, 363 (C.M.A. 1987)*, *cert. denied*, ***485 U.S. 968, 108 S. Ct. 1242, 99 L. Ed. 2d 441 (1988)***.

prejudicial error and affirm.

I. Background

Appellant and Lance Corporal [LCpl] Romeo were close friends and first-term Marines assigned to the same unit in Camp Pendleton. They spent time together after work and on the weekends. They would eat together, watch movies together, and drink together, often in Appellant's barracks room. LCpl Romeo had slept in Appellant's barracks room once, leaving in the middle of the night. Theirs was a close, but platonic, relationship.

On 14 January 2017, LCpl Romeo and Appellant were in the barracks socializing. LCpl Romeo inadvertently locked herself out of her room. When Marines invited Appellant and LCpl Romeo to go out to clubs in downtown San Diego, LCpl Romeo was initially reluctant to go. Nevertheless, Appellant urged her to go, and said that he would not go unless she went, so she relented and went out with the group.

The group of Marines went to several **[*3]** bars and clubs. Appellant and LCpl Romeo drank heavily, as did others. LCpl Romeo experienced an alcohol induced blackout and was not able to recall many of the events of that night. Sometime in the early morning hours of 15 January 2017, the group returned to Camp Pendleton.

The last thing LCpl Romeo remembered from that night was smoking a cigarette outside of one bar discussing whether the group should go to another one. The next morning, she awoke in Appellant's bed with a pillow over her face. Her pants were down. Appellant was penetrating her vulva with his penis, withdrew, and then penetrated her anus with his penis. She panicked and froze, then fell asleep or lost consciousness. She next awoke in the light of morning. Her pants, which had been down, were up, and there was no longer a pillow over her face. Appellant was lying on the floor of the room, apparently asleep, with his arm over his face.

LCpl Romeo woke Appellant and demanded he tell her where her cell phone was; then she took her phone and drove back to her barracks, which were a short distance away. While sitting in her car, she called the base sexual assault hotline and requested assignment of a victim advocate.

By **[*4]** the time she found the barracks duty Marine to help her get into her room, she found Appellant waiting for her near her door. She ignored him. From the time LCpl Romeo left Appellant's room and throughout the next several days, she received several text messages and calls from him. Again, she ignored him. She went to the hospital later that day and submitted to a sexual assault forensic exam [SAFE]. Special agents of the Naval Criminal Investigative Service [NCIS] interviewed her a few days later when she elected to make her sexual assault report unrestricted.

During her NCIS interview, with her victims' legal counsel [VLC] present, the special agent asked LCpl Romeo to consider whether she would permit him to forensically search her cell phone to recover the text messages and call logs from the morning of the assault. The Special Agent warned LCpl Romeo that he could only conduct a full extraction of the cell phone; he could not simply extract the messages from Appellant or the messages from a particular time frame. Days later, LCpl Romeo informed the Special Agents she would not consent to a search of her cell phone. Inexplicably, the agents did not immediately seek LCpl Romeo's permission **[*5]** to take screenshots of the pertinent text messages from LCpl Romeo's phone, which would permit retention of crucial evidence without a full phone extraction. Nor did they ever discuss the content of the messages, even though they had repeatedly emphasized the importance of building a timeline of the events of 14-15 January 2017.

A few days after her interview, LCpl Romeo participated in a controlled call with Appellant. He denied that he had sex with her that night. When NCIS Special Agents interviewed Appellant the day after the controlled call, he persisted in denying any sexual contact with LCpl Romeo. He claimed she slept in his bed and he slept on the floor. He claimed that LCpl Romeo awoke early in the morning, said she was going to smoke, then left. Because she was still drunk, Appellant explained, he was worried about her. He called and texted her and tried to find her because he was concerned for her safety.

The Special Agents left the room to take a break. When they returned, they told Appellant that LCpl Romeo had a sexual assault examination. They also told him the kit had been analyzed and showed unknown male DNA. They asked him what he would say if the kit revealed this **[*6]** was his semen. Appellant stated he would be "shocked" and, if that were the case, he must have blacked out and not remembered the sex act.[3] Then he asked what consequences he might face and whether

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[3] Prosecution Exhibit [Pros. Ex.] 13 at 52; Pros. Ex. 12 at 09:57:43 AM.

he could refuse to provide his DNA for comparison. When the Special Agents told him he could not refuse, he relented and said, "Yeah, I did it."[4] He admitted that he knew LCpl Romeo was asleep, but he pulled her pants down and penetrated her vagina anyway, stopping only when she moved in her sleep. Forensic analysis of the SAFE kit revealed that Appellant's DNA was, in fact, found on LCpl Romeo's genitalia and anus.

In an attempt to recover the text messages Appellant sent on the morning of the assault, the Government pursued a few courses of action. They requested and received a command authorization to seize and search Appellant's cell phone, but they could not conduct a forensic analysis. They sent a subpoena to Appellant's cellular service provider but could only obtain details of phone calls and could not obtain details or content of any text messages. The Government did not pursue these same investigative methods for LCpl Romeo's phone or cell phone records. They had offered her the opportunity **[*7]** to consent to search and when she refused, they did not ask whether she would consent to a less invasive review of her phone.

Not satisfied with this gap in the Government's evidence, the trial counsel Captain Westman later re-approached LCpl Romeo, again seeking the text messages. LCpl Romeo answered that she did not have the messages, and the trial counsel made no further inquiries. The trial counsel understood that LCpl Romeo "didn't have [the text messages] on her phone anymore for whatever reason," which the trial counsel *assumed* meant "she had a different phone or something."[5] Trial counsel merely accepted that LCpl Romeo was unable to provide the text messages "for some specific reason other than because she just wasn't willing to provide them."[6] But the trial counsel never determined what that "specific reason" might have been. She simply left the matter unresolved.

This unresolved matter reared its head during LCpl Romeo's testimony at trial, when the details surrounding her phone led to a Defense objection that revealed the trial counsel had failed to disclose statements she was constitutionally required to disclose. As the trial counsel apparently predicted, the civilian defense **[*8]** counsel cross-examined LCpl Romeo and established that she had refused to provide her cell phone to NCIS Special Agents for search. On re-direct examination, seeking to elicit a more palatable reason why LCpl Romeo refused the Special Agent's request, the trial counsel asked a leading question to which the military judge sustained a Defense objection. According to the trial counsel, she was intending to ask whether LCpl Romeo could not provide the messages because she had a different phone or because her "phone had deleted messages," though the trial counsel did not actually know the reason because she had never asked.[7]

In response, LCpl Romeo answered, to the stated surprise of the trial counsel, that her Apple iPhone automatically deleted text message conversations after a certain period of time, without user intervention. She said, "I had had a problem with the . . . phone . . . after a certain amount of time, it'll delete the text messages, it'll delete the phone records, I don't have any control over that; it's just something that my phone does automatically."[8]

Skeptical of this response, the civilian defense counsel requested an *Article 39(a), UCMJ*, hearing to challenge the trial **[*9]** counsel's conduct. He alleged the trial counsel's failure to disclose this statement by LCpl Romeo—assuming it had been made to the trial counsel pre-trial—constituted a violation of the Government's obligations pursuant to *Giglio v. United States*[9] to disclose impeachment information. The trial counsel said she had never heard LCpl Romeo make this claim before, as she had never demanded a clear answer why LCpl Romeo could not provide the messages. Although the trial counsel had asked a leading question, she said she was not trying to suggest a specific response because she did not know the answer.

In the course of trying to discern whether LCpl Romeo had previously made this seemingly incredible claim to the trial counsel, and whether trial counsel then failed to disclose it, the civilian defense counsel and military judge learned of several discovery violations. In addition, while litigating this discovery violation, the military judge came to believe that the trial counsel made deliberately evasive or inconsistent statements[10]

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[4] Pros. Ex. 13 at 53; Pros. Ex. 12 at 10:02:30 AM.

[5] Original Record [Orig. Rec.] at 668. This is a verbatim transcript of the first trial, which ended in a mistrial.

[6] *Id.* at 669.

[7] *Id.* at 679.

[8] *Id.* at 661.

[9] *405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)*.

[10] *See* Orig. Rec. at 798-800.

to him about her conversations with LCpl Romeo leading up to trial. After accepting written filings and hearing oral argument over the course of two days, the **[*10]** military judge declared a mistrial. The propriety of the judge's action in declaring a mistrial—and whether the Defense consented to it—are key issues in this appeal.

After the mistrial, the convening authority ordered a second trial. The Defense moved to dismiss the charges on the basis of double jeopardy, arguing the Defense had not consented to a mistrial, which they argued was not manifestly necessary. The military judge denied this motion, and the members convicted Appellant of sexual assault.

Further facts necessary to resolve this AOE are included below.

II. Discussion

A. The Military Judge's Ruling

The military judge issued a written ruling ordering a mistrial and outlining findings of fact and conclusions of law.[11] The military judge found that the trial counsel had committed four different discovery violations.

1. Incomplete response relating to Government contact with LCpl Romeo

The Defense requested to interview LCpl Romeo before trial. She refused. In response, the Defense requested discovery from the Government indicating the date and general topic discussed during any meeting between the trial counsel and LCpl Romeo. The civilian defense counsel amplified his request with **[*11]** an email explaining why he requested the information and, perhaps sensing the trial counsel might lack experience, providing examples[12] of the types of statements that would be considered discoverable under *Giglio v. United States*. He emphasized his concern that, having no access to interview LCpl Romeo, it was doubly important that the Government disclose any of her inconsistent statements and new substantive statements. In the email response, the trial counsel provided only the dates of interviews, stated that LCpl Romeo now remembered going out to the bars about an hour later than she previously stated, and indicated that the Government had complied with and would continue to fully comply with its discovery obligations.

During trial, just before cross-examination, the civilian defense counsel asked the trial counsel, "[H]ave there been any additional interviews of LCpl [Romeo], or are there any additional disclosures since my email over the weekend?"[13] The trial counsel said, "No."[14] Later events revealed this was not correct—the trial counsel not only had a substantive discussion with LCpl Romeo, but LCpl Romeo provided an inconsistent statement the trial counsel failed to disclose. The **[*12]** trial counsel stated she did not disclose this additional interaction with LCpl Romeo because she thought the civilian defense counsel only sought disclosure of the times the trial counsel "met with [LCpl Romeo] to talk about testimony, substantive things, to go through her testimony."[15]

The military judge ruled that the trial counsel's terse response to the Defense written discovery request was "at a minimum, incomplete and at worst, misleading."[16] The military judge explained that the trial counsel should have fully complied with the request or, if she did not believe such information was subject to discovery, she should have so stated. Instead, she "provided incomplete information regarding both the . . . pretrial interaction with [LCpl Romeo] and *Giglio* information."[17]

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[11] Appellate Exhibit [App. Ex.] LXI at 635-53. This exhibit contains all appellate exhibits submitted during the first trial that resulted in a mistrial.

[12] "For example, LCpl [Romeo] reports to the [sexual assault forensic examiner] that she has no memory from the bar until she feels sex occurring while there is a pillow over her face. If she now remembers bits and pieces of that time that she previously did not remember, that should be disclosed." The civilian defense counsel delineated two other hypothetical examples then concluded "[t]hese are just three of many examples I can think of and are without regard to whether the inconsistency is understandable or directly beneficial to the Defense in your opinion. If her interviews with [trial counsel] reveal no information inconsistent with her prior statements, please confirm such." App. Ex. LXI at 593.

[13] *Id.* at 628 (Affidavit of Civilian Defense Counsel).

[14] Trial counsel did state that LCpl Romeo had been present when trial counsel interviewed her mother over the weekend.

[15] Orig. Rec. at 808.

[16] App. Ex. LXI at 649.

[17] *Id.* at 649-50.

The military judge found, considering those actions:

> when viewed in light of the arguments made in court, the court is left with the inescapable conclusion that [the trial counsel] was either unaware of the state of the evidence in the custody of the government, does not fully understand the discovery requirements of a prosecutor, was actively trying to play discover[y] games, or some combination of the above. Regardless **[*13]** of the reason, the information requested was *Giglio* material that should have been disclosed.[18]

2. Failure to disclose LCpl Romeo's inconsistent statement

Although the trial had come to a halt over the issue of LCpl Romeo's cell phone and text messages, it was a different statement that the military judge found to be the most egregious discovery violation. As detailed above, the civilian defense counsel requested a list of all of the dates the trial counsel met with LCpl Romeo. In between direct and cross-examination, the civilian defense counsel asked the trial counsel whether there had been any additional interviews since the discovery response. The trial counsel stated that LCpl Romeo was present when the trial counsel interviewed her mother but that she had not interviewed LCpl Romeo.

However, the trial counsel failed to disclose the fact that she also interviewed LCpl Romeo on the morning of trial. The trial counsel sought to clarify LCpl Romeo's recollection of two key points—her body positioning and the state of her clothes during the assault and after the assault when she first awoke. At trial, LCpl Romeo testified that when she awoke during the sexual assault she was on her back **[*14]** and that when she awoke after the assault, she was on her stomach. The detail about waking up on her stomach was new.

In its written motion, the Defense pointed out this new detail: "During the direct examination of LCpl [Romeo], Trial Counsel elicited the witness to testify that when she awoke 'on the second time' she awoke on her stomach. Trial Counsel had not previously disclosed this information which was not revealed in the NCIS interview to Defense."[19]

The Government responded, "[A]pproximately ten minutes before trial, LCpl [Romeo] stated to Trial Counsel for the first time that she woke up twice during the alleged assault, once on her back and once on her stomach."[20] The Government conceded that "[i]n her NCIS interview, LCpl [Romeo] had only described waking up on her back."[21]

During oral argument, the Government conceded it should have disclosed this statement pursuant to *Giglio v. United States*. The trial counsel explained that she believed at first that LCpl Romeo had made an inconsistent statement, but then she checked her notes (which were incorrect) and came to believe that this was not an inconsistent statement. She stated that her notes were incorrect because she recorded the **[*15]** special agent's question, not LCpl Romeo's response, but mistook this notation to represent LCpl Romeo's answer.

Consistent with the Government's concession, the military judge found this constituted a discovery violation.

3. Mishandling non-privileged communications as privileged

The weekend before trial, the trial counsel gave notice she intended to present evidence in presentencing that LCpl Romeo had experienced suicidal ideations. In response, the Defense requested any non-privileged materials relating to LCpl Romeo's mental state and any evidence of trauma. The trial counsel responded, "I can request non-privileged records related to [LCpl Romeo's mental health treatment] currently in possession of the Government and will provide whatever I find to the defense as soon as possible."[22] The trial counsel did not provide any responsive documents.

Then, during voir dire of the members, one member indicated that he knew LCpl Romeo because she was temporarily assigned to his unit. As the command sergeant major, he received email updates on LCpl Romeo's well-being, as reported by her chain of command, none of whom were mental health treatment providers. Although he knew she was seeing

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[18] *Id.* at 650.

[19] *Id.* at 562.

[20] *Id.* at 603.

[21] *Id.* at 612.

[22] *Id.* at 593.

"counselors" **[*16]** in relation to a past suicidal ideation, the emails he described were command-generated updates based on leaders' interactions with LCpl Romeo.[23]

This member was excused from further service on the panel. Following this member's excusal, consistent with his earlier request, the civilian defense counsel asked the trial counsel to request the emails. The trial counsel contacted the excused member, who provided the emails. After her legal assistant received the emails, the trial counsel elected to treat the emails as though they were privileged. The trial counsel did not read them but instead forwarded them to LCpl Romeo's VLC.

The military judge only learned the Government had the emails after the civilian defense counsel brought up the issue on the record. The civilian defense counsel noted that he had asked the trial counsel to find and disclose the emails the excused member had discussed, and the trial counsel indicated that she would do so.[24] The trial counsel responded that "[w]e have since gotten emails from [the excused member], and the VLC is reviewing them because of what they might potentially contain."[25] She also stated she sent the emails to the VLC first because they "directly concern[ed] **[*17]** his client[ ]," and "because [the emails] had to deal with such a sensitive subject matter," so she thought it "would be something that he would be interested in seeing."[26] During questioning of the trial counsel, the military judge established that the trial counsel had entrusted the VLC to make the discovery determination on her behalf and to decide whether emails sent by LCpl Romeo's chain of command to other members of her chain of command were privileged.

The military judge ruled that the trial counsel "failed to exercise due diligence" in this matter.[27] The Defense had requested the information, it was subject to discovery under Rule for Courts-Martial [R.C.M.] 701 absent a claim of privilege, and the trial counsel stated she would provide it, but then she failed to do so and instead submitted it to the victim's legal counsel "because of a generalized concern regarding privilege."[28] The military judge held that, because the information was a routine chain of command update on LCpl Romeo's wellbeing, "it is highly unlikely that the contents of these routine emails would qualify . . . as privileged material under" Military Rule of Evidence 513.[29]

4. Failure to disclose note to VLC during LCpl Romeo's testimony

During **[*18]** the Defense cross-examination of LCpl Romeo, or immediately after, the trial counsel belatedly sought to ascertain the reason why LCpl Romeo could not provide the text messages from Appellant. She passed a note to LCpl Romeo's VLC, sitting in the gallery, asking, "She no longer has that phone, correct? When TC talked about texts, calls with her, she was willing to provide but didn't have."[30] The VLC responded, "I can't recall but either new phone or messages were already deleted."[31] Based on this response, the trial counsel asked LCpl Romeo the leading question detailed above.

The military judge did not know of the existence of this note exchange until trial counsel cited it in defense of her contention that LCpl Romeo had never told her why she no longer had the text messages.[32] At that point, the military judge sua sponte challenged the propriety of the trial counsel consulting VLC during LCpl Romeo's testimony. As it pertained to discovery, he ruled that the note contained material discoverable under *Giglio v. United States* "because it bears directly on the impeachment of" LCpl Romeo.[33] The military judge interpreted the note as suggesting that the trial counsel already knew "of at least **[*19]** one possible innocuous explanation as to why the government [did] not have the text messages from the accused" other than the one

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[23] Orig. Rec. at 420.

[24] *See id.* at 794.

[25] *Id.* at 837.

[26] *Id.* at 838.

[27] App. Ex. LXI at 650.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 547, 559.

[31] *Id.* at 558.

[32] The civilian defense counsel and the military judge both questioned the credibility of the trial counsel's claim that she had no advance notice of LCpl Romeo's statement about why she no longer had the text messages.

[33] App. Ex. LXI at 648.

that had been disclosed to the defense.[34] And the note contained "two additional explanations" made by LCpl Romeo's agent on her behalf, neither of which had been disclosed to the defense.[35]

In light of the trial counsel's earlier incomplete disclosures relating to her meetings with LCpl Romeo and the timing of the note, the military judge held the failure to disclose the note's contents constituted a discovery violation. The military judge found the note was "effectively an investigative step by the government to shore up a potential hole in their case—at the very time defense counsel [was] making it."[36] He added:

> While it is not hard to understand how a victim and her lawyer may be more inclined to cooperate with the government, that does not mean the government should be able to exploit that relationship during trial to ambush the defense with previously undisclosed factual assertions designed to rehabilitate the victim's credibility.

5. Conclusion that mistrial was justified

Before granting the mistrial, on the record, the military judge stated that the **[*20]** undisclosed discovery could have changed the Defense strategy during motions practice and at trial. After properly citing the cases and rules pertinent to discovery, discovery violations, and mistrials, the military judge explained:

> The court does not understand how [the trial counsel] could think to notify defense counsel in her email response [the weekend before trial] about an hours' disparity in [LCpl Romeo's] recollection as to when they leave to go out drinking on the night in question, but did not think to inform defense counsel about [LCpl Romeo's] disclosure the morning before taking the stand that she now recalls waking up twice and once on her stomach.
>
> This is especially disturbing in light of a) how obviously well-rehearsed [LCpl Romeo's] direct testimony was and b) how [the trial counsel] was able to work that newly disclosed information into her direct examination.
>
> The cumulative nature and piecemeal manner in which the discovery violations by the government came to light in this case would undermine confidence in any verdict because any remedy short of mistrial would necessarily require the accused and the court to rely on the detailed trial counsel to understand and comply **[*21]** with their discovery obligations.[37]

He then weighed the feasibility and sufficiency of several possible remedies for discovery violations, as listed in Rule for Courts-Martial 701(g)(3). He rejected the Defense-requested remedy of dismissal with prejudice, which would "amount to a windfall for the accused."[38] He concluded that Appellant could "still receive a fair trial should the convening authority" decide to pursue one.[39]

He further rejected remedies less drastic than a mistrial as insufficient. He did not believe it would be sufficient to merely order the Government to permit proper discovery or to grant a continuance because "the violations [were] all at least in part a result of detailed trial counsel failing to fully understand or appreciate her discovery responsibilities."[40] He could not disallow presentation of the withheld evidence, as such evidence was impeachment evidence that would benefit the Defense; nor could he strike LCpl Romeo's entire testimony because the result would be the same as dismissal with prejudice. Recognizing that a mistrial is a "drastic remedy," he ruled such remedy was the "order [that was] just under the circumstances" under Rule for Courts-Martial 701(g)(3)(D).[41]

B. Double Jeopardy after a Mistrial

After a mistrial is declared, **[*22]** under Rule for Courts-Martial 915(c)(2), further proceedings are permitted "except when the mistrial was declared after jeopardy attached and before findings, and the declaration was: (A) [a]n abuse of discretion and without the consent of the defense; or (B) [t]he direct result of intentional prosecutorial misconduct designed to necessitate a

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[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 647.

[38] *Id.* at 651.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 652.

mistrial."[42] Neither party argues the Government acted deliberately to necessitate a mistrial. Both parties agree the mistrial was declared after jeopardy attached and before findings. Therefore, Appellant's second trial could proceed unless the mistrial was an abuse of discretion *and* was without the consent of the Defense.

1. Dismissal with prejudice was not appropriate

On appeal, Appellant argues the military judge "abused his discretion in declaring a mistrial *instead of dismissing the case with prejudice*."[43] Arguing that his "first trial was polluted with discovery violations that materially altered the nature of the case," he then argues that "[d]ismissal would have been the *most appropriate* remedy in this case."[44]

Dismissal is a "drastic remedy" that is only "appropriate when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings."[45] Dismissal **[*23]** is a remedy of last resort that is not appropriate if "an error can be rendered harmless" by other corrective action.[46] In *United States v. Stellato*, the Court of Appeals for the Armed Forces reversed the ruling of the service court of criminal appeals and reinstated the military judge's ruling dismissing charges with prejudice based on "continual and egregious" discovery violations.[47] The violations present in *Stellato* were of a far greater magnitude and severity than those present in this case.[48]

By the grant of a mistrial Appellant claims he was prejudiced in four ways in his second trial. We disagree with each of his contentions.

First, he argues he was prejudiced by revealing his strategy during the first trial. However, in his written ruling granting a mistrial, the military judge found that the civilian defense counsel had already revealed his strategy through pretrial communications and requests. The strategy—involving a motive to fabricate, drunken consent, and mistake of fact—would necessarily be revealed through pretrial motions, proposed voir dire, and in the Defense's request for instructions regardless of whether there had been one trial or two.[49]

Second, he argues the **[*24]** members panel in the second trial was confused by references to the first trial. Our review of the record reveals no such confusion. During examination of LCpl Romeo, when necessary, the parties referred to a "previous hearing."[50] No member questioned the nature of this hearing.

Third, Appellant argues that because the new trial counsel "were in direct communication with the previous trial counsel," the "taint" of the original discovery violations was not mitigated.[51] However, this is no indication that any discovery violations occurred in the course of the second trial. The first trial counsel's communications with VLC, via email and text message, were disclosed and were the subject of additional litigation. Furthermore, the military judge ordered the new trial counsel to take "aggressive remedial actions" to ensure no further discovery violations occurred, including by reviewing the prior trial counsel's file.[52] The new trial counsel acknowledged this admonishment and, absent evidence suggesting otherwise, we presume he did so.

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[42] This rule is consistent with the Supreme Court's holding in *United States v. Dinitz, 424 U.S. 600, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976)*, in which the Court recognized that an appellant "may nonetheless desire 'to go to the first jury and, perhaps, end the dispute then and there with an acquittal'" even though grounds exist to justify granting a mistrial. *Id. at 608* (quoting *United States v. Jorn, 400 U.S. 470, 484-85, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971)* (plurality opinion)).

[43] Appellant's Brief of 12 Jun 2019 at 21 (emphasis added).

[44] *Id.* at 21, 26 (emphasis added).

[45] *United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004)*.

[46] *United States v. Stellato, 74 M.J. 473, 488 (C.A.A.F. 2015)* (quoting *Gore, 60 M.J. at 187*).

[47] *Id. at 482*.

[48] As an initial point of contrast, in *Stellato*, the "trial counsel . . . affirmatively and specifically declined to examine the contents of the box [of evidence] despite [an] . . . explicit offer for him to do so" and after he was told that the box contained notes, journals, and correspondence between a child victim and her mother containing the victim's statements describing the allegations against Major Stellato—including one note described as a recantation. To make matters worse, the trial counsel deliberately rejected the invitation to inspect the contents of the box in order to avoid having to disclose exculpatory evidence to the defense. *Id. at 477-78, 486*.

[49] *See* App. Ex. LXI at 526-34.

[50] Record at 301.

[51] Appellant's Brief at 28.

[52] Record at 95.

Fourth, Appellant argues that he was prejudiced by the mistrial because he elected to release his civilian defense counsel before the second trial because he could **[*25]** not afford to pay them. Appellant was expecting a child and decided he would prioritize saving for the baby. The military judge conducted an extensive colloquy with Appellant before permitting the civilian defense counsel to withdraw. He confirmed that Appellant knowingly and voluntarily desired to release his civilian counsel, he had not been pressured to do so, and he believed it was in his best interests. The military judge informed Appellant that the counsel would be ethically obligated to represent Appellant, even if he could not pay them, and the military judge would compel them to do so if Appellant desired.[53] Nevertheless, Appellant unequivocally stated that it was his own preference to release his civilian counsel. Although he stated he was satisfied to proceed to trial with his two detailed defense counsel, at the urging of the military judge, the senior defense counsel was additionally appointed to the case.

We find that Appellant was not entitled to the drastic remedy of dismissal with prejudice, and his second trial was not prejudiced by the fact that his first trial ended in a mistrial. Therefore, we do not consider whether dismissal would have been a remedy *preferable* to **[*26]** Appellant. Rather, we consider whether there was manifest necessity to grant a mistrial and whether Appellant consented.

2. The military judge did not abuse his discretion in finding the Defense consented to a mistrial

The Defense made inconsistent statements about whether they consented to a mistrial. The Defense filed a written "Motion to Dismiss with Prejudice or Grant Other Appropriate Relief . . ." in which it asked for, in alternative to dismissal with prejudice, a mistrial.[54]

As oral argument progressed and it appeared likely that the military judge would grant a mistrial, the Defense focused their arguments on why dismissal with prejudice was the only adequate remedy. When directly asked to state the Defense position on a mistrial, the civilian defense counsel stated equivocally, "[W]e believe a mistrial not to be appropriate," but that it would be "more appropriate than continuing with this trial, with this trial team, or anyone associated with this trial team."[55]

When directly asked whether the Defense would object to a mistrial, the civilian defense counsel said, "I do," and noted that any "lack of objection has preconditions" requesting that the military judge impose "certain measures" **[*27]** to "attempt to remedy the prejudice that's created with the mistrial."[56] He also stated, "[I]f the Court can figure out a way that a mistrial eliminates and alleviates those issues, then we're in agreement" and that "we would object to a mistrial on just its face without protective measures."[57]

Instead of a mistrial, the civilian defense counsel requested to continue the trial, with the members then impaneled, but subject to conditions that included: a continuance; disqualifying the trial counsel and all others from her office; prohibiting newly assigned trial counsel from communicating with the trial counsel and learning the Defense strategy; setting a "new motion's [sic] date to relitigate certain motions"; permitting Defense to "do a new opening statement," and to "re-open cross-examination" of LCpl Romeo.[58] The military judge noted that this requested remedy was, in all but name and a new panel, a mistrial. We agree.

In his written ruling, the military judge stated the mistrial was granted "over the objection of the accused."[59] When the charges were re-referred and the parties litigated the Defense motion to dismiss charges on the grounds of Double Jeopardy, the military judge for the second **[*28]** trial concluded that the Defense's stated opposition was merely to gain tactical advantage and that the Defense had in fact consented to the mistrial.

Given the Defense's conflicting statements and their strident arguments that the Government's actions justified dismissal with prejudice, the second military judge's finding that the Defense consented to the mistrial does not constitute an abuse of discretion. However, even if the Defense had not consented to the mistrial, there was manifest necessity to grant a mistrial

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[53] The military judge noted that any debts owed could be the subject of later negotiation or settlement but that he would nonetheless order the civilian defense counsel to represent Appellant if he so desired.

[54] App. Ex. LXI at 554.

[55] Orig. Rec. at 855.

[56] *Id.* at 857.

[57] *Id.* at 857-58.

[58] *Id.* at 867-68.

[59] App. Ex. LXI at 653.

even over Defense objection.

3. There was manifest necessity to grant the mistrial

A mistrial is one of the possible remedies for a discovery violation.[60] "[M]istrials are disfavored."[61] A "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 cast substantial doubt upon the fairness of the proceedings."[62]

A military judge has "considerable latitude" in determining whether to grant a mistrial.[63] It is a matter of "sound discretion," which we will not disturb in the absence of a clear abuse of that discretion.[64] A military judge abuses his **[*29]** discretion "when [the military judge's] findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law."[65]

The Defense arguments in support of dismissal—articulated at trial and on appeal—all establish the manifest necessity of a mistrial in this case. The military judge encapsulated the evidence presented in his findings of fact. Those findings are supported by the record, are not clearly erroneous, and Appellant does not dispute them. The military judge recited the applicable principles of law, and his decision was reasonable. In addition to the reasons cited in his ruling, he also articulated the importance of the withheld discovery to the Defense case.

The Defense articulated the importance of LCpl Romeo's statement that she woke up on her stomach.[66] Based on all prior statements of which the Defense was aware, LCpl Romeo described how she had woken up, (only) on her back, with a pillow on her face. The Defense anticipated that the Government would argue Appellant put a pillow over the victim's **[*30]** face so that she could not identify her assailant. The Defense viewed the pillow as a "real bad fact"[67] that severely undercut Appellant's defense, which was that two friends engaged in a regrettable experience of drunken sex that neither remembered but during which Appellant reasonably believed LCpl Romeo consented. Then, Appellant falsely confessed, which the Defense argued was supported by the fact that he had gotten the facts wrong and only confessed to the version of events LCpl Romeo relayed to him in the pretext phone call. The Defense argued that knowing LCpl Romeo awoke on her stomach, face down, would allow them to argue Appellant never put a pillow over her face. Rather, they could argue that her face was on the pillow because she had been sleeping on her stomach and she was "confusing a pillow [on her face] for being on her stomach."[68] The civilian defense counsel then described how he curtailed potential aspects of the Defense strategy because of this "bad fact," and he could present a different strategy altogether after having learned of this disclosure.

Based on this impact on the Defense strategy and the reasons cited by the military judge, we find that it was manifestly **[*31]** necessary to grant a mistrial. In this case, granting a mistrial was "within the range of remedies available to the military judge," and the military judge did not abuse his discretion in granting a

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[60] *See* R.C.M. 701(g)(3), which permits a military judge to "(A) Order the party to permit discovery; (B) Grant a continuance; (C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and (D) Enter such other order as is just under the circumstances"—which could include granting a mistrial.

[61] *United States v. Commisso, 76 M.J. 315, 318 (C.A.A.F. 2017)* (citing *United States v. Diaz, 59 M.J. 79, 90 (C.A.A.F. 2003))*.

[62] R.C.M. 915(a).

[63] *United States v. Seward, 49 M.J. 369, 371 (C.A.A.F. 1998)*.

[64] *United States v. Rosser, 6 M.J. 267, 270, (C.M.A. 1979)*

[65] *Stellato, 74 M.J. at 480* (alteration in original) (quoting *United States v. Miller, 66 M.J. 306, 307 (C.A.A.F. 2008))*.

[66] The Government's written motion inconsistently described two versions: 1) that LCpl Romeo woke up once on her back while she was being assaulted and then again on her stomach when Appellant was sleeping; and 2) that LCpl Romeo stated she awoke twice while she was being assaulted, once on her back and the second time on her stomach. *See* App. Ex. LXI at 602, 612. Both renditions were inconsistent with LCpl Romeo's NCIS interview; the second rendition was inconsistent with her testimony at the first trial. The trial counsel stated that LCpl Romeo told her the first version, not the second, and that her written filing was "absolutely poorly worded." Orig. Rec. at 806.

[67] *Id.* at 774.

[68] *Id.* at 763.

mistrial.[69] Had the first trial proceeded to findings, the Government's discovery violations would have "cast substantial doubt upon the fairness of the proceedings."[70]

Because there was manifestly necessary for the military judge to grant a mistrial, the Government was permitted to re-refer the charges and try Appellant at a second court-martial, even if the mistrial had been granted over his objection.

We believe it is worth reiterating the words of our superior court from *United States v. Stellato*, describing the Government's discovery obligations as follows:

> Discovery in the military justice system, which is broader than in federal civilian criminal proceedings, "is designed to *eliminate pretrial gamesmanship*, reduce the amount of pretrial motions practice, and reduce the potential for surprise and delay at trial." This Court has held that trial counsel's "obligation under *Article 46," UCMJ*, includes *removing "obstacles to defense access to information"* and providing "such other assistance **[*32]** as may be needed to ensure that the defense has an equal opportunity to obtain evidence.[71]

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. *Arts. 59*, *66, UCMJ*.

The findings and sentence are **AFFIRMED**.

Judges LAWRENCE and STEPHENS concur.

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[69] *Id.* at 491.

[70] R.C.M. 915(a).

[71] *Stellato, 74 M.J. at 481 (C.A.A.F. 2015)* (emphasis added) (citations omitted) (quoting *United States v. Jackson, 59 M.J. 330, 333 (C.A.A.F. 2004)*; *United States v. Williams, 50 M.J. 436, 442 (C.A.A.F. 1999))*.

United States v. Harrington

United States Air Force Court of Criminal Appeals

October 14, 2021, Decided

No. ACM 39825

Reporter
2021 CCA LEXIS 524 *; 2021 WL 4807174

UNITED STATES, Appellee v. Sean W. HARRINGTON, Airman First Class (E-3), U.S. Air Force, Appellant

Notice: THIS IS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER *AFCCA RULE OF PRACTICE AND PROCEDURE 30.4*.

Subsequent History: Review granted by *United States v. Harrington, 2022 CAAF LEXIS 95, 2022 WL 508870 (C.A.A.F., Jan. 28, 2022)*

Later proceeding at *United States v. Harrington, 2022 CAAF LEXIS 96, 2022 WL 509886 (C.A.A.F., Jan. 31, 2022)*

Review granted by *United States v. Harrington, 2022 CAAF LEXIS 201 (C.A.A.F., Mar. 14, 2022)*

Prior History: **[*1]** Appeal from the United States Air Force Trial Judiciary. Military Judge: Christopher M. Schumann. Sentence: Sentence adjudged 1 July 2019 by GCM convened at Cannon Air Force Base, New Mexico. Sentence entered by military judge on 30 July 2019: Dishonorable discharge, confinement for 14 years, and reduction to E-1.

Counsel: For Appellant: Major M. Dedra Campbell, USAF; Major Matthew L. Blyth, USAF.

For Appellee: Lieutenant Colonel Matthew J. Neil, USAF; Major Zachary T. West, USAF; Mary Ellen Payne, Esquire.

Judges: Before POSCH, RICHARDSON, and CADOTTE, Appellate Military Judges. Judge RICHARDSON delivered the opinion of the court, in which Senior Judge POSCH joined. Judge CADOTTE filed a separate opinion concur-ring in the result.

Opinion by: RICHARDSON

Opinion

RICHARDSON, Judge:

A general court-martial comprised of officer members convicted Appellant, contrary to his pleas, of one specification of involuntary manslaughter and one specification of communicating a threat in violation of *Articles 119* and *134*, Uniform Code of Military Justice (UCMJ), *10 U.S.C. §§ 919*, *934*, *Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*).[1],[2] Also, Appellant was found guilty, consistent with his pleas, of one specification of divers use of cocaine and one specification **[*2]** of divers use of marijuana, both in violation of *Article 112a, UCMJ, 10 U.S.C. § 912a*, *Manual for Courts-Martial, United States* (2012 ed.).[3] Additionally, consistent with his pleas, Appellant was found not guilty of one specification of aggravated assault alleged in violation of *Article 128, UCMJ, 10*

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[1] All charged offenses in this case occurred prior to 1 January 2019, and were preferred and referred to court-martial after that date. Unless otherwise noted, all references in this opinion to the non-punitive articles of the Uniform Code of Military Justice (UCMJ), Rules for Courts-Martial (R.C.M.), and Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

[2] Appellant was charged with, and pleaded not guilty to, murder in violation of *Article 118, UCMJ, 10 U.S.C. § 918 (2016 MCM)*, but was convicted of the lesser offense of involuntary manslaughter in violation of *Article 119, UCMJ, 10 U.S.C. § 919 (2016 MCM)*. Nonetheless, the announced finding to this charge was "guilty" when it should have been announced as "not guilty, but guilty of a violation of *Article 119*." *See* R.C.M. 918(a)(2)(B). While the findings worksheet also had this error, we note the military judge told the members in his findings instructions that the lesser-included offense of involuntary manslaughter was a violation of *Article 119*. Appellant has not claimed prejudice from this error, and we find none.

[3] These offenses occurred between on or about 4 January 2014 and on or about 24 July 2017.

U.S.C. § 928 (2016 MCM)].[4]

The court-martial sentenced Appellant to a dishonorable discharge, 14 years of confinement, and reduction to the grade of E-1. The convening authority did not disturb the adjudged sentence.

Appellant, through counsel, raises 12 assignments of error, several of which we have reordered. Three relate to Appellant's conviction for involuntary manslaughter: (1) whether the military judge abused his discretion with his instructions to the members on false exculpatory statements and accident; (2) whether the circuit trial counsel improperly argued uncharged misconduct and made improper comments during argument on the merits; and (3) whether Appellant's conviction is factually and legally sufficient. Appellant's counsel also asserts the following assignments of error: (4) whether Appellant's conviction for communicating a threat is factually and legally sufficient; **[*3]** (5) whether the military judge abused his discretion in denying a defense motion to dismiss for the Government's failure to disclose an alleged relationship between the trial counsel and an investigative agent; (6) whether Appellant was denied a fair trial because court members heard numerous instances of impermissible testimony; (7) whether the military judge abused his discretion by allowing a victim's parents to deliver unsworn statements in a question-and-answer format with trial counsel; (8) whether the military judge abused his discretion by denying a defense request to instruct the members that the maximum punishment for involuntary manslaughter was ten years; (9) whether the trial counsel made improper arguments in sentencing; (10) whether Appellant's sentence was inappropriately severe; (11) whether the convening authority erred by failing to take action on the sentence; and (12) whether the cumulative effect of errors substantially impaired the fairness of Appellant's trial. Appellant personally[5] supplements issue (10), and raises three additional issues on appeal: (13) whether the Government denied him his right to a speedy trial under *Article 10, UCMJ, 10 U.S.C. § 810*, and Rule for Courts-Martial (R.C.M.) 707; (14) whether the military **[*4]** judge abused his discretion in denying a Defense motion to suppress Appellant's statements to police; and (15) whether the Government's post-trial processing delays warrant sentence relief.

We have carefully considered issues (6), (8), (12), (13), and (14), and we find they warrant neither further discussion nor relief. *See United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987)*. As to the remaining issues, we find no error that materially prejudiced Appellant's substantial rights, and we affirm the findings and sentence.

I. Background

MJ was shot in the head with Appellant's .45-caliber handgun in Appellant's garage in the early morning of 5 July 2018. He died four days later. Appellant and MJ, a fellow Airman, were friends and co-workers.

At the time of the shooting, Appellant was facing court-martial charges for other misconduct, with trial scheduled to begin on 13 August 2018. Specifically, a year before the shooting, Appellant threatened one of his roommates, AB. While AB and their other roommate and fellow Airman, BI, were away at a meeting, and Appellant believed he had been "hogtied," Appellant sent AB messages, including, "Whoever the sick sadistic mf who did this I'm going to kill," and "Tell me who did it and I'll go easy on **[*5]** you." AB and BI returned to their home. AB saw flat cord or twine "thrown about the yard," but saw no evidence that Appellant had been tied up. Appellant offered AB "one more chance" to tell Appellant who was sent to the house and tied him up. Appellant's gun was next to him during this conversation.

Appellant also used cocaine and marijuana, which Appellant admitted to law enforcement. AB witnessed Appellant's cocaine use.

On 25 July 2018, the convening authority withdrew and dismissed the threat, assault, and drug use charges from the general court-martial "to allow[] for further investigation of additional charges and consolidation of all known charges into one proceeding." Appellant's counsel requested a board to inquire into Appellant's mental responsibility and capacity under R.C.M. 706; the special court-martial convening authority granted this request on 1 November 2018. All charges in this case were preferred on 3 January 2019 and examined pursuant to *Article 32, UCMJ, 10 U.S.C. § 832*, before referral to trial by general court-martial on 27 February 2019. Appellant was arraigned 12 days later. Appellant

[4] Additionally, one charge and specification of voluntary manslaughter in violation of *Article 119, UCMJ, 10 U.S.C. § 919 (2016 MCM)*, were withdrawn and dismissed after arraignment but before entry of pleas.

[5] *See United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

was in pretrial confinement from 5 July 2018 until he was sentenced on 1 July 2019; his sentence to confinement was **[*6]** credited with these 361 days.

II. Discussion

A. Involuntary Manslaughter

1. Additional Background

Appellant was assigned to Cannon Air Force Base (AFB), New Mexico, and lived in nearby Clovis, New Mexico. On 4 July 2018, Appellant invited three friends to his residence: MJ (a fellow enlisted Airman), and KM and AJ, two civilian women. Over the course of the evening, the group ate, drank, and watched fireworks. By approximately 0100, KM and AJ had left, leaving MJ and Appellant alone in the garage.

Appellant called 911 at around 0215. Below are some of the relevant portions of the exchange:[6]

> [Appellant]: My friend was playing with a f[**]king gun.
> . . .
> 911 Operator: Did he shoot himself? [Silence.] I need to know. Did he shoot himself?
> [Appellant]: I don't know.
> 911 Operator: You don't know?

Shortly thereafter officers from the Clovis Police Department (CPD) arrived on the scene. The following separate exchanges occurred between CPD officers and Appellant, each captured on a bodycam video:

> CPD Officer: Were you in here when it happened?
> [Appellant]: Yes.
> CPD Officer: Yes.
> [Appellant]: Sort of. I don't know, man. I don't know.

And:

> CPD Officer: Were you in here when this happened?
>
> [Appellant]: Yes, well, **[*7]** sort of. I don't know, man. I don't know.
> CPD Officer: Did you watch him shoot himself?
> [Appellant]: Everything happened so fast.

Appellant was taken to the CPD station. He was provided a *Miranda* warning[7] and agreed to answer questions. Appellant made the following statements about the shooting:

> I grabbed that gun from him and then it discharged; that's about the closest thing I got in my mind that happened at this point. Next thing you know, he's on the ground, he's bleeding out, and I'm calling the police.
> . . .
> So I grabbed it from—the gun from him and it discharged.
> . . .
> I thought I—when I grabbed it I thought I pointed it up enough. That's what we're taught in—finger discipline.
> . . .
> I wasn't sort of thinking is all. I wasn't thinking like a gun owner at all.
> . . .
> I was so confident, I guess, 'cause the gun wasn't firing at all that night.

Appellant also made one reference to grabbing the gun from MJ because of MJ saying something about hurting the dog.[8] Appellant also told CPD officers he was "blurry" about the details of how he was holding the gun when he grabbed it, but he was able to provide a demonstration of how he held it "pointed up."

The CPD officers who arrived on scene found a Glock **[*8]** 21 handgun, a live round, and a spent casing—all .45 caliber—on a work bench a few feet away from where MJ was lying on the ground. MJ received care from medical personnel, was transported to a local hospital, and was then air-lifted to a larger hospital, where he died four days later.

Due to Appellant's military status, CPD alerted the Air Force Office of Special Investigations (AFOSI). Initially, CPD had primary investigative jurisdiction over the shooting. Around mid-July 2018, CPD transferred the investigation, evidence, and jurisdiction to the Air Force.

At trial, the Prosecution presented testimony from KM (one of the friends who was with Appellant and MJ in

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[6] These statements are taken from the transcript of the trial. Our review of the audio recording reveals the transcript is slightly, but not substantially, different.

[7] *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*.

[8] KM testified that MJ was familiar with the dog. On the night MJ was shot, he was doing tricks with the dog, and giving her beef jerky treats.

the garage before the shooting), four officers from CPD, two AFOSI agents, three examiners from the United States Army Criminal Investigation Laboratory (USACIL), a crime-scene-reconstruction expert, and a forensic pathologist. The Prosecution also presented, *inter alia*, Appellant's 911 call; two CPD bodycam videos showing interactions between Appellant and officers after officers arrived on scene; the seized Glock 21, bullets, and spent casings; the clothes and sandals Appellant was wearing when CPD officers arrived; expert **[*9]** reports relating to DNA from Appellant's clothes, fingerprints (or lack thereof), firearms and ammunition, and crime-scene reconstruction; and MJ's autopsy report and death certificate.

2. False Exculpatory Statement Instruction

a. Additional Background

The Defense did not object to the admission into evidence of audio of Appellant's 911 call and bodycam videos of the police response to Appellant's garage. The Defense moved to suppress the contents of Appellant's interview at the police station; after this motion was denied, Appellant did not object to the video's introduction at trial.

As the military judge was finalizing the instructions he would give the members on findings, the Government requested an instruction on false exculpatory statements of Appellant. The Defense objected to the instruction, arguing Appellant's statements all were general denials of guilt. The military judge agreed with the Government, explaining:

> I believe the instruction is justified because, in this particular instance there is at least some evidence that the members could conclude after consideration, that after the alleged offense that is charged in [Charge II], that the accused made statements that were **[*10]** inconsistent with each other. In other words, he had made statements to include, and I will summarize here, that [MJ] had shot himself, he had made statements that he was unaware of what happened, and he had made statements that [MJ] was holding the gun and that the accused tried to take the gun away from him because of a perceived threat to the accused's dog. The fact that the accused had made multiple statements to different law enforcement individuals that were inherently inconsistent with each other, I believe that that contradiction is what provides independent evidence of the falsity -- potential falsity of those statements. At least enough to warrant the inclusion of the false exculpatory statement instruction.

The military judge instructed the members that Appellant "may have made contradictory statements" about the offense alleged in Charge II. The military judge continued:

> Conduct of an accused, including statements made and acts done upon being informed that a crime may have been committed or upon being confronted with a criminal charge, may be considered by you in light of other evidence in the case in determining the guilt or innocence of the accused. If an accused voluntarily **[*11]** offers an explanation or makes some statement tending to establish his innocence, and such explanation or statement is later shown to be false, you may consider whether this circumstantial evidence points to a consciousness of guilt. You may infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his innocence. The drawing of this inference is not required.
>
> Whether the statement was made, was voluntary, or was false is for you to decide. Whether evidence as to an accused's voluntary explanation or statement points to a consciousness of guilt, and the significance, if any, to be attached to any such evidence, are matters for determination by you, the court members.

Appellant repeats this claim on appeal. Specifically, Appellant claims the military judge abused his discretion by providing the members an instruction on false exculpatory statements. He argues "the military judge's conclusion that Appellant's statements are inherently inconsistent is unsupported by the evidence." Further, he argues the military judge used an incorrect standard of "potentially false" and was required to make a predicate **[*12]** finding that some evidence of falsity was admitted. The Government argues "those statements contradicted each other, and the mutually exclusive nature of those contradictions proved their falsity."

b. Law

Whether a military judge properly instructs the court members is a question of law we review de novo. *United States v. Hibbard, 58 M.J. 71, 75 (C.A.A.F. 2003)* (citation omitted). A military judge's decision to provide an instruction is reviewed for an abuse of discretion. *United States v. Anderson, 51 M.J. 145, 153 (C.A.A.F. 1999)* (citation omitted).

"[F]alse statements by an accused in explaining an alleged offense may themselves tend to show guilt" but a "general denial of guilt does not demonstrate any consciousness of guilt." *United States v. Colcol, 16 M.J. 479, 484 (C.M.A. 1983)* (citation omitted). "Moreover, in order to decide that an accused's general denial of illegal activity is false, the factfinder must decide the very issue of guilt or innocence; and so the instruction would only tend to produce confusion because of its circularity." *Id.*

When raised by the evidence, the military judge may provide the members a general instruction on false exculpatory statements. *See United States v. Opalka*, 36 C.M.R. 938, 944-45 (A.F.B.R. 1966) (approving the instruction as a correct statement of law and finding that failure to identify particular statements was not prejudicial).

c. Analysis

We find the instruction was **[*13]** raised by the evidence, and the military judge did not abuse his discretion when he provided the instruction.

First, we find the military judge did not err when he described Appellant's statements as "potentially false." In determining whether to provide court members an instruction on false exculpatory statements, a military judge does not determine whether a statement was, in fact, false. Instead, the military judge's role is to determine whether the factfinder could reasonably conclude from the evidence that the statement was false and tended to show consciousness of guilt. Thus, the military judge was correct when he instructed the members that "[w]hether the statement was made, was voluntary, or was false" was "for [them] to decide."

Contrary to Appellant's assertions, we do not find that Appellant's statements conveyed only a general denial of guilt, and we do find their potential falsity was supported by the evidence. Appellant professed a lack of memory during some statements, but provided details in other statements. He stated MJ was "playing with a gun" when he was shot, but also that Appellant grabbed the gun from MJ and it discharged. Members could reasonably find these statements **[*14]** were made, that they were mutually inconsistent, and that if all could not be true, then one or more must be false. Furthermore, in this case, any such falsity would directly relate to the ultimate issues involved in the alleged offense of murder and its lesser-included offense of involuntary manslaughter. That Appellant did not remember then did remember, or recalled differing versions of what happened to cause MJ to be shot and killed, could be considered circumstantial evidence pointing to his consciousness of guilt. The military judge did not err in providing the court members this instruction.

3. Accident Instruction

Appellant claims on appeal that "[t]he unnecessary inclusion of 'sober' in the instruction for the defense of accident served to undermine the defense's viability" and "[left] the impression that his intoxication made the defense of accident unavailable." We find the military judge did not abuse his discretion in providing the tailored instruction on the defense of accident.

a. Additional Background

Before trial, the Defense indicated it intended to put on a defense of accident, and during trial, it adduced evidence to support such a defense. Additionally, both parties **[*15]** introduced evidence that Appellant and MJ were drinking alcohol before the shooting.[9]

In its case in chief, the Defense introduced evidence that Appellant was drunk when talking to the responding police officers. Specifically, it introduced a bodycam video in which the officer can be heard saying, "He's so drunk right now. He is slurring his speech. I told her to stop asking questions."

Thereafter, the Government requested the military judge modify his draft instruction on accident by adding the word "sober" to the reasonably prudent person standard, "especially given the body cam footage that was just published." The Defense objected, stating the

[9] The Defense did not ask that evidence of Appellant's alcohol use be excluded. However, the military judge granted the Defense motion to exclude evidence under Mil. R. Evid. 404(b) that Appellant became aggressive when he drank alcohol to excess and that Appellant once held up an individual at knifepoint or gunpoint after Appellant had been drinking.

military judge's draft language came "out of the bench book"[10] and was not inaccurate; the change was not prompted by the members; and the Government wanted the change because it "would be more convenient" for its case.

In his analysis on the record, the military judge analogized to the law guiding mistake and ignorance, "where the courts . . . have made it clear that you cannot consider voluntary intoxication when deciding whether or not a belief or ignorance was reasonable." The military judge decided to add the word **[*16]** "sober," explaining:

> I'll just note that the purpose of the instructions is to ensure that the members properly consider the evidence within the confines of the law. And again, I do believe that adding the word sober is an appropriate characterization of the standard for assessing whether or not an individual acted with an amount of care or safety for others that a reasonably prudent sober person would have used, under those circumstances.

In his instructions to the members on accident—for both the charged offense and the lesser offense of which Appellant was convicted—the military judge advised, *inter alia*:

> Second, the accused must not have been negligent. In other words, the accused must have been acting with the amount of care for the safety of others that a reasonably prudent sober person would have used under the same or similar circumstances. . . .
>
> . . . If you are satisfied beyond a reasonable doubt that the accused did not act with the amount of care for the safety of others that a reasonably prudent sober person would have used under the same or similar circumstances, the defense of accident does not exist.

Although the military judge added the word "sober" to his instruction on **[*17]** accident, he did not add it to his instruction on the element of involuntary manslaughter that requires that an accused act with culpable negligence.

b. Law

Accident is a defense to the offense of involuntary manslaughter and has three elements. First, there must be evidence "that the accused was engaged in an act not prohibited by law, regulation, or order;" second, the lawful act "must be shown . . . to have been performed in a lawful manner, i.e., with due care and without simple negligence; and" third, it must be shown that "this act was done without any unlawful intent." *United States v. Arnold, 40 M.J. 744, 745-46 (A.F.C.M.R. 1994)* (citing *United States v. Van Syoc, 36 M.J. 461, 464 (C.M.A. 1993)*); *see also* R.C.M. 916(f) ("A death, injury, or other event which occurs as the unintentional and unexpected result of doing a lawful act in a lawful manner is an accident and excusable.").

"Due care" is "such care as would be exercised by an ordinarily prudent [person] when sober." *United States v. Bragg*, 4 C.M.R. 778, 782 (A.F.C.M.R. 1952) (citation omitted); *see also Restatement (Second) of Torts § 283C cmt. d* (Am. Law Inst. 1965) (noting that if a drunken person's "conduct is not that of a reasonable man who is sober, his voluntary intoxication does not excuse" conduct that would otherwise be negligent). The concept of "reasonably prudent person" is an objective standard. "The actor is required to do what this ideal **[*18]** individual would do in his place. The reasonable man is a fictitious person, who is never negligent, and whose conduct is always up to standard." *Restatement (Second) of Torts § 283 cmt. c* (Am. Law Inst. 1965).

When each element of the defense of accident is raised by the evidence, the prosecution has the burden of disproving the defense beyond a reasonable doubt. *See* R.C.M. 916(b)(1); *see also United States v. Ferguson, 15 M.J. 12, 17 (C.M.A. 1983)* (finding that "if the defense involves several elements of proof, the record must contain some evidence on each of those elements" for an accused to be entitled to an instruction on accident).

c. Analysis

We disagree with Appellant that the inclusion of the word "sober" in the military judge's instructions left an impression with the members that the defense of accident was unavailable. The military judge did not tell the members that an intoxicated person cannot act with the same care as a reasonably prudent person would. Instead, he advised them that they should consider Appellant's actions against the standard of what a reasonably prudent sober person would do. At trial, Appellant did not request the military judge explain this distinction to the members. We find the instruction was

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[10] We understand this to be a reference to the *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9.

not confusing and was an accurate statement of the law. As the members **[*19]** otherwise could have been confused about how Appellant's voluntary intoxication related to the defense of accident, we find the military judge did not abuse his discretion in providing them the tailored instruction.

Even if the military judge erred, we find the result would not have been different. The defense of accident requires that an accused must not have acted with even simple negligence. Involuntary manslaughter requires that an accused act with culpable negligence—a degree of carelessness greater than simple negligence. When instructing the members on this element of culpable negligence, the military judge did not add the word "sober" to the reasonably prudent person standard. The members then convicted Appellant of involuntary manslaughter. By finding beyond a reasonable doubt that Appellant acted with culpable negligence, whether using a drunk or sober standard, the court members rejected the claim that Appellant acted non-negligently. Thus, in finding the culpable negligence element proved beyond a reasonable doubt, the members would not have found the defense of accident relieved Appellant of responsibility.

Having found no error in the accident instruction, we consider Appellant's **[*20]** related claim involving negligence[11] when we consider the claims of improper findings argument and legal insufficiency.

4. Findings Argument

Appellant contends that the Prosecution argued several of Appellant's acts on 4-5 July 2018 were "inherently dangerous," thereby confusing the members about which "inherently dangerous act" was an element of the charged offense.[12] Appellant rhetorically asks on appeal, "What specifically did [Appellant] do that was either an inherently dangerous act or an act of culpable negligence?" We find the Prosecution clearly answered this question during findings argument at trial. We find neither error nor prejudice. Additionally, we provide no relief for Appellant's claim that "the [circuit trial counsel] improperly attacked [Appellant's] comments during the interrogation."

a. Additional Background

The military judge provided the members with instructions relating to "inherently dangerous" acts. In identifying the elements of murder that the Prosecution needed to prove beyond a reasonable doubt, the military judge stated:

> (2) That [MJ's] death resulted from the act of the accused in shooting [MJ] in the head with a handgun . . . ;
>
> (3) That this act was inherently **[*21]** dangerous to another, that is, one or more persons, and evinced a wanton disregard for human life[.]

In her findings argument relating to the shooting, the circuit trial counsel made several references to what she described as "inherently dangerous" acts:

> At some point, after [KM] left, [Appellant] went to his bedroom and got a loaded 45 caliber Glock handgun while he was drunk. If that alone isn't inherently dangerous, then certainly trying to fire it while you were drunk is. Those are the accused's words. That's what he said. "Yeah I went to my room and I got the gun. I wanted to shoot it in the air.[ ] It's a family tradition. We go out drinking all day, I've been drinking for eight hours, and I'm going to go out in a neighborhood where I have small children as neighbors, and I'm gonna shoot off guns in the air.["] That is absurd and that is inherently dangerous, and it is a wanton disregard for human life.

Soon thereafter, the Defense made its only objection during the Prosecution's arguments on findings. The circuit defense counsel explained: "The court's instructions [are] that the act is the shot that struck [MJ's] head. To argue that getting the gun from the bedroom is the inherently **[*22]** dangerous act is just not how this case is charged. It's designed to inflame the passions." The circuit trial counsel responded, "[W]e're going to argue that it was the pulling of the trigger that's the act in the elements but I think that we -- that it's fair game to argue that just getting a loaded

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[11] Specifically, Appellant argues that the circuit trial counsel's findings argument demonstrates the error was not harmless; it "cast confusion on the role of drinking alcohol in the shooting," blurring the concepts of "inherently dangerous act"—an element of the charged offense of murder—and "reasonably prudent person"—part of the negligence component of the defense of accident.

[12] "Any person . . . who, without justification or excuse, unlawfully kills a human being when he . . . is engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life . . . is guilty of murder." *Article 118, UCMJ* (2016 *MCM*). *Article 119, UCMJ*, does not address "inherently dangerous" acts.

firearm out while drinking is inherently dangerous." The military judge overruled the objection. He explained: "I think the circumstances surrounding the alleged offense will be considered fairly by the members as facts and circumstances admitted into evidence. They can take into consideration all the facts and circumstances when deciding whether or not the government has met their burden on that element."

The circuit trial counsel next argued what she would later specify was the charged inherently dangerous act. In explaining why they should conclude Appellant lied in the 911 call when he said he did not know whether his friend shot himself, circuit trial counsel argued Appellant would have been thinking, "How am I going to explain that we were drunk, messing around with a 45 caliber loaded handgun in a garage and I pulled the trigger?"

Later, the circuit trial counsel was unambiguous in **[*23]** her argument about the charged inherently dangerous act: "And the intentional act that is inherently dangerous is putting your finger on a trigger and pulling it, even if it's pointed up in the air. Even if it's a threat. Even if you didn't think it was going to fire." And again: "The accused pulled the trigger, and pulling the trigger of a firearm of a loaded firearm in a closed garage is an act inherently dangerous to another with wanton disregard for human life." And again: "Just remember, the act is pulling the trigger." And in her rebuttal argument: "All you need to know is that he took an act, he did an act, he pulled the trigger. That's the act. And it was so inherently dangerous to another and it was likely to cause death or grievous bodily harm. And that result is death."

The circuit trial counsel was not as clear about the inherently dangerous act when she was arguing how the evidence proved elements of the offense of murder:

> We've had plenty of medical testimony that he was shot in the head with a handgun. That is the cause of death. And the accused[' s] own words said that he had it, "I snatched the gun away, I grabbed the gun, I thought I pointed it up high enough. I know **[*24]** finger discipline, I was taught that." So was this act inherently dangerous to another? That is one or more persons in it evinced a wanton disregard for human life. So basically it showed a wanton disregard for human life. Yeah, yes. Because if you look at the firearm again, you don't have to be a gun owner or attend a gun safety class to know that you don't point a loaded firearm at someone. You don't get a loaded firearm out when you've been drinking. You should never have a loaded firearm out, unless you're on the range or doing something with it, but at a party where you've been drinking all day, to bring it out and try to shoot it in the air, put it on the workbench? No. But certainly to pull the trigger back? Even as what you think is going to be an empty threat. That is a wanton disregard for human life. The accused knew that death or great bodily harm was a probable consequence. Sure, it's a loaded firearm if you pull the trigger. He says, you treat every gun like it's loaded. You have to know that the probable consequence of pulling the trigger is that a bullet can come out, and if it's pointed in the direction of someone, that could hit someone and kill them, or at least **[*25]** cause grievous bodily harm. And in the confines of a closed garage, the police testified that when they got there the garage door was down. So the fact that you're even pulling the trigger in a closed garage? Think about it. Even if it's not pointed at someone, the ricochet of that -- that alone could cause death or grievous bodily harm. And that it was unlawful. Of course it was unlawful. He's not a cop acting pursuant to any duties. He's out drinking at a Fourth of July party playing with a loaded gun. It's unlawful.

The Defense did not object to this argument.

In its own argument in findings, when speaking about "an inherently dangerous activity," the Defense suggested the Government did not prove beyond a reasonable doubt that Appellant—and not MJ—was the one who pulled the trigger. The Defense did not address any other potential inherently dangerous act.

In addition to his claims of error about the nature of the inherently dangerous act, Appellant identified what he claims were improper arguments relating to his statements to investigators, none of which drew an objection:

> So what does he say? Well I would ask you to watch at the beginning when the officer first walks in. Now he's **[*26]** been held overnight because he shot his friend, and the first thing he comments on is not, ["H]ey how's he doing, what's going on, I'm freaking out, I can't believe this, it's a horrible accident, he was trying to do something stupid with the gun and I was wrestling it away.["] No, it was, ["Y]ou go to Notre Dame man? Nice T-shirt.["] Really?
>
> . . . .
>
> This is what he thinks about when he shot his friend

> in the face, "but when all the s[**]t went down, I think I had some [ammunition] in my pocket." ["]When all this s[**]t went down?["] You shot your friend in the head and that's the cavalier attitude you're going to take about this interview? It's careless. Just like he was careless and reckless with the gun the night before, ["]when all this s[**]t went down.["]

b. Law

When preserved by objection, we review de novo allegations of improper argument to determine whether the military judge's ruling on the objection constituted an abuse of discretion. *United States v. Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017)* (citations omitted). In doing so, we review any improper argument for prejudicial error. *United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018)* (citations omitted).

When no objection was made at trial, we review for plain error. *Id.* "Plain error occurs when (1) there is error, (2) the error is plain **[*27]** or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Id. at 401* (quoting *United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005)*).

In analyzing prejudice from a prosecutor's improper argument, we consider: "(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*). We do not review counsel's words in isolation; we review the argument "within the context of the entire court-martial." *United States v. Baer, 53 M.J. 235, 238 (C.A.A.F. 2000)* (citations omitted).

"Improper argument is one facet of prosecutorial misconduct." *Sewell, 76 M.J. at 18* (citing *United States v. Young, 470 U.S. 1, 7-11, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)*). "Trial prosecutorial misconduct is behavior by the prosecuting attorney that '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, 55 S. Ct. 629, 79 L. Ed. 1314 (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. Voorhees, 79 M.J. 5, 10 (C.A.A.F. 2019)* (quotations and citation omitted). The trial counsel may appropriately "argue the evidence of record, as well as all reasonable inferences fairly derived from such **[*28]** evidence." *Baer, 53 M.J. at 237* (citation omitted). She may not, however, "cross[ ] the exceedingly fine line which distinguishes permissible advocacy from improper excess" and use language that is "more of a personal attack on the defendant than a commentary on the evidence." *Fletcher, 62 M.J. at 183* (internal quotation marks and citation omitted.)

When evidence has been introduced that indicates "similarities between a charged offense and prior conduct, whether charged or uncharged, to show . . . propensity" but was not admitted using a specific exception in our rules of evidence allowing for propensity evidence, counsel may not argue propensity. *United States v. Burton, 67 M.J. 150, 152-53 (C.A.A.F. 2009)*.

c. Analysis

Appellant preserved his objection to the portion of circuit trial counsel's argument that could imply the charged inherently dangerous act was getting the firearm from the bedroom. We consider whether the military judge abused his discretion in overruling that objection. We review the portions of the argument Appellant now claims were improper, but to which Appellant did not object at trial, for plain error. If we find error, plain or otherwise, we consider whether Appellant was prejudiced.

i) Inherently dangerous act

Considering the circuit trial counsel's argument as a **[*29]** whole, we find her statement that Appellant getting the firearm from the bedroom was an inherently dangerous act was not improper. After the Defense objected, circuit trial counsel clarified—in front of the members—that "it was the pulling of the trigger that's the act in the elements." She then argued it was "fair game to argue that just getting a loaded firearm out while drinking is inherently dangerous." With these two statements seemingly in opposition, the military judge ruled the circuit trial counsel was arguing "facts and circumstances" the members could consider "when deciding whether or not the [G]overnment has met their burden on that element." We find the military judge did not abuse his discretion by overruling the Defense

objection to the Prosecution's argument about getting the firearm from the bedroom, and by allowing the Prosecution to argue facts and circumstances leading up to the act of pulling the trigger.

Next, we consider whether the portions of the circuit trial counsel's argument that stated or implied that other actions besides pulling the trigger were inherently dangerous acts was improper. We find those portions do not constitute plain or obvious error. Again, **[*30]** considering the argument in context and as part of the whole, we do not agree with Appellant that circuit trial counsel "obscured the key issue" of whether or when Appellant was engaged in an inherently dangerous act. While the circuit trial counsel's argument did not neatly compartmentalize the evidence supporting each element, she made abundantly clear that the Prosecution had to prove Appellant pulled the trigger to meet the element of murder concerning an inherently dangerous act.

Finally, any error on this issue would be harmless because the members did not find Appellant guilty of murder, but rather, found him guilty of an offense that does not require proof of an inherently dangerous act. The military judge instructed the members that:

> The offense charged, murder, and the lesser included offense of involuntary manslaughter, differ in that the offense charged requires as elements that you be convinced beyond a reasonable doubt that the act was inherently dangerous to another, that is, one or more persons, and evinced a wanton disregard for human life, and that the accused knew that death or great bodily harm was a probable consequence of the act, whereas the lesser offense of involuntary **[*31]** manslaughter does not include such elements, but does require that this act amounted to culpable negligence.

Thus, even if trial counsel's argument about "inherently dangerous act" was improper, Appellant did not suffer prejudice. He was not convicted of an offense with such an element.

The Government repeatedly made clear to the members that the inherently dangerous act they were proving beyond a reasonable doubt was Appellant pulling the trigger, and the members were advised they could consider evidence of Appellant's actions leading up to the shooting in determining whether pulling the trigger was an inherently dangerous act. We find no error and that Appellant suffered no prejudice.

ii) Appellant's Character - Statements to Investigators

Appellant asserts that the circuit trial counsel improperly argued "bald propensity evidence for his 'character' of being careless," which included "an improper slight towards [Appellant]." Specifically, Appellant finds fault with circuit trial counsel's argument that Appellant's word choices in speaking to investigators were "careless [j]ust like he was careless and reckless with the gun the night before, [']when all this s[**]t went down.[']" Assuming **[*32]** error in the Prosecution arguing propensity, we find no error in the comments on Appellant's attitude, and we find no prejudice under a plain error standard of review.

The Prosecution's argument made the analogy that it was more likely Appellant was careless in pulling the trigger of the firearm because he was careless in his words to investigators. However, we find no material prejudice to a substantial right and thus no plain error. Unlike in *Burton*, where the trial counsel "encouraged panel members to compare the similarities of two charged offenses, pointed out several specific examples, and argued that these similarities showed Appellant's propensity to commit such crimes," *Burton, 67 M.J. at 152*, here the improper argument was limited to a single comment and was not part of a broader argument about character for carelessness. Also, the fact that the Defense did not object "is some measure of the minimal impact of a prosecutor's improper comment." *United States v. Carpenter, 51 M.J. 393, 397 (C.A.A.F. 1999)* (internal quotation marks and citations omitted). The military judge did not *sua sponte* provide an instruction on considering propensity or character evidence, and none was requested, which demonstrates the low severity of the misconduct but also the lack of measures **[*33]** to cure it. Finally, the weight of the evidence was substantial, as discussed *infra* with respect to legal sufficiency. Thus, having considered the factors in *Fletcher, 62 M.J. at 184*, we find no prejudice.

Appellant, in his assignment of error, quoted circuit trial counsel's argument about Appellant's attitude when he first met with investigators, but did not specifically claim it was error. Nevertheless, we also consider the propriety of the Prosecution's argument that instead of asking about the welfare of his friend who was just shot in the head, or "freaking out," or explaining how the shooting was "a horrible accident," Appellant calmly complimented the investigator on his t-shirt.

We do not find the comments about carelessness and

the t-shirt compliment to be "more of a personal attack on [Appellant] than a commentary on the evidence." *Voorhees, 79 M.J. at 11* (quoting *Fletcher, 62 M.J. at 183*). For the most part, the circuit trial counsel parroted Appellant's own words—which were not themselves disparaging. These comments on Appellant's attitude related to the theme of circuit trial counsel's argument: "the truth is easy, the truth is quick, and the truth is consistent." The thrust of this argument was twofold: (1) the members should view Appellant's **[*34]** easy or quick answers to investigators' questions as fact or sincere emotion, and (2) the members should view Appellant's confused, vague, or non-responsive answers to investigators' questions as Appellant's efforts to conceal the truth or concoct a version of events because the truth was harmful to Appellant. In a closing argument where the Prosecution properly commented on Appellant's lack of truthfulness regarding the facts and circumstances surrounding the shooting, we do not find that these brief comments on Appellant's attitude were an attempt "unduly to inflame the passions or prejudices of the court members." *United States v. Clifton, 15 M.J. 26, 30 (C.M.A. 1983)* (citations omitted). We do not find this comment evinced prosecutorial misconduct.

5. Legal and Factual Sufficiency

Appellant asserts several bases in challenging the legal and factual sufficiency of his conviction for involuntary manslaughter. First, he argues that the actual act which constituted the crime of which the court members found Appellant guilty is ambiguous. Appellant points to circuit trial counsel's arguments to the members in findings, discussed *supra*, describing various "inherently dangerous acts" relating to the charged offense of murder—one of which was **[*35]** pulling the trigger. Next, Appellant claims the evidence did not demonstrate beyond a reasonable doubt that Appellant pulled the trigger. Finally, he argues the defense of accident and the possibility of a superseding cause should absolve him of criminal responsibility. We find Appellant's conviction for involuntary manslaughter both legally and factually sufficient.

a. 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 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, "the standard for legal sufficiency involves a very low threshold to sustain a conviction." **[*36]** *United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019)* (quotation marks, brackets, and citation omitted), *cert. denied*, __ *U.S.* __, *139 S. Ct. 1641, 203 L. Ed. 2d 902 (2019)*. "[T]he government is free to meet its burden of proof with circumstantial evidence." *King, 78 M.J. at 221* (citations 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." *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*).

The elements of involuntary manslaughter in violation of *Article 119, UCMJ*, a lesser-included offense of murder as charged in the Specification of Charge II, include that: (1) MJ is dead; (2) MJ's death resulted from the act of Appellant shooting MJ in the head with a handgun; (3) the killing of MJ by Appellant was unlawful; and (4) Appellant's act constituted culpable negligence. *See* 2016 *MCM*, pt. IV, ¶ 44.b.(2).

Regarding the second element—whether **[*37]** the

death was the result of an appellant's act—we consider proximate cause. "To be proximate, an act need not be the sole cause of death, nor must it be the immediate cause -- the latest in time and space preceding the death. But a contributing cause is deemed proximate only if it plays a material role in the victim's decease." *United States v. Romero, 24 C.M.A. 39, 1 M.J. 227, 230, 51 C.M.R. 133 (C.M.A. 1975)* (citations omitted). "Further, an intervening cause excuses an accused from his criminally negligent conduct when 'the second act of negligence looms so large in comparison with the first, that the first is not to be regarded as a substantial factor in the final result.'" *United States v. Lingenfelter, 30 M.J. 302, 307 (C.M.A. 1990)* (quoting *United States v. Cooke, 18 M.J. 152, 154 (C.M.A. 1984)*).

"Culpable negligence" is "a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission." 2016 *MCM*, pt. IV, ¶ 44.c.(2)(a)(i). "We apply an objective test in determining whether the consequences of an act are foreseeable." *United States v. McDuffie, 65 M.J. 631, 635 (A.F. Ct. Crim. App. 2007)* (citing *United States v. Riley, 58 M.J. 305, 311 (C.A.A.F. 2003)*, and *United States v. Oxendine, 55 M.J. 323, 326 (C.A.A.F. 2001)*). "The test for foreseeability is whether a reasonable person, in view of all the circumstances, would have realized the substantial and unjustifiable danger created by his acts." *Oxendine, 55 M.J. at 325* (internal quotation marks and citation omitted).

"Acts which may amount to culpable negligence include negligently . . . pointing a **[*38]** pistol in jest at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be dangerous." 2016 *MCM*, pt. IV, ¶ 44.c.(2)(a)(i).

b. Analysis

Appellant asserts that the evidence presented does not prove beyond a reasonable doubt that he pulled the trigger. The issue, however, is whether Appellant was the proximate cause of the trigger being pulled in a culpably negligent manner resulting in Appellant shooting MJ.

Appellant's own admissions are sufficient evidence. Appellant admitted he "grabbed the gun from [MJ]" and thought he (Appellant) "pointed it up enough" before it discharged. In the light most favorable to the Prosecution, these words suggest Appellant had control of the firearm when MJ was shot, and therefore MJ's death resulted from a culpably negligent act of Appellant.

Moreover, the evidence indicates a very low probability that MJ pulled the trigger. When the 911 operator asked whether MJ shot himself, Appellant said he did not know the answer. He could not answer similar questions from CPD officers. The investigation revealed no evidence that MJ was holding the firearm *when it discharged*. Sergeant JG was among the first CPD officers to arrive at the **[*39]** scene. He testified regarding what self-inflicted wounds typically look like:

> During similar incidents and most responses, the wound that I observed that night wasn't consistent with most self-inflicted gunshot wounds that I've ever seen over my career. That being said, GCR[13] gunshot residue, powder [b]urns, muzzle impressions, things that you would normally see if somebody was intending to commit suicide.

AFOSI Special Agent (SA) AC testified as an expert in shooting-incident reconstruction and crime-scene re-creation. She opined that MJ would have been standing when he was shot, and the bullet traveled in a "path . . . upward at a 38-degree angle." A different expert in shooting-incident reconstruction concurred in her report. That expert opined that the muzzle was 3-12 inches from the point of impact on MJ. The evidence indicated MJ was standing and facing the part of the bench where the firearm was found when he was shot.

Similarly, the evidence indicates a very low likelihood that the gun discharged without the trigger being pulled. An expert in firearms examination, shooting-incident reconstruction, and pattern analysis testified that to make the gun fire, one must "deactivate that **[*40]** safety bar first, and then you can pull the trigger back to fire the gun." In response to a member's question, the expert testified he had "never seen a negligent or accidental discharge of a Glock, whether it was . . . fired in range or during competitions or in literature, where the trigger wasn't pulled." Another expert in firearms examination testified that this particular firearm required just over six pounds of pressure or weight to pull the trigger, which is within the standard range for a Glock; in contrast, the expert testified, a "hair trigger" requires less than two pounds.

Appellant's defense of accident was not well supported.

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[13] "GCR" is not explained in the record. It likely was a misspeak of "GSR," an acronym for "gunshot residue." The exact meaning is not necessary for our analysis.

Appellant's admissions that he "wasn't thinking like a gun owner" and "was so confident . . . [be]cause the gun wasn't firing at all that night" reasonably can be understood to describe culpable negligence. Appellant did not state where the gun was pointing before he grabbed it from MJ, except for once saying MJ threatened the dog with the gun. The evidence does not support a conclusion that MJ pointed the gun at himself. A reasonable conclusion from the evidence is that Appellant knew the gun was loaded with live ammunition, either took the gun from **[*41]** MJ or already possessed it, maneuvered it so that Appellant's finger was on the trigger and it was pointing towards the top of MJ's head, and then applied over six pounds of pressure to fire the weapon and shoot MJ. That the weapon actually fired may have been a surprise to Appellant because it had been misfiring, but his actions immediately leading to the firing were more than simply negligent. Thus, the members reasonably could find the defense of accident did not exist.

Appellant would have us find that he was engaged in the lawful act of "taking back his own weapon back from MJ" in a lawful manner without any unlawful intent, thus meeting the three prongs of the defense of accident. *See* *Arnold, 40 M.J. at 745-46* (citing *United States v. Van Syoc, 36 M.J. 461, 464 (C.M.A. 1993)*). We are unconvinced that "grabbing" a loaded firearm under these circumstances was not negligent. Moreover, while one could conclude from the evidence that the act of "grabbing" was among the acts that may have caused the gun to fire as Appellant suggests, it does not negate other conclusions—including that Appellant turned the handgun toward MJ and pulled the trigger. We find the Prosecution disproved the defense of accident beyond a reasonable doubt despite the possibility that MJ's **[*42]** death was a consequence of Appellant retrieving his gun from MJ.

Appellant also implies that MJ could be to blame for his death. On appeal, Appellant states: "From the limited evidence, it is impossible to know what MJ may have done while [Appellant] grabbed the gun." Such mere speculation does not give rise to a superseding cause of death. The members found the proximate cause was Appellant shooting MJ as a result of a culpably negligent act of Appellant. Appellant's statements after the shooting belie Appellant's claims that MJ was the cause of his injuries and resultant death.

In assessing legal sufficiency, we are limited to the evidence produced at trial and are required to consider it in the light most favorable to the Prosecution. We conclude that a rational factfinder could have found beyond a reasonable doubt all the essential elements of Appellant's convicted offense of involuntary manslaughter. 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 convinced of Appellant's guilt beyond a reasonable doubt. Therefore, we find Appellant's conviction **[*43]** on the Specification of Charge II for involuntary manslaughter legally and factually sufficient.

B. Communicating a Threat - Legal and Factual Sufficiency

1. Additional Background

In July 2017, Appellant lived with his two roommates AB and BI. AB had worked with AFOSI as a confidential informant. On 23 July 2017, AB came home around 0330, after a long night of designated driving for friends who were drinking alcohol. She joined Appellant and his civilian friend MS in the backyard. Shortly thereafter, both Appellant and MS snorted cocaine. AB rejected their offer to take some, then went to bed around 0400. BI had been asleep during this time and woke up around 0630. BI found Appellant was awake; it appeared to BI that Appellant had been up all night drinking and using cocaine. Appellant and BI spent the rest of the day drinking.

After AB woke up around 1800 hours, BI, who was very upset, asked her to drive him to an "AA meeting." Appellant declined to join them. During the meeting, Appellant called BI, who was crying and did not answer the phone. Appellant then started sending text messages to AB. The messages included: "Whoever the sick sadistic mf who did this I'm going to kill," and **[*44]** "Tell me who did it and I'll go easy on you." Appellant also asked, "Who in the f[**]k went into my room and took my s[**]t [a]nd tied me with it[?] I'm f[**]king dead as serious[,] who did it or who did you hit up[?]"

When AB and BI arrived home from the AA meeting, the front door was locked and AB did not have a key. They walked to the side of the house and saw Appellant sitting in a lawn chair, with a handgun and extended clip on a barstool next to him. Some sort of flat twine was strewn around the yard, but they did not see indications that Appellant had been tied up. Neither knew why Appellant believed he had been "hogtied." BI thought

Appellant "looked confused, maybe irrational" and "scared," and AB thought Appellant was drunk and "coming down from a cocaine high." Appellant offered AB "one more chance" to tell him who was sent to the house. AB saw Appellant rotate the gun so it pointed at her; BI did not see Appellant touch the gun. BI took Appellant's gun and put it on top of the refrigerator. AB later took the clip and hid it. AB texted an AFOSI agent about what happened, and later came to believe that AFOSI agents had seized the gun. AB moved out about a month later. Appellant **[*45]** was found guilty of communicating a threat to AB, but not guilty of aggravated assault for his conduct involving the handgun.

2. Law

The elements of communicating a threat, as alleged in the Specification of Charge IV, include that: (1) Appellant communicated certain language expressing a present determination or intent to wrongfully injure AB presently or in the future; (2) the communication was made known to AB; (3) the communication was wrongful; and (4) under the circumstances, Appellant's conduct was to the prejudice of good order and discipline in the armed forces. *See* 2016 *MCM*, pt. IV, ¶ 110.b.

We evaluate the first element—whether the communication constituted a threat—from the point of view of a reasonable person. *United States v. Rapert, 75 M.J. 164, 168 (C.A.A.F. 2016)*. "Importantly, however, this objective approach to the notion of a 'threat' refers only to the *first* element of the offense and not to the *third* element." *Id.* (emphasis in original). That is, while the language used must convey a present determination or intent, an accused need not actually intend to do the injury threatened. 2016 *MCM*, pt. IV, ¶ 110.c. Moreover, a communication is wrongful when an accused transmitted it "for the purpose of issuing a threat, with the **[*46]** knowledge that the communication would be viewed as a threat, or acted recklessly with regard to whether the communication would be viewed as a threat." *Id.*

3. Analysis

Appellant's basis for attacking the legal sufficiency of his conviction of communicating a threat is that the alleged language was not a threat to injure AB, was not wrongful, or both.

Appellant was charged with wrongfully communicating a threat to injure AB by making two statements: (1) "Whoever the sick sadistic mf who did this I'm going to kill," and (2) "Tell me who did it and I'll go easy on you." As he did at trial, Appellant claims the first statement does not communicate a threat to injure AB because Appellant did not know who tied him up. Appellant claims the second statement would not be perceived by a reasonable person as a threat, but instead just a drunk and drugged Appellant annoying his roommate with "idle banter."

The Government asserts the messages together demonstrate Appellant was angry, and he directed his anger at AB because he thought she was personally responsible for tying him up, or at least knew who was. Indeed, the evidence showed the two statements were related; they were in the string of text **[*47]** messages Appellant sent to AB after he believed someone tied him up.

We need not interpret the statements separately. Appellant was charged with communicating "a threat to injure" AB, and both statements comprise the charged threat. A reasonable reading of the text messages, as well as the context before, during, and after Appellant sent them, is that Appellant was going to kill those who tied him up; that he demanded AB provide him information about who besides her was involved in tying him up; and that AB providing him that information would result in her injury being less severe than death.

Finally, we are not persuaded by Appellant's argument that his threatening communication was not wrongful. Not only did Appellant's text messages indicate he was very angry, but he said he was "dead as serious." Moreover, the fact that Appellant soon thereafter confronted AB with a gun provides some evidence that he meant his words to be perceived as a threat. The evidence does not lead to a conclusion that the statements were only "idle banter."

In assessing legal sufficiency, we are limited to the evidence produced at trial and are required to consider it in the light most favorable to the Prosecution. **[*48]** *See Robinson, 77 M.J. at 297-98* (citation omitted). We conclude that a rational factfinder could have found beyond a reasonable doubt all 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, *see Turner, 25 M.J. at 325*, we are

convinced of Appellant's guilt beyond a reasonable doubt. Therefore, we find Appellant's conviction for communicating a threat as alleged in the Specification of Charge IV legally and factually sufficient.

C. Discovery/Prosecutorial Misconduct

1. Additional Background

Sometime between when the court recessed for the evening on 26 June 2019—in the middle of the Government's findings case in chief—and when it opened again the next morning, the military judge was informed of a potential conflict involving Capt AH, the assistant trial counsel, and SA GM, an AFOSI agent formerly assigned to Cannon AFB. The allegation was that Capt AH and SA GM engaged in a sexual relationship during 2017 and 2018 while both were married to other people. The military judge gave counsel most of the day "to explore the issue and the potential impact it may **[*49]** have on this case." By the end of the day, the staff judge advocate removed Capt AH from the case and the Defense indicated it would file a written motion to dismiss with prejudice based on *Fifth Amendment* and *Brady* violations.[14] The Defense told the military judge: "the only remedy we will be requesting is dismissal with prejudice. We would oppose dismissal without prejudice, and we would oppose a mistrial." In anticipation of filing its written motion that evening, the Defense was allowed to call its two witnesses—SA CO and SA AD—and present argument. The Defense filed its written motion to dismiss on 27 June 2019 and the Government filed its opposition thereafter.

The afternoon of the next day, 28 June 2019, the parties marked their written filings and the military judge provided an oral ruling. The military judge issued a written ruling the same day; he denied the Defense's motion to dismiss with prejudice.

We find the military judge's findings of fact regarding this motion to be supported by the record and not clearly erroneous. SA GM was an enlisted AFOSI agent assigned to Cannon AFB during the AFOSI investigation of Appellant. In July 2017, he and another AFOSI agent (SA AD) interviewed AB about **[*50]** Appellant pointing a firearm at her and communicating a threat to her. AB believed that firearm was seized by AFOSI agents; however, no AFOSI agent, including SA GM, admitted to seizing it. Also in July 2017, AB witnessed Appellant use cocaine, and notified SA AD. Later, Appellant worked for AFOSI as a confidential informant, during which time SA GM interacted with him on one operation.

Capt AH arrived to Cannon AFB in August 2017. The next month, she interviewed AB about the assault and threat. The record does not indicate when Capt AH was detailed as assistant trial counsel in Appellant's general court-martial, but does show she acted in that role as early as November 2018, while the murder investigation was ongoing.

Four AFOSI agents heard that SA GM claimed to have had an affair with Capt AH. SA CO and SA AD—the two agents who testified during motions practice that SA GM told them this directly—doubted his veracity. One of those agents, SA CO, heard this claim in June 2018, but did not report it to his leadership until sometime between November 2018 and January 2019, after SA GM had left Cannon AFB.[15]

In response to the shooting in July 2018, SA GM and two other agents were called out **[*51]** to Appellant's home. SA CO was the lead AFOSI agent in the murder investigation. SA GM was not assigned to work on the murder investigation and had no role in the case. SA CO testified that any unprofessional relationship between SA GM and Capt AH would have had no effect on how AFOSI handled the investigation.

Shortly before trial, on 20 May 2019 the Defense notified the Government that SA GM was on its witness list. Because SA GM was deployed, Capt AH asked the Defense if it was amenable to stipulations of fact as an alternate to production of SA GM. One stipulation Capt AH proposed was that the firearm was not seized by AFOSI agents, to include SA GM and SA WB, in July 2017.

About a week before the trial began, Capt AH had an email exchange with SA GM, who wanted to know what he needed to do to prepare for trial. In her message dated 20 June 2019, she told SA GM that the Defense might ask him about his "memory of seizing/non-seizing [Appellant]'s firearm" in July 2017. SA GM maintained he had no memory of seizing the firearm, stating: "I do

[14] *U.S. Const. amend. V*; *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*.

[15] The record indicates SA GM deployed or permanently changed duty stations.

not remember taking any guns. I remember an op[eration][16] with [Appellant], but taking a gun is something I really think I would remember doing **[*52]** if I did it." The Government did not provide this email to the Defense until trial.

2. Law

In reviewing discovery matters, we conduct a two-step analysis: "first, we determine whether the information or evidence at issue was subject to disclosure or discovery; second, if there was nondisclosure of such information, we test the effect of that nondisclosure on the appellant's trial." *United States v. Coleman, 72 M.J. 184, 187 (C.A.A.F. 2013)* (quoting *United States v. Roberts, 59 M.J. 323, 325 (C.A.A.F. 2004)*).

"The failure of the trial counsel to disclose evidence that is favorable to the defense on the issue of guilt or sentencing violates an accused's constitutional right to due process." *Coleman, 72 M.J. at 186* (citing *Brady, 373 U.S. at 87*). Such cases are reviewed for harmless error. *Id.* (citing *Smith v. Cain, 565 U.S. 73, 75, 132 S. Ct. 627, 181 L. Ed. 2d 571 (2012)*). Favorable evidence includes "impeachment evidence as well as exculpatory evidence." *Strickler v. Greene, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)* (citation omitted); *see also United States v. Claxton, 76 M.J. 356, 359 (C.A.A.F. 2017)* (quoting *Strickler, 527 U.S. at 280*).

> There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Strickler, 527 U.S. at 281-82.

Prejudice is shown when the undisclosed evidence is material, and "[s]uch evidence is material 'if there is a reasonable probability that, **[*53]** had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Strickler, 527 U.S. at 280* (quoting *United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)*); *see also Smith, 565 U.S. at 75* (citation omitted). A reasonable "possibility" of a different result is not sufficient. *Strickler, 527 U.S. at 291*. We evaluate prejudice from the nondisclosure "in the context of the entire record." *Turner v. United States, 137 S. Ct. 1885, 1893, 198 L. Ed. 2d 443 (2017)* (quoting *United States v. Agurs, 427 U.S. 97, 112, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976)*); *see also United States v. Stone*, 40 M.J, 420, 423 (C.M.A. 1994) (noting that "recourse to *the entire record* of trial is required to determine the effect of the undisclosed evidence on the conviction"). We evaluate the military judge's determination of materiality de novo. *See Roberts, 59 M.J. at 326* (citing *United States v. Morris, 52 M.J. 193, 198 (C.A.A.F. 1999)*).

A *Brady* violation is demonstrated "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley, 514 U.S. 419, 435, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)*. Whether the military judge would have allowed the evidence to be admitted is not determinative: "In this context however, the question is not whether the military judge would or would not have permitted the cross-examination under [Mil. R. Evid.] 608(b), but whether the information was material to the defense's preparation for trial." *Roberts, 59 M.J. at 326* (citing R.C.M. 701(a)(2)(A)).

"A military accused also has the right to obtain favorable evidence under *Article 46, UCMJ, 10 U.S.C. § 846 (2006)*, as implemented by R.C.M. 701-703." *Coleman, 72 M.J. at 186-87* (footnotes omitted). The **[*54]** United States Court of Appeals for the Armed Forces (CAAF) "has held that *Article 46*[, UCMJ,] and its implementing rules provide greater statutory discovery rights to an accused than does his constitutional right to due process." *Coleman, 72 M.J. at 186* (citing *Roberts, 59 M.J. at 327*). Thus, when "the defense made a specific request for the undisclosed information . . . we apply the heightened constitutional harmless beyond a reasonable doubt standard." *Coleman, 72 M.J. at 187* (citations omitted).

When fashioning a remedy for a discovery violation, military judges consider the individual facts of the case. *See United States v. Dancy, 38 M.J. 1, 6 (C.M.A. 1993)*. Remedies can include granting a continuance, prohibiting a party from calling a witness or introducing evidence, dismissal with or without prejudice, or providing a remedy that is considered just under the circumstances. *See United States v. Stellato, 74 M.J. 473, 488 (C.A.A.F. 2015)*; R.C.M. 701(g)(3). Dismissal "is a drastic remedy" but nevertheless may be

[16] This is a reference to a controlled buy of illegal drugs while Appellant was acting with the AFOSI as a confidential informant—after Appellant admitted to AFOSI that he had used illegal drugs.

appropriate when "no lesser sanction will remedy" the prejudicial effects of the discovery violation. Stellato, 74 M.J. at 488 (internal quotation marks and citation omitted). We evaluate the military judge's choice of remedy for an abuse of discretion. Id. at 480.

3. Analysis

In his oral ruling, the military judge considered the Government's failure to provide to the Defense the email exchange between SA GM **[*55]** and Capt AH as well as failure to disclose the nature of their relationship. The military judge found no Brady violation related to the email; the Government had already notified the Defense that no agent maintained they had seized Appellant's firearm in 2017. Regarding the relationship, the military judge first found that Capt AH's removal as assistant trial counsel was a sufficient remedy for any prosecutorial misconduct. He then found no Brady violation related to failure to disclose this relationship to the Defense. He analyzed both discovery issues using the factors in Strickler.

Appellant asserts the military judge abused his discretion by denying the defense motion to dismiss, and challenges the failure to disclose the nature of the relationship but not the failure to disclose the email. Appellant does not dispute the military judge's understanding of Brady and Strickler, but claims the military judge's conclusions regarding the first (favorable to the Defense) and third (prejudice) Strickler prongs were erroneous. *See* Strickler, 527 U.S. at 281-82. The Government does not contest that the alleged relationship was subject to discovery, but asserts the military judge's findings, analysis, and conclusions were not erroneous.

We agree with Appellant **[*56]** that the military judge erred in his analysis of whether information about the alleged relationship was favorable to the Defense. However, we find that the military judge did not err in his conclusions that Appellant was not prejudiced by the nondisclosure and that dismissal with prejudice was not warranted.

a. Favorable Evidence

Addressing whether the information would be favorable to the Defense, the military judge found it "speculative at best." He continued:

> Having played no meaningful role in either investigation, there is no evidence that the existence of a relationship between SA [GM] and Capt [AH], had it been disclosed, would have amounted to evidence that was favorable to the Defense. . . . While it could conceivably be perceived as a design on the part of his fellow agents to protect SA [GM], given his insignificant role in this particular case, any impeachment would be on a collateral matter having little if any probative value, and would fail to survive the [Mil. R. Evid.] 403 balancing test.

To the extent the military judge was addressing the *admissibility* of the evidence to determine if it was favorable to the Appellant under the first Strickler prong, we find error. When considering whether evidence **[*57]** is favorable, we look not to whether it would be admitted, but whether the information had exculpatory or impeachment value. *See* Roberts, 59 M.J. at 326. Thus a military judge's determination that evidence would be excluded under Mil. R. Evid. 403 is of little consequence in determining whether the evidence would be favorable to the Defense and subject to disclosure. The question is whether the information at issue—that assistant trial counsel allegedly had an unprofessional relationship with an AFOSI agent who had a tangential role in the investigation of Appellant's offenses—was subject to disclosure because it had exculpatory or impeachment value, and thus was favorable to defense preparation. In this case, we see some impeachment value in any such evidence, and disclosure to the Defense could have helped it prepare for trial. The military judge's analysis of whether the information would be favorable to the Defense is better suited to whether Appellant suffered prejudice.

b. Prejudice and Materiality

In his prejudice analysis, the military judge found:

> There must be some logical tie between the relationship and either actions taken as part of the investigation or conduct that would amount to valid impeachment evidence for **[*58]** the relationship to be material to the case and result in an unfair trial, thereby prejudicing the Accused. No such link has been established.

The military judge emphasized the facts that Capt AH was not involved in the investigation of Appellant's drug offenses, and that SA GM was not involved in the investigation of Appellant's homicide offense. He also

concluded that whether AFOSI seized Appellant's firearm in 2017 was irrelevant to the offenses with which Appellant was charged. Specifically, he found that "whether or not [AB] felt safe or unsafe due to her understanding of whether the gun was seized is irrelevant," "the controlled buy took place *after* the alleged assault," and "any effort to cross examine agents and suggest that their failure to seize a firearm in August 2017 . . . somehow contributed to the shooting of [MJ] would not be probative of any fact in issue and would surely fail the [Mil. R. Evid.] 403 balancing test."

After finding the third *Strickler* prong was not met, the military judge addressed trial defense counsel's arguments that the Defense would have approached this case differently had the claim of an inappropriate relationship been disclosed. He found this argument unsupported by the **[*59]** evidence. As to the drug offenses to which Appellant pleaded guilty, the military judge noted the Government's evidence was strong, and included Appellant's confession; "Capt [AH] did not even arrive on station until after the drug investigation was complete;" and the emails regarding whether the firearm was seized were "entirely professional in nature and consistent with the type of communications" between trial counsel and potential witnesses. As to the offenses involving AB, she was "the primary witness . . . with [AF]OSI primarily taking statements." And finally, "the vast majority of the physical evidence related to the alleged murder was collected by Clovis [Police Department]." He summarized his conclusion: "The Court fails to see how knowledge of the existence of the relationship in question would have driven significant changes to the Defense approach to the [AF]OSI investigation to a degree warranting dismissal with prejudice."

On appeal, Appellant outlines "evidence of the investigators' questionable behavior that could aid the Defense in demonstrating reasonable doubt." Specifically, Appellant notes:

> (1) [AF]OSI inexplicably failed to seize the weapon that was allegedly used **[*60]** to assault their [confidential informant]; (2) the detachment commander, who was later relieved, ordered SA CO to make a year-old entry in the [internal data pages] indicating a weapon was seized that was never in fact seized; (3) SA AC lacked an understanding of some basics of crime scene analysis; (4) SA AC made an inappropriate Facebook Live video during the investigation itself, in part to complain about the [Clovis Police Department]; (5) at least five agents and investigators were aware of an unprofessional relationship between trial counsel and an agent, yet this information never left the detachment; and (6) the detachment's failure to swab the Glock for fingerprints to see if MJ handled the weapon. Taken together, the Defense could have mounted a comprehensive attack of the detachment's competence, or decided not to plead guilty to some specifications.

Appellant continues: "It lost these options because of Capt AH's *Brady* violation. This is prejudice. The military judge abused his discretion in finding otherwise."

We disagree that Appellant lost these options for attacking the AFOSI investigation and the credibility of the agents. Before the alleged discovery violation, the record **[*61]** shows the Defense had information about five of the six "questionable behaviors" by AFOSI—all but the alleged unprofessional relationship. Not only did it have this other information, the Defense actually presented much of it at trial. It "lost" only an opportunity to try to get information about the alleged relationship—and the AFOSI agents' beliefs about its existence—before the members, and an opportunity to try to impeach SA GM.

We agree with the military judge that such evidence would fail a Mil. R. Evid. 403 balancing test. At the time of trial, the matter had not been investigated. This was a highly inflammatory claim about the personal and sexual relationships of two people involved in Appellant's court-martial, one of whom had very little involvement in the investigations against Appellant. We find very little probative value and a high danger of prejudice and confusion of the issues. Thus, even if the allegation had been disclosed to the Defense, the details of it would not have been before the fact-finder. Accordingly, Appellant has not established prejudice and has thus failed to establish a *Brady* violation. *See Strickler, 527 U.S. at 281-82*.

c. Harmless Beyond a Reasonable Doubt

Finding no *Brady* violation, we consider whether **[*62]** relief is warranted for failure to provide discovery under *Article 46, UCMJ*. If the Defense made "a specific request for the undisclosed information . . . we apply the heightened constitutional harmless beyond a reasonable doubt standard" in assessing the failure to disclose. *Coleman, 72 M.J. at 187* (citations omitted).

On appeal, both parties presume that Appellant's discovery request for the undisclosed information was specific and not general.[17] We will accept that presumption, as our determination is the same.

We are convinced that the failure of the Government to disclose to the Defense the claim that SA GM and Capt AH had an unprofessional relationship is harmless beyond a reasonable doubt. A replacement assistant trial counsel might have been detailed to prosecute the case, but the strength and admissibility of the evidence—and the strategic decisions based thereon—would not have changed. We note that even after Appellant learned about SA GM's claim, he did not want a continuance or a mistrial, which would result in a delay and time for investigation into the claim. We see no reasonable probability that, had the information been disclosed to the Defense, the result of Appellant's court-martial would have been different. **[*63]** Any belief that the result would have been different is speculative and is unsupported by the record.

d. Remedy

The law provides the military judge wide discretion to fashion an appropriate remedy for a discovery violation based on the facts of the case. At trial, Appellant narrowed those options, insisting the only remedy he sought was dismissal with prejudice. The military judge considered that option, and concluded dismissal with prejudice was not warranted. He noted that one remedy was already in place: Capt AH was removed as assistant trial counsel. He restated his previous findings: "It is speculative at best whether or not the relationship in any way actually impacted the investigation, the prosecution, or otherwise deprived the Defense of impeachment material or other information favorable to the Defense that has resulted in an unfair trial." Finally, he noted the members were unaware of the issue and accordingly concluded that no curative instruction was required.

Any prejudice Appellant may have suffered as a result of not knowing about the claimed relationship does not warrant the remedy of dismissal with prejudice. Less drastic measures were available, including a delay to **[*64]** prepare cross-examination, withdrawal of Appellant's guilty pleas, or a mistrial. *See* Stellato, 74 M.J. at 488. However, the Defense made clear that it was only requesting dismissal with prejudice, to the exclusion of all other remedies. We find the military judge did not abuse his discretion by denying Appellant the particular relief he requested.

e. Prosecutorial Misconduct

Appellant claims the failure of assistant trial counsel to disclose to the Defense the nature of her relationship with SA GM is prosecutorial misconduct: "Here, the gatekeeper of discovery from the Government to the Defense is the very person implicated in the discovery owed to the Defense, and the decision is made by that individual to conceal, rather than disclose." Appellant claims this court should "recognize that prosecutorial misconduct of this gravity rises to the level of a due process violation" and asks us to set aside the findings and sentence with prejudice. Appellant acknowledges that the trial defense counsel did not "explicitly invoke the language of prosecutorial misconduct," but claims that was "the inescapable implication of its attack on Capt AH's conduct."

Appellant asserts Capt AH should have disqualified herself, or **[*65]** at least disclosed grounds for disqualification, and that her "failure to raise the issue of her disqualification was misconduct, plain and simple." Appellant's claims of prosecutorial misconduct against Capt AH all presume SA GM's claim is true. We have considered whether a post-trial evidentiary hearing is required to resolve the factual issue of whether there was, in fact, an unprofessional relationship. *See* United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993) (noting the purpose of such a hearing "is merely to clarify collateral or predicate matters"); United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411, 413 (C.M.A. 1967). We find a hearing unnecessary to resolve Appellant's claims. Even assuming the existence of an unprofessional relationship, we find no further remedy is warranted in this case—especially not Appellant's requested remedy of setting aside all charges and specifications.

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[17] At trial and on appeal, Appellant did not assert he made a specific request for information regarding the personal relationships of potential witnesses. Instead, Appellant made a more generic request for evidence tending "to diminish the credibility of any witness, potential witness, alleged victims, or co-actor, including evidence of character, conduct, or bias." The specific examples of the information requested were convictions, military discharges, nonjudicial punishment, and adverse administrative actions. The Defense cited Brady and Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). Capt AH provided the Government's discovery response.

D. Format of Victim Impact Unsworn Statement

Appellant contends that the military judge abused his discretion in allowing two victims to present unsworn statements via a question-and-answer format with trial counsel. We disagree.

1. Additional Background

MJ was survived by his parents and brother. Upon an unopposed Government request, the military judge appointed MJ's mother, MH, as MJ's legal representative "for purposes **[*66]** of assuming her [sic] rights" pursuant to *Article 6b, UCMJ, 10 U.S.C. § 806b*.

In an *Article 39(a), UCMJ, 10 U.S.C. § 839(a)*, hearing in pre-sentencing, the military judge summarized a conference he had with counsel pursuant to R.C.M. 802. The parties had informed the military judge that both Appellant and victims desired to use a question-and-answer format from the witness stand.

During the Article 39(a), UCMJ, hearing, the circuit defense counsel objected to both the question-and-answer format and the lack of a written proffer of the statements from the victims:

> MJ: Okay. And what's the objection to the Q&A?
> CDC: Your Honor, [R.C.M.] 1001(c)(5) is kind of very specific in terms of how the unsworns can be done and it says there needs to be a written proffer of what they're going to be talking about and we think that essentially what is being done is the exact opposite of what the rule specifically says must be done.
>
> MJ: Okay. So, Government, in reviewing [R.C.M.] 1001(c) sort of in its entirety, it doesn't necessarily preclude a Q&A format but it also doesn't imply a Q&A format in the same way that we've seen with the unsworn statement of the accused but one thing it does require -- oh, by the way, there is a reference to the military judge's ability to reasonably limit the form and statements provided and that cites **[*67]** back to RCM 801(a)(3),[18] which states subject to the Uniform Code of Military Justice and this [M]anual, the military judge exercises reasonable control over the proceedings to promote the purposes of these rules and the manual. So, I do have some discretion. However, there is a requirement that a written proffer at least be provided to the [D]efense.

The circuit trial counsel addressed the Defense's objection to the question-and-answer format:

> The rule does not prohibit it. We think it's permissible. This is a unique case. [Appellant] was just convicted of killing these people's son so I think it would be appropriate for them to sit and answer questions. It also gives us, as the trial counsel, the ability to appease some of the defense concerns that this could go off the rails or outside the bounds[. I]f we do it in a question and answer format, we have the ability to control that versus just letting the mother, father, and brother get up and talk, which does -- there are concerns from trial counsel in any case but certainly in a case like this that it could go outside the bounds, and we want the ability to control that and we think that the best way to do that would be through a question and answer **[*68]** format.

The military judge then ruled:

> So, within my authority under [R.C.M.] 801(a)(3) and after reviewing [R.C.M.] 1001(c), I don't see any language in here that would specifically prohibit a Q&A style unsworn victim impact statement, provided that the [G]overnment does comply with the rule with regard to providing a written proffer of the matters that are going to be addressed in the statement. And, so, as long as that satisfies the [D]efense is prepared to object to anything that they may find in that statement, and I do tend to agree with the [G]overnment in a sense that it does give counsel greater control of the matters that are revealed during the unsworn statement if they are controlling the questioning and the answering. But either way, the court has a sua sponte duty to step in and intervene if a victim impact statement strays beyond the confines of [R.C.M.] 1001, and the court will exercise that authority. So, it's just a matter of providing them that written contact. I'm indifferent as to whether or not the individuals want to submit to an actual interview but what I don't want to do is excessively delay the morning while the interview's being conducted.

When the Defense renewed its objection, the military **[*69]** judge reiterated his ruling:

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[18] "The military judge shall: . . . [s]ubject to the UCMJ and this Manual, exercise reasonable control over the proceedings to promote the purposes of these rules and this Manual." R.C.M. 801(a)(3).

> Again, I find that's within my authority under [R.C.M.] 801(a)(3) to allow for the format of how evidence is presented and how unsworn statements are presented in this court-martial. I don't believe that a Q&A format, in any way, runs contrary to [R.C.M.] 1001(c). In fact, I think, again, as the government articulated, it provides a greater sense of control in the sense that the government can control the questions, raise and reorient the witness - - the individual providing the unsworn statement. And so, I understand your objection but it's overruled. I think that's well within the confines of the rule to allow that Q&A format.

The Government anticipated MJ's mother, father, and brother would make unsworn statements. None were represented by counsel. Only the brother's statement was in writing.[19] In discussion with the military judge regarding the Defense's objection, the circuit trial counsel said she told the family they would have to subject themselves to an interview with the Defense if they chose not to write out a proffer of their oral statements. On a break, the Government provided the Defense a "proffered statement" and the Defense "had the opportunity to talk to [members of] the family." **[*70]** [20]

The Defense also objected to the parents' statements addressing pre-incident topics, including MJ's "childhood, the things he enjoyed doing, why he wanted to come into the Air Force, how proud they were of him when he joined the Air Force, just a lot of biographical data on him growing up, which is totally unrelated to victim impact." The Government countered that those topics are relevant "to understand who [MJ] is and why this has had such an impact on them." The military judge ruled:

> Based on the proffered expected unsworn statement as articulated by the [G]overnment and after consideration of the [D]efense's concerns, I'm going to overrule that objection. [R.C.M.] 1001(c)(2)(B) describes victim impact as any financial, social, psychological and medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty. Given that this case involves an offense that resulted in the death of another human being, the ability for the family to articulate that individual's life up to the point where he died, I think is relevant, within the definition of victim impact, certainly at a minimum the psychological impact on the family of having a loved one deceased. **[*71]**

After the Government rested its case in presentencing, the military judge provided the court members an instruction regarding victim unsworn statements:

> Members of the Court, at this time you will hear some unsworn statements from individuals that are identified as victims of the crime. I want to read you a brief instruction though as to how you can consider these particular statements. An unsworn statement is an authorized means for [a] victim to bring information to the attention of the court and must be given appropriate consideration. The victim cannot be cross-examined by the [P]rosecution or [D]efense or interrogated by court members, or me, upon an unsworn statement but the parties may offer evidence to rebut statements of fact contained in it. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement is not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to use your common sense and **[*72]** your knowledge of human nature and the ways of the world.

The first victim to provide an oral unsworn statement was MH, MJ's mother and *Article 6b*, UCMJ, representative. The assistant trial counsel asked her questions, including: her name and her relationship to MJ, where MJ was born, his hometown, his personality as a baby, what he was like as an older child and in high school, how MJ felt being stationed so close to home, why MJ joined the Air Force, and how it felt to watch him graduate from basic training. Additionally, counsel asked MH questions relating to MJ's injury and death, including how she learned about it, how she felt at the hospital where MJ was being treated, how her life has been affected without MJ, and what had been done to

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[19] This statement was marked and presented to the members as a court exhibit. MJ's brother did not provide an oral statement.

[20] The record is not clear whether the mother and father provided a written proffer, or the Government prepared a written proffer on the family's behalf, or if this refers to the brother's written statement. It also is not clear who "the family" comprised. Finally, the Government and the military judge may have presumed the Government was responsible for providing the Defense a proffer of the victims' statements.

memorialize MJ. Many of MH's responses were narrative or provided more information than called for in the question.

The second victim to provide an oral unsworn statement was MJ's father. The circuit trial counsel asked him questions, including: background of MJ's birth and name, what MJ was like as a young child and older child, the father's relationship with MJ and MJ's brother, what he thought of MJ joining the Air Force and being stationed **[*73]** close to home, how it felt to watch MJ graduate from basic training, and whether MJ enjoyed being in the Air Force. Additionally, counsel asked him questions relating to MJ's injury and death, including how the father learned about it, going to the hospital where MJ was being treated, how he thought about MJ now that MJ was deceased, and changes in the family dynamic (which answer was mostly non-responsive). Like MH, many of MJ's father's responses were narrative or provided more information than called for in the question. Some of the questions were more directive in nature, including whether he was proud of MJ when he joined the Air Force and whether they immediately drove to Lubbock after learning MJ was shot. After the circuit trial counsel had no more questions, the military judge thanked MJ's father for his "testimony;" at the same point after MH's statement, the military judge told MH she was "good to step down."

2. Law

We review a military judge's interpretation of R.C.M. 1001[21] de novo, but review a decision to admit victim-impact statements in pre-sentencing for an abuse of discretion. *See* United States v. Hamilton, 78 M.J. 335, 340 (C.A.A.F. 2019); United States v. Barker, 77 M.J. 377, 382-383 (C.A.A.F. 2018); *see also* United States v. Tyler, 81 M.J. 108, 112-113 (C.A.A.F. 2021) (describing the military judge as the "gatekeeper for unsworn victim statements" with **[*74]** the power to restrict their contents.). A military judge abuses his discretion when he makes a ruling based on an erroneous view of the law. *See* Barker, 77 M.J. at 383 (citing United States v. Lubich, 72 M.J. 170, 173 (C.A.A.F. 2015)).

[21] Rules addressing a victim's right to be reasonably heard were contained in R.C.M. 1001A (2016 *MCM*). However, those rules are now contained in R.C.M. 1001(c). *See* 2019 *MCM*, App. 15, at A15-18 ("R.C.M. 1001(c) is new and incorporates R.C.M. 1001A of the MCM (2016 edition)."). Our analysis cites to these versions as applicable.

Article 6b, UCMJ, details several rights belonging to crime victims. Among them are the "right to be reasonably heard at . . . a sentencing hearing relating to the offense," and the "reasonable right to confer with the counsel representing the Government" at a court-martial proceeding relating to the offense. Articles 6b(a)(4)(B) and 6b(a)(5), UCMJ, 10 U.S.C. §§ 806b(a)(4)(B), (a)(5). *See also* R.C.M. 1001(c)(1) ("[A] crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at the presentencing proceeding relating to that offense.").

In presentencing, "[t]he crime victim may make an unsworn statement and may not be cross-examined by trial counsel or defense counsel, or examined upon it by the court-martial." R.C.M. 1001(c)(5)(A). A victim's right to be reasonably heard, which can include making an unsworn statement, is separate from the parties' rights to present evidence. The CAAF has specifically noted that the R.C.M. 1001A/1001(c) process "belongs to the victim" who has "an independent right to be reasonably heard at a sentencing hearing." Barker, 77 M.J. at 383 (internal quotation marks and citations omitted). "Upon good cause **[*75]** shown, the military judge may permit the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement." R.C.M. 1001(c)(5)(B).

"We conclude that the rights vindicated by R.C.M. 1001A are personal to the victim in each individual case. Therefore, the introduction of statements under this rule is prohibited without, at a minimum, *either the presence or request of the victim*, the special victim's counsel, or the victim's representative." Barker, 77 M.J. at 382 (emphasis added) (citing R.C.M. 1001A(a) and R.C.M. 1001A(d)-(e)). "[T]he right to be reasonably heard requires that the victims be contacted, given the choice to participate in a particular case, and, if they choose to make a statement, offer the statement themselves, through counsel, or through a 'victim's designee' where appropriate." Hamilton, 78 M.J. at 339-40 (citations omitted).

"The military judge shall: . . . [a]t the military judge's discretion, in the case of a victim of an offense under the UCMJ who is . . . deceased, designate the legal guardian(s) of the victim or the representative(s) of the victim's estate, family members, or any other person deemed as suitable by the military judge to assume the victim's rights under the UCMJ." R.C.M. 801(a)(6); *see also* Article 6b(c), UCMJ, 10 U.S.C. § 806b(c).

3. Analysis

Appellant urges this court to find the question-and-answer **[*76]** format used in this case erroneous, and to set aside his sentence. He claims "[t]he military judge essentially allowed [MJ's parents] to testify from the witness stand without cross-examination." He rebukes the Government for having "commandeered [MJ's parents'] right of allocution," including exercising "control" over the victims' statements.[22] We find the military judge did not err in determining that a question-and-answer format was a permissible means for the victims to present their unsworn statements to the sentencing authority under R.C.M. 1001(c). Moreover, we find it was not error for the victims to provide their statements as answers to trial counsel's questions, of which questions the Defense was on notice.

We acknowledge our sister court has come to a different conclusion on the latter issue. In *United States v. Cornelison, 78 M.J. 739 (A. Ct. Crim. App. 2019)*, *rev. denied*, *79 M.J. 189 (C.A.A.F. 2019)*, the Army Court of Criminal Appeals (ACCA) considered whether it was error to allow an unsworn victim statement delivered in a question-and-answer format between the victim and trial counsel during the Government's presentencing case. The ACCA found no error in the question-and-answer format, but it found "R.C.M. 1001A(e)(2)[23] requires the victim's own counsel—not the trial counsel, defense counsel, **[*77]** or the court-martial—be the individual who asks the victim such questions." *Id. at 744*. The ACCA concluded "the military judge erred by failing to enforce R.C.M. 1001A as it is written when he allowed the trial counsel to participate in [the victim's] unsworn statement." *Cornelison, 78 M.J. at 744*. While the ACCA found error in the involvement of the trial counsel, as well as the timing of the statement, it found no prejudice. *Id.; see also United States v. Bailey, No. ACM 39935, 2021 CCA LEXIS 380, at *15 (A.F. Ct. Crim. App. 30 Jul. 2021)* (unpub. op.) (finding clear or obvious error when trial and trial defense counsel read victim statements out loud).

We do not conclude R.C.M. 1001(c) must be read narrowly, or even that a narrow interpretation would reach the same result as *Cornelison*. We do not interpret R.C.M. 1001(c) to require a result that seems inconsistent with the statutory right in *Article 6b, UCMJ*, to be "reasonably heard," which the President repeated in R.C.M. 1001(c)(1). The plain language of this right reaches both the substance of a victim's statement and the means by which the victim may be heard. The right countenances that a victim may choose to have members of the court and members of the public hear the victim in open court in the manner chosen by the victim, whether the victim makes an oral statement personally or through a question-and-answer format. We decline **[*78]** to find that a victim who chooses to participate by delivering an unsworn statement aided by counsel for either party is outside the scope of a victim's statutory and regulatory right to be reasonably heard.

We interpret R.C.M. 1001(c) to be in harmony with *Article 6b, UCMJ*. The language in R.C.M. 1001(c)(5)(B) stating "the military judge may permit the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement" could mean the President wanted to clearly identify a role for victims' counsel—who in the past have been excluded from participation in many facets of a court-martial—and not mean that victims could choose only those counsel to speak on their behalf. To conclude only the latter would diminish the rights Congress bestowed on victims. Moreover, we note both Congress and the President have stated a designated individual may assume the rights of the victim. *Article 6b(c), UCMJ*; R.C.M. 801(a)(6), 1001(c)(1). Interpreting R.C.M. 1001(c)(5)(B) *expressio unius est exclusio alterius* would mean only a crime victim's counsel may deliver the victim's unsworn statement. Such an interpretation necessarily excludes the designee—unless they also are the victim's counsel—from exercising the victim's right to be reasonably heard; we are confident neither Congress nor the **[*79]** President intended this result. Therefore, we find R.C.M. 1001(c)(5)(B), which allows for all or part of the victim's statement to be delivered by the victim's counsel, does not *prohibit* a victim from responding to open questions from a party's counsel, as occurred in this case. While R.C.M. 1001(c)(5)(A) prohibits cross-examination of a victim who provides an unsworn statement, it does not specifically prohibit direct questions to facilitate a victim's right to be reasonably heard.

Finally, we do not agree that trial counsel asking the victim open questions constitutes a "deliver[y of] all or part of the crime victim's unsworn statement." R.C.M.

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[22] We considered Appellant's additional assertion that the Government improperly argued the contents of the crime victims' unsworn statements, and find this claim has no merit. *See Tyler, 81 M.J. at 113*; *Matias, 25 M.J. at 361*.

[23] R.C.M. 1001A(e)(2) stated, "Upon good cause shown, the military judge may permit the victim's counsel to deliver all or part of the victim's unsworn statement." (2016 *MCM*).

1001(c)(5)(B). In this case, and in *Cornelison*, those questions provided context for the answers; the victim's answers, not the questions, constitute the victim's unsworn statement.

The victims in this case were active participants and personally delivered their unsworn statements to the court. This was not the situation in *Barker* and *Hamilton*, where the victims were not present at the presentencing hearing, their matters were introduced by trial counsel as prosecution exhibits, and there was no evidence the victims were even aware their statements were being admitted. Here, the victims requested that trial counsel direct their **[*80]** unsworn statements. *See Barker, 77 M.J. at 382*.

Even if trial counsel's questions should not have been made during the victim's unsworn statement, the questions were not an improper Government attempt to "slip in evidence in aggravation that would otherwise be prohibited by the Military Rules of Evidence." *Hamilton, 78 M.J. at 342*. The military judge had ruled,[24] over defense objection, that the proffered topics were within the scope of appropriate victim matters, and did not *sua sponte* interrupt either statement for going outside the scope.[25] We find the military judge did not abuse his discretion in allowing MJ's parents to present their unsworn statements to the court by answering questions posed by trial counsel.[26]

Even assuming error in trial counsel's facilitation of the crime victims' unsworn statements, we would find no prejudice. "If an error occurs in the admission of evidence at sentencing, the test for prejudice is whether the error substantially influenced the adjudged sentence." *Hamilton, 78 M.J. at 343* (internal quotation marks and citation omitted). "When determining whether an error substantially influenced a sentence, this Court considers the following four factors: (1) the strength of the Government's case; (2) the strength of the defense **[*81]** case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." *Id.* (internal quotation marks and citation omitted). "An error is more likely to be prejudicial if the fact was not already obvious from the other evidence presented at trial and would have provided new ammunition against an appellant." *Barker, 77 M.J. at 384* (citation omitted). An error is more likely to be harmless when the evidence was not "critical on a pivotal issue in the case." *United States v. Cano, 61 M.J. 74, 77-78 (C.A.A.F. 2005)* (internal quotation marks and citation omitted).

To be clear, any error was in allowing the trial counsel's questions; the parents' answers were an appropriate exercise of their victim rights. We find trial counsel's questions had no substantial influence on the sentence. Those questions did not change the strength of the parties' cases, with the Government's case being significantly stronger than the Defense's case. The questions were within the scope of R.C.M. 1001(c) and, for the most part, were open ended. The Defense was on notice as to what topics each victim would address. We find Appellant was not prejudiced by the victims presenting unsworn statements in the form of responses to trial counsel's questions in this case.

[24] Appellant does not challenge this ruling on appeal.

[25] Concern that the victims might state matters outside the proper scope of victim impact under R.C.M. 1001(c) was one of the Government's stated reasons in support of allowing the victims to answer questions vice requiring the victims to provide narrative statements, and one reason the military judge allowed it. We are hesitant to condemn the Government's attempt to prevent the members from hearing inappropriate matters.

[26] Notwithstanding a victim's right to be reasonably heard, a military judge has the responsibility to "[e]nsure that the dignity and decorum of the proceedings are maintained," and shall "exercise reasonable control over the proceedings." R.C.M. 801(a)(2)-(3); *LRM v. Kastenberg, 72 M.J. 364, 372 (C.A.A.F. 2013)* (noting that a victim's "right to a reasonable opportunity to be heard on factual and legal grounds" is "subject to reasonable limitations and the military judge retains appropriate discretion under R.C.M. 801").

E. Sentencing [*82] Argument

Appellant asserts error in the Government's sentencing argument relating to Appellant's record of nonjudicial punishment[27] as well as use of the word "reckless" to describe Appellant's behaviors. We find no error.

1. Additional Background

The Government offered into evidence in pre-sentencing several documents reflecting Appellant's history of misconduct. Among them were two referral enlisted performance reports, one referencing

[27] *See Article 15, UCMJ, 10 U.S.C. § 815*, which authorizes nonjudicial punishment.

nonjudicial punishment and one referencing a failed drug screen; a record of nonjudicial punishment from July 2014, for drunk and disorderly conduct; a letter of counseling from February 2015, for failing to prepare for a uniform inspection; and a letter of reprimand (LOR) from February 2015, for failing a dorm inspection.

Additionally, the Government offered an LOR from August 2015, issued to Appellant for failing to report to duty on time. Appellant was to report for duty at 0700. After he was late, personnel from his unit went to his dorm; they did not find Appellant but they found his car in the dorm parking lot with an empty beer bottle next to it. At 0840, Appellant called his work section and explained that he was off base at the residence of BI, **[*83]** that they had been drinking, and that he had overslept. Appellant responded to the LOR in writing, concluding: "ADAPT[28] has taught me a great deal about the effects and repercussions of drinking alcohol. I will not let alcohol dictate my life or affect my career. Thank you."

The Defense objected to admission of the record of nonjudicial punishment and the LOR for failure to report for duty. The military judge allowed all the documents into evidence.

Before the court members heard argument from counsel, the military judge provided them comprehensive instructions, including:

> It is the duty of each member to vote for a proper sentence for the offenses of which the accused has been found guilty. Your determination of the kind and amount of punishment, if any, is a grave responsibility requiring the exercise of wise discretion. Although you must give due consideration to all matters in mitigation and extenuation, as well as to those in aggravation[, y]ou must bear in mind that the accused is to be sentenced only for the offenses of which he has been found guilty.

In sentencing argument, the circuit trial counsel made **[*84]** a connection from Appellant's nonjudicial punishment to the conduct of which he was convicted; trial defense counsel did not object.

> If you were listening to that [guilty-plea] inquiry what he said was every time he was using those drugs, he was drinking. And he kept saying in different forms but the bottom line is he kept saying ["]my inhibitions were lowered. [ ]Alcohol lowers my inhibitions. When I drink, my inhibitions get lowered." He said it differently every time but time and time again, he said when he drinks alcohol, his inhibitions are lowered. It started with using drugs. He would drink and use cocaine, drink and smoke weed. We're in the military. That is not acceptable. He knew this about himself. He was put on notice. ["]When I drink, my inhibitions are lowered and I use drugs.["] But it wasn't just the drugs that put him on notice that when he drinks his inhibitions are lowered, it was the *Article 15* he got. If you look back at that *Article 15* that you have. He got an *Article 15* in 2014 for drunk and disorderly. In 2014, the military put [Appellant] on notice that when he drinks, he acts in a reckless manner. Drunk and disorderly.
>
> Look at that paperwork and you can consider **[*85]** it when you're considering an appropriate punishment and what the military had done to put this young man on notice that he had reckless behavior when he drank and it started back in 2014. But if that wasn't enough, if the LORs, that the *Article 15* putting him on notice that you can't drink because you can't control yourself, if that wasn't enough, he should've known on July 23, 2017 when the drug use culminated, when [AB] saw him snort cocaine and immediately texted [AF]OSI. . . .
>
> . . . .
>
> We have drugs, two different kinds, pervasive drug use. He's in the military. It's not allowed. That doesn't stop him. You heard [BI], it's with civilians. It's with military members. It's here in Clovis. It's in Portales. It's at parties. He's having parties at his house where this is going on. Pervasive drug use. It's now led into threats and he is on notice. He's called into [AF]OSI and it doesn't stop. The drinking continues. This is all about his choices. He chose to continue drinking. He chose to use cocaine. He chose to smoke marijuana. He chose to threaten a friend, a roommate, and a fellow Airman. And when he could've stopped it, when he had that opportunity, he didn't. Instead he kept drinking. **[*86]** He made that choice to continue to drink knowing that he is reckless, that he is out of control and on the 4th of July 2018, knowing that his inhibitions get lowered and he makes bad

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[28] We understand this to refer to the Air Force Alcohol and Drug Abuse Prevention and Treatment (ADAPT) program. *See generally* Air Force Instruction (AFI) 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (18 Jul. 2018).

> decisions, he drank all day and then decided to get out a loaded firearm. He decided to get out a loaded firearm and shoot it in the air in a neighborhood.
> And again, when it wasn't firing, when it wasn't going off, when he couldn't -- you know, this family tradition couldn't come to be, he had a choice and that choice could've been ["]let me put this gun back. This is not a good idea. I've been drinking all day. I have a loaded gun. It's not firing. Let me put it back in my room. Because it was a bad choice to get it out in the first place.["] But you know what, we don't have to be here today if he had made a different choice. . . .
> . . . .
>
> Members, [Appellant] had every data point he needed to know that if he was going to drink, he was going to be reckless and that means you can't get out guns. He chose to drink but he didn't have to choose to get out a loaded firearm. He knew that. The drugs, the threats, the firearm, the shooting, the killing of his friend, he needs to be punished. He needs to be punished **[*87]** for all those. . . . The Air Force doesn't stand for the drug use or the reckless behavior, for threatening other [A]irmen, for bringing out loaded firearms when they're drunk . . .

In sentencing argument, the trial defense counsel also addressed Appellant's history of alcohol abuse:

> [Appellant] said something profound in his unsworn statement, something that's sort of a realization. He says ["]every time I drank I didn't [get] in trouble but every time I got in trouble[,] I had been drinking.["] It's remarkable the paperwork you have in front of you. This that brought us to the court-martial, everything involves alcohol and, so, when you're looking at rehabilitative potential what is the common denominator here. Alcohol. And, so, understanding he made some choices. He made some terrible choices that led him here. The idea that, why don't you have this alcoholic cure his alcoholism by himself. That's a bit hard to believe. So, whatever sentence that you craft, take that into consideration, the fact that he needs help. This isn't just an exercise of crushing him. If he gets a hold of alcohol, you can think about his rehabilitative potential, that he can get back on the straight and narrow. **[*88]**
> . . . .
> . . . You hear about after the 2017 incident when he confessed to [AF]OSI. Rather than getting him help, what did we do? He was placed as a confidential informant. I can't . . . help to think what if he had actually gotten help[?] What if [he] had curbed his alcoholism at that point, his [addiction]? Where would we be at this point?

2. Law

We review prosecutorial misconduct and improper argument de novo. *See* *Voorhees, 79 M.J. at 9*. When an appellant did not object at trial to trial counsel's sentencing argument, courts review for plain error. *United States v. Halpin, 71 M.J. 477, 479 (C.A.A.F. 2013)* (citing *United States v. Marsh, 70 M.J. 101, 104 (C.A.A.F. 2011)*).

> Plain error occurs when (1) there is error, (2) the error is clear or obvious, and (3) the error results in material prejudice to a substantial right of the accused. Thus, we must determine: (1) whether trial counsel's arguments amounted to clear, obvious error; and (2) if so, whether there was a reasonable probability that, but for the error, the outcome of the proceeding would have been different.

Voorhees, 79 M.J. at 9 (internal quotation marks and citations omitted). The burden to establish plain error, including prejudice, is on the appellant. *Id. at 9, 12*.

3. Analysis

Appellant asserts the circuit trial counsel's sentencing argument contained improper matters. First, Appellant claims **[*89]** the circuit trial counsel "blur[red] the boundary between charged and uncharged misconduct, drawing a straight line from nonjudicial punishment in 2014 to involuntary manslaughter in 2018." According to Appellant, this conduct raises two issues: "(1) the argument placed the nonjudicial punishment on par with the convicted misconduct for the purpose of sentencing; and (2) [the circuit trial counsel] essentially argued that the act of drinking itself was reckless." Additionally, Appellant asserts the circuit trial counsel improperly conflated Appellant's "reckless" history of alcohol use with the "reckless" acts for which he was convicted. We find no error, much less plain error.

We do not agree that the circuit trial counsel implicitly or expressly implied that Appellant should be punished for uncharged misconduct, including the misconduct for

which he received nonjudicial punishment. Her argument was that the nonjudicial punishment and other misconduct put Appellant on notice that his alcohol use had contributed to his misconduct, yet he continued to drink and make poor choices, culminating in Appellant shooting MJ. She argued Appellant needed to be punished for the offenses of which **[*90]** he was convicted: "The drugs, the threats, the firearm, the shooting, the killing of his friend, he needs to be punished. He needs to be punished for all those."

We also see no error in the circuit trial counsel describing as "reckless" Appellant's actions that were in evidence. The members already had determined legal issues of recklessness relating to the offenses. The members' duty in sentencing was to determine an appropriate sentence for Appellant, and not to make additional findings about recklessness. The circuit trial counsel's argument about Appellant's history of reckless behavior was not confusing, misleading, or unfairly prejudicial. The members were to consider all matters properly before them, including Appellant's history of misconduct involving alcohol use.

Ultimately, both the Prosecution and the Defense used Appellant's alcohol use as a theme in their sentencing arguments. The Prosecution argued Appellant was on notice that his alcohol use reduced his inhibitions and led to his criminal behavior. The Defense argued that had Appellant received help for alcoholism, he might not have made those "terrible choices." We are confident the court members punished Appellant only **[*91]** for the crimes of which he was convicted.

F. Sentence Appropriateness

Appellant claims his sentence to 14 years in confinement was inappropriately severe, noting that the maximum confinement authorized for involuntary manslaughter was 10 years and claiming that the drug and threat offenses were not particularly aggravated. Additionally, Appellant personally asks us to compare his sentence to two cases, each involving an appellant who shot a friend. Appellant does not indicate whether those appellants also were sentenced for drug crimes and communicating a threat.

1. Law

We review sentence appropriateness de novo. *United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006)* (footnote 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)*. "[T]he statutory phrase 'should be approved' does not involve a grant of unfettered discretion but instead sets forth a legal standard subject to appellate review." *United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010)* (citing *United States v. Hutchison, 57 M.J. 231, 234 (C.A.A.F. 2002)*, and *United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999)*). "Although we are accorded great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency." *United States v. Fields, 74 M.J. 619, 625 (A.F. Ct. Crim. App. 2015)* (citing *Nerad, 69 M.J. at 138, 146*) (additional citation omitted).

During our *Article 66(d), UCMJ*, review of sentence **[*92]** appropriateness, we may, but are not required to, consider cases that are not "closely related" to Appellant's. *See United States v. Wacha, 55 M.J. 266, 267 (C.A.A.F. 2001)*; *Lacy, 50 M.J. at 288*. We "are required to engage in sentence comparison only 'in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.'" *United States v. Sothen, 54 M.J. 294, 296 (C.A.A.F. 2001)* (quoting *United States v. Ballard, 20 M.J. 282, 283 (C.M.A. 1985)*).

When arguing sentence disparity and asking this court to compare his sentence with the sentences of others, an appellant bears the burden to demonstrate those other cases are "closely related" to his, and if so, that the sentences are "highly disparate." *See Lacy, 50 M.J. at 288* (citation omitted). Cases are "closely related" when, for example, they include "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Id.* When an appellant carries this burden, or if the court raises the issue *sua sponte*, the Government must show a rational basis for the sentence disparity. *Id.*

"We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and **[*93]** all matters contained in the record of trial." *Fields, 74 M.J. at 625* (quoting *United States v. Bare, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006)*).

2. Analysis

In both unpublished, sister-service cases Appellant cites, the appellant pleaded guilty to shooting a friend. One was also convicted of obstruction of justice. We do not find these cases to be closely related to Appellant's case. While we may consider the sentences in other cases even if they are not closely related to Appellant's, we decline to do so. "The appropriateness of a sentence generally should be determined without reference or comparison to sentences in other cases." *United States v. LeBlanc, 74 M.J. 650, 659 (A.F. Ct. Crim. App. 2015)* (en banc) (citing *Ballard, 20 M.J. at 283*). Here, we find no reason to deviate from the general rule set out in *LeBlanc*.

As to his first argument—that his sentence was inappropriately severe—we have considered this particular Appellant, the nature and seriousness of the offenses, Appellant's record of service, and all matters contained in the record of trial. We find nothing particularly noteworthy about this Appellant or his service record, which pale in comparison to taking a life, threatening an Airman, and repeatedly using illegal drugs. For these offenses, Appellant faced a maximum punishment of confinement for 20 years, reduction to the grade of E-1, forfeiture of **[*94]** all pay and allowances, and a dishonorable discharge. Understanding we have a statutory responsibility to affirm only so much of the sentence that is correct and should be approved, *Article 66(d), UCMJ*, we determine the sentence is not inappropriately severe.

G. Convening Authority's Decision on Action

Appellant requests this court "remand the case to the Chief Trial Judge to resolve a substantial issue with the convening authority's failure to take action in his decision memorandum." We decline to do so, relying on a post-trial declaration of the convening authority.

1. Additional Facts

The earliest offenses of which Appellant was convicted—divers use of cocaine and marijuana—occurred between 4 January 2014 and 24 July 2017. All charges and specifications against Appellant were referred to trial on 27 February 2019. Appellant's trial concluded on 1 July 2019. The court-martial sentenced Appellant to a dishonorable discharge, 14 years of confinement, and reduction to the grade of E-1.

Appellant requested clemency on 12 July 2019, specifically requesting the findings be set aside or that he receive a reduction of his sentence to confinement. The convening authority signed a Decision on Action memorandum on **[*95]** 26 July 2019. The convening authority did not disturb the adjudged sentence, but referenced the reduction in rank and confinement components. He stated, *inter alia*:

> 1. I hereby take no action in the case of *United States v. A1C Sean W. Harrington*.
>
> 2. . . . [U]pon completion of the sentence to confinement, AIRMAN BASIC SEAN W. HARRINGTON will be required, under *Article 76a, UCMJ*, to take leave pending completion of appellate review.

Appellant's circuit defense counsel received the convening authority's decision on 29 July 2019; the trial defense counsel responsible for post-trial representation received it on 31 July 2019. The military judge signed the entry of judgment on 30 July 2019, reflecting the sentence as adjudged, without modification. No party moved the military judge for a post-trial hearing claiming the convening authority's decision memorandum was incomplete, irregular, or contained error. *See* R.C.M. 1104(b)(2)(B).

Following Appellant's assignment of error, we granted the Government's motion to attach the convening authority's declaration regarding his decision to take no action.[29] In the declaration, the convening authority stated he considered, *inter alia*, Appellant's request for clemency. He stated, "After considering **[*96]** the submission, I determined the findings and sentence, as adjudged, were appropriate. In taking no action, my intent was to provide no relief on the findings or sentence under *Article 60, [UCMJ]*."

2. Law

"The proper completion of post-trial processing is a question of law the court reviews de novo." *United States v. Zegarrundo, 77 M.J. 612, 613 (A.F. Ct. Crim. App. 2018)* (citing *United States v. Kho, 54 M.J. 63, 65*

[29] We consider the convening authority's declaration as necessary to resolve issues "raised by the record but [ ] not fully resolvable by the materials in the record," *United States v. Jessie, 79 M.J. 437, 442 (C.A.A.F. 2020)*, namely the convening authority's intent with respect to action.

(C.A.A.F. 2000)).

At the time the convening authority signed the Decision on Action in this case, Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, Section 13D (18 Jan. 2019), advised Air Force convening authorities to grant relief as circumscribed by the applicable version of Article 60, UCMJ.[30] For a case involving at least one convicted offense committed before 24 June 2014, AFI 51-201 reminded convening authorities to "use the version of Article 60 in effect prior to 24 June 2014" and noted they had "full discretion to grant clemency on the court-martial findings and/or sentence." AFI 51-201, ¶ 13.16.1. The instruction also equated "taking action" with "granting post-sentencing relief," explaining: "A decision to take action is tantamount to granting relief, whereas a decision to take no action is tantamount to granting no relief." AFI 51-201, ¶ 13.17.1.

Recently, the CAAF provided clear instruction to convening authorities **[*97]** exercising their authority under Article 60, UCMJ, 10 U.S.C. § 860. In United States v. Brubaker-Escobar, No. 20-0345, 81 M.J. 471, 2021 CAAF LEXIS 818 (C.A.A.F. 7 Sept. 2021), the CAAF considered the implication of a Presidential executive order relating to changes to Article 60, UCMJ, in the Military Justice Act of 2016 (MJA). The executive order stated that if an accused is found guilty of committing at least one offense before January 1, 2019:

> Article 60, of the UCMJ, as in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority . . . to the extent that Article 60:
>
> (1) requires action by the convening authority on the sentence;
> . . . .
> . . . or
> (5) authorizes the convening authority to approve, disapprove, commute, or suspend a sentence in whole or in part.

Exec. Order No. 13,825, § 6(b), 83 Fed. Reg. 9889, 9890 (8 Mar. 2018).

The CAAF first found the President had the authority to designate the effective dates of the MJA, then provided a clear signpost for convening authorities going forward:

> [I]n any court-martial where an accused is found guilty of at least one specification involving an offense that was committed before January 1, 2019, a convening authority errs if he fails to take one of the following post-trial actions: approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part.

*Id. at *1*.

The CAAF applied its holding to the case before **[*98]** it:

> We therefore further hold that the convening authority erred by taking "no action" in this case pursuant to the new Article 60a rather than by taking one of the specified actions required under the old Article 60. However, we conclude that the convening authority's determination did not constitute plain error.

*Id. at *4*. The court found the convening authority's failure to explicitly take one of those actions was a "procedural error." *Id. at *2, 7-8*. The court then noted: "Pursuant to Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2018), procedural errors are 'test[ed] for material prejudice to a substantial right to determine whether relief is warranted.'" *Id. at *8* (alteration in original) (quoting United States v. Alexander, 61 M.J. 266, 269 (C.A.A.F. 2005)). Ultimately, the court found no prejudice and affirmed. Brubaker-Escobar, 81 M.J. 471, 2021 CAAF LEXIS 818, at *8*.

3. Analysis

In light of Brubaker-Escobar, we find the convening authority erred when he did not explicitly "approve, disapprove, commute, or suspend the sentence in whole or in part" as required by Article 60(c)(2), UCMJ, *Manual for Courts-Martial, United States* (2012 ed.) (2012 *MCM*).

Testing this error for prejudice, we find none. We have no cause to doubt the convening authority's declaration. The convening authority correctly understood his authority to grant Appellant's clemency request, to include setting aside **[*99]** the findings and reducing the period of confinement. The convening authority adhered to the Air Force's guidance on taking post-trial action by stating he was taking "no action" to effectuate his decision under Article 60(c)(2), UCMJ (2012 *MCM*), to

---

[30] Specifically, AFI 51-201, ¶ 13.16, stated: "To determine the applicable version of Article 60, look at the date of the earliest offense resulting in a conviction. The version of Article 60 in effect on that date applies to the entire case."

approve Appellant's adjudged sentence in full. Thus, we find no material prejudice to a substantial right of Appellant.

H. Post-Trial Processing Delay

1. Additional Background

As noted above, Appellant's trial concluded on 1 July 2019, the convening authority signed a Decision on Action memorandum on 26 July 2019, and the military judge signed the entry of judgment on 30 July 2019. The court reporter certified the record of trial on 1 November 2019. The record was docketed with this court on 23 December 2019. The record is comprised of 11 volumes with 1,159 pages of trial transcript, and includes 31 prosecution exhibits, 13 defense exhibits, 1 court exhibit, and 93 appellate exhibits.

Appellant, through counsel, requested 11 enlargements of time to file his assignments of error. All were opposed by the Government, but granted by this court. After the fifth request for enlargement of time was granted, this court also granted appellate counsel's request to withdraw **[*100]** due to personnel turnover and appointment of a new detailed counsel—all to which Appellant consented. After an order from this court to state in future requests whether Appellant was notified of his right to submit a timely appeal and of the requested enlargement of time, in the eighth through eleventh requests for enlargement of time, Appellant's counsel asserted Appellant agreed with the request. At the same time as the ninth request for enlargement of time, Appellant's counsel moved this court to examine sealed materials, which request was granted in part 12 days later over Government opposition. In the final request for enlargement of time, filed on 5 January 2021, Appellant's counsel noted that "[o]n the date requested, 420 days will have elapsed" from docketing with this court, and that Appellant's confinement status had slowed the process.

On 26 January 2021, Appellant's counsel requested leave to file Appellant's assignments of error in excess of the court's page and word limits, which we granted without opposition. On the same date, Appellant filed his assignments of error. The Government requested one enlargement of time to file its answer, which Appellant opposed but this **[*101]** court granted. On 15 March 2021, after being granted its request to exceed the court's word and page limits, the Government filed its answer. On 25 March 2021, Appellant filed his reply brief. This opinion was over 18 months after Appellant's case was docketed with this court.

2. Law

This court reviews de novo whether an appellant's due process rights are violated because of post-trial delay. *United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)* (citations omitted). In the absence of a due process violation, this court considers whether relief for excessive post-trial delay is warranted consistent with this court's authority under *Article 66(d), UCMJ*. *See United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002)*; *United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015)*, *aff'd*, *75 M.J. 264 (C.A.A.F. 2016)*.

In *Moreno*, the CAAF established thresholds for facially unreasonable delay, including docketing with the Court of Criminal Appeals more than 30 days after the convening authority's action, and the Court of Criminal Appeals rendering a decision more than 18 months after docketing. *Moreno, 63 M.J. at 142*.

Post-trial processing of courts-martial has changed significantly since *Moreno*, to include the use of an entry of judgment before appellate proceedings can begin. *See United States v. Livak, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020)*; *see also United States v. Brown, 81 M.J. 507, 510 (A. Ct. Crim. App. 2021)*. This court has previously explained the consequences of updates to post-trial processing:

> [T]he specific requirement in *Moreno* which called for docketing to **[*102]** occur within 30 days of action no longer helps us determine an unreasonable delay under the new procedural rules. However, we can apply an aggregate standard threshold the majority established in *Moreno*: 150 days from the day Appellant was sentenced to docketing with this court.

Livak, 80 M.J. at 633 (citation omitted).

The test to review claims of unreasonable post-trial delay is to evaluate "(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 *Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)*) (other citations omitted)). "No single factor is required for finding a due process violation and the absence of a

given factor will not prevent such a finding." *Moreno, 63 M.J. at 136* (citing *Barker, 407 U.S. at 533*).

If a court does not find that the post-trial delay was prejudicial under the fourth *Barker* factor, a due process violation only occurs when, "in balancing the other three factors, the delay is so egregious that tolerating it would 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)*.

3. Analysis

Appellant argues he is entitled to relief due to facially unreasonable post-trial-processing delays. He cites no prejudice, and we find none.

Applying *Livak*, we **[*103]** find a facially unreasonable delay in both the docketing with this court and this court issuing its opinion in Appellant's case. From the conclusion of trial to the docketing of Appellant's case with this court, 175 days passed, which is more than the 150 days for a threshold showing of facially unreasonable delay. From docketing with this court until this decision, over 21 months have passed, which is more than the 18 months for a threshold showing of unreasonable delay.

Having found facially unreasonable delays, we assess whether there was a due process violation by considering the four *Barker* factors. We begin with the last factor: prejudice. In *Moreno*, the CAAF identified three types of cognizable prejudice for purposes of an Appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of the appellant's ability to present a defense at a rehearing. *63 M.J. at 138-39* (citations omitted).

We find no oppressive incarceration nor impairment of the Defense at a rehearing. *See id. at 140*. As for anxiety and concern, the CAAF has explained that "the appropriate test for the military justice system is to require an appellant to show particularized **[*104]** anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Id.* Appellant has articulated no such particularized anxiety in this case, and we discern none.

Turning to the other *Barker* factors, we find the length of both delays was not excessively long. The reasons for the post-trial processing delay are not extraordinary. While the record of trial is lengthy, trial counsel review alone comprised almost one-third of the time. As for appellate review, Appellant asked for delays totaling over 11 months, whereas Appellee asked only for a 14-day delay. Finally, we see no indication Appellant requested speedy post-trial processing and review. Considering all the *Barker* factors, we find neither prejudice nor any particularly egregious delay here. *See Toohey, 63 M.J. at 362*.

Appellant also asks us to exercise our authority under *Article 66(d), UCMJ*, to provide relief for excessive post-trial delay in the absence of a due process violation. *See Tardif, 57 M.J. at 225*. After considering the factors enumerated in *Gay, 74 M.J. at 744*, we conclude such relief is not warranted.

III. CONCLUSION

The approved findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights **[*105]** 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**.[31]

Concur by: CADOTTE

Concur

CADOTTE, Judge (concurring in the result):

I agree with the conclusion of the court approving the findings and sentence entered as correct in law and fact, and finding that no error materially prejudicial to the substantial rights of Appellant occurred. *Articles 59(a)* and *66(d)*, Uniform Code of Military Justice, *10 U.S.C.*

[31] Although not raised by Appellant, we note the statement of trial results (STR) failed to include the command that convened the court-martial as required by R.C.M. 1101(a)(3). *See United States v. Moody-Neukom, No. ACM S32594, 2019 CCA LEXIS 521, at *4 (A.F. Ct. Crim. App. 16 Dec. 2019)* (per curiam) (unpub. op.). The STR and entry of judgment also incorrectly stated that Appellant pleaded not guilty to voluntary manslaughter in violation of *Article 119, UCMJ*, when he entered no plea to that withdrawn charge. Appellant has not claimed prejudice and we find none. We direct the military judge, through the Chief Trial Judge, Air Force Trial Judiciary, to correct the entry of judgment before completion of the final order under R.C.M. 1209(b) and AFI 51-201, Section 14J.

§§ 859(a), *866(d)*. However, I disagree with court's finding that "it was not error for the victims to provide their statements as answers to trial counsel's questions." Rule for Courts-Martial (R.C.M.) 1001(c)(5)(B) states that "[u]pon good cause shown, the military judge may permit the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement." Unlike my esteemed colleagues, I find R.C.M. 1001(c) does not authorize trial counsel to participate in a victim's unsworn statement. I agree with our sister court that participation by the trial counsel in a victim's unsworn statement constitutes error. *United States v. Cornelison, 78 M.J. 739 (A. Ct. Crim. App. 2019)*, *rev. denied*, *79 M.J. 189 (C.A.A.F. 2019)*; *see also United States v. Bailey, No. ACM 39935, 2021 CCA LEXIS 380, at *15 (A.F. Ct. Crim. App. 30 Jul. 2021)* (unpub. op.). Although the majority did not find error, my colleagues found that, if error is assumed, trial counsel's participation in the victims' unsworn statements did not result in prejudice. I agree, and likewise **[*106]** find no prejudice to Appellant. Accordingly, I find the military judged erred by allowing trial counsel participation in the victims' unsworn statements; nevertheless, Appellant did not demonstrate he was prejudiced as a result, and I concur that the findings and sentence as entered should be approved.

United States v. Vargas

United States Army Court of Criminal Appeals

June 16, 2022, Decided

ARMY MISC 20220168

Reporter
2022 CCA LEXIS 365 *; 2022 WL 2189543

UNITED STATES, Appellant v. Private First Class ERICK VARGAS, United States Army, Appellee

Notice: NOT FOR PUBLICATION

Subsequent History: Later proceeding at *United States v. Vargas, 2022 CAAF LEXIS 592 (C.A.A.F., Aug. 12, 2022)*

Prior History: [*1] Headquarters, Fort Campbell. Jacqueline Tubbs and Sasha N. Rutizer, Military Judges, Lieutenant Colonel Ryan W. Leary, Staff Judge Advocate.

Counsel: For Appellant: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Dustin L. Morgan, JA; Major Karey B. Marren, JA (on brief and reply brief).

For Appellee: Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Bryan A. Osterhage, JA; Captain Sean Patrick Flynn, JA (on brief).

Judges: Before FLEMING, HAYES, and PARKER, Appellate Military Judges. Judge HAYES and Judge PARKER concur.

Opinion by: FLEMING

Opinion

MEMORANDUM OPINION AND ACTION ON APPEAL BY THE UNITED STATES FILED PURSUANT TO *ARTICLE 62, UNIFORM CODE OF MILITARY JUSTICE*

FLEMING, Senior Judge:

The government asserts the military judge abused her discretion when she dismissed this case with prejudice because the government failed to disclose to the defense, until at trial, a prior act and statement by appellee. We find the military judge abused her discretion by dismissing the case with prejudice when lesser sufficient remedial remedies were available to cure any harm to the defense caused by the government's disclosure failure.

BACKGROUND

In April 2021, the government **[*2]** charged appellee with two specifications of sexual assault and four specifications of abusive sexual contact, in violation of *Article 120*, Uniform Code of Military Justice, *10 U.S.C. § 920 (2019)* (UCMJ).[1] The convening authority referred the case in June 2021; the arraignment occurred in mid-July 2021; and additional *Article 39(a), UCMJ* sessions occurred in November 2021 and on March 7, 2022. On March 8, 2022, during the named victim's (Specialist (SPC) [TEXT REDACTED BY THE COURT]) direct testimony, the military judge granted the defense motion to dismiss the charge and specifications with prejudice. The government now appeals the military judge's ruling pursuant to *Article 62, UCMJ*.

FACTS

On Friday, March 4, 2022, prior to the start of appellee's contested court-martial, the government re-interviewed SPC [TEXT REDACTED BY THE COURT]. During this interview, SPC [TEXT REDACTED BY THE COURT] stated appellee called her a "beauty queen" and kissed her on the forehead "3-4 times" prior to the sexual assault. This was new information, and the government failed to disclose it to the defense.

On Monday, March 7, 2022 an *Article 39(a)*, UCMJ hearing was conducted regarding motions filed pursuant to Military Rules of Evidence 404(b) and 412. Specialist

[1] The government dismissed one specification of sexual assault and one specification of abusive sexual assault with prejudice prior to the start of the contested trial on March 8, 2022.

[TEXT REDACTED BY THE COURT] testified during the hearing regarding the events surrounding the charged offenses but, again, the new information was never **[*3]** revealed. At the contested trial the following day during SPC [TEXT REDACTED BY THE COURT] direct examination, the government counsel asked questions about the events leading up to the charged offenses. Specialist [TEXT REDACTED BY THE COURT] testified that appellee "started grabbing my head and kissing my foreh[ead], telling me I was a beauty queen(.)"

Defense counsel immediately objected asserting it was "the first time we have ever heard this testimony." A debate ensued as to when the government first learned about this new information. Initially, the trial counsel asserted the government learned of the new information from SPC [TEXT REDACTED BY THE COURT] after the *Article 39(a), UCMJ*, session on Monday, March 7, 2022, acknowledging the information was not immediately disclosed. The military judge excused the trial counsel from further participation in the trial and the government detailed new counsel. This new trial counsel acknowledged that the government knew about the new information on Friday, March 4, 2022, conceding the government failed to disclose to the defense the new statement by appellee to SPC [TEXT REDACTED BY THE COURT] about being a "beauty queen" and his act of kissing her on the forehead. The military judge concluded the government's nondisclosure of the new information was not **[*4]** "willful misconduct."

The military judge and the parties then explored a range of options to cure the government's nondisclosure. Ultimately, defense counsel asserted "the only proper remedy is dismissal with prejudice. However, if the Court does not believe that that's appropriate, then we would request a mistrial and dismissal without prejudice." The government proffered the following alternative remedies: (1) allowing the defense to impeach SPCI [TEXT REDACTED BY THE COURT] "on this issue;" (2) granting a continuance for the defense to have "the time that they need to adequately prepare for their case;" and (3) "craft[ing] a limiting instruction to the panel and also an instruction to the government that they will not argue these acts."

After listening to the parties, the military judge made the following oral ruling:

> I do find that a delayed disclosure hampered the ability to prepare a defense. There are a number of things the defense could have done. They could have prepared a different direct examination or cross-examination of her. They could have crafted a new theory. They could have if they felt that that evidence was overwhelming, sought a pretrial agreement to some or all of the offenses, or pled without **[*5]** the benefit of a pretrial agreement to some or all the offenses if that was a consideration for them. The nondisclosure of that information foreclosed them from considering that strategy. Whether the non-disclosure would have allowed the defense to rebut evidence more effectively. Had they had that information earlier, they could have used that information in their opening statement, in their *voir dire*.
>
> This Court is required to craft the least drastic remedy to obtain a desired result. I have considered the number of remedies. I have already dismissed the original trial counsel. I have considered not allowing any additional direct examination of the victim, but, of course, would result in - - that has no -- that is an absurd result. There is no evidence presented. I have considered allowing a delay. I don't think a delay cures the issue. I've considered bringing the alleged victim back in here to allow the defense to fully cross-examine her on that issue, and then putting her back on in front of the panel members. That does not cure the issue. It doesn't cure what I previously stated with respect to a strategic option, with what they could have done with that information ahead of time. **[*6]** I've considered a curative instruction, but you cannot unring that bell, not when you consider the government's opening statement. I've considered precluding the government from being able to argue anything about linking a basis of the kiss on the forehead. But that doesn't cure the issue, which is non-disclosure, failure to allow them to prepare, and foreclosing the ability to create a strategic option. So the fact is, there is not another remedy. Defense, I am granting your motion to dismiss with prejudice. I am aware under R.C.M. 915 ---- Court's in recess for 5 minutes.

After a seven-minute recess the court was recalled and the military judge concluded her ruling stating "I considered a mistrial under ... R.C.M. 915 and do not find that that remedy is sufficient given the gravity of the government's discovery violation. So with that said, Defense, I am granting your motion to dismiss with prejudice. In a moment we'll call in the members and I will dismiss them."

The government then asked the military judge to reconsider her oral ruling and requested "a continuance, breaking for the day, to file a written response." The military judge provided the following two-word response "No. Denied."

The panel was recalled **[*7]** and advised the military judge "granted a motion that terminate[d] these proceedings." The trial was then immediately adjourned. The parties at trial never filed any written briefs and the military judge did not issue a written ruling.

LAW AND DISCUSSION

This Court reviews "a military judge's discovery rulings [] for an abuse of discretion." *United States v. Stellato, 74 M.J. 473, 480 (C.A.A.F. 2015)* (citing *United States v. Jones, 69 M.J. 294, 298 (C.A.A.F. 2011)*). Likewise, we also review "a military judge's remedy for discovery violations" using the abuse of discretion standard. *Id.* (citing *United States v. Trimper, 28 M.J. 460, 461-62 (C.M.A. 1989)*). "The abuse of discretion standard calls for more than a mere difference of opinion," but instead occurs when the military judge's "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *Id.* (citations and internal quotation marks omitted). Absent clear error, we are bound by the military judge's fact-finding. *See id. at 482*. In *Stellato*, the Court of Appeals for the Armed Forces (CAAF) stated while dismissal with prejudice may be an appropriate remedy for a discovery violation, "dismissal is a drastic remedy and courts must look **[*8]** to see whether alternative remedies are available." *74 M.J. at 488* (quoting *United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004)*).

Here, the military judge failed to impose the least drastic remedy that would have cured the error; as such, dismissal with prejudice was outside the range of alternative choices reasonably arising from the relevant facts and applicable law.[2] We need go no further in our analysis than to discuss her decision that a mistrial was not a reasonable remedy. Granting a mistrial is, by no means, a lower level remedial measure but, as it is one step removed from the most draconian act of dismissing a case with prejudice, it must be considered before granting a case dispositive ruling.

"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 cast substantial doubt upon the fairness of the proceedings." Rule for Courts-Martial [R.C.M.] 915(a). "The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons," including times "when inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members." R.C.M. 915(a), discussion. **[*9]** Mistrials are an unusual and disfavored remedy that are reserved as a "last resort." *United States v. Diaz, 59 M.J. 79, 90 (C.A.A.F. 2003)*. "Because of the extraordinary nature of a mistrial, military judges should explore the option of taking other remedial action." *Ashby, 68 M.J. at 122* (citation omitted).

We now turn to the military judge's decision to deny granting a mistrial as a "last resort" remedy. The military judge provided a bare bone discussion regarding a mistrial after pronouncing "there is not another remedy," granting the motion to dismiss for prejudice, and then taking a seven-minute recess to craft a one sentence analysis that "the gravity of the government's discovery violation" warranted dismissal with prejudice. First, the military judge's analysis as to the "gravity" of the violation appears to contrast with her earlier finding of fact that the government's discovery violation was not "willful misconduct." The timing and brevity of the military judge's limited analysis creates a strong impression that any mistrial remedy was an after-thought and not a seriously considered and weighed option. Further, although not dispositive to our decision, we note the military judge was unwilling to allow the government an opportunity to present a **[*10]** written brief and a written ruling was not forthcoming to expand upon her reasoning for granting a dismissal without prejudice, a case dispositive ruling, as opposed to granting a less stringent remedial measure of a mistrial. Additionally, the military judge summarily rejected

[2] As the basis for the dismissal was a discovery violation, typically we would address both the ruling finding a discovery violation and the subsequent remedy. *See Stellato, 74 M.J. at 481*. However, the government concedes the statement at issue should have been disclosed, stating in their brief, "[u]pon learning of this information, trial counsel should have provided timely notice to the accused." Therefore, we focus primarily on the dismissal with prejudice, and discuss the discovery violation only as it relates to the appropriateness of the military judge's remedy.

without comment a government request for reconsideration.

In determining whether a mistrial was a reasonable remedy, we now turn to the military judge's ruling as to the potential harms to the defense because of the government's nondisclosure. The military judge held the defense was harmed because they could have "crafted a new theory" of the case or prepared a different voir dire, opening statement, or direct or cross-examination of SPC [TEXT REDACTED BY THE COURT]. The military judge also held the defense could have sought a pretrial agreement with the convening authority or, in the alternative, decided to plead guilty without the benefit of a pretrial agreement. All of these alleged harms, however, could have been sufficiently addressed with a mistrial which would have given the defense an opportunity to craft a new theory of the case, pre are a different voir dire, opening statement, or direct or cross-examination of SPC [TEXT REDACTED BY THE COURT], or to **[*11]** explore pretrial negotiations with the convening authority, or to plead guilty.

We find a decision to grant a mistrial was an even more reasonable remedial measure in this case when: (1) the defense counsel agreed to a mistrial, as an *alternative* form of relief, if a dismissal without prejudice was not granted; and (2) the military judge made a finding of fact, which we now affirm as it is not clearly erroneous, that the government's discovery violation was not "willful misconduct." Under this backdrop, a decision by the military judge to grant a mistrial would have allowed for a "trial by another court-martial" and an opportunity for the defense to cure every harm articulated by the military judge.[3]

In *Stellato*, the CAAF highlighted that the "military judge concluded [his ruling] by noting that '[t]he almost complete abdication of discovery duties' 'call[ed] into serious question whether the Accused [could] ever receive a fair trial' where evidence was lost, unaccounted for, or left in the hands of an interested party." *74 M.J. at 489* (brackets in original). The CAAF determined the military judge did not err in finding prejudice, in part because the discovery violations prevented the defense from calling **[*12]** a "key witness" and the aforementioned lost and unaccounted for evidence. *Id. at 490*.

This case does not involve lost witnesses, lost evidence, or the "complete abdication of discovery duties" but, instead, consists of a singular failure by the government to notify the defense regarding a two-word statement and one act by appellee discovered by the government a few days prior to the contested trial. Although this opinion should in no way be misconstrued to condone the government's disclosure failure, we find the military judge abused her discretion by dismissing the case with prejudice when she failed to exhaust lesser reasonable remedies.

CONCLUSION

The government's appeal under *Article 62, UCMJ* is GRANTED. The military judge's March 8, 2022 oral ruling dismissing the case with prejudice is VACATED. The record of trial is returned to the military judge for proceedings not inconsistent with this opinion.

Judge HAYES and Judge PARKER concur.

End of Document

[3] *See* R.C.M. 915(c)(2). By this order, we do not suggest that a mistrial was the only appropriate lesser remedy; a more in-depth inquiry might have established that a continuance and/or a curative instruction, for example, would have satisfactorily addressed the failure to disclose.

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on August 19, 2022.

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