IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Chief Warrant Officer Two (CW-2) **JONATHAN K. CUNNINGHAM** United States Army Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. 20220140 USCA Dkt. No. 26-0085/AR

Kelsey Mowatt-Larssen
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 695-9851
USCAAF Bar No. 38204

Kyle C. Sprague
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar No. 36867

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

Issues Presented[1]

I. WHETHER THE MILITARY JUDGE ERRED BY ADMITTING A HEARSAY STATEMENT OF APPELLANT'S WIFE.

II. WHETHER THE MILITARY JUDGE IMPROPERLY ALLOWED OPINION TESTIMONY AS TO THE MEANING OF "SIT AND SPIN."

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, [hereinafter UCMJ] 10 U.S.C. § 866. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ 10. U.S.C. § 867(a)(3).

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant respectfully requests this Court consider the information provided in Appendix B.

Statement of the Case

On March 24, 2022, an officer panel sitting as a general court-martial convicted appellant, Chief Warrant Officer Two (CW2) Jonathan K. Cunningham, contrary to his pleas, of one specification of sexual abuse of a child, one specification of false official statement, and one specification of wrongful interference with an adverse administrative proceeding in violation of Articles 120b, 107, and 131g, Uniform Code of Military Justice, 10 U.S.C. §§ 920b, 907 and 931g [UCMJ]. (R. at 758; Statement of Trial Results (STR)).[2] The next day, March 25, 2022, the military judge sentenced appellant to be dismissed from the service. (R. at 802; STR).

On May 19, 2022, the convening authority took no action on the findings or sentence. (Convening Authority Action). On May 25, 2022, the military judge entered judgment. (Judgment of the Court). On November 20, 2023, the Army Court docketed appellant's case. (Referral and Designation of Counsel).

On November 4, 2025, the Army Court affirmed appellant's conviction. *United States v. Cunningham*, ARMY 20220140 (A. Ct. Crim. App. 4 Nov. 25) (Appendix A). On January 3, 2026, appellant filed a petition for a grant of review to this Court, asking to extend the time for appellant to file his supplement. This

[2] After the presentation of evidence, but prior to closing arguments, the military judge dismissed the specification of indecent language in violation of Article 134, UCMJ (the Specification of Charge II) on preemption grounds. (R. at 528).

Court granted appellant's third enlargement of time to file the supplement until February 27, 2026.

Reasons to Grant the Petition

In this case, evidentiary error did the work the evidence could not. An erroneously admitted hearsay statement irreparably damaged appellant's credibility and lay opinions as to the term "helicopter sit and spin" usurped the factfinder's critical function by resolving the ultimate issue.

The excited utterance exception is a narrow one. When admitted without strong evidence of continuing stress and spontaneity, it erodes the reliability safeguards embedded in Military Rule of Evidence (M.R.E.) 803(2). While the Army Court found the military judge did not abuse his discretion in admitting a statement from appellant's spouse, its conclusion does not fully address how the statement satisfies the elements for an excited utterance. This is especially dangerous when a statement is dispositive to the case, as it was here. In this case, the defense presented a strong alibi that appellant's son, not appellant, was the source of messages to the victim. When the members heard appellant's own wife telling him, "I told you to stop talking to her," that undoubtedly changed the trajectory of the trial.

Similarly, allowing lay opinions as to the meaning of "helicopter sit and spin" improperly influenced the case by allowing generalized familiarity in place

of actual perception. Despite lacking contextual understanding of *appellant's* meaning behind the phrase, three witnesses were permitted to define the term. One of the witnesses, a Special Agent from Army Criminal Investigation Command (CID), bolstered his interpretation by explaining his training and experience, effectively blurring the line between lay opinion and expert testimony. The witnesses became vehicles for the prosecution's narrative that the language was "indecent," compelling the members to accept this interpretation rather than evaluate appellant's words for themselves.

Statement of Facts

A. Background: Messages between "Appellant" and Miss MJ

Miss MJ is SSG BJ's daughter. (R. at 417-418, 574). Appellant met SSG BJ around 2012 and remained in touch. (R. at 419, 421). In the summer of 2019, Miss MJ visited SSG BJ at Fort Bragg, North Carolina and met appellant for the first time. (R. at 418, 421).

In February 2020, Miss MJ messaged appellant via Instagram to thank him for a sweatshirt he had given her. (R. at 272-74, 278, 550-51). A brief conversation followed. (Pros. Ex. 2, pp. 1-9).

Master KC is appellant's son and is roughly the same age as Miss MJ. (R. at 574). In June 2020, Master KC logged into appellant's Instagram account and saw

a picture of Miss MJ. (Pros. Ex. 5, p. 1). He then used appellant's Instagram account to message her, presenting himself as his father. (R. at 582).

During this conversation, Master KC made fun of Miss MJ for being short, calling her "Frodo" and "helicopter sit and spin midget." (R. at 582-83; Pros Ex. 3, pp. 18, 31). They continued their conversation over Snapchat, where Master KC continued to pose as appellant. (R. at 583-84; Pros Ex. 4).

When Miss MJ returned to Fort Bragg approximately three weeks later, she told her father and stepmother about the messages from appellant's accounts. (R. at 311, 397-99). Staff Sergeant BJ confronted appellant with the Instagram messages. (R. at 424). Appellant stated it was his account, but that he had not sent the messages. (R. at 424, 451).

Master KC overheard some of the conversation between SSG BJ and his parents and the next morning confessed to his parents that he had logged into appellant's Instagram account and messaged Miss MJ. (R. at 590-93; Pros. Ex. 5). Later that same morning, Master KC confessed to Miss MJ's mother that he sent the Instagram messages to Miss MJ. (R. at 594).

At trial, the defense presented direct evidence from Master KC, under oath, that he, not appellant, was responsible for sending the inappropriate messages to Miss MJ. (R. at 580-85). Master KC confirmed he used capitalizations and punctuation in his messages to Miss MJ in a way that mirrored appellant's style.

(R. at 588-90). He testified it was not difficult for him to mimic appellant's messaging and that he was familiar with appellant's height, age, and medical history. (R. at 588-89, 705-06). The government did not call any expert witnesses to introduce evidence of Instagram or Snapchat logins to verify user data.

The defense also introduced evidence that 1) Master KC gave confessions to his mother and Miss MJ's stepmother (R. at 591-96, Pros. Exs. 5 and 6) that were consistent with his in-court testimony; 2) that both appellant and his mother had encouraged him to tell the truth; and 3) that he had been punished for his actions by his parents, something he told his friends about. (R. at 544-45, 596-98). Master KC's testimony was corroborated by his consistent sworn statement to an Investigating Officer appointed by appellant's command prior to the preferral of charges. (Pros. Ex. 11).

The defense also called six senior leaders to establish appellant's character for truthfulness. The government did not offer any evidence in rebuttal.

B. Erroneously Admitted Hearsay Statement

Staff Sergeant BJ testified when he confronted appellant about having an inappropriate conversation with Miss MJ, appellant denied the allegation. (R. at 426). Staff Sergeant BJ then went to his house to get Miss MJ's phone. (R. at 427). When he returned to the house with the phone, appellant's wife grabbed it and asked "[w]hat the fuck is this?" (R. at 427).

Outside the presence of the members, the trial counsel then elicited the following statement from SSG BJ, attributed to appellant's wife: 'I told you to stop talking to her.'" (R. at 430).

Defense objected based on hearsay and elicited the following pertinent facts from SSG BJ:

> CDC: [I]n the sworn statement [for the subject administrative investigation], you stated that "when I got there, [appellant's wife] came outside and took the phone from me to look at it. [Appellant's wife] then said, "what the fuck is this," correct?
>
> WIT: Yes.
>
> CDC: While looking at [appellant]. [Appellant] said that it, it is his account, but that it's not him writing it. Do you recall that?
>
> WIT: Yes.
>
> CDC: Also, then you said, [appellant's wife] then said to [appellant], "I told you to stop talking to her," correct?
>
> WIT: Yes.
>
> CDC: And then you also said that after [appellant's wife] read all of the—all of it, she gave me the phone back and walked to the house.
>
> WIT: Yes.
>
> CDC: So, so you don't know what—how, how far she read other than to see that there was—that she had seen a, a text message between what you believe to be [appellant] and [Miss MJ], correct?
>
> WIT: Yes.
>
> . . . .

> CDC: You don't know anything other than [appellant's wife] had the phone and saw the first set of text messages between [Miss MJ] and who you believe to be [appellant], correct"
>
> WIT: Yes.
>
> CDC: And also you don't know—at that time, you had no idea what [appellant's wife] thought at all, did you? You couldn't.
>
> WIT: No, I just, just from how she was answering, it just sound—she sounded upset.

(R. at 431-432).

After hearing the proposed foundation, the military judge made a preliminary determination that appellant's wife experienced a startling event and made a statement while in the state of nervous excitement. (R. at 433). Defense objected to the relevance of the statement. (R. at 436). The government argued that it went to the service discrediting element of the indecent language specification, and that it was also relevant to show that appellant was in fact messaging Miss MJ. (R. at 437). Defense then objected under Military Rule of M.R.E. 403, arguing that it was ambiguous because SSG BJ had no way of knowing the context in which the statement had first been uttered to appellant. (R. at 437). The military judge overruled both objections, finding that the government had laid a sufficient foundation for an excited utterance and that the statements were relevant to facts at issue, specifically the terminal element of the indecent language specification. (R. 438).

After the government rested, defense moved to dismiss the specification of indecent language in violation of Article 134, UCMJ, on preemption grounds. (R. at 528). The government did not object, and the military judge granted the motion. (R. at 528). The military judge did not reconsider his earlier ruling on the relevance of the hearsay statement, nor did he give the panel an instruction to disregard the testimony, only that the panel disregard the dismissed charge and its specification on the flyer. (R. at 529).

C. Lay Opinions or Expert Testimony

During the government's direct examination of the victim's stepmother, Mrs. KJ, the military judge permitted the trial counsel to ask Mrs. KJ her understanding of the phrase "helicopter sit and spin" over defense objection. (R. at 385-86). The civilian defense counsel had argued Mrs. KJ was "no more capable of saying what it meant than any member is from their own experience." (R. at 388-89). In overruling the objection, the military judge did not offer analysis, but stated Mrs. KJ, "can't offer an expert opinion [. . .] can't filter it through Urban Dictionary [or] through hearsay." (R. at 389). Mrs. KJ then testified she was "familiar" with the term; "it means that it's a sexual position between a man and a woman to where the man lies on a floor or a bed, and the woman is on top of him having sex with him, in a riding position while she is spinning around." (R. 400).

Later, trial counsel asked the same question of SSG BJ, to which he gave the definition: "[i]t's typically you have a female that's very small and light, would sit on the male genitalia and you would spin her." (R. 424).

Lastly, the government called a Special Agent from CID, who had acted as an investigator on appellant's case. The agent testified that the phrase was slang and that one of his duties was to "interact and review slang terms" and interpret their meaning. (R. at 497). As to the meaning of "sit and spin," the agent testified, "the way I interpret in the context of the text messages of what I interpreted, the term to mean was when a woman spins around a man's penis 360 degrees." (R. at 497). As to the meaning of "helicopter sit and spin," the agent testified, "[i]n the context of the text messages, the way I interpreted that to mean, was the height differential between himself and the victim." (R. at 497).

Later, a panel member asked the agent: "can 'helicopter sit and spin' be interpreted in any other way than sexual?" (R. at 517). Before the agent could respond, the military judge told him he had to testify to his personal knowledge. (R. at 517). The agent then answered, "the way I interpreted that comment was in the context of the messages that I read. That's why I interpreted it the way that I did." (R. at 517).

I. WHETHER THE MILITARY JUDGE ERRED BY ADMITTING A HEARSAY STATEMENT OF APPELLANT'S WIFE

Standard of Review

"The standard of review of a military judge's ruling admitting or excluding an excited utterance is an abuse of discretion." *United States v. Feltham*, 58 M.J. 470, 474 (C.A.A.F. 2003). "An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact." *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003). If the error is nonconstitutional in nature, this court will find prejudice if the error had a substantial influence on the findings. *United States v. Bowen*, 76 M.J. 83 (C.A.A.F. 2017) (citation omitted).

In weighing the prejudice from erroneous findings, this Court will evaluate: "(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. Kerr*, 51 M.J. 401, 405 (C.A.A.F.1999).

Law

The hearsay rule is a general rule of exclusion. *See* M.R.E. 802. As an exception, a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible under M.R.E. 803(2).

This Court has adopted a three-part test to determine whether a statement qualifies as an excited utterance:

> (1) the statement must be "spontaneous, excited or impulsive rather than the product of reflection and deliberation";
>
> (2) the event prompting the utterance must be "startling"; and
>
> (3) the declarant must be "under the stress of excitement caused by the event."

United States v. Arnold, 25 M.J. 129, 132 (C.M.A. 1987) (citations omitted) (internal quotation marks omitted).

"The proponent of the excited utterance has the burden to show by a preponderance of the evidence that each element is met." *United States v. Henry*, 81 M.J. 91, 96 (C.A.A.F. 2021) (citing *Bourjaily v. United States*, 483 U.S. 171, 175, (1987)).

Argument

The evidence does not support that the statement, "I told you to stop talking to her," related to a startling event, that appellant's wife was under the stress of excitement, or that the statement was spontaneous, excited, or impulsive. The Army Court's opinion largely adopts the military judge's conclusions in places where it could independently analyze the three prongs from *United States v. Arnold*.

The record does not reflect that appellant's wife made her statement in

response to a startling event. While the Army Court found that the "event of being confronted with messages between her husband and the 13-year old victim was a startling event," it is unclear what appellant's wife actually saw. Staff Sergeant BJ testified that appellant's wife looked through Miss MJ's phone, but he did not know which messages she viewed or how many. He also testified she appeared "upset," but admitted he could not know what she was thinking or feeling. (R. at 432). Even by SSG BJ's account, appellant's spouse did not exhibit the level of emotion one would expect to see when faced with a startling event.

The Army Court agreed with the military judge that "appellant's wife was still under the stress of excitement caused by the event and her response was not the product of reflection or deliberation, but was spontaneous and impulsive." However, the only evidence cited in support of this conclusion is the fact the statement "was made within moments of seeing the messages, with little opportunity to calculate a response, and was not the product of questioning." As to the first consideration – whether appellant's wife was under the stress of excitement – the evidence fails to establish the physical or mental condition of the declarant. Rather, SSG BJ testified he had "no idea" what appellant's wife thought at all (R. at 432), and the government failed to put on any other evidence of her demeanor. Regarding the spontaneity of the statement, appellant's wife

uttered the subject statement after taking the phone, asking a question ("what the fuck is this"), listening to a response, and reviewing the messages again. In this sense, she had time to consider and formulate a reaction.

Finally, because the military judge found the hearsay statement relevant to the Article 134 offense which was subsequently dismissed, the military judge should have instructed the panel members to disregard the hearsay statement. The Army Court noted the military judge found the statement relevant "at a minimum" to the Article 134 charge; however, in his ruling, the military judge cited the terminal element of the specification of indecent language in violation of Article 134, UCMJ, to justify the value of the statement. Without this specification and its terminal element, the probative value shrinks in relation to the danger of unfair prejudice. The prejudice is even more apparent when considering the defense's complete alibi and the government's reliance on weak, circumstantial evidence.

II. WHETHER THE MILITARY JUDGE IMPROPERLY ALLOWED OPINION TESTIMONY AS TO THE MEANING OF "SIT AND SPIN."

Standard of Review

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Bowen*, 76 M.J. 83, 87 (C.A.A.F. 2017). This court must reverse for an abuse of discretion when "the military judge's findings of fact are clearly erroneous or . . . his decision is influenced by an erroneous view of

the law." *United States v. Byrd*, 60 M.J. 4, 5 (C.A.A.F. 2004) (citing *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995)). "[W]here the military judge placed on the record his analysis, deference is clearly warranted." *United States v. Finch*, 79 M.J. 389, 397 (C.A.A.F. 2020) (quotation omitted). However, where "the military judge fails to place his findings and analysis on the record, less deference will be accorded." *Id*.

"The appellate court evaluates prejudice from an erroneous evidentiary ruling by weighing (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. Lopez*, 76 M.J. 151, 156 (C.A.A.F. 2017).

Law

"Lay opinion testimony is only admissible if (1) the opinion is rationally based on the witness's perception; and (2) the opinion is helpful either to an understanding of the testimony of the witness on the stand or to the determination of a fact in issue. *Id*. (citing *Byrd*, 60 M.J. at 7)) (internal citation omitted). "The general rule in federal civilian courts is that 'lay witnesses are normally not permitted to testify about their subjective interpretations or conclusions as to what has been said.'" *Byrd*, 60 M.J. at 7 (citing *United States v. Cox*, 633 F.2d 871, 875 (9th Cir. 1980)). "Where terms are capable of being understood by the layman,

and where the jury is capable of interpreting the language or slang involved, lay witness opinion testimony is improper, as is the lay witness's conclusion or interpretation of the conversation." *Id.* at 8 (citing *State v. Webb*, 243 Mont. 368, 792 P.2d 1097, 1100 (Mont. 1990)).

"In order to allow lay opinion testimony interpreting a facially coherent conversation . . . the government [has] to establish a foundation that [calls] into question the apparent coherence of the conversation so that it no longer [seems] clear, coherent, or legitimate." *Id.* at 8. However, even if the government has established a foundation of ambiguity or incoherence in the communication, "[f]or a lay opinion interpreting another person's meaning to be admissible, the proponent must establish that the witness has some special basis for determining the speaker's true meaning." *Id*. "Once that foundation is laid, the witness "may clarify conversations that are abbreviated, composed of unfinished sentences and punctuated with ambiguous references to events that were clear only to the conversation participants[.]" *Id*. (citing *United States v. Sneed*, 34 F.3d 1570, 1581 (10th Cir. 1994)).

Argument

The witnesses in this case did not have a special basis for understanding appellant's meaning behind "helicopter sit and spin," and therefore lacked the foundation for interpreting the meaning of the phrase. *See id*. at 7. Neither SSG

BJ, Mrs. KJ, nor the Special Agent observed appellant use the phrase at any point and were not part of the conversation between appellant and Miss MJ. While the Army Court was satisfied the witnesses had "personal knowledge" of the phrase, their general familiarity cannot supplant the particularized knowledge required for discerning the *speaker's* intended meaning in this context.

The CID Special Agent offered his interpretation of the term "sit and spin" after discussing his investigative role and after explaining he "frequently interact[s] or review[s] slang terms," predicating his interpretation on his professional experience rather than his personal perception. (R. at 495-96). This allowed the prosecution to avoid the scrutiny of M.R.E. 702 while enjoying the credibility of expertise. Although his testimony was labeled as a lay opinion (again, without understanding of appellant's meaning), practically speaking, it implied specialized knowledge. This is evidenced by the fact a panel member specifically asked the agent whether the term could be interpreted in any way other than sexual. (R. at 517). Clearly, this member trusted the agent's authority and felt beholden to his understanding of the phrase, even if the member was inclined to consider a different, non-sexual meaning. This suggests the improper testimony swayed at least one vote.

In this sense, the evidentiary value of the evidence was strong, especially in light of the government's weak case. The government relied on suspicion and

conjecture. The defense, on the other hand, presented a strong case through a complete alibi and character witnesses.

The Army Court's determination that the phrase is not facially coherent reveals the danger in erroneously allowing lay opinions. If the phrase was not facially coherent, the members required help to evaluate it, and the witnesses' interpretation supplied meaning. Because the witnesses lacked perception-based knowledge of what appellant meant, their interpretation was speculative. Yet those opinions became the lens through which the phrase was evaluated by the members.

Conclusion

WHEREFORE, appellant respectfully requets this Court grant his petition for review.

Kelsey Mowatt-Larssen
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 495-3762
USCAAF Bar No. 38204

Kyle C. Sprague
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar No. 36867

APPENDIX A

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
POND, MORRIS, and JUETTEN
Appellate Military Judges

UNITED STATES, Appellee
v.
Chief Warrant Officer Two JONATHAN K. CUNNINGHAM
United States Army, Appellant

ARMY 20220140

Headquarters, Fort Bragg
Gregory B. Batdorff and John H. Cook, Military Judges
Colonel Joseph B. Mackey, Staff Judge Advocate

For Appellant: Captain Robert W. Duffie, JA (argued);[1] Colonel Philip M. Staten, JA; Lieutenant Colonel Autumn R. Porter, JA; Major Robert W. Rodriguez, JA; Captain Robert W. Duffie, JA (on brief); Lieutenant Colonel Autumn R. Porter, JA; Major Robert W. Rodriguez, JA; Captain Robert W. Duffie, JA (on reply brief).

For Appellee: Captain Alex J. Berkun, JA (argued); Colonel Richard E. Gorini, JA; Major Marc B. Sawyer, JA; Major Austin L. Fenwick, JA (on brief).

4 November 2025

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

POND, Senior Judge:

An officer panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of false official statement, one specification of sexual abuse of a child by intentionally communicating indecent language to a child under 16 years of age, and one specification of wrongful

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[1] We heard oral argument in this case on 31 March 2025 as part of "Project Outreach," a public awareness program demonstrating the operation of the military justice system.

interference with an adverse administrative proceeding in violation of Articles 107, 120b, and 131g, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 920b, 931g [UCMJ]. Prior to findings, the military judge dismissed one specification of indecent language in violation of Article 134, UCMJ, on preemption grounds. For the offenses of which appellant was convicted, the military judge sentenced him to be dismissed from the service.

The charges arose from Instagram messages sent to the victim, a 13-year-old girl, and the ensuing investigation. Before this court, appellant alleges his convictions are factually insufficient because the government could not prove beyond a reasonable doubt that he committed the Article 120b, UCMJ offense when his 14-year-old son, and not appellant, sent the messages communicating indecent language to the victim. Appellant also argues the government failed to prove the charged indecent language—"helicopter sit and spin midget" and "you're such a tease"—was both indecent and communicated with an intent to arouse the sexual desire of appellant, as charged. Separately, appellant argues the military judge erred by admitting an out of court statement from appellant's wife as an excited utterance. Appellant requests this court grant relief by setting aside the findings and sentence.[2] For the reasons discussed below, we disagree and find the evidence factually sufficient and the hearsay statement properly admitted and affirm.

BACKGROUND

Appellant and the victim's father, Staff Sergeant (SSG) BJ, met when they were both enlisted Soldiers, eight years before the events related to the offenses unfolded. Appellant became a mentor and friend to SSG BJ, who had children of a similar age to appellant's children, and their families stayed close throughout various assignments to different duty stations over the years. The victim was the 13-year-old daughter of SSG BJ from a prior relationship, who primarily resided with her mother in another state. The victim had never met appellant in the eight years leading up to the offenses. In the summer of 2019, however, she visited her father in North Carolina, where appellant was also stationed, and for the first time met appellant and his family. Appellant became like an uncle figure to the victim. They talked about his work, his back injury, and sharks. On the other hand, the victim barely talked to appellant's son who

[2] We address a third assignment of error regarding improper opinion testimony further in the opinion. We have given full and fair consideration to appellant's other assignments of error as well as those matters personally raised pursuant to *Untied States v. Grosfeton*, 12 M.J. 431 (C.M.A. 1982), and find they merit neither discussion nor relief.

was only a year or two older than her and good friends with her older brother. Appellant brought the victim a hooded sweatshirt with the word "SAVAGE" on the front. In mid-February of 2020, she thanked appellant for the sweatshirt in a text message through the social media platform, Instagram. A short exchange ensued where the two discussed the victim's recent trip to an aquarium and ended with appellant telling the victim not to skip school and wishing her safe travels home.

Four months passed with no messages exchanged between the two Instagram accounts. Then, on 29 June 2020, shortly after noon, the victim received a message from appellant asking, "How's life in Washington going?" Another conversation ensued, this one longer than the previous exchange. Appellant at first asked when the victim was going to come back to visit her father (she was planning on visiting her father the following month) and then appellant joked about the victim's short height (she was only five feet tall) and appellant's back injury and greater height (appellant was reportedly six feet tall). When the victim expressed that she wished she was taller, appellant replied: "Nah short is good . . . I'll explain when you're older."

The messages from appellant also commented on a picture the victim posted on her Instagram account, which she took of herself posing in a bathroom:

> JC: [3] Trying to look all cute in the pics you took
>
> . . .
>
> JC: In the tie dye with your tongue out lol
>
> . . .
>
> JC: I was gonna say something about your pic but I won't

Appellant also commented on how the victim's shorts made it look like she was not wearing pants in the picture: "I see skin . . . I see side leg . . . [the shorts] must be really short."

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[3] We use "JC" to refer to messages from appellant's Instagram account, "Victim" to refer to messages from the victim's social media accounts, and "Jonathan" to refer to messages from appellant's Snapchat account, described *infra*.

The messages then turned to the victim's age and how she was almost 14 years old—"Hmmmm 14, and short . . . Well I'm old, I should stop texting you"—before appellant again teased the victim about her height, calling her "midget" and "Frodo." The victim testified at trial that she did not know what Frodo meant.

When the victim called appellant "skyscraper" because of his height, appellant responded he had "worse" nicknames for the victim "but your ears are too young . . . Plus you might snitch." The two discussed meeting up so the victim could "slit [appellant's] eyebrow," but because the victim's stepmother would have her "on lockdown," their meeting "would have to be on the DL." The victim testified that "DL" was an abbreviation for "down low," which meant "kind of secretive."

When the victim continued calling appellant "skyscraper," the following exchange ensued:

JC: I'm going to find a really bad nickname for you

Victim: hahah bring it on

JC: I'll start calling you Sit and Spin

At trial, witnesses familiar with the term testified that "spit and spin" referred to a sexual position where a female, typically petite, sits on the male genitalia and spins around the male's penis 360 degrees.

The messages continued to joke about appellant's age. The victim called appellant "ancient." In response, appellant called the victim, "Savage." Appellant then inquired about the victim's boyfriends and whether she had "messed around" and had "bodies." The victim testified that "bodies" referred to the number "of people you've slept with."

Victim: nah ion wanna do that w the guys here but i've gotten close let's jus say that

JC: So you are still somewhat innocent

Victim: yeah hahah

. . .

JC: So you knew what sit and spin was lmao

Victim: yeah hahah who tf doesn't

At trial, the victim testified she did not, in fact, know what "sit and spin" meant but said she did because she did not want to seem less intelligent.

JC: lol I don't know

. . .

JC: Ummm I don't know how to react now

. . .

I'm scared to talk to you now lmao

Victim: you should be

HAHA IM JP

JC: Wow

Victim: hahahah

JC: And you wanna razor my eyebrow???

. . .

JC: You are just looking for an excuse to get close to me

. . .

JC: Cause I know I ain't ugly

Victim: mhm keep telling yourself that

JC: You pant less midget

Victim: fuck off (laughing emoji)

JC: Nah

Helicopter sit and spin midget

The conversation again turned to the victim's boyfriends and the "level" of seriousness:

JC: So how many ex's you talking about?

Told you now I'm curious

Appellant also asked how old the victim's boyfriends were:

JC: How old???

. . .

JC: When you said older I thought you meant

like in their 20s or something

. . .

Victim: a couple guys on my snap are like 19 but 22 is the oldest

JC: You're trouble!!!

I didn't know you had snap lol

I have one but no one really knows I have it

Appellant joked that he should make an OnlyFans page and get paid. OnlyFans is a site where users can post explicit or sexual pictures of themselves to which others can subscribe and pay. Appellant then asked for the victim's Snapchat username so he could add her. Snapchat is another messaging platform where messages will automatically delete after a certain period of time, if not immediately, upon being viewed. The victim's Snapchat account was private, requiring her to add appellant to communicate with him. After the victim told appellant she received "at least two dick pics a week," appellant responded "No dick picks I promise lol." The conversation then moved to Snapchat where they continued to talk about how the victim should make an OnlyFans page but with "normal pictures and still get paid." Appellant called the victim a tease.

While Snapchat automatically deletes messages, the victim was able to surreptitiously take screenshots of some of the last messages exchanged. The victim testified Snapchat would typically send a notification to the other person if a screenshot of a message were taken, but she discovered if she exited the application while still having it displayed in the background of her cell phone, she could take a screenshot without Snapchat sending the notification. The victim stated she did not screenshot every text although there were about twenty messages, including one in which she told appellant he was being scary and one in which she pointed out the age difference between them:

Jonathan: Oh so now I'm a creeper??? (sad face emoji)

Victim: I mean ur 39 on a 13 year olds snap sooooo

A few hours after this exchange, the victim noticed she had been unadded from appellant's Snapchat account.

The victim questioned whether the conversation was normal—"is this how uncles are supposed to talk?"—but hesitated telling her dad because she did not want to overreact or ruin his friendship with appellant. Three weeks later, however, while visiting her dad in North Carolina, the victim showed her father the messages.

Upon reading the messages, SSG BJ immediately drove to appellant's house in the middle of the night and confronted him. When SSG BJ asked appellant if he was having an inappropriate conversation with his daughter, appellant threw up his arms, shrugged his shoulders, looked out at the street, and said "nope." SSG BJ thought it was weird that appellant would not look at him and asked the question again and got the same response. When SSG BJ told appellant he had proof on his daughter's phone, appellant again denied sending the messages to the victim. SSG BJ then went back to his house to retrieve his daughter's cell phone. When he returned a few minutes later, appellant's wife walked out, grabbed the phone, and said "What the f**k is this, Jonathan?" Appellant replied that he did not know and that it looked like his account "but doesn't sound like me." Appellant's wife began looking through the messages and before she handed the phone back to SSG BJ, she said, "I told you to stop talking to her." The defense objected to the admission of this statement at trial, which serves as the basis for appellant's second assignment of error discussed further below. Before he left, SSG BJ asked appellant one more time if appellant did it and he got the same response—a denial while appellant looked out at the street. SSG BJ testified that appellant did not look him in the eye at any point while talking to him that night.

The next morning, appellant texted SSG BJ to call him because appellant's son had confessed to sending the messages to the victim using appellant's Instagram password. Appellant's wife took screenshots of text messages between her and her son in which he admitted to texting the victim, and sent the screenshots to the victim's stepmother. The screenshots reflected the following exchange between appellant's son and appellants wife:

> Son: does what happened with [SSG BJ] have something to do with [the victim]?
>
> Wife: Why would you think that?
>
> Son: because a month or couple ago i texted her
>
> Wife: About what?
>
> Son: just about stuff
> and some stuff i shouldn't have
>
> Wife: Elaborate
>
> Son: i was on dads instagram because i was bored and i saw he had a message from her
> and i responded pretending to be him

In the texts, appellant's son denied that appellant told him to say it was him. When the victim's stepmother received the screenshots of the text messages from appellant's son, she immediately asked to talk with him through Facetime video chat. During this conversation, the victim's stepmother asked appellant's son in different ways if he had ever chatted with the victim on Snapchat. He told her he had not. After this conversation, appellant's son wrote an apology letter in which he also confessed to sending the victim messages from appellant's Snapchat account.

SSG BJ first reported the matter to U.S. Army Criminal Investigation Division (CID), but appellant's command initiated an administrative investigation under Army Regulation 15-6, Procedures for Administrative Investigations and Boards of Officers (1 April 2016) [AR 15-6]. On 22 October 2020, the AR 15-6 investigating officer (IO) interviewed appellant, who gave a statement. The IO also asked appellant if he would give consent to the IO to interview his son alone, without a parent present. Appellant declined and was present during his son's interview. During the IO's questioning of his son, appellant asked a few times why the IO was asking a question but otherwise just stared at his son while he answered questions. His son, on the other hand, never

looked at appellant, but appeared tense, nervous, and fidgety as he explained that he used appellant's passcode and login information to twice hack into appellant's social media account.[4] Appellant's son typed his responses to the interview questions in a sworn statement as appellant looked over his shoulder. As the IO left the room to print the sworn statement, he overhead appellant telling his son that one of his answers was wrong. When the IO returned, appellant's son said he needed to change one of his answers. His original statement stated, "I first went into his accounts around the beginning of the summer, probably around June to August." He then crossed out "June" and wrote "January."

The government subsequently charged appellant with sexual abuse of a child by intentionally communicating indecent language—"helicopter sit and spin midget" and "you're such a tease"—to the victim, a child under the age of 16 years old. Additionally, the government charged appellant with communicating a false official statement for later telling CID he did not text the victim[5] and wrongful interference with an adverse administrative investigation for telling his son to change his sworn statement. Appellant was convicted of all three of these offenses. The government also charged appellant with indecent language in violation of Article 134, UCMJ, which the military judge dismissed on preemption grounds after the presentation of evidence but before findings.

At trial, the government's case in chief included testimony from the victim about the messages from appellant's accounts on Instagram and Snapchat. The victim also testified that appellant was six feet tall while his son was only an inch or two taller than her 5-foot frame. The government introduced the messages sent from appellant's Instagram account to the victim in February 2020 and June 2020, as well as the screenshots the victim took of messages from appellant's Snapchat account. Additionally, the government introduced text messages from appellant to SSG BJ and text messages from appellant's son to demonstrate the difference in style, punctuation, and capitalization; specifically, the lack of punctuation and capitalization in the messages written by appellant's

[4] The IO testified that during their verbal conversation, before typing the sworn statement, appellant's son stated he used appellant's cell phone to access appellant's social media accounts. Appellant's son, however, testified that he used his own cell phone to message the victim through appellant's social media accounts.

[5] At trial, the parties stipulated that this referred to text messages sent to the victim on 29 June 2020.

son. The government also introduced the sworn statements from appellant and appellant's son to the command's appointed investigating officer as well as CID's subsequent interview of appellant. During the CID interview, appellant denied messaging the victim on 29 June 2020, stating the first time he found out about the messages was the night SSG BJ came to his house to confront him. Appellant subsequently deleted all of his social media accounts, including Instagram and Snapchat. He further stated multiple times throughout the interview that he had only previously messaged the victim to ask, "How's life?".

Appellant's son took the stand and testified that he was the one who sent the victim the messages on 29 June 2020. His son testified that he knew appellant's passwords, which he used to log in to appellant's Instagram account using his own cell phone and that he messaged the victim on impulse after seeing the picture she posted on Instagram. He thought she was cute. Appellant's son testified he was familiar with the things they discussed about appellant—his father's age and injuries—and had no problem impersonating his father, to include imitating his style of text messaging. While the son's cell phone settings were adjusted to not automatically capitalize text, he testified he manually capitalized the beginning of every message to the victim in order to impersonate appellant. He also testified he had heard "helicopter sit and spin" at school and was familiar with the character Frodo from Lord of the Rings. As punishment for his actions, the son had all of his electronics taken away for a month. On cross, appellant's son was unable to identify one of the pictures the victim included as part of the Instagram post from 27 June 2020, a post that appellant's son had previously testified he saw on the Instagram feed and that, according to his testimony, prompted him to spontaneously message the victim. He also testified that he loved his father, trusted him, and did not want to see him get in trouble. In addition to appellant's son, the defense called appellant's wife and six other witnesses who testified to appellant's character for honesty. At the time of trial, appellant had completed over 18 years of service.

LAW AND DISCUSSION

A. Hearsay

1. Additional Background

At trial, appellant objected to the admission of his wife's hearsay statement, "I told you to stop talking to her." The government argued the out of court statement was admissible as an excited utterance under the exception to the rule against hearsay in Military Rule of Evidence (M.R.E.) 803(2).

To litigate the matter, the military judge held an Article 39(a) session. SSG BJ testified when he arrived at appellant's home to confront appellant a second time, appellant's wife looked and sounded angry and upset while she looked through the messages. On cross, he admitted he did not know how many of the messages appellant's wife read before handing back the phone. He testified there was a break in between her initial statement, "What the f**k is this?" and "I told you to stop talking to her," but in total he was only at appellant's home for about six minutes during this second confrontation.

The military judge ruled the statement was admissible as an excited utterance and was not otherwise excluded under M.R.E. 403's balancing test.[6] He found the statement was relevant to facts in issue, specifically, "at a minimum," the terminal element of the charged Article 134 offense. After the government rested, the defense moved to dismiss the Article 134 offense under preemption. Receiving no government objection, the military judge granted the motion and instructed the panel to disregard the dismissed charge and its specification.

2. Law and Discussion

"The standard of review of a military judge's ruling admitting or excluding an excited utterance is an abuse of discretion." *United States v. Feltham*, 58 M.J. 470, 474 (C.A.A.F. 2003). "An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact." *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003). If the error is nonconstitutional in nature, this court will find prejudice if the error had a substantial influence on the findings. *United States v. Bowen*, 76 M.J. 83 (C.A.A.F. 2017) (citation omitted).

"As a general rule, hearsay, defined as an out of court statement offered into evidence to prove the truth of the matter asserted, is not admissible in courts-martial." *United States v. Ayala*, 81 M.J. 25, 28 (C.A.A.F. 2021). As an exception, a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible under M.R.E. 803(2). "The implicit premise [of the exception] is that a person who reacts 'to a startling event or condition' while 'under the stress of excitement caused' thereby will speak truthfully because of a lack of

[6] Mil. R. Evid. 403 provides: "The military judge may exclude relevant evidence if is probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence."

opportunity to fabricate." *Bowen*, 76 M.J. at 87-88 (quoting *United States v. Jones*, 30 M.J. 127, 129 (C.M.A. 1990) (internal quotations omitted).

For hearsay to be admitted as an excited utterance, our superior court adopted a three-pronged test:

> (1) the statement must be "spontaneous, excited or impulsive rather than the product of reflection and deliberation";
>
> (2) the event prompting the utterance must be "startling"; and
>
> (3) the declarant must be "under the stress of excitement caused by the event."

United States v. Arnold, 25 M.J. 129, 132 (C.M.A. 1987) (citations omitted) (internal quotation marks omitted).

"The proponent of the excited utterance has the burden to show by a preponderance of the evidence that each element is met." *United States v. Henry*, 81 M.J. 91, 96 (C.A.A.F. 2021). "Although hearsay may fall under an exception, like all evidence, it is subject to the balancing test of Mil. R. Evid. 403." *United States v. Guyton*, 2020 CCA LEXIS 462, at *20 (Army Ct. Crim. App. 16 Dec. 2020).

We find no abuse of discretion in admitting the hearsay statement from appellant's wife as an excited utterance under M.R.E. 803(2). We agree with the military judge that the event of being confronted with messages between her husband and the 13-year-old victim was a startling event. While SSG BJ testified that he did not know how many of the messages appellant's wife read, he observed her look through them and afterwards appear angry and upset when she made the statement. We also agree that appellant's wife was still under the stress of excitement caused by the event and her response was not the product of reflection or deliberation, but was spontaneous and impulsive. It was made within moments of seeing the messages, with little opportunity to calculate a response, and was not the product of questioning. As all three prongs of the *Arnold* test were met, the hearsay statement was admissible as an excited utterance.

Appellant further argues because the military judge found the hearsay statement was relevant to the Article 134 offense which was subsequently dismissed after the presentation of evidence but before findings, the military judge should have instructed the panel members to disregard the hearsay

statement. The military judge found the statement was relevant "at a minimum" to the terminal element of the Article 134 Indecent Language offense, however, he did not limit the admission of the hearsay statement to the single Article 134 offense. The government argued the hearsay statement was relevant not only to prove the later-dismissed Article 134 offense but also to show appellant was in fact the one texting the victim. We also find the hearsay statement was relevant on that fact at issue.[7] The statement from appellant's wife, "I told you to stop texting her," tended to make a fact of consequence—that it was appellant messaging the victim and not his son—more probable. Finally, we agree with the military judge's conclusion that the probative value of the statement was not substantially outweighed by the danger of unfair prejudice under M.R.E. 403. The probative value was relatively high when the identity of the person messaging the victim was a central issue in the case. And the evidence was not cumulative, it was not likely to "confuse the issues," or mislead the members.

Even assuming it was error to admit the hearsay statement, we find no prejudice. Because the declarant of the hearsay statement testified, thereby satisfying appellant's right to confrontation and due process, we apply the test for nonconstitutional evidentiary errors. *Compare United States v. Clayton*, 67 M.J. 283, 288 (C.A.A.F. 2009) (applying constitutional error test to testimonial hearsay). Weighing the strength of the government's case, the strength of the defense's case and the quality and materiality of the evidence, we conclude the evidence did not have "a *substantial* influence on the findings." *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (citation and internal quotation marks omitted) (emphasis added). The evidence was material as it tended to prove that it was appellant who sent the messages but in light of the government's case, as discussed further below, we are not persuaded the admission of the hearsay statement had a substantial influence on the findings. The government's case was strong, even considering appellant's alibi, and were we to exclude this evidence, we would still find the evidence factually sufficient.

B. Factual Sufficiency

1. Law

We review factual sufficiency under Article 66, UCMJ. Because appellant's offenses occurred prior to 1 January 2021, we review under the previous version of Article 66, UCMJ. *See Manual for Courts-Martial, United*

[7] M.R.E. 401: "Evidence is relevant if: (a) it has *any tendency* to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." 2019 MCM, pt III-18 (emphasis added).

States (2016 ed) *[MCM]*.[8] Under that statute, the "test for factual sufficiency is whether, after weighing the evidence in the record of trial and allowing for the fact that we did not personally see and hear the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 325 (C.M.A. 1987).

To convict appellant of sexual abuse of a child in violation of Article 120b, UCMJ, as charged, the government was required to prove beyond a reasonable doubt that it was appellant who committed a lewd act upon the victim, a child under 16 years of age, by intentionally communicating the charged indecent language to her—"helicopter sit and spin midget" and "you're such a tease"—and that he did so with an intent to arouse his sexual desire.

Article 120b, UCMJ, defines "lewd act" in relevant part, as "intentionally communicating indecent language to a child by any means, including via any communication technology, with an intent to . . . arouse or gratify the sexual desire of any person," 10 U.S.C. § 920b(h)(5)(C); and "any indecent conduct, intentionally done with or in the presence of a child, including via any communication technology," amounting to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations, 10 U.S.C. § 920b(h)(5)(D). Our superior court "has long held that indecent is synonymous with obscene." *United States v. Meakin*, 78 M.J. 396, 401 (C.A.A.F. 2019) (citation omitted). Whether a word, sound, or other communication is indecent "must be evaluated in the context in which it was made." *United States v. Green*, 68 M.J. 266, 270 (C.A.A.F. 2010) (affirming the CCA's decision that "mmmm-mmmm-mmmm" constituted "indecent" language within the context of the utterance).

2. Discussion

Like the factfinder at trial, who saw and heard the evidence, this court is also convinced beyond a reasonable doubt of appellant's guilt and finds the evidence factually sufficient. Like the factfinder at trial, we are unconvinced that appellant's son was the one who sent the victim messages from appellant's social media accounts on 29 June 2020. Based on the evidence presented at

[8] Congress subsequently amended Article 66, UCMJ, to modify the statutory standard for factual sufficiency review, which applied to offenses that occurred on or after the date of enactment. Fiscal Year 2021 National Defense Authorization Act (NDAA), P.L. 116-283, 1 January 2021.

trial, we find this theory implausible for many of the same reasons the government argued to the panel members.

The style and punctuation of the messages sent to the victim from appellant's account matched the typical style and punctuation of appellant's text messages and not his son's. The first words of sentences and pronouns like "I" were almost always capitalized and sentences sometimes, although not always, ended with punctuation in messages sent to the victim: "How's life in Washington going?" and "Staying out of trouble?". In contrast, neither the 13-year-old victim nor appellant's 14-year-old son used capitalization or punctuation in their day-to-day messaging. When asked why she did not capitalize the start of her sentences, the victim testified, "Because it's kind of cool if you don't with people my age."

The panel heard evidence about the default text settings for cell phones. Appellant's son testified that his cell phone's default was set to not capitalize words and, thus, he had to manually edit the messages to the victim as he typed so as to match the style of his father's texts. To support this, the defense identified numerous times that the messages from appellant's account failed to begin a sentence with a capitalized sentence, arguing these slip-ups were the consequence of appellant's son failing to perfectly imitate his father. We note, however, of the over 190 messages sent to the victim from the exchange initiated on 29 June 2020—excluding messages with only emojis—only 22 messages did not begin with capitalization. Of those 22 messages, all but two began with "lol" or "lmao."[9] The word "lol" was also not capitalized in messages appellant sent to the victim in February 2020. Yet, appellant's son testified that the first "lol" message was not sent by him: "That wasn't me." Therefore, appellant sent the messages to the victim in February 2020, which would indicate appellant's settings also do not capitalize "lol" by default or otherwise. If we were to believe the defense theory, that would indicate appellant's 14-year-old son manually capitalized the beginning of approximately 170 messages to the victim.

The topics of the messages to the victim were those familiar and second nature to appellant, not to his son. There were repeated references to the height discrepancy between appellant and the victim, whereas appellant's son was only a few inches taller than the victim at 5 feet, 3 inches.[10] There were repeated

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[9] Of these, most begin with "lol," whereas "lmao" was used approximately six times.

[10] Appellant's wife testified that the Instagram messages stating appellant was 6 feet tall got her husband's height wrong, which is how she knew it was her son sending

(continued . . .)

references to the age difference between appellant and the victim—"Well I'm old, I should stop texting you," "your ears are too young"—whereas appellant's son was not that much older than the 13-year-old victim. And there were references to appellant's back injuries.

The messages from appellant's Instagram account also do not read like the messages of a teenager, but read like the messages of a 39-year-old man—"I work all the time,"—who is writing to a 13-year-old girl and, for that reason, would need to keep the conversation discreet. The messages told the victim that if they were to meet up it would have to be on the "DL," in other words, kept quiet. When the victim stated some of her boyfriends have been "older," appellant assumed she meant "in their 20s or something," when in actuality the victim was referring to 15-year-old boys because 15 is older to a 13-year-old—but would not seem old to an adult. And when they discussed the victim's boyfriends and whether she had "messed around" with some of them, the appellant responded: "I don't know how to react now . . . I'm scared to talk to you now." This is a natural response for a 39-year-old married man messaging a 13-year-old victim, not for a 14-year-old boy messaging a slightly younger teenage girl he thinks is cute.

When the victim's mother asked appellant's son multiple different ways during the video chat about whether he had ever messaged the victim on Snapchat, he denied it. Appellant's son testified that he did not tell the victim's stepmother about the Snapchat messages initially because he did not want to get in more trouble. But it is more plausible that he denied sending messages on Snapchat because he did not know about the messages exchanged on Snapchat. Appellant told the victim in their messages, "no one really knows I have it," referring to his Snapchat account. Given he did not receive any notifications of screenshots, there was no reason for appellant to believe there would be screenshots of his messages to the victim. There was no reason for appellant's son to deny sending the messages on Snapchat when he had already confessed to sending the other messages. There was no reason to deny it unless he did not know about the Snapchat messages because he did not send them. But there were many reasons for appellant's son to say it was him, including that he loved his father, trusted his father, and did not want to see him get in trouble.

Even his guilty reaction when initially confronted by the vicitm's father, his close friend of eight years corroborated it was appellant who sent the

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(. . . continued)
the messages to the victim—because appellant was 5 feet, 11 inches tall. But the panel also heard testimony from other witnesses that appellant was "around 6-foot".

messages. Appellant would not look his friend in the eye. Further, appellant told CID that he only messaged the victim, "How's life." Yet, the only time "How's life" appears in the messages introduced at trial between appellant and the victim is the beginning of the conversation on 29 June 2020: "How's life in Washington going?" The messages called the victim "Savage," mirroring the words on the Christmas gift to the victim. While there was no direct evidence that appellant sent the messages, the government introduced an overwhelming amount of circumstantial evidence that it was appellant and not his son who messaged the victim on 29 June 2020. "It is well accepted that circumstantial evidence is sufficient to sustain a finding of guilt." *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004); *see also* R.C.M. 918(c) ("Findings may be based on direct or circumstantial evidence.")

We also conclude, contrary to appellant's argument, that in light of the context of the entire message exchange between appellant and the victim, the charged language was both indecent and made with the intent to arouse appellant's sexual desires. First, we find the words indecent within the context of the messages to the 13-year-old victim. One communication made reference to a sexual position—"helicopter sit and spin midget" [11]—the other called the victim "a tease" after informing her she should make an OnlyFans page with "normal pictures," when users typically sell explicit content of themselves. The messages were made in the context of discussions about how intimate the victim had been with her boyfriends. Appellant called the victim "helicopter sit and spin midget" after the victim indicated she knew what the term "sit and spin" meant. In short, communicating sexual positions to a child under the age of 16 and calling the victim "a tease" against the backdrop of the sexual topics discussed reflect both the indecent nature of the language and the intent with which it was communicated.

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[11] In his third assignment of error, appellant alleges that the military judge erred by allowing three witnesses—the victim's father, the victim's stepmother, and a CID agent—to testify to the meaning of "helicopter sit and spin" as lay opinions under M.R.E. 701. Rule 701 requires, in relevant part, that a lay opinion be rationally based on the witness's perception and helpful to the determination of a fact in issue. We do not find an abuse of discretion in this case where the witnesses testified that they had personal knowledge of the term or, in the case of the CID agent, often reviewed and interpreted slang terms such as "sit and spin," and the language or slang was not facially coherent. *Compare United States v. Byrd*, 60 M.J. 4 (C.A.A.F. 2004) (finding error where there was a lack of foundation for witness's interpretation of facially coherent language). Contrary to appellant's argument, the testimony left the ultimate issue of whether the language was indecent to the factfinder.

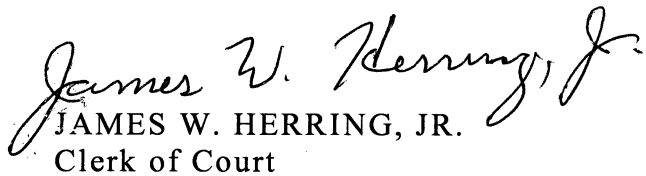
For all these reasons, we find appellant's conviction to the Article 120b, UCMJ offense factually sufficient and consequently, we find appellant's convictions for the other offenses of false official statement and wrongful interference with an adverse administrative proceeding also factually sufficient.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Senior Judge Morris and Judge Juetten concur.

FOR THE COURT:



JAMES W. HERRING, JR.
Clerk of Court

APPENDIX B

Appendix B: Matters Submitted Pursuant to *United States v. Grostefon*

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant, through appellate defense counsel, personally requests that this court consider the following matters:

I. WHETHER APPELLANT'S CONVICTION IS LEGALLY SUFFICIENT

II. WHETHER GOVERNMENT COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY REPEATEDLY ATTEMPTING TO ADMIT INADMISSIBLE MRE 404(b) TESTIMONY OVER SUSTAINED OBJECTIONS

III. WHETHER APPELLANT IS ENTITLED TO RELIEF FOR UNREASONABLE POST-TRIAL DELAY

Standard of Review

This court reviews allegations of unreasonable post-trial delay de novo. *United States v. Anderson*, 82 M.J. 82, 85 (C.A.A.F. 2022) (citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Law

A convicted soldier's right to Due Process includes a timely review and appeal of his conviction. *United States v. Toohey*, 60 M.J. 100, 101 (C.A.A.F. 2004). Even without specific prejudice, this court can still grant relief in cases

where there is unreasonable and unexplained post-trial delay. *United States v. Toohey II*, 63 M.J. 353, 362 (C.A.A.F. 2006).

Where post-trial delay is found to be unreasonable, but not a due process violation, this court still has "authority under Article 66[(d)(1), UCMJ,] to grant relief for excessive post-trial delay without a showing of 'actual prejudice' within the meaning of Article 59(a)." *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002) (citing *United States v. Collazo*, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000)). In deciding what findings and sentence should be approved, this court looks to "all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay." *Id.* at 224. "Dilatory post-trial processing, without an acceptable explanation, is a denial of fundamental military justice, not a question of clemency." *United States v. Ponder*, ARMY 20180515, 2020 CCA LEXIS 38, at *3 (Army Ct. Crim. App 10 Feb. 2020) (summ. disp.) (quoting *United States v. Bauerbach*, 55 M.J. 501, 507 (Army Ct. Crim. App. 2001)) (granting relief for excessive post-trial delay in light of government's failure to provide adequate reasons).

Although this court has overruled its previous 150-day limit of presumptive unreasonableness, it may find excessive delay "based on an examination of all relevant circumstances" under Article 66(d)(2). *United States v. Winfield*, 83 M.J. 662, 665-66 (Army Ct. Crim. App. 2023).

Facts and Argument

On March 25, 2022, the military judge sentenced appellant to be dismissed from the service. (R. at 802; STR). On April 1, 2022, appellant's trial defense counsel submitted a request for an extension of time to submit clemency matters on his behalf. That extension was granted and on April 24, 2022, appellant's counsel submitted clemency matters, citing several legal errors in the proceedings. (Request for Clemency). On May 19, 2022, the convening authority took no action on the findings or sentence. (Convening Authority Action). On May 25, 2022, the military judge entered judgment. (Judgment of the Court). The trial counsel received the record for review on August 9, 2023. Forty-nine days later, the trial counsel completed the errata. (Trial Counsel Review of RoT). Inexplicably, the military judges did not receive the record until nearly a month after the trial counsel had completed his review. (G. Bret Batdorff, Authentication of the RoT). Military judges COL G. Bret Batdorff and COL J. Harper Cook certified the record on October 23 and 27, 2023, respectively. On November 20, 2023, this court docketed appellant's case. (Referral and Designation of Counsel).

The chief of justice submitted a post-trial delay memorandum citing, among other issues: operational exigencies, namely a deployment to Europe of some OSJA personnel; personnel shortages, including the loss of their civilian post-trial paralegal; issues with transcribing when utilizing a contracted transcription service;

issues training court reporters on the new transcription software; and the immense backlog of post-trial cases that pre-dated appellant's case. The chief of justice's memorandum makes clear that the post-trial issues at this OSJA are systematic, much of the backlog in transcription emerging prior to many of the difficulties enumerated by the chief of justice. However, this failure to expeditiously process other appellants' cases for appeal is an inadequate excuse for the failure in this case.

Appellant had a sterling career (Def. Ex. J) and an exceptional reputation among senior leaders (R. 639-669) and yet was subject to the indignity of a dismissal springing from convictions in a tainted trial. As is clear in appellant's clemency matters submitted to the convening authority—appellant had reason to believe that the outcome of his trial was not supported by competent evidence and that he had been prejudiced by numerous errors. (Request for Clemency). The extreme delay that appellant has had to wait, 544 days, before he could begin the process of righting these wrongs represent significant bases of anxiety and concern.

IV. WHETHER THE TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY IMPERMISSIBLY LOWERING THE BURDEN OF PROOF DURING HIS CLOSING ARGUMENT.

Standard of Review

Where no objection is made, this court reviews prosecutorial misconduct and improper argument for plain error. *United States v. Voorhees*, 79 M.J. 5 (C.A.A.F. 2019) (citing *Andrews*, 77 M.J. at 398. "The burden of proof under plain error review is on the appellant." *Id*. "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." *Id*. at 401 (internal quotation marks omitted). Thus, this court 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 (citing *United States v. Lopez*, 76 M.J. 151, 154 (C.A.A.F. 2017).

Law

"Prosecutorial misconduct 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. Meek*, 44 M.J. 1, 10-11 (C.A.A.F. 1996). Prosecutorial misconduct at trial 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." *Sewell*, 76 M.J. at 18.

Facts and Argument

During his closing argument, trial counsel repeatedly asked panel members to look through the text messages introduced of appellant and his son, Master KC. When doing this, trial counsel used language like: "what does this look more consistent with?" and "decide what does this look more like?" (R. at 707-708). Defense counsel did not object.

"An accused has an absolute right to the presumption of innocence until the government has proven every element of every offense 'beyond a reasonable doubt.'" *United States v. Hills*, 75 M.J. 350, 356 (C.A.A.F. 2016). Trial counsel's repeated pleas for the panel to weigh the evidence, not to determine whether the cited evidence eliminated reasonable doubt as to the identity of the person messaging Miss MJ, but in order to determine what was "more likely," impermissibly lowered the burden of proof—a clear, obvious error. In a case where the central issue was the identity of the individual messaging Miss MJ—one in which there was compelling evidence of appellant's innocence, namely an alibi in the form of his son's confession—there is a reasonable probability, absent this improper argument, that the outcome of the proceeding would have been different.

V. WHETHER THE MILITARY JUDGE ERRED BY OVERRULING CIVILIAN DEFENSE COUNSEL'S OBJECTIONS OF HEARSAY AND AUTHENTICATION TO PROSECUTION EXHIBITS 7 AND 15

VI. WHETHER THE MILITARY JUDGE ALLOWED MRS. KJ TO COMMENT IMPERMISSIBLY ON THE CREDIBILITY OF APPELLANT WHEN SHE TESTIFIED THAT SHE WAS "UNCOMFORTABLE" AFTER RECEIVING TEXT MESSAGES IN WHICH APPELLANT ADMITTED TO MESSAGING MISS MJ

VII. WHETHER THE MILITARY JUDGE ABANDONED JUDICIAL IMPARTIALITY BY REPEATEDLY LAYING FOUNDATIONS FOR GOVERNMENT TESTINOMY AND EXHIBITS AFTER DEFENSE COUNSEL OBJECTED

VIII. APPELLANT HAD TO FACE BEING OSTRACIZED BY HIS ENTIRE NEIGHBORHOOD AFTER A STORY ABOUT HIS CASE WAS PUBLISHED IN THE LOCAL NEWSPAPER AND SUBSEQUENTLY THE FACEBOOK NEIGHBORHOOD PAGE. THIS CAUSED HIM TO SELL HIS FAMILY HOME AND MOVE AWAY.

IX. AFTER APPELLANT'S CONVICTION, MASTER KC HAD TO CHANGE SCHOOL SYSTEMS, LEAVING THE FRIENDS HE HAD HAD SINCE 7TH GRADE DURING HIS JUNIOR YEAR OF HIGH SCHOOL

X. DESPITE APPELLANT'S COURT MARTIAL CONVICTIONS, HE STILL RECEIVED AN OUTSTANDING EVALUATION FROM HIS SUPERIORS

XI. MASTER KC HAS PERSISTED IN ADMITTING RESPONSIBILITY FOR HIS DECISION TO USE APPELLANT'S ACCOUNTS TO MESSAGE MISS MJ

XII. APPELLANT IS SUFFERING THROUGH IMMENSE CHRONIC PHYSICAL PAIN CAUSED BY THE INJURIES HE RECEIVED WHILE SERVING AS A WARRANT OFFICER, INCLUDING FROM INJURIES SUSTAINED TWICE TO HIS BACK AND FROM A SHOULDER RECONSTRUCTION SURGERY

CERTIFICATE OF COMPLIANCE WITH RULE 24 AND RULE 37

1. This brief complies with the type-volume limitation of Rule 24(b): this brief contains 3,843 words.

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

KELSEY MOWATT-LARSSEN
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 695-9851
USCAAF Bar No. 38204

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Cunningham, Crim. App. Dkt. No. 20220140, USCA Dkt. No. 26-0085/AR was electronically filed with the Court and Government Appellate Division on February 27, 2026.

Kelsey Mowatt-Larssen
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 695-9851