IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLEE
v.	)	
Private First Class (E-3) **TRYVON M. JONES,** United States Army, Appellant	)	Crim. App. Dkt. No. 20210503 USCA Dkt. No. 23-0188/AR

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

Issue Presented

WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ADMITTING APPELLANT'S POST INCIDENT BROWSER HISTORY AS RES GESTAE.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (ACCA) reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2019) [UCMJ]. The statutory basis for this Court's jurisdiction rests upon Article 67(a)(3), UCMJ.

Statement of the Case

On September 15, 2021, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault of a child, two specifications of sexual abuse of a child, and one specification of

aggravated assault, in violation of Articles 120b and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 920b and 928 (2019) [UCMJ]. (JA 003, 004, 009). The military judge sentenced appellant to reduction to the grade of E-1, confinement for 13 years and 8 months,[1] and a dishonorable discharge. (JA 010). On October 6, 2021, the convening authority took no action. (JA 015). On April 4, 2023, the Army Court of Criminal Appeals affirmed the findings and sentence. (JA 002). This Court granted appellant's petition for grant of review of the above issue on August 16, 2023. (JA 001).

Statement of Facts

A. The sexual assault of a thirteen-year-old victim.

In November 2020, Specialist (SPC) DJ lived on Fort Carson, Colorado, with his wife and young children. (JA 100). AG, SPC DJ's younger sister, also stayed with SPC DJ and his family on Fort Carson in November 2020. (JA 023, 100, 101). At the time, AG was thirteen years old and in the seventh grade. (JA 047–048, 101).

[1] Appellant was sentenced to ten years confinement for Specification 1 of Charge I (sexual assault of a child), three years confinement for Specification 2 of Charge I (sexual abuse of a child), six months confinement for Specification 3 of Charge I (sexual abuse of a child), three years confinement for Specification 2 of Charge I (sexual abuse of a child), and two months confinement for The Specification of Charge II (aggravated assault), all to run consecutively. (JA 003, 004, 010).

Specialist DJ considered appellant to be his best friend. (JA 101). Specialist DJ provided appellant with a key to his house, and "trusted him to watch [his] children . . . and look after [his] house" if SPC DJ was away. (JA 102). Appellant met SPC DJ's younger sister AG in late September 2020. (JA 102–03). Appellant knew AG was thirteen years old at the time. (JA 048, 102).

On November 4, 2020 around 1700 hours, AG was in SPC DJ's house when she went upstairs to a bedroom to complete her classwork. (JA 030–031, 075). Appellant also went with AG to an upstairs bedroom. (JA 031). While assisting with homework, appellant "leaned into" AG and kissed her on the lips. (JA 036–037). Appellant then moved the laptop AG was using off her lap and began kissing her neck and stomach, which made AG "nervous." (JA 037–038). Eventually, appellant moved AG's shorts to the side to begin licking her vagina.(JA 039–040). After licking AG's vagina, appellant put his hand on AG's neck and started squeezing "really hard." (JA at 041–042). The pressure appellant applied to AG's neck made her feel like her "eyes were gonna kind of pop" and restricted her ability to even say anything. (JA 043). AG tried to grab appellant's wrist and pull it down a little bit to indicate that appellant was "hurting" her. (JA 042–043). At no time did AG ask appellant to put his hand around her neck. (JA 043).

Ultimately, appellant removed his hand from AG's neck in order to pull his pants down. (JA 043). Appellant was on top of AG and faced her at the time. (JA 043). When appellant pulled down his pants, he exposed his erect penis to AG. (JA 044). Appellant then moved AG's shorts to the side, and "started rubbing his penis" on the opening of her vagina. (JA 044–045). AG also felt appellant place a "little bit" of his penis inside of her vagina. (JA 045). AG told appellant that she did not want to engage in sexual activity with him while he was attempting to have sex with her. (JA 046). Appellant also committed these acts in front of RJ, AG's one-year-old niece, who AG was babysitting at the time and was in the bedroom with the pair. (JA 023–024, 031–032, 035–036, 040).

B. The eyewitness to the crime.

SD was a neighbor to SPC DJ and his family on Fort Carson in November 2020. (JA 078). SD also knew appellant because he was always around SPC DJ's house since he was SPC DJ's best friend at the time. (JA 079–080).

On the afternoon of November 4, 2020, SD went to SPC DJ's house to "hang out" and decided to "sneak[] up on" AG. (JA 081). She quietly made her way upstairs to where the bedrooms were located, and opened the door to one of the rooms. (JA 082). Upon opening the door, SD saw appellant's buttocks and

that his pants and underwear were around his knees.[2] (JA 083, 085). SD noticed that appellant was kneeling on the bed, and she also observed what she believed to be AG's hair.[3] (JA 083). AG was on the bed in front of appellant at the time, and AG actually called out SD's name when SD opened the door. (JA 083, 090). Other than appellant, SD, RJ, and AG, there was no one else in the house at the time. (JA 093). SD testified that it was "very shocking and unpleasant to see" appellant "with his pants down in front of a [thirteen]-year-old" girl. (JA 093).

SD's interruption also caused appellant to "jump[] up and pull[] his pants up." (JA 046). Appellant recognized that he could get into "really big trouble" if people found out about what he was doing to AG at the time. (JA 046). SD confronted appellant a few hours later about what she had witnessed in order to gain clarity on what she saw. (JA 086). Appellant began by responding, "[w]hen a man sees a woman," at which point SD cut him off and ended the conversation. (JA 086–087).

C. Appellant's admissions to law enforcement.

Supervisory Special Agent (SSA) CW interviewed appellant at "roughly 4:06" on the morning of November 5, 2020, shortly after his sexual activity with

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[2] SD recognized appellant "[b]ecause of his head shape, and his body, the build of him. It's pretty noticeable that it's him. And his head and his hair and then his butt." (JA 083).

[3] SD was able to recognize AG's hair because "it was red at the time." (JA 089).

AG came to law enforcement's attention. (JA 112-14, 152). Appellant essentially told SSA CW that he complied with AG's request to engage in sexual activity while he helped her with her seventh-grade homework. (JA 152). Appellant knew AG was thirteen years old at the time, and recognized that he was in trouble after SD walked in on them. (JA 152). This was because appellant knew it was wrong to engage in sex acts with a child. (JA 152). Appellant even told SSA CW that he should die for what he did with AG. (JA 152).

Appellant corroborated many aspects of AG's account. For example, appellant admitted to performing oral sex on AG, and admitted that he planned for AG to perform oral sex on him before SD walked in on them. (JA 152). According to appellant, AG told him to choke her since that is what she allegedly enjoyed, which caused him to place his hand around her neck. (JA 152). Appellant claimed that he merely complied with AG's request to squeeze her neck. (JA 152). Appellant also admitted to placing his penis near AG's upper thigh, and he spit on his hand to use it as lubricant since the friction of grinding his penis against AG's thigh and lower body was hurting her. (JA 152). According to appellant, it was possible that his penis went into her vagina even though he did not intend to have sexual intercourse with her. (JA 152).

D. Appellant's internet searches.

On November 12, 2020, Special Agent (SA) KM searched appellant's internet browsing history on appellant's cell phone to review anything appellant looked up online after he committed the crimes in question. (JA 106–08). SA KM took screen shots of the cell phone's internet browsing history. (JA 109).

Appellant's internet browser history showed that someone using his cell phone had searched via Google on November 5, 2020, the day after appellant sexually assaulted AG, for "how many years for sexual assault." (JA 150). The cell phone user also searched on the same day via Google for the following: (1) "choking charge;" (2) "Types of Sexual Assault;" (3) "what is sextual (sic) assault;" and (4) "reasons people could be dishonorably discharged." (JA 150). Appellant's internet browser history also indicated that the phone user made other searches unrelated to the charges. (JA 151).

E. The military judge's admission of evidence.

At trial, appellant objected to the introduction of his browsing history, arguing that it was irrelevant and constituted Mil. R. Evid. 404(b) matter for which he received no notice. (JA 110). The government contended that it was not Mil. R. Evid. 404(b) evidence and explained: "[Appellant's] search of the Google history immediately after the assault. After his confrontation with [SD], he then searched specific terms that go to his state of mind immediately after the assault . .

. . It's the government's position this is *res gestae* with the charged offenses." (JA 109). The military judge disagreed with that assertion, stating, "I don't see how it's *res gestae*" and asked defense for a response. (JA 109). Appellant again argued that the evidence was not relevant and required prior Mil. R. Evid. 404(b) notice. (JA 110). The military judge seemingly rejected this theory as well when she asked, "If it's as [trial counsel is] claiming, this is [appellant's] search history shortly after the incident, how is that [Mil. R. Evid.] 404[b]? How does that implicate [Mil. R. Evid.] 404(b)?" and later concluded "I don't see the connection to [Mil. R. Evid.] 404(b)." (JA 110). Appellant reiterated his position that it is was not *res gestae* of the offense and implicates "things that happened earlier." (JA 111). Ultimately, trial counsel described the searches as evidence of consciousness of guilt, albeit without expressly using that term:

> This is also not anything to do with his character evidence. This is what he did immediately after the assault. This is not any sort of-- we're not offering this for character evidence. This is what he did in the -- in his state of mind when he did it. . . [I]it's him looking up -- it's relevant because he's looking up sex assault, choking charges, how much time for sex assault. He's looking up things of what he just did. And it goes right to state of mind that this was an assault, that he knew it was an assault, and that he was looking it up.

(JA 111).[4] The military judge then overruled the objection without further explanation. (JA 111). In his post-trial matters, defense counsel highlighted the admittance of the searches as evidence of consciousness of guilt.[5] (JA 016).

Summary of the Argument

The military judge did not abuse her discretion in admitting appellant's post incident internet browsing history since his Google searches contained evidence of his consciousness of guilt. Mil. R. Evid. 404(b) is not implicated when consciousness of guilt evidence does not also involve propensity evidence. Even if the military judge abused her discretion, the error did not have a substantial influence on the findings or sentence.

Standard of Review

A military judge's decision to admit evidence is reviewed "for an abuse of discretion." *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). The abuse of discretion standard "recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." *Id*. (citations omitted).

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[4] Although trial counsel does not use the phrase "consciousness of guilt" her description of the evidence of his state of mind related to "things he just did" encapsulates the concept. (JA 111).

[5] Defense counsel wrote, "The Government argued that the Internet searches went to consciousness of guilt, but admitted they could not accurately account for when the searches took place, directly affecting the relevance and admissibility of this evidence." (JA 016).

Law

Propensity evidence under Mil. R. Evid. 404(b) "is a generally impermissible form of character evidence in which members 'prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.'" *United States v. Quezada*, 82 M.J. 54, 59 (C.A.A.F. 2021) (quoting Mil. R. Evid. 404(b)(1)). On the other hand, "[c]onsciousness of guilt evidence is different from propensity evidence" since it "is an acceptable form of circumstantial evidence used to show 'awareness of an accused that he or she engaged in blameworthy conduct.'" *Id.* (quoting *Black's Law Dictionary* 379 (11th ed. 2019)). "*Res gestae* is defined as 'the events at issue, or other events contemporaneous with them.'" *United States v. St. Jean*, 83 M.J. 109, fn. 2 (C.A.A.F. 2023) (quoting *Black's Law Dictionary* 1565 (11th ed. 2019)).

A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused. Article 59(a), UCMJ; 10 U.S.C. § 859(a) (2019). "For preserved nonconstitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings." *United States v. Frost*, 79 M.J. 104, 111 (C.A.A.F. 2019) (cleaned up). In determining the prejudice from an erroneous admission of evidence, the court weighs: "(1) the strength of the

government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (citing *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).[6]

Argument

Appellant's internet browser history the day after he sexually assaulted, sexually abused, and choked AG was properly admissible as consciousness of guilt evidence. The evidence was relevant to show that appellant was aware he "engaged in blameworthy conduct" and it did not represent inadmissible character evidence under Mil. R. Evid. 404(b). Even if the military judge abused her discretion, the admission of this evidence did not have a substantial influence on the findings or sentence.

A. The military judge properly admitted appellant's post incident browser history.

As a preliminary matter, the military judge did not determine that the searches were *res gestae* of the offense. (JA 109). She explicitly expressed her doubts, telling trial counsel, "I don't see how it's res gestae." (JA 109).

[6] Appellant asks this court to apply the 11th Circuit's three-part test outlined *United States v. Perez-Tosta.* 36 F.3d 1552, 1562 (11th Cir. 1994). (Appellant's Br. 9–10). This court should decline to do so. The *Perez-Tosta* test is the 11th Circuit's attempt to "discern three factors the court should consider in determining the reasonableness of pretrial notice under 404(b)" and not a test for prejudice of wrongly admitted evidence. *Id.*

Appellant's implication that "she admitted the evidence under the *res gestae* doctrine" is unsupported by the record. (Appellant's Br. 12). Rather, it is clear that the evidence shows that appellant searched terms indicative of somebody who committed sexual and aggravated assault crimes the same day he spoke with SSA CW. (JA 150). The searches are consistent with appellant's statement to SSA CW that he knew he should not have engaged in sex acts with a child.[7] (JA 152).

The trial counsel argued for admission through this notion. (JA 111). Although the term "consciousness of guilt" was not used, the concept is perfectly encapsulated by trial counsel arguing "[appellant is] looking up things of what he just did. And it goes right to state of mind that this was an assault, that he knew it was an assault, and that he was looking it up." (JA 111). This is not "a vague 'state of mind' inference as indicative of knowledge and *res gestae*" as appellant contends, but rather is a succinct and accurate explanation of how the searches were evidence of a consciousness of guilt.[8] (Appellant's Br. 12).

Consequently, the military judge did not abuse her discretion in admitting

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[7] In his interview with SSA CW appellant stated "I'm sorry. I shouldn't have done what I did. I should have walked away and this situation could have been avoided entirely. But here we are." (JA 152 at minute mark 1 hour 57 minutes).

[8] The military judge only overruled the objection after this explanation of admissibility, further indicating it was admitted under the theory of consciousness of guilt and not *res gestae*. (JA 111). Even if the military judge admitted the evidence as *res gestae* it would not necessarily be error, and if error, would still be subject to a prejudice analysis. *Frost*, 79 M.J. at 104.

appellant's post incident internet browser history since it constituted proper consciousness of guilt evidence. *See*, *e.g.*, *United States v. Clark*, 69 M.J. 438, 444 (C.A.A.F. 2011) (stating "demeanor has been admitted where it is relevant to an accused's 'consciousness of guilt' under M.R.E. 404(b), such as in cases of an accused fleeing from the scene of a crime or destroying evidence, or in cases of witness or prosecutor intimidation") and *Quezada*, 82 M.J. at 59 ("[c]onsciousness of guilt evidence is different from propensity evidence").

This case is distinguishable from *United States v. Tovarchavez*, 78 M.J. 458, 469 (C.A.A.F. 2019). There, this court held that "appellant's text message apologies do not unassailably establish his consciousness of guilt" as "they could be interpreted as establishing consciousness of guilt [and] they could also have been statements from someone who knows they have acted inappropriately, but not criminally." *Id.* Unlike *Tovarchavez*, there can be no doubt here that appellant was searching for the consequences of his criminal acts, and is thus proper consciousness of guilt evidence.

B. The military judge did not admit the evidence under Mil. R. Evid. 404(b).

Appellant contends that the military judge's decision to admit the evidence as "other act evidence . . . without proper notice and good cause" ultimately "impacted the trial's outcome." (Appellant's Br. 11–12). However, the military judge did not admit appellant's post incident browser history into evidence under

Mil. R. Evid. 404(b) as best shown by her skepticism that she did not "see the connection to [Mil. R. Evid.] 404[b]." (JA 110). The remaining defense objection was relevance, which the military judge overruled. (JA 110–11). Thus, appellant's argument fails because the record shows the military judge did not find this evidence admissible under Mil. R. Evid. 404(b).

More importantly, appellant's argument fails because Mil. R. Evid. 404(b) is not implicated when consciousness of guilt evidence does not involve propensity. *See United States v. Moore*, 2022 CCA LEXIS 140, at *8–9 (Army Ct. Crim. App. 7 Mar. 2022) (stating that if evidence of consciousness of guilt "does *not* on its face suggest propensity, Mil. R. Evid. 404(b) is not applicable") (emphasis in original) (applying *Quezada*, 82 M.J. at 59). Appellant's internet browsing history occurred after his crimes committed against AG and after authorities and SD confronted him about his conduct with AG. (JA 086, 150, 152). The fact that it was a one-time occurrence shortly after appellant's crimes and law enforcement interview clearly shows that this was not propensity evidence. Instead, the browsing history showed that appellant was now concerned about the consequences of his actions since law enforcement authorities were aware of what he did to AG. As a result, the military judge correctly identified that appellant's Google searches did not implicate propensity evidence, which took them outside the purview of Mil. R. Evid. 404(b) and made them squarely admissible as

evidence of appellant's consciousness of guilt. *Quezada*, 82 M.J. at 59.

C. Even if error, admission of appellant's post incident browser history did not have a substantial influence on the findings or sentence.

Even if this court were to determine that the military judge abused her discretion in admitting appellant's post incident browser history into evidence, its admission did not have a substantial influence on the findings and sentence in light of the overwhelming evidence indicating appellant's guilt. *Frost,* M.J. at 104. When weighing the *Kohlbek* factors, it is clear that the error was harmless.[9] 78 M.J. at 334. First, the government's case was very strong while the defense case was very weak. *Id.* AG's testimony, her age, appellant's knowledge of that age, an eyewitness to the crime, and his confession to SSA CW overwhelmingly proved beyond a reasonable doubt that that appellant committed the offenses. (JA 023–099, 152). While appellant pointed out various prior inconsistent statements AG made, that does not weaken the government's case. *United States v. Cano*, 61 M.J. 74, 74 (C.A.A.F. 2005) (noting that "inconsistencies are not uncommon when child abuse victims testify" and "[a]ny person who suffers from some type of traumatic experience, adult or child, may have difficulty relating that experience in a chronological, coherent and organized manner"). Further, the internet searches

[9] Regardless of whether the military judge admitted the evidence as consciousness of guilt or *res gestae*, the analysis under *Frost* and *Kohlbek* remains the same. 79 M.J. at 104; 78 M.J. at 334.

provided the factfinder with no fact that was not elicited from other testimony or evidence, namely his consciousness of guilt. (JA 152); *See United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007) (When a "fact was already obvious from . . . testimony at trial" and the evidence in question "would not have provided any new ammunition," an error is likely to be harmless.) (citing *Cano*, 61 M.J. at 77–78). The fact remains that AG's testimony was corroborated by SD's observations when she walked into the bedroom. (JA 047–074, 082–086). Perhaps most crucially, the incriminating statements appellant made to SSA CW constitute very strong corroborating evidence of AG's testimony. (JA 152). *See United States v. Ellis*, 57 M.J. 375, 381 (C.A.A.F. 2002) ("[A] voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession.")

Additionally, the quality and materiality of the evidence is low. Appellant claims this is evidence of the government taking "every opportunity" to use the evidence to its advantage. (Appellant's Br. 4). The record does not support that characterization. Government counsel made one reference to the searches in closing argument right before she made repeated mention of appellant's far more damning admissions to SSA CW. (JA 118–19). Further, the government did not rely upon, or mention, the searches in its presentencing argument. (JA 135–38).

Appellant has claimed that the phrases "knowing evil," "a bad guy in plain sight," and "the wolf in sheep's clothing" are references to these searches. (Appellant's Br. 15). Appellant explicitly claims "the government cannot demonstrate that their effort to paint [a]ppellant as a 'knowing evil' did not have a substantial influence on sentencing." (Appellant's Br. 16). However, context is important and the t argument made at trial, made without objection, does not fit appellant's assertions:

> From fairy tales to true crime, there has existed this concept of knowing evil when you see it. It's the monster in the woods, the man in the mask lurking in the shadows. This evil exists outside, but not in our own home. While tucking in our children at night, we check under the bed for monsters, showing them that they are safe in their house, that the evil is only outside.

(JA 135). The government is clearly not referencing appellant's knowledge of his crime but rather the concept of where one expects evil or danger to be. Trial counsel then goes on to explain how appellant used his position of trust with his best friend, the victim, and her family to execute the crimes. (JA 135–36). No reasonable reading of trial counsel's pre-sentencing argument would conclude "knowing evil," "a bad guy in plain sight," and "the wolf in sheep's clothing" are references to appellant's post incident Google searches. (JA 135–36). Ultimately, this case primarily came down to credibility and corroboration, as AG testified credibly to what appellant did to her on November 4, 2020, and eye witness SD testimony, along with appellant's statements to SSA CW, provided critical corroboration of her account. Thus, this court can be confident that the

admission of appellant's internet browser history, if error, did not have a substantial influence on the findings or sentence.

Conclusion

WHEREFORE, the government respectfully requests that this honorable court affirm the findings and sentence.

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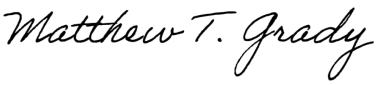

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains **4,826** words.

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

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Attorney for Appellee
October 16, 2023

APPENDIX

United States v. Moore

United States Army Court of Criminal Appeals

March 7, 2022, Decided

ARMY 20140875

Reporter
2022 CCA LEXIS 140 *; 2022 WL 671971

UNITED STATES, Appellee, v. Staff Sergeant ANTONIO T. MOORE, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by United States v. Moore, 2022 CAAF LEXIS 347 (C.A.A.F., May 10, 2022)

Prior History: [*1] Headquarters, 25th Infantry Division. Gregory Gross, Andrew Glass, James Herring, Military Judges (trial), Kenneth W. Shahan, Military Judge (rehearing), Lieutenant Colonel Leslie A. Rowley, Staff Judge Advocate (trial), Colonel Marvin J. McBurrows, Staff Judge Advocate (rehearing).

United States v. Moore, 2017 CCA LEXIS 191 (A.C.C.A., Mar. 23, 2017)

Counsel: For Appellant: Colonel Michael C. Friess, JA; Major Rachel P. Gordienko, JA; Captain Nandor F.R. Kiss, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Rachel P. Gordienko, JA; Captain Nandor F.R. Kiss, JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Brett A. Cramer, JA; Captain Melissa A. Eisenberg, JA (on brief).

Judges: Before BROOKHART, PENLAND, and ARGUELLES[1], Appellate Military Judges. Senior Judge BROOKHART and Judge PENLAND concur.

Opinion by: ARGUELLES

Opinion

MEMORANDUM OPINION ON FURTHER REVIEW

ARGUELLES, Judge:

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

At appellant's first trial in 2014, an officer panel sitting as a general court martial convicted him, contrary to his pleas, of two specifications of violating a no-contact order, six specifications of sexual assault, and one specification of assault consummated by a battery in violation of Articles 90, 120, and 128, Uniform [*2] Code of Military Justice 10 U.S.C. §§ 890, 920, 928 (2006 & Supp. V 2012) [UCMJ]. The panel acquitted appellant, inter alia, of two specifications of rape in violation of Article 120, UCMJ. On appeal, this court set aside the findings for five of the six sexual assault specifications. *United States v. Moore*, ARMY 20140875, 2017 CCA LEXIS 191 (Army Ct. Crim. App. 23 Mar. 2017) (mem. op.); *United States v. Moore*, 77 M.J. 198 (C.A.A.F. 2018).

On rehearing, a military judge sitting as a general court-martial convicted appellant of two of the remaining five sexual assault specifications, and sentenced him to confinement for thirteen years and a dishonorable discharge.[2] The convening authority approved the findings and so much of the sentence as provided for confinement for 12 years and 11 months and a dishonorable discharge.

This case is before the court for review pursuant to Article 66, UCMJ. Appellant raises three assignments of error, two of which merit discussion but no relief.[3]

BACKGROUND

On 16 July 2013, appellant's wife walked in on him having sex with her daughter/his stepdaughter (hereinafter referred to as the "victim"), who was twenty-two years old at the time. This conduct formed the basis for the sexual assault specification that survived the first trial.

Over the course of several interviews with U.S. Army Criminal Investigation Command (CID) agents, the victim disclosed that [*3] appellant had been sexually assaulting her for thirteen years beginning in 2000, when she was nine years old. The victim also described how, after she told her mother that appellant first raped her in the summer of 2003, her mother still married him later that summer. In both her CID interviews and at trial, the victim testified that after appellant enlisted in the Army in 2004, the sexual assaults and rapes continued at each of his duty stations, to include Fort Riley, Fort Knox, Fort Benning, and Schofield Barracks. This ongoing conduct formed the basis for the other five sexual assault specifications, and it was at Schofield Barracks in July of 2013 when the victim's mother walked in on appellant and the victim.

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[2] The complete procedural history of this case is set forth in greater detail in *United States v. Moore*, 79 M.J. 483, 484-85 (C.A.A.F. 2020)

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

When the victim was cross-examined, the defense brought out a number of facts that made it appear as though her sexual relationship with appellant may have been consensual. For example, in April of 2014, CID discovered that when she was nineteen, the victim sent appellant a number of sexually charged and salacious texts, videos, and photos. When asked at trial why she never mentioned any of this evidence during her first three interviews with CID in 2013, the victim claimed [*4] that she "completely forgotten" about it.

Likewise, the victim continued to move to new duty stations with appellant even after she turned eighteen, despite having the opportunity to live either on her own, with roommates, or other families she met at church. Defense counsel also elicited that in her CID interviews, the victim initially denied that anything happened between her and appellant, and began to change her story only after several hours of questioning. Finally, the victim testified that immediately after the Schofield Barracks incident, she was worried that her mother would "cast [her] out of her life" and was "terrified" that she would no longer be allowed in the family.

On the other hand, the victim testified that she never wanted to send appellant the "humiliating" and "embarrassing" sexually charged messages and videos, but rather did so at his request, and further explained that they would often appease and satisfy him. The victim also described how "[t]he more videos and the more pictures he got, the more he would stay off," and that there were fewer sexual assaults when she sent him the pictures and videos. Likewise, although she said on cross-examination that roommates [*5] were "no fun," and "[w]ho passes up a free trip to Hawaii," on re-direct the victim explained that she continued to move with appellant and her family because she felt an obligation to care for her younger siblings, and because appellant convinced her that she would never be able to make it on her own.

The government also called a child psychologist who testified as an expert on counterintuitive behavior. The expert explained how many of the victim's behaviors and reactions, including sending the salacious and sexually charged messages and videos, were not atypical in sexual abuse cases involving close family members. The expert also described the likely devastating impact of the victim's mother's decision to marry appellant notwithstanding the victim's disclosure of rape.

LAW AND DISCUSSION

A. Military Rule of Evidence 404(b) Rulings

1. Additional Facts

Prior to trial, the military judge ruled that evidence that appellant smothered the victim with a pillow in August of 2012 was admissible under Military Rule of Evidence (Mil. R. Evid.) 404(b). The military judge also ruled that multiple prior incidents in which appellant allegedly sexually assaulted the victim were admissible under Mil. R. Evid. 413, to include (1) the July 2013 incident at Schofield Barracks, for which appellant [*6] was found guilty in his first trial; and (2) an incident that occurred in 2006 at Fort Riley, where appellant sodomized the victim after she returned home from a football game. Appellant does not directly challenge either of these rulings on appeal and we see no reason to disturb them. *See United States v. Phillips*, 52 M.J. 268, 272 (C.A.A.F. 2000) ("We review a military judge's admission of evidence under Mil. R. Evid. 404(b) for abuse of discretion.") (citing *United States v. Robles-Ramos*, 47 M.J. 474, 476 (C.A.A.F. 1998)); *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013) (holding that the military judge's decision to admit evidence under Mil. R. Evid. 413 is reviewed for abuse of discretion) (citing *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010)).

Rather, appellant claims that the military judge erred in admitting evidence pertaining to seven separate, unnoticed prior "crimes, wrongs, and acts" under Mil. R. Evid. 404(b). We disagree.

2. Legal Standard

We review a military judge's evidentiary rulings for abuse of discretion. *United States v. Owens*, 51 M.J. 204, 209 (C.A.A.F. 1999). The abuse of discretion standard is deferential, predicating reversal on more than a mere difference of opinion. *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) (citation omitted) ("[T]he abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range.").

In pertinent part, Mil. R. Evid. 404(b) provides that:

> (1) *Prohibited Uses*. Evidence of a crime, wrong, or other act is not admissible to prove a [*7] person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) *Permitted Uses; Notice*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by the accused, the prosecution must: (A) provide reasonable notice of the general nature of any such evidence that the

> prosecution intends to offer at trial; and (B) do so before trial — or during trial if the military judge, for good cause, excuses lack of pretrial notice.

Although there is no requirement that the "other act" be criminal in nature, *see United States v. Franklin*, 35 M.J. 311, 318 (C.M.A. 1992), just because evidence is offered for a purpose listed in Mil. R. Evid. 404(b)(2) (i.e., to show motive, opportunity, intent, etc.) does *not* necessarily mean that it falls within the purview of Mil. R. Evid. 404(b).

We start by addressing *United States v. Staton*, 69 M.J. 228 (C.A.A.F. 2010), which both sides misread as standing for the proposition that any and all "consciousness of guilt" evidence is governed by Mil. R. Evid. 404(b). *See, e.g.* Appellee Br. 22. The issue in *Staton* was whether intimidation of the prosecutor could show consciousness of guilt and thus fall with the "other purposes" of admissible Mil. R. Evid. 404(b)(2) evidence. Although [*8] the Court of Appeals for the Armed Forces (CAAF) ultimately answered that question "yes," it in no way recognized a blanket rule that *all* consciousness of guilt evidence falls within Mil. R. Evid. 404(b). To the contrary, the CAAF simply held that in addition to the exceptions enumerated Rule 404(b)(2), consciousness of guilt may be introduced under Mil. R. Evid. 404(b)(2) where it otherwise demonstrates propensity. *Id.* at 231-32.

In other words, to the extent there is evidence that on its face appears to demonstrate propensity, that evidence is inadmissible under Mil. R. Evid. 404(b)(1), unless it falls within one of the exceptions set forth in (b)(2), to include motive, opportunity, intent, or even consciousness of guilt. *See United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997) ("The first sentence of Mil.R.Evid. 404(b) prohibits propensity evidence. . . . [a]ccordingly, the sole test under Mil.R.Evid. 404(b) is whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime and thereby to suggest that the factfinder infer that he is guilty, as charged, because he is *predisposed to commit similar offenses*.") (emphasis added); *United States v. Ferguson*, 28 M.J. 104, 108 (C.M.A. 1989) ("Mil.R.Evid. 404(b) clarifies that evidence of past wrongdoing is not 'relevant' to show in a general sense that, 'if he did it before, he probably did it again.").

But on the other hand, if there [*9] is evidence of intent, motive, consciousness of guilt, etc., that does *not* on its face suggest propensity, Mil. R. Evid. 404(b) is not applicable. Directly on point is the CAAF's recent holding in *United States v. Quezada*, __ M.J. __, No. 21-0089, 82 M.J. 54, 2021 CAAF LEXIS 1098, at *15-16 (C.A.A.F. 20 Dec. 2021):

> Consciousness of guilt evidence is different from propensity evidence. Consciousness of guilt evidence is an acceptable form of circumstantial evidence used to show "awareness of an accused that he or she has engaged in blameworthy conduct." *Black's Law Dictionary* 379 (11th ed. 2019). By contrast, propensity evidence is a generally

> impermissible form of character evidence in which members "prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Military Rule of Evidence 404(b)(1).

By way of another example, just because Mil. R. Evid. 404(b) lists "intent" as a permissible justification to introduce "[e]vidence of a crime, wrong, or other act," it does not follow that *any* evidence demonstrating an accused's criminal intent to commit sexual assault falls within the parameters of Mil. R. Evid. 404(b). Rather, the notice required to introduce such evidence of intent must be provided *only* if the evidence also suggests a propensity to commit sexual assaults.

3. Analysis

Appellant first claims that the military judge improperly [*10] admitted Mil. R. Evid. 404(b) evidence when the government elicited testimony that he lied to CID when he claimed that he and victim never had any type of sexual contact. The military judge expressly ruled, however, that he was not considering appellant's statement to CID as Mil. R. Evid. 404(b) evidence: "I'm not considering this as some 404(b), such as: false official statement. I will conditionally admit this statement of [appellant] to CID, under the theory that it might show consciousness of guilt. If it's not tied up later on from the evidence in this case, then I won't be considering it."

Given the military judge's express statement that he was not considering this evidence under Mil. R. Evid. 404(b), there was no error. *See United States v. Hyppolite*, 79 M.J. 161, 165 (C.A.A.F. 2019) ("All of this leads us to the straightforward conclusion that the trial judge considered the evidence to the extent that it was proof of a scheme and did not consider the evidence to the extent that it might have been evidence of propensity."); *United States v. Longstreath*, 45 M.J. 366, 374 (C.A.A.F. 1996) ("In the absence of evidence to the contrary, we will presume that the military judge did not consider testimony he struck."); *United States v. Ross*, ARMY 20190537, 2020 CCA LEXIS 353, at *18-19 (Army Ct. Crim. App. 30 Sep. 2020) (mem. op.) (holding that to the extent appellant is claiming that the government "smuggled" in similar sexual assault propensity evidence without the [*11] proper notice and safeguards of Mil. R. Evid. 413, "we are confident that the military judge did not consider the evidence for this purpose") (citations omitted).

Alternatively, this statement was admissible as a false exculpatory statement. *See* Dep't of Army Pam. 27-9, Legal Services: Military Judges Benchbook, para. 7-22 (29 Feb. 2020) (Benchbook) ("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 [the factfinder] in light of other evidence in the case

in determining the guilt or innocence of the accused."); *Quezada*, __ M.J. _, 2021 CAAF LEXIS 1098, at *1-2 (reaffirming that the Benchbook false exculpatory statements instruction "announces a correct principle of law") (citations omitted). Finally, even if the military judge did ultimately consider this evidence as consciousness of guilt, because the statement at issue does not show propensity to commit sexual assaults, he correctly ruled that it was outside the purview of Mil. R. Evid. 404(b). *Id.* at *15-16 ("Consciousness of guilt evidence is different from propensity evidence.").

Appellant's second and third Mil. R. Evid. 404(b) challenges are to the military judge's ruling admitting evidence [*12] that appellant: (1) exhibited extensive controlling behaviors, telling the victim she needed to "earn" or "deserve" any favorable treatment before she would be allowed to do the things she wanted; and (2) prevented the victim from having relationships with males her age. After the defense objected to this line of questioning during the direct examination of the victim's mother, however, the military judge ruled that he would consider this evidence only if it was "part-and-parcel" of the conduct that he previously ruled was admissible under Mil. R. Evid. 413. Once the government focused this line of questioning on the alleged Mil. R. Evid. 413 anal sodomy which occurred immediately after the victim attended a football game at Fort Riley in 2006, the military judge properly overruled the defense 404(b) objection: "I'm not considering that as 404(b) at this time. . . I just don't view that statement as 404(b) evidence." *See Hyppolite*, 79 M.J. at 165 ("[T]rial judge considered the evidence to the extent that it was proof of a scheme and did not consider the evidence to the extent that it might have been evidence of propensity.").

Likewise, given the victim's subsequent testimony that the "price [she] had to pay" to attend the football game was submitting to sodomy [*13] by appellant, her statements were *res gestae* to the admissible Mil. R. Evid. 413 post-football game sexual assault evidence. *See United States v. Metz*, 34 M.J. 349, 351 (C.M.A 1992) (holding that *res gestae* evidence is admissible to place evidence in context); *United States v. Gaddy*, ARMY 21050227, 2017 CCA LEXIS 179, at *5 (Army Ct. Crim. App. 20 Mar. 2017) (summ. disp.) ("When conduct is inexorably intertwined with the alleged offense itself, it is not 'other sexual behavior,' but rather becomes part of the *res gestae* of the offense. That is, the testimony 'was admissible as part of the same transaction as the assault.") (citing *United States v. Peel*, 29 M.J. 235, 239 (C.A.A.F. 1989)).

Appellant's fourth asserted Mil. R. Evid 404(b) error is based on the military judge's ruling permitting the victim's mother to testify that appellant attempted to "bribe" her by offering to give her a power of attorney. Specifically, the victim's mother testified that when she discovered appellant and the victim having sex, he fell to his knees and said, "Please, you know what they would do to people like me if you call the MPs and I get locked up. Please

don't call the MPs. I will sign you over the power of attorney, and I'll give you what you want."

The military judge and parties litigated this issue several times throughout the course of the trial. At one point, and consistent with our discussion of *Staton* and *Quezada* above, the military judge correctly [*14] ruled:

> So I don't believe this is 404(b). . . . I think you're under the misapprehension that any fact in the case--if what you're saying is the way it works then any fact in the case would have to have a 404(b) exception to it. This is simply a fact in the case that's made relevant by virtue of it possibly demonstrating consciousness of guilt. I do not believe it's 404(b) evidence, so an exception is not, an exception is not necessary for 404(b).

After revisiting the issue the next day, the military judge further clarified that he was limiting his consideration of this evidence as it pertained to the specific incident in which appellant's wife walked in on him and his daughter, which again was *not* charged in this case, but admitted only under Mil. R. Evid. 413.

Appellant's statements to his wife and procurement of a power of attorney the following day do not suggest a propensity to commit sexual assaults. *See Miller*, 46 M.J. at 65 (holding that Mil. R. Evid. 404(b) is applicable to evidence suggesting a predisposition to commit similar offenses). Consequently, the military judge properly considered appellant's conduct as relevant consciousness of guilt evidence outside the purview of Mil. R. Evid. 404(b). *Quezada*,__ M.J. __, 2021 CAAF LEXIS 1098, at *15-16 ("Consciousness of guilt evidence is different from propensity evidence."). [*15] Alternatively, even if this ruling was in error, it was harmless because the military judge only considered this consciousness of guilt evidence with respect to the Mil. R. Evid. 413 allegations, and *not* to the specifications at issue before him. Put another way, given that appellant was already convicted at the first trial of the sexual assault when his wife walked in on him and the victim, there was no error in military judge considering his subsequent actions limited to the extent they related to that incident. *See Longstreath*, 45 M.J. at 374 ("In the absence of evidence to the contrary, we will presume that the military judge did not consider testimony he struck.").

Appellant's fifth Mil. R. Evid. 404(b) challenge is based on the military judge's ruling allowing the victim to testify that, after her mother walked in on them and kicked her out of the house, he told her not to talk to CID or anyone else about their relationship. Among other things, the government asserted that it was not eliciting this testimony to show obstruction of justice, but rather only to explain the victim's ensuing actions, including not calling the police or CID. Indeed, defense counsel highlighted this issue in his opening statement, making multiple references to the [*16] fact that the victim did not report the incident and initially told CID that they never had any sexual relations.

In overruling the defense objection at trial, the military judge ruled:

> I'm going to rule that, in the event that this is considered a 404(b) type of evidence, that I believe it is admissible for non-propensity purposes; specifically to demonstrate consciousness of guilt on behalf of the accused. In the event that I was not to consider this 404(b), then I would consider it not for substance, but as something that then might form an explanation for her subsequent actions to CID, or--and I would likely allow it on redirect if I weren't to allow it here, in the event that the defense's cross-examination somehow made this relevant. For those reasons, I'm going to go ahead and overrule the defense objection and permit this statement.

We need not reach the Mil. R. Evid. 404(b) aspect of the military judge's ruling because during opening statements, defense counsel opened the door to this line of questioning by repeatedly referencing the victim's failure to report and her initial denial to CID. *See United States v. Haney*, 64 M.J. 101, 112 (C.A.A.F. 2006) (holding that the defense may open the door for rebuttal evidence in the opening statement); *Franklin*, 35 M.J. at 317 (holding that trial [*17] defense counsel opened the door to the issue of innocent intent in his opening statement by arguing that the Government would not be able to prove premeditation and attempted rape) (citing *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989)); *United States v. Cosentino*, 844 F.2d 30, 33 (2d Cir. 1988) ("If the opening sufficiently implicates the credibility of a government witness, we have held that testimonial evidence of bolstering aspects of a cooperation agreement may be introduced for rehabilitative purposes during direct examination."); *United States v. Gaind*, 31 F.3d 73, 78 (2d Cir. 1994) (same).[4]

The military judge's alternate ruling that he would consider the victim's testimony if it became relevant during her cross-examination likewise removes any potential error. On cross-examination defense counsel devoted significant time to questioning the victim about her failure to report the alleged sexual abuse and her initial statements to CID. Because it would have been appropriate to allow the victim to explain this conduct during redirect, there was no error in admitting the explanation on direct. Notably, appellant did not claim either at trial or on appeal that he would not have questioned the victim about these subjects absent the government raising it during direct examination, and he would be hard pressed [*18] to make such a claim in light of his counsel's opening statement.

Finally, even if we were to reach the Mil. R. 404(b) issue, for all of the reasons set forth above, the military judge also correctly ruled that appellant's telling the victim not to talk

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[4] We are cognizant of the CAAF's holding in *United States v. Turner*, 39 M.J. 259 (C.M.A. 1994), but agree with the CAAF's subsequent characterization in Haney that Turner stands for the proposition that "'*nothing more than* a single passing comment during defense counsel's *opening statement*' may not be enough without more, to open the door." *Haney*, 64 M.J. at 117 (emphasis in original). Defense counsel's opening statements in this case about the victim's failure to report and initial denials to CID were far more than a mere "single passing comment."

to CID does not constitute the type of "other acts" propensity evidence that triggers the notice requirements of that rule. Put another way, telling the victim to not report a sexual assault does not necessarily show a propensity to commit sexual assaults, but rather is relevant because it suggests consciousness of guilt. *See Miller*, 46 M.J. at 65; *Quezada*, __ M.J. __, 2021 CAAF LEXIS 1098, at *15-16.

Appellant's asserted sixth Mil. R. Evid. 404(b) error pertains to the victim's testimony that he video recorded some of their sexual encounters without her consent or knowledge. At the outset, it is worth noting that these videos were in evidence because the defense successfully moved to admit them under Mil. R. Evid. 412. When the victim was initially asked on direct examination if she was aware that appellant had made the videos, defense counsel objected: "404(b), I think the government is going to try to get an unauthorized recording." After confirming that the videos were admitted pursuant to a defense Mil. R. Evid. 412 motion, the military judge overruled the objection. [*19]

In addition, defense counsel placed the victim's consent to the recordings at issue during his opening statement. Among other things, he pointed out that the victim neglected to tell CID that "she was willingly recorded performing oral sex, acknowledging the camera, and readjusting it for a better shot." On cross-examination defense counsel again challenged the victim's assertion that she did not consent to the filming of the videos.

Given that there is no challenge to the admission of the explicit videos, questions about whether the victim was aware of the recordings were "part-and-parcel" of any inquiry into the videos. *See Metz*, 34 M.J. at 351 (holding that *res gestae* evidence is admissible to place evidence at issue in context). Alternatively, given that defense counsel asserted in his opening statement that the victim willingly consented to these videos, he opened the door for this line of questioning on direct. *See Haney*, 64 M.J. at 112; *Franklin*, 35 M.J. at 317. Finally, and in any event, given the nature and extent of the defense's cross-examination on this issue, because this evidence would have been admissible on redirect, to the extent there was any error, it was harmless.

Appellant's final Mil. R. Evid. 404(b) assertion of error is that the military judge [*20] erred in permitting the victim to describe how he threatened to call the police on her for stealing a car, and to put out an "APB" when he learned she was talking to another male. In setting the context for the admissible Mil. R. Evid. 404(b) pillows-mothering incident, the victim described how appellant was mad at her for talking to another man, and explained how their conversation started on her way home from work. During this conversation, appellant told her that "he would put out a APB, saying that I stole the car." After she got home, this disagreement escalated to a wrestling match in which appellant pushed her face into a pillow and told the other kids pile on top of her. When asked if she thought about running away after the incident, the victim referred back to the "APB" comment that appellant made earlier that day. The military judge overruled the defense 404(b) objection

to this testimony and agreed with trial counsel's statement that "I don't think that is 404(b)."

First, because this conversation set the context for the admissible Mil. R. Evid. 404(b) pillow smothering evidence, it was *res gestae* to that incident. *See Metz*, 34 M.J. at 351. Alternatively, because this evidence does not suggest a propensity to commit sexual assault, the military [*21] judge's evidentiary ruling was correct. *See Miller*, 46 M.J. at 65; *Quezada*, __ M.J. __, 2021 CAAF LEXIS 1098, at *15-16. Alternatively, because the defense spent a significant portion of their opening statement and cross-examination highlighting the fact that the victim never left despite having multiple opportunities to do so, it was not error for the Government to ask her on direct examination why she did not leave that night. *See Haney*, 64 M.J. at 112; *Franklin*, 35 M.J. at 317.

B. Rule for Courts-Martial 914 Ruling

1. Additional Facts

At trial, the defense moved to preclude the victim from testifying under Rule for Courts-Martial (R.C.M) 914 because they did not receive a copy of her second interview with CID on 19 July 2013. After extensive litigation, which included an initial ruling in favor of the defense and the taking of additional evidence on reconsideration, the military judge ultimately ruled that no recording of this interview ever existed, and denied the defense motion to strike.

Just prior to the victim's testimony, the defense preemptively sought to strike her testimony because they did not receive a copy of her second recorded interview with CID. Specifically at issue were three CID interviews with the victim on 17 July, 19 July, and 22 September 2013. Although recordings of the first and third interviews were [*22] provided to the defense prior to the first trial, no recording of the second interview was ever produced.

As part of the R.C.M. 914 litigation, the CID agent who conducted the interview on 19 July testified that it was his normal practice not to take notes during the interview, but rather to write up his report after the interview by watching the recording. The subject matter of the 19 July interview and the agent's investigation report ("AIR") were extensive. The agent testified that although he had no specific recollection of whether the interview was recorded, he believed he would have followed his usual practice of writing the report after watching the recording. The agent also testified that had there been no recording of the interview, he would have likely indicated the reason in his AIR, which made no

mention either way as to the recording. And, during her third interview with CID in September of 2013, the victim indicated that all of her previous interviews were recorded.

After hearing the initial testimony and argument, the military judge initially ruled that the victim would not be able to testify unless of a copy of her interview was provided to the defense. Among other things, [*23] the military judge based his ruling on the victim's statement that all three interviews were recorded, the fact that the first and third interviews were recorded, the agent's failure to annotate in his AIR the reasons why the interview was not recorded, and the agent's failure to obtain a sworn statement in lieu of the recording. Given the agent's testimony that it was his practice to never take notes during an interview, the military judge also questioned whether the agent possessed the "recall and mental acuity" to accurately summarize a three hour interview in his AIR absent any recording.

In its request for reconsideration, the government presented new evidence in the form of an email from the initial Special Victim Prosecutor (SVP) dated 2 October 2013, and the statements of the two trial counsel who tried the case back in 2014. In her email, the SVP stated "[i]s everyone tracking that the recording of the victim's second Interview with CID malfunctioned/did not record." One of the former trial counsel also testified that he was present during the second interview (which was the only time he saw it), that he never had possession of any recording of that interview, and that he remembered [*24] receiving the SVP email about the malfunction.

The other former trial counsel submitted an affidavit in which he attached an email showing that he and his co-counsel went to CID shortly before appellant's pretrial confinement hearing and discovered that the interview was not recorded, or that the recording device failed. The second trial counsel also indicated in his affidavit that if there was a recording, it would have been provided to the defense, and that it was his practice to take detailed notes about recorded interviews for future reference. Given that he did not have any such notes pertaining to the second interview in his file, it was his conclusion that there was no recording of the victim's second interview with CID.

As part of its motion for reconsideration, the government also elicited testimony that in July of 2013, CID policy required only subject interviews, as opposed to witness or victim interviews, to be recorded. In addition, the government demonstrated that when appellant went to the CID office later that same day (19 July) for a secondary rights advisement (which per CID policy needed to be recorded), that meeting was also not recorded. Finally, a former CID supervisor [*25] testified that during this time period the Schofield Barracks CID office was having technical malfunctions with its software, where agents would press the record button, the screen would indicate the interview was recording, yet the interview would not be the system.

In an email ruling dated 27 August 2018, the military judge issued written findings of fact and conclusions of law in which he found that "[t]he evidence now establishes that a video recording of [victim's] 19 July 2013 CID interview never existed," and ruled that the "Defense motion to strike (in advance) [victim's] testimony pursuant to RCM 914 is denied." Among other things, the military judge based his new ruling on the testimony and emails of the prior trial counsel and SVP, the fact that CID was having technical errors with its recording system at the time, and that at the time that there was no CID requirement to record all interviews with alleged sexual assault victims.[5]

2. Legal Standard

We review a military judge's decision to strike testimony under R.C.M. 914 for abuse of discretion. *United States v. Muwwakkil*, 74 M.J. 187, 191 (C.A.A.F. 2015). Rule for Courts-Martial 914 provides in pertinent part that after a witness has testified on direct examination, "the military judge, [*26] on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving party, any statement of the witness that relates to the subject matter concerning which the witness has testified . . . ." The purpose of R.C.M. 914 "is to further the fair and just administration of criminal justice by providing for disclosure of statements for impeaching government witnesses." *United States v. Brooks*, 79 M.J. 501, 506 (Army Ct. Crim. App. 2019) (citing *Muwwakkil*, 74 M.J. at 190. Video interviews, even if they do not contain sworn statements, fall within the purview of R.C.M. 914. *United States v. Clark*, 79 M.J. 449, 453-54 (C.A.A.F. 2020).

Although a good faith loss or destruction of R.C.M. 914 material may excuse the government's failure to produce the "statements," *Clark*, 79 M.J. at 454 (citations omitted), we agree with the parties that "[t]he only area of dispute in this case is whether the statement existed" in the first instance. Appellant's Br. 28.

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[5] Although the military judge directed the court reporter to "mark this email as the next AE in order," that did not happen, and the ruling was initially not part of the record. The Government filed a Motion to Attach this ruling to the appellate record pursuant to Rule 23.3 of the United States Army Court of Criminal Appeals Rules of Appellate Procedure ("Rule 23.3"), which we have granted. Appellant did not file an opposition to the Government's Motion to Attach, but rather asserts in his reply brief that we cannot consider the military judge's written ruling because the government failed to request that the record be returned to the convening authority for correction under the 2016 *Manual for Courts-Martial* R.C.M. 1104(d) in effect at the time. Rule for Courts-Martial 1104(d)(1) states that "[a] record of trial found to be incomplete or defective after authentication *may* be . . . returned to the convening authority by superior competent authority for correction under this rule," and R.C.M. 1104(d)(2) provides that "[a]n authenticated record of trial believed to be incomplete or defective *may* be returned to the military judge or summary court-martial for a certificate of correction." (emphasis added). Given its permissive "may" language, we interpret RCM 1104(d) as one, but not the exclusive, way to supplement the record. As such, we do not view our Rule 23.3 to conflict with 1104(d), and exercise our discretion under this rule to supplement the record by attaching the underlying written R.C.M. 914 ruling to the Record of Trial. *Cf. United States v. Mosley*, 35 M.J. 693, 695 (N.M.C.M.R. 1992) (holding that since R.C.M. 1104(d) "provides that the record *may* be returned to the convening authority," an appellate court has discretion to accept certificates of correction and affidavits in lieu of returning the record to the convening authority) (emphasis in original).

3. Analysis

As set forth above, because we may not substitute our judgment for that of the military judge, the question before us on appeal is *not* whether reasonable minds can differ as to whether CID ever recorded the second interview. Rather, we can only provide relief if we find that the military judge's ruling constitutes an abuse of discretion. *See Gore*, 60 M.J. at 187 ("[T]he abuse of [*27] discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range.") (citation omitted).

After hearing and weighing the evidence, the military judge in this case applied the proper legal standard and placed his detailed factual findings and conclusion on the record. *See United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014) ("[W]here the military judge places on the record his analysis and application of the law to the facts, deference is clearly warranted.") (citing *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)). As such, because we decline to substitute our judgment for that of the military judge, we find that he did not abuse his discretion in denying the defense motion to exclude under R.C.M. 914.[6]

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Senior Judge BROOKHART and Judge PENLAND concur.

End of Document

[6] Even if we were to deny the Government Motion to Attach and/or disregard the military judge's written ruling, based on all of the facts and evidence in the record, we in any event agree with the military judge's ultimate finding that there was no recording of the second interview.

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 October 16, 2023.

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