IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	APPELLEE FINAL BRIEF
v.	)	
	)	Crim. App. Dkt. ARMY 20190663
Specialist (E-4) **NICHOLAS R. ST. JEAN,** United States Army, Appellant	)	USCA Dkt. No. 22-0129/AR

ANDREW M. HOPKINS
Captain, Judge Advocate
Appellate Attorney, Government
Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0778
andrew.m.hopkins8.mil@army.mil
U.S.C.A.A.F. Bar No. 37593

PAMELA L. JONES
Major, Judge Advocate
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 36798

CHRISTOPHER B. BURGESS
Colonel, Judge Advocate
Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 34356

Index of Brief

Table of Authorities

United States Supreme Court Cases

Court of Appeals for the Armed Forces/Court of Military Appeals Cases

Service Court Cases

Uniform Code of Military Justice

Military Rules of Evidence

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	APPELLEE FINAL BRIEF
v.	)	
	)	Crim. App. Dkt. ARMY 20190663
Specialist (E-4) **NICHOLAS R. ST. JEAN,** United States Army, Appellant	)	USCA Dkt. No. 22-0129/AR

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

Issue Presented

WHETHER THE MILITARY JUDGE ERRED BY EXCLUDING EVIDENCE UNDER MIL. R. EVID. 412 AND BY PREVENTING THE DEFENSE FROM PRESENTING EVIDENCE OF PARTICIPATION AND CONSENT DURING THE RES GESTAE OF THE CHARGED SEXUAL ASSAULT.

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 24-26, 2019, a general court-martial consisting of officer and enlisted members convicted appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, UCMJ, and one specification of false

official statement in violation of Article 107, UCMJ. (JA 014). The court-martial sentenced appellant to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for five years, and a dishonorable discharge. (JA 228). On October 28, 2019, the convening authority deferred the reduction in grade, adjudged forfeitures, and automatic forfeitures until entry of judgment. (JA 015).

On January 13, 2022, ACCA affirmed the finding of guilty to the sexual assault specification and set aside the finding of guilty to the false official statement specification. *United States v. St. Jean*, ARMY 20190663 (Army Ct. Crim. App. Jan. 13, 2022) (mem. op.). (JA 002). The service court reassessed appellant's sentence and reduced his term of confinement by two months. (JA 010–11).

Statement of Facts

A. Appellant Sexually Assaults MC

MC joined the Army in July of 2017. (JA 037). She arrived at Fort Sill—her first duty station—on the evening of Wednesday, May 2, 2018. (JA 038).

On the morning of Thursday, May 3, 2018, MC met appellant, who was assigned as her sponsor. (JA 039). While he escorted MC around post, appellant invited her to join him and some friends at a concert in Kansas on Saturday, May 5, 2018. (JA 040). MC agreed and paid appellant for her ticket on Friday, May 4, 2018. (JA 042–44). At that time, appellant also invited MC to drink alcohol with

him and his friends later that night. (JA 041). MC was reluctant to accept the invitation because she was underage, and she was concerned that someone would attempt to have sex with her if she drank with them. (JA 041). Appellant assured her he would not allow that to happen, and that he would not get her in trouble for underage drinking. (JA 041). As a result, MC agreed to join appellant that night for drinks. (JA 041).

The night of Friday, May 4, 2018, MC joined appellant and consumed two or three alcoholic drinks. (JA 046). In the early hours of May 5, 2018, MC told appellant she was tired and was heading to her room. (JA 047). Appellant escorted MC back to her room and asked for her key so that he could check on her later. (JA 047).

After she fell asleep, MC awoke with appellant on top of her penetrating her vagina with his penis. (JA 047). She could not move due to appellant's weight, and he placed his hand over her mouth. (JA 048). As appellant penetrated her vagina with his penis, MC felt extremely scared and confused. (JA 048). When appellant attempted to change positions, MC got up and ran to the sink outside of her bathroom. (JA 048–49, JA 120). Appellant followed her to the sink and then back to her bed, where he sexually assaulted her again. (JA 049, JA 120–21).

B. Appellant's Pretrial Motion

The government charged appellant with one specification of sexual assault under the theory that he "commit[ted] a sexual act upon [MC] by causing penetration of her vulva with his penis, when the [appellant] knew or reasonably should have known [MC] was asleep, unconscious, or otherwise unaware that the sexual act was occurring; and with an intent to gratify the sexual desire of [appellant]." (JA 016).

In a pretrial motion, appellant sought to introduce evidence of a romantic (though non-sexual) encounter with MC on May 3, 2018, which allegedly left visible marks upon appellant's body[1]. (JA 299, JA 301, JA 310) (sealed). The defense sought to introduce this evidence under both Mil. R. Evid. 412(b)(2) and 412(b)(3). (JA 303) (sealed).[2]

In support of its motion, defense provided a sworn affidavit from appellant, which stated that on May 3, 2018, he went to MC's barracks room to purchase

[1] Appellant refers to the alleged May 3, 2018 incident as a sexual encounter throughout his brief. (Appellant's Br. 2–32). Appellee refers to the same alleged incident as a romantic (non-sexual) encounter.

[2] Appellant also attempted to introduce witness testimony that on May 3, 2018, MC showed appellant a picture of herself and made a comment concerning her sexual preferences, as well as witness testimony that MC and appellant were seen sleeping together on a hotel room's fold-out couch the day after the assault. The military judge allowed evidence of the hotel room testimony, but excluded evidence of the photo and MC's comments. (JA 299–300) (sealed).

concert tickets. (JA 310) (sealed). He claimed that MC asked him to sit on her bed and, after talking for a bit, they engaged in minor romantic activity which resulted in some marks upon appellant. (JA 310) (sealed). The defense later supplemented its motion with disclosures from the government which included a statement from MC that "[s]he had never kissed [appellant] before." (JA 324) (sealed).

The military judge issued a seven-page denial of appellant's motion wherein he detailed the evidence presented and laid out the legal standard of admissibility of evidence pursuant to both Mil. R. Evid. 412(b)(2) and 412(b)(3). (JA 327–33) (sealed). The military judge found the probative value of the evidence "very slight." (JA 332) (sealed). The military judge reasoned, in part, that the prior activity bore little similarity to the charged act, which significantly reduced its relevance. (JA 332) (sealed). The military judge found that the evidence's "very slight" probative value was outweighed by the "very great" concerns under Mil. R. Evid. 403. (JA 332) (sealed). Accordingly, the military judge denied the defense motion. (JA 333) (sealed).

C. Appellant Waives Res Gestae Issue

During trial, appellant attempted to introduce evidence of marks on his body the morning after the sexual assault. (JA 188). The government objected under Mil. R. Evid. 412 and the military judge conducted a closed hearing. (JA 355–59) (sealed).

At the hearing, the military judge reminded appellant of the prior ruling prohibiting the introduction of evidence relating to marks caused during his alleged consensual romantic encounter with MC on May 3, 2018. (JA 355–56) (sealed). Appellant argued that the marks were incident to the res gestae of the charged encounter. (JA 356–57).

In response, the military judge asked appellant to identify any evidence that connected the marks on appellant to the sexual assault. (JA 357–58) (sealed). Appellant conceded that there had been no evidence introduced connecting the marks to the sexual assault. (JA 358) (sealed). The military judge asked appellant for a proffer of what evidence he would introduce to connect the marks to the sexual assault. (JA 358) (sealed). Appellant elected to move on from the line of questioning. (JA 358) (sealed). Appellant informed the military judge he would possibly readdress the issue if evidence was later presented that tied the marks to the sexual assault, but he never did. (JA 358) (sealed).

Summary of Argument

The military judge did not abuse his discretion by excluding evidence of the alleged consensual romantic encounter between appellant and the victim (MC) on May 3, 2018. Although appellant offered this evidence under the consent exception provided by Mil. R. Evid. 412(b)(2), the evidence was not relevant to mistake of fact as to consent because consent was not at issue.

To the extent that there was any probative value of the evidence for actual consent, such value was very slight, and was substantially outweighed by the dangers enumerated in Mil. R. Evid. 403. In particular, admission of the evidence would have misled the panel members and confused the relevant issue. Similarly, the evidence was not constitutionally required because it was irrelevant and immaterial to appellant's alternative justifications for an exception to the rule in Mil. R. Evid. 412(b)(3). Appellant asserted constitutional rights to confront, impeach, or cross-examine his accuser concerning the alleged encounter, but failed to articulate how the evidence was necessary for his defense.

Appellant's arguments for the admission of the May 3 evidence—which included testimony that MC left visible marks on his body after the two "made out"—would be relevant if he were able to provide evidence that MC also left the same marks on his body when the sexual assault occurred. Under those fact, such evidence from the May 5 encounter would fall outside Mil. R. Evid. 412 protections entirely, constituting instead evidence of participation and consent during the res gestae of the charged sexual assault. In this case, appellant did not proffer such evidence and effectively waived the issue at trial.

Even assuming that the military judge erred in excluding evidence of the alleged May 3 encounter, such error did not result in prejudice to appellant. The panel members convicted appellant of penetrating MC's vulva with his penis when

he knew or reasonably should have known MC was asleep, unconscious, or otherwise unaware that the sexual act was occurring. As such, admission of the proffered evidence of a minor, consensual romantic encounter a day prior to the assault would have at most supported a theory that MC might have consented to a sexual encounter with appellant if she had not been asleep. Such a finding would not have changed the outcome of the case and did not prejudice appellant.

Standard of Review

A military judge's decision whether to admit evidence is reviewed for abuse of discretion. *United States v. Erickson*, 76 M.J. 231, 234 (C.A.A.F. 2017).

Law

A. Abuse of discretion

A military judge abuses his discretion when: (1) "his findings of fact are clearly erroneous," (2) "the military judge's decision is influenced by an erroneous view of the law," or (3) when "the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008) (citations omitted). To find an abuse of discretion under the last of these tests requires "more than a mere difference of opinion"; rather, the military judge's ruling "must be arbitrary, fanciful, clearly unreasonable or clearly erroneous." *United States v. Collier*, 67 M.J. 347, 353 (C.A.A.F. 2009) (internal quotation marks omitted)

(citations omitted).

B. Military Rule of Evidence 412

Military Rule of Evidence 412 is a rule of exclusion. *United States v. Banker*, 60 M.J. 216, 221 (C.A.A.F. 2004). It prohibits the admission of "evidence that the victim engaged in other sexual behavior" except as provided within the rule. Mil. R. Evid. 412(a). Other sexual behavior is defined as "any sexual behavior not encompassed by the alleged offense." Mil. R. Evid. 412(d). Among the listed exceptions to the rule are evidence of specific instances of sexual behavior by the alleged victim with the accused to prove consent (the "consent" exception); and evidence the exclusion of which would violate the accused's constitutional rights (the "constitutional" exception). Mil. R. Evid. 412(b)(2), (3). Any evidence offered under the rule is subject to challenge under the standards outlined within the rule itself and also under Mil. R. Evid. 403. Mil. R. Evid. 412(c)(3).

It is appellant's burden to demonstrate that the proffered evidence is relevant and admissible. Mil. R. Evid. 412(c)(3). Evidence is relevant if it has "any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence." Mil. R. Evid. 401. Additionally, he must show that the probative value outweighs the danger of unfair prejudice. Mil. R. Evid. 412(c)(3); *Banker*, 60 M.J. 223 ("when balancing the probative value of the

evidence against the danger of unfair prejudice under M.R.E. 412, the military judge must consider not only the M.R.E. 403 factors . . . but also prejudice to the victim's legitimate privacy interests").

Evidence falling under the Mil. R. Evid. 412(b)(3) exception is not weighed against a victim's privacy and is instead only analyzed under Mil. R. Evid. 403. *Id*. The exception for constitutionally required evidence includes an accused's ability to cross-examine the witnesses against him. *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011) (citations omitted). However, "trial judges retain wide latitude to limit reasonably a criminal defendant's right to cross-examine a witness based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (quotation and citation omitted). Such evidence, provided it passes the Mil. R. Evid. 403 balancing test, is admissible if relevant, material, and favorable (i.e., "vital") to the defense, no matter how embarrassing it may be to the alleged victim. *Banker*, 60 M.J. at 222–23. Relevance is determined in accordance with Mil. R. Evid. 401. *Id.* Materiality is determined through a multi-factored test that considers the importance of the issue for which the evidence was offered in relation to the other issues in the case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to the issue. *Id.* (citation

and quotation omitted). Favorable or vital to the defense refers to the strength of the relation of the evidence to a defense theory of the case. *United States v. Dorsey*, 16 M.J. 1 (C.M.A. 1983).

If the excluded evidence is constitutionally required, the court must determine whether the error was harmless beyond a reasonable doubt. *Ellerbrock*, 70 M.J. 314, 320.

C. Article 120(b) – Sexual Assault of a person who is asleep, unconscious, or otherwise unaware the act is occurring

To sustain a conviction for sexual assault when the other person is asleep, unconscious or otherwise unaware the act is occurring, in violation of Article 120(b), UCMJ, the government must prove: (a) that the accused committed a sexual act upon another person; (b) that the person was asleep, unconscious, or otherwise unaware that the sexual act was occurring; and (c) that the accused knew or reasonably should have known that the other person was asleep, unconscious, or otherwise unaware that the sexual act was occurring. Article 120(b)(2); *MCM*, 2016, pt. IV, ¶ 45.b.(3)(e). "The term 'sexual act' means the penetration, however slight, of the penis into the vulva or anus or mouth." Article 120(g)(1)(A). "A sleeping, unconscious, or incompetent person cannot consent." Article 120(g)(7)(B).

Analysis

The military judge did not abuse his discretion when he denied appellant's

motion to admit evidence under Mil. R. Evid. 412. The military judge applied the correct law to the facts presented and reasonably concluded that appellant failed to meet his burden to overcome Mil. R. Evid. 412. (JA 333) (sealed). The evidence was irrelevant to the charged offenses and the danger of prejudicial effect significantly outweighed the minimal probative value it possessed. Accordingly, the military judge issued a proper ruling well within the reasonable range of options. The ruling should not be disturbed.

A. The evidence was not relevant to mistake of fact as to consent because consent was not at issue.

The fact-finder was charged with assessing whether appellant committed a sexual act upon MC while she was asleep, unconscious, or otherwise unaware. (JA 016). Consequently, the question presented to the factfinder was whether the evidence established that MC was legally unable to consent at the time of the sexual act.

The military judge correctly observed that the standard for the consent exception (Mil. R. Evid. 412(b)(2)) is that the evidence must be relevant under Mil. R. Evid. 401 and must survive the Mil. R. Evid. 403 analysis. (JA 330) (sealed) (citing *Banker*, 60 M.J. at 222). It is incumbent on the appellant to show that the proffered evidence is relevant. *See Dowling v. United States*, 493 U.S. 342, 351 n.3 (1990). In order for appellant's mistake of fact to be relevant to the sexual assault charge, the "fact" would have to relate to MC's ability to consent.

The military judge correctly found that the proffered evidence was irrelevant to the factual question of whether or not MC was able to consent to sex. Even if the May 3 encounter happened as appellant proffered, appellant did not—and cannot—connect this minor romantic encounter to an honest belief that MC was able to consent during the encounter early Saturday morning.[3]

Appellant relies upon *United States v. Zak*, 65 M.J. 786 (Army Ct. Crim. App. 2007), for the proposition that "a sexual history between individuals is constitutionally required to preserve the right to present a credible mistake of fact as to consent defense." (Appellant's Br. 19). In *Zak*, the government charged the appellant with rape and forcible sodomy, relying upon the victim's inability to consent due to intoxication and the lack of prior sexual history between the appellant and the victim. *Zak*, 65 M.J. at 787. The defense theory was that, over time, the appellant and the victim's relationship became increasingly sexual, culminating in consensual sex, or at least what appeared to the appellant to be consensual sex on the night in question. *Id*. The defense further tried to establish that the victim could not remember but that she had, in fact, consented to the sex while in an alcohol-induced blackout. *Id*.

The erroneously excluded evidence in *Zak* was relevant to the appellant's

[3] Appellee does not concede that MC and appellant actually did engage in prior consensual activity given that MC affirmatively denied it when asked. (JA 324) (sealed).

mistake of fact as to whether the victim was consenting to sex during the encounter at issue. In other words, the evidence was relevant in *Zak* because the appellant's mistake of fact theory attacked the government's charge that the victim was unable to consent. Here, the excluded evidence of a brief romantic encounter short of sexual intercourse was wholly irrelevant to the fundamental issue of whether MC was able to consent at the time of the assault. By solely alleging that MC was legally unable to consent at the time of the offense, the government "effectively removed from the equation at trial any issue of consent." *United States v. Riggins*, 75 M.J. 78, 84 (C.A.A.F. 2016).

As observed by the military judge in his findings and conclusions, and unlike the appellant in *Zak*, appellant presented no evidence to the court which would implicate a mistake of fact as to consent. (JA 331). Appellant complains on appeal that without apparent authority the military judge imposed a requirement for direct evidence as to appellant's mistake of fact, "[p]resumably … through appellant either testifying or submitting an affidavit to the effect that (1) the charged sexual intercourse occurred, (2) he believed it was consensual, and (3) his belief was informed by his sexual history with MC." (Appellant's Br. 20, n. 7). Appellant argues that such a standard would "require an accused to make substantial admissions (i.e. that the charged conduct occurred) at an early procedural stage." (Appellant's Br. 20, n. 7).

However, when the government through its charging decision has effectively removed any issue of consent from the equation, it is incumbent upon an accused to introduce *some* evidence in order to place consent at issue. *Riggins*, 75 M.J. at 84. It cannot be enough for defense counsel to merely suggest in its motion—as appellant did in this case—that the charged sexual intercourse occurred, that the accused believed it was consensual, and that the belief was informed by his sexual history with the victim. (JA 304, JA 305). "Filing a motion containing factual assertions, however, does not satisfy a duty to produce *evidence*." *United States v. Lewis*, 42 M.J. 1, 4 (C.A.A.F. 1995) (emphasis added). It is unclear how appellant could expect to argue for the relevance of a prior romantic encounter to a mistake of fact as to consent if he is unwilling to concede that an encounter occurred which he believed to have been consensual.

Appellant also relies upon *United States v. Leonhardt* in support of his argument that it was error for the military judge to have found "no evidence before the court" relating to a mistake of fact as to consent. 76 M.J. 821,826 (A.F. Ct. Crim. App. 2017) (where military judge erred by describing defense proffer at Mil. R. Evid. 412 hearing as a mere assertion). (Appellant's Br. 20, JA 331). However, in *Leonhardt*, as also in *Zak*, the military judges abused their discretion when they considered the credibility of the proffered evidence in performing their relevancy analysis. In both cases, the "assertions" at issue were proffered through the

accused's testimony at Mil. R. Evid. 412 hearings. Here, the military judge declined to make any determination as to the truth of the May 3 encounter, correctly focusing on the relevance of the evidence. Finding that appellant offered no evidence that the May 5 encounter was consensual, the May 3 evidence held no relevance to a mistake of fact as to consent.

Appellant could have raised a mistake of fact as to consent by offering evidence that the alleged sexual assault was a consensual encounter or that he had reason to believe that it was a consensual encounter.[4] As was his right, he chose instead to hold the government to its burden and proving beyond a reasonable doubt that MC was unable to consent to sexual intercourse when he sexually assaulted her.

B. The "very slight" probative value of the evidence for actual consent was substantially outweighed by the dangers enumerated in Mil. R. Evid. 403.

The military judge correctly observed that the standard for the consent exception (Mil. R. Evid. 412(b)(2)) is that the evidence must be relevant under Mil.

[4] At trial, both appellant's mistake of fact and actual consent arguments were apparently predicated on the notion that the physical marks observed on appellant's body were a result of the encounter giving rise to the sexual assault charge. In this light, the marks allegedly left by the victim would undoubtedly evince MC's participation and would be relevant to the factfinder's determination of whether she was asleep at the time of the sexual encounter. As appellant attempted to argue under this premise in the Mil. R. Evid. 412 hearing, however, the military judge reminded him that he had unambiguously proffered evidence that the marks resulted from the May 3 romantic encounter, and had not offered any evidence connecting the marks to the May 5 sexual encounter. (JA 346–47).

R. Evid. 401 and must survive the Mil. R. Evid. 403 analysis. (JA 330) (sealed) (citing *Banker*, 60 M.J. at 222). The military judge found that the evidence (notably, all of the evidence sought by appellant, to include the photo incident and MC's comments to appellant concerning sexual preferences) had some relevance as to consent. (JA 332) (sealed). He noted that the evidence had a very slight tendency to show that if MC had a consensual romantic encounter which left visible marks upon appellant, as well as showed him the picture and made the comment, "she might be willing to consent to having sex with the accused." He then emphasized that the tendency would be "very slight." (JA 332) (sealed).

Appellant argues that the military judge's decision to exclude the evidence of the romantic encounter under Mil. R. Evid. 403 deserves no deference because his articulated reasons related to the photograph and comment evidence, and not the romantic encounter evidence. (Appellant's Br. 23–25). He argues further that when considered in isolation, exclusion of the romantic encounter evidence lacked a supportable basis because the circumstances of the encounter were "common and vanilla," and that there was "nothing embarrassing or prejudicial about the act itself." (Appellant's Br. 25).

However, unfair prejudice is not the only danger contemplated by the rule. Mil. R. Evid. 403 also permits a military judge to exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the

following: confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence. Mil. R. Evid. 403.

If all of the evidence sought for admission only amounted to a "very slight" probative value in the aggregate, the particular relevance of the minor romantic encounter would have, *a fortiori*, even less relevance. In any event, the relevance was *de minimis* and overwhelmingly outweighed by the dangers of confusing the issues and misleading the members. Mil. R. Evid. 403.

For the reasons explained *supra* in section "A," consent was never at issue in this case. Accordingly, the introduction of evidence which was itself marginally relevant to consent could only confuse the issues and mislead the members. Compounding the risk, MC denied that the proffered consensual encounter on May 3 ever took place. (JA 324). Litigating the issue would have introduced a trial within a trial on a collateral issue, pointlessly diverting the panel members' attention from the actual elements of the charged offenses. *See also United States v. Berry*, 61 M.J. 91, 97 (C.A.A.F. 2005) (holding that the military judge must consider the "possible distraction of the factfinder that might result from admission of the testimony.").

In sum, the dangers of prejudicial effect to the court-martial supported the military judge's conclusion that the concerns under Mil. R. Evid. 403 were "very great." (JA 332). As a result, the military judge's determination that the evidence

of prior consensual romantic activity should not be admitted fell well within the reasonable range of options available to him and his exclusion of the evidence was proper.

C. The evidence was not constitutionally required because it was irrelevant, immaterial, and unnecessary.

The military judge correctly articulated the standard for the constitutional exception (Mil. R. Evid. 412(b)(3)) requiring that the evidence be (a) relevant; (b) material; and (c) favorable to the defense. (JA 330).

While the appellant offered a host of justifications for the constitutional exception (confrontation, cross-examination, impeachment, motive to fabricate, providing context to the court members, explaining the nature of the relationship, and appellant's ability to present a defense), he was unable to overcome the Mil. R. Evid. 401 relevancy hurdle for any of them. (Appellant's Br. 20, JA 299–311).

In his pre-trial motion, appellant argued that:

> [T]he credibility and past history of the alleged victims (sic) are relevant to whether the charged acts occurred or, if they occurred, or (sic) are the progeny of confabulation. The context of the totality of the circumstances as it relates to alleged victims past experience is vitally important to ascertain the validity of the charges.

(JA 303–04). In this case, the "past history" evidence consisted of a brief romantic interlude short of sexual intercourse which allegedly left visible marks on appellant's body. The following night, MC woke up in the middle of the night to

appellant penetrating her vulva with his penis. Appellant offered no rational basis—much less evidence—to suggest that the prior encounter rendered the second more or less likely to have occurred or to have been the product of the victim's confabulation. Under even the most elastic "totality of the circumstances" analyses, appellant's argument fails to establish a relevancy connection between the two encounters.

In addition, cross-examination on MC's omission of the alleged consensual romantic activity on May 3 from her previous statements was not constitutionally required. There is no evidence that any party ever asked MC about whether she had engaged in any prior romantic consensual activity with appellant, or any other question where discussion of such events would have been expected, until after the Mil. R. Evid. 412 hearing. (JA 324) (sealed). Furthermore, the proffered event was irrelevant to the charged offense, so MC's silence on an irrelevant, collateral matter had no bearing on her credibility.

While appellant argues that MC's omission of the alleged prior consensual romantic activity on May 3 from her previous statements constituted "major credibility issues that appellant was constitutionally entitled to explore on cross-examination," it is unclear which rule of evidence would have permitted such cross-examination. (Appellant's Br. 22). Mil. R. Evid. 412 is a rule of exclusion. Appellant merely disagrees with the rule. Were he permitted to cross-examine MC

on his alleged prior romantic interlude with her, the rule would cease to have any meaning.

D. Appellant did not proffer evidence of participation and consent during the res gestae of the charged sexual assault.

The military judge did not err in excluding evidence of marks upon appellant's body because he failed to establish the relevance of such evidence.[5] *See* Mil. R. Evid. 104(b) ("When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist."); *see also* Mil. R. Evid. 401. The mere fact that appellant had marks on him, absent evidence to provide context, does not have a tendency to make any fact of consequence more or less likely. Further, the danger of the prejudicial effect of the evidence substantially outweighed any possible relevance. Accordingly, the military judge did not err.

Appellant never established a connection between his alleged encounter with MC on May 3, 2018 to the sexual assault. (Appellant's Br. 26–28). When the military judge asked appellant to establish the requisite link between the two

[5] Preliminarily, appellant seemingly abandoned his effort to admit the evidence without the military judge making a ruling. (JA 358) (sealed) (Appellant's defense counsel stating that he would "move on" and would readdress the issue at a later time which never occurred). Accordingly, this issue is waived and there is nothing for this court to correct on appeal. *See United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) ("Waiver is the intentional relinquishment or abandonment of a known right.") (citations and quotations omitted).

unrelated encounters, he provided no connection between any potential marks he received from MC and the sexual assault. (JA 358) (sealed). Unable to even connect his marks to the May 5 sexual assault, appellant certainly cannot reasonably establish a connection to MC or as a result of his assault of her. The evidence was appropriately excluded. Mil. R. Evid. 104(b).

To the limited extent that the marks, without context, may have been relevant, the danger of undue prejudice substantially outweighed any probative value. *See* Mil. R. Evid. 403. Providing the members with evidence of marks on appellant, without context, would leave them confused. As such, even if the evidence presented some marginal probative value, the prejudicial effect would substantially outweigh any value. Consequently, the military judge's exclusion of evidence related to marks on the appellant fell well within the reasonable range of options at his disposal.

E. Assuming error, such error did not result in prejudice to appellant.

Even assuming arguendo that the military judge erred by excluding the proffered evidence, such error had no bearing on the outcome of his case. By convicting appellant of the charged sexual assault offense, the panel found that MC was asleep at the time of the sexual act. As such, the panel concluded beyond a reasonable doubt that MC was legally unable to provide consent. Article 120(g)(8)(B) ("A sleeping, unconscious, or incompetent person cannot consent.").

Accordingly, evidence suggesting that MC might have consented if she had not been asleep would not have changed the outcome of the case.

In determining prejudice arising from nonconstitutional evidentiary errors, 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)).

The government's case was strong. MC made an outcry to her mother shortly after the sexual assault and also wrote a poem that noted she was asleep when appellant penetrated her vulva. (JA 051). Further, MC's detailed and credible testimony established the elements of the sexual assault beyond a reasonable doubt. (JA 037–180). In contrast, the defense case relied heavily upon the testimony of two of appellant's close friends, whose bias was apparent throughout their testimony. (JA 058, JA 194).

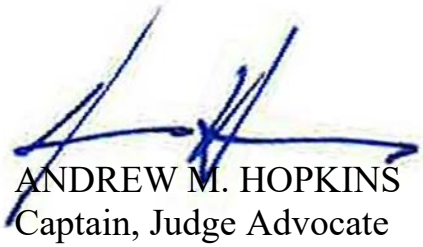
In addition, the evidence was immaterial because the issue (or issues) for which the evidence was offered was unimportant with respect to the fundamental question of whether or not MC was able to consent to sex with appellant on May 5. Moreover, MC's disavowal of the May 3 episode further undermines the materiality of the evidence. *Banker*, 60 M.J. at 222–23 ("Materiality is determined through a multi-factored test that considers . . . the extent to which the issue is in

dispute.”).

In sum, evidence of a prior consensual romantic encounter, far short of intercourse, was irrelevant, and the danger of prejudice outweighed any minimal probative value. Furthermore, evidence that MC did not mention the underlying event with her prior statements was not constitutionally required. Accordingly, the military judge did not abuse his discretion by excluding the evidence and appellant’s claim of error should be denied.

Conclusion

The United States respectfully requests that this Honorable Court AFFIRM the judgment of the Army Court.



ANDREW M. HOPKINS
Captain, Judge Advocate
Appellate Attorney, Government
Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0778
andrew.m.hopkins8.mil@army.mil
U.S.C.A.A.F. Bar No. 37593

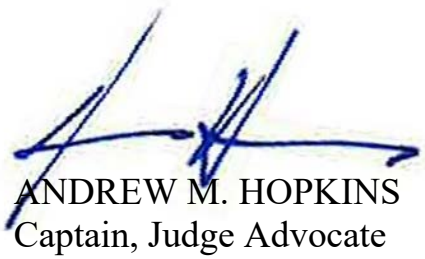
PAMELA L. JONES
Major, Judge Advocate
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 36798

CHRISTOPHER B. BURGESS
Colonel, Judge Advocate
Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 34356

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 **5,581** 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.



ANDREW M. HOPKINS
Captain, Judge Advocate
Attorney for Appellee
June 30, 2022

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 July 1, 2022.

DANIEL L. MANN
Senior Paralegal Specialist
Office of The Judge Advocate
General, United States Army
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0822