United States Navy–Marine Corps Court of Criminal Appeals

Before
HOUTZ, MYERS, and KISOR
Appellate Military Judges

UNITED STATES
Appellee

v.

Thomas H. TAPP
Private First Class (E-2), U.S. Marine Corps
Appellant

No. 202100299

Decided: 28 February 2023

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judges:
Derek A. Poteet (arraignment)
John P. Norman (trial)
K. Scott Woodard (post-trial motion)
Glen R. Hines (Sealing Orders and Entry of Judgment)

Sentence adjudged 20 February 2021 by a general court-martial convened at Marine Corps Base Camp Pendleton, California, consisting of officer and enlisted members. Sentence in the Entry of Judgment: reduction to E-1, confinement for three years, forfeiture of all pay and allowances, and a dishonorable discharge.[1]

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[1] Appellant was credited with having served 215 days of pretrial confinement.

For Appellant:
Lieutenant Megan E. Horst, JAGC, USN

For Appellee:
Lieutenant Michael A. Tuosto, JAGC, USN (argued)
Lieutenant Gregory A. Rustico (on brief)

Judge KISOR delivered the opinion of the Court, in which Senior Judge HOUTZ and Judge MYERS joined.

PUBLISHED OPINION OF THE COURT

KISOR, Judge:

A panel of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of violating a general order prohibiting consuming alcohol while underage, and one specification of committing a sexual act upon Ms. November[2] by penetrating her vulva with his penis without her consent in violation of Articles 92 and 120, Uniform Code of Military Justice [UCMJ].[3]

Appellant asserts seven assignments of error (AOEs):

(1) Was the evidence legally and factually sufficient to support a finding of guilt for sexual assault?

(2) Did the military judge abuse his discretion when he prohibited the defense from presenting evidence that the complaining witness contracted chlamydia, which provided a credible alternative explanation for her injuries and deprived Appellant of his constitutional right to present a complete defense?

(3) Did the military judge abuse his discretion when he denied the defense's motion to compel assistance of an expert in forensic pathology, gynecology, and wound interpretation?

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[2] All names in this opinion, other than those of Appellant, the judges, and counsel, are pseudonyms.

[3] 10 U.S.C. §§ 892, 920.

(4) Did the military judge err by denying defense challenges of Master Sergeant Papa and Captain Strike for their actual and implied bias?

(5) Was Appellant deprived of his constitutional right to an impartial judge?

(6) Did the impact of cumulative error deprive Appellant of a fair court-martial?

(7) Was Appellant entitled to a unanimous verdict?

Although we find no prejudicial error and affirm the conviction, several issues warrant fulsome discussion.

I. BACKGROUND

A. Events at the beach and the barracks.

Ms. November, a sixteen year old high school student, and her mother, Ms. Lima, went to the beach in Oceanside, California, one afternoon in July 2018. At the beach, Ms. November met two Marines, Appellant and Private First Class [PFC] Hotel, and they struck up a conversation. Around 6:00 p.m., Ms. Lima went home, allowing Ms. November to stay at the beach but instructing her to be home by 8:30 p.m. Appellant, PFC Hotel, Ms. November, and another Marine, PFC Sierra, the one person of the four who was of age to purchase alcohol, went to a liquor store and PFC Sierra purchased beer and a bottle of vodka. Appellant loaned his sweatshirt to Ms. November.

The four of them rode to Camp Pendleton in an Uber, which took approximately half an hour. PFC Sierra, Ms. November, and PFC Hotel sat in the back seat, with Appellant in the front seat. During the ride, they began drinking from the bottle of vodka. During the Uber ride, PFC Hotel kissed Ms. November and put his fingers in her vagina. Ms. November testified that she did not want that to happen and did not consent to it, but she did not want to put herself in an awkward position by saying anything. She testified that she planned to drink alcohol and hang out, but was not planning to do anything romantic or physical at all with Appellant or PFC Hotel.

At the barracks, Appellant, Ms. November, and PFC Hotel first went to PFC Hotel's room and drank more vodka and some beer, which they were mixing together. About half an hour later, the three went to Appellant's room and continued to drink. Ms. November, who weighed between 110 and 115 pounds, had not eaten very much and was intoxicated. She was sitting on a bed when PFC Hotel attempted to remove her swimsuit bottom. She fell off of the bed and went into the bathroom by herself. Appellant followed her into the bath-

room and began kissing her. She had used her cell phone camera to take pictures of herself, and took a video of her and Appellant in the bathroom.[4] Her next memory is of waking up in a hospital bed the next day.

PFC Hotel was a percipient witness to, and a participant in, the ensuing sexual assault, and testified under a grant of immunity. He generally corroborated Ms. November's account of the events at the beach and in the Uber; but he described the events in the back seat as consensual. He testified that there was no blood on his fingers after digitally penetrating her in the Uber, and indicated that his plan was to engage in a threesome back at the barracks. In response to a question from trial counsel as to whether he thought Ms. November knew of this plan he testified, "I would assume so."[5] According to PFC Hotel, Ms. November told them she was 19 years old.

PFC Hotel testified that back in Appellant's room, the three were drinking vodka and beer, and that Ms. November was slurring her words and fell down twice. PFC Hotel testified that after Ms. November and Appellant came out of the bathroom she willingly kissed both of them, she then took off Appellant's shirt, and willingly let PFC Hotel and Appellant take off her clothes. At that point Appellant began having sexual intercourse with Ms. November on the floor while PFC Hotel inserted his penis in her mouth. PFC Hotel described Ms. November as lying on her back on the floor with her arms and legs flat on the floor and not moving. He physically moved her hand to his penis and then grabbed her head and moved her head to his penis. After a few minutes PFC Hotel and Appellant switched positions, at which point PFC Hotel observed that Appellant's penis was red. PFC Hotel testified that he then put his fingers into Ms. November's vagina, and when he pulled them out he observed that she was bleeding and noticed that she was entirely nonresponsive. PFC Hotel and Appellant then started "freaking out" as they were unable to wake Ms. November, who was unconscious.[6] PFC Hotel went to get PFC Sierra, who had medical training. Appellant and PFC Hotel tried to clean up the blood with paper towels, and they partially dressed Ms. November. PFC Sierra unsuccessfully attempted to wake her up.

During this time Ms. November's mother, Ms. Lima, was attempting to locate her daughter. Ms. November had not replied to her mother's text messages, and Ms. Lima could see from her phone that Ms. November had left the

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[4] Pros. Ex. 6.

[5] R. at 1283.

[6] R. at 1299.

beach. Ms. Lima was surprised that her daughter was at Camp Pendleton. Ultimately she called the Camp Pendleton Provost Marshal's Office [PMO] (base police) who began searching the barracks for Ms. November. Another Marine indicated to the base police that the missing girl was in Appellant's room, and four police officers identified themselves and knocked on the door for "a few minutes" before PFC Sierra eventually opened the door.[7] They found Ms. November, unconscious and bleeding, on the bathroom floor, and Appellant, wearing only shorts, passed out on the bed. The police observed a large bloodstain on the floor and vomit on the wall and on the floor. The first police officer to observe Ms. November initially believed that she was dead.[8]

An officer handcuffed the unconscious Appellant in the bed and left him there; he woke up some hours later. He was detained and agents from the Naval Criminal Investigative Service [NCIS] interviewed him the following day after he had sobered up. During that interview, which was recorded, Appellant first stated that he did not remember the events in the barracks because he was blacked out, but then also stated that the sex with Ms. November was consensual. He stated that both he and PFC Hotel had sex with Ms. November. Appellant was then subjected to a sexual assault forensic examination.

B. The hospital examination and the medical evidence and testimony at trial.

After discovering the unconscious Ms. November, base police alerted emergency medical personnel who transported Ms. November to a local hospital in an ambulance. Her blood alcohol level was still .24 some hours later when it was tested. She had no memory of having sex when she awoke, but she was in tremendous pain and was bleeding from internal lacerations and external injuries. She was transported to a different hospital for a forensic sexual assault examination the next day.

Ms. Oscar performed the sexual assault forensic examination, which took approximately four hours, and she later testified at Appellant's court-martial as to her findings. She was also proffered by the trial counsel and recognized by the military judge as an expert witness "in the field of sexual assault and forensic examinations."[9] Ms. Oscar holds a bachelor's degree in nursing and is certified by the State of California as a "SANE A" nurse, which requires 300 hours of clinical work as a Sexual Assault Nurse Examiner [SANE] nurse and

[7] R. at 922.

[8] R. at 948.

[9] R. at 1516.

then passing an exam. By the time of trial Ms. Oscar had performed over 129 forensic sexual assault examinations.

Ms. Oscar testified that Ms. November was experiencing severe vaginal pain. She observed that Ms. November had bruising on her legs, a bruise on her labia, and two lacerations in her vagina that were still bleeding at the time of the examination. One of the lacerations was two centimeters long and exposed the subcutaneous tissue. She testified that this was deeper than a superficial laceration, although even superficial lacerations can be painful. Ms. November initially told her that she was menstruating at the time of the incident, though she corrected that statement at a follow up exam a few days later, as it turned out that she then believed that she was not menstruating. Accordingly, Ms. Oscar recorded in her initial report that she observed menstrual bleeding as well as bleeding injuries. She also took swabs for later DNA analysis and comparison. Ms. November tested positive for chlamydia. At trial, it was shown that Appellant's DNA was present in Ms. November's vagina and that it was Ms. November's blood on the carpet. Both PFC Hotel and Appellant later tested negative for chlamydia.

Prior to trial, defense counsel filed a motion for an expert consultant in gynecology and "wound interpretation."[10] The military judge denied that motion, but ordered the Government to provide an "adequate substitute" expert consultant who would be "qualified and equivalent and competent to what you will present."[11] The Government provided LT Helm. LT Helm holds a bachelor's degree in nursing, a master's degree in nurse midwifery, and is certified by the Navy as a Sexual Assault Medical Forensic Examiner [SAMFE]. The Defense objected to her being an adequate substitute, as she had conducted only ten sexual assault examinations, less than one-tenth of the sexual assault examination experience that Ms. Oscar had at the time. LT Helm was also recognized by the court, without objection, as an expert witness in the field of "women's gynecological health and sexual assault medical forensic examinations."[12]

At trial, LT Helm testified she was present and observed Ms. Oscar's testimony, and had reviewed Ms. Oscar's report. She agreed with Ms. Oscar's observations and findings.[13] She also testified that she had seen lacerations and

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[10] App. Ex. XV; App. Ex. XXV.

[11] R. at 70.

[12] R. at 1752.

[13] R. at 1753.

bruising on patients not alleging sexual assault, but had not seen any injuries on any of the SANE examinations she had done. Further, that the only laceration she had seen like the one Ms. Oscar found during the exam of Ms. November had resulted from childbirth.[14]

LT Helm further testified that in her expert opinion, the lacerations documented by Ms. Oscar during the exam would not, by themselves, have caused the amount of bleeding that had been described at trial.[15] (The blood on the carpet, the blood on Ms. November's clothing after she had been partially dressed by Appellant and PFC Hotel, and the blood documented by Ms. Oscar). She testified that it could have been menstrual blood. She also agreed that, as a general matter, that lacerations or other injuries can result from consensual sex.

C. The Military Rule of Evidence 412 issue

At trial, LT Helm was not, however, allowed to opine that Ms. November's chlamydia could have contributed to her bleeding in this case. This issue had been litigated in the context of a pretrial motion brought under Military Rule of Evidence 412, and again during trial when the Defense filed a motion for reconsideration of the military judge's ruling excluding this evidence. On the motion for reconsideration, the Defense presented an affidavit from LT Helm that stated that, in her opinion, possible symptoms of chlamydia include post-coital bleeding and cervical discharge that were consistent with the description of the stain on the barracks room carpet as described by the police. She also stated that chlamydia can cause the type of pain and inflammation described by Ms. November's mother during her testimony about her observations of Ms. November after the incident.[16]

D. The Trial Result and Sentence

During closing argument, trial counsel highlighted Ms. Oscar's experience. He said, "She's an expert; she performed the examination – [Ms. November] had some of the worst injuries in her vagina that [Ms. Oscar] had ever seen, having done 119-some sexual assault examinations."[17] The Defense in its closing argument admitted that Appellant violated a general order by drinking

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[14] R. at 1753-54.

[15] R. at 1756.

[16] App. Ex. LXXXVI at 1.

[17] R. at 1855.

alcohol in the barracks, but argued that the sex between Appellant and Ms. November was consensual, or (in the alternative) that Appellant had a reasonable mistake of fact that Ms. November was consenting.[18] The Defense also argued that the blood on the carpet was menstrual blood.[19] The panel of officer and enlisted members convicted Appellant of both charges.

Although Appellant was facing a maximum confinement time of thirty-two years, trial counsel asked the members to sentence Appellant to 11 years of confinement, a dishonorable discharge, reduction in paygrade to E-1 and total forfeiture of all pay and allowances.[20] The assistant defense counsel argued for a sentence of 19 months.[21] The members sentenced Appellant to be confined for three years, to be reduced to paygrade E-1, to forfeit all pay and allowances, and to be discharged with a dishonorable discharge.[22]

The members panel which convicted and sentenced Appellant included one person, Master Sergeant Papa, who had been challenged for cause by the Defense after voir dire. The panel also included one person who would have been excused via a defense peremptory challenge (First Lieutenant Echo), but for the fact that the Defense's peremptory challenge was used against another person (Captain Strike) after the military judge denied the Defense's challenge for cause against him.

E. The Post-Trial Challenge to the Military Judge.

On 20 February 2021, immediately after the trial had adjourned and the members were dismissed and defense counsel had departed the courtroom, the military judge had a stern *ex parte* conversation with trial counsel in the presence of the court reporter. The military judge was critical of the trial counsel's sentencing presentation. Trial counsel later sent a memorandum to defense counsel, dated 1 March 2021 memorializing trial counsel's recollections of that conversation which, according to trial counsel, occurred on "Saturday, 24 February 2021" although Saturday was actually 20 February.[23] On 6 March 2021, the Defense filed a post-trial motion to disqualify the military judge and to set

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[18] R. at 1895.

[19] R. at 1890.

[20] R. at 1967-68.

[21] R. at 1973.

[22] R. at 1991.

[23] App. Ex. CXI at 29.

aside the findings and sentence, alleging that the military judge had been biased.[24] Sometime between 1-9 March 2021, before the post-trial motion had been litigated or resolved, the Chief Defense Counsel of the Marine Corps filed a professional responsibility/judicial ethics complaint against the military judge.[25]

On 8 March 2021, the military judge held a post-trial Article 39(a) session wherein he acknowledged that he had provided trial counsel with "direct, stern feedback." He stated that he had been impartial throughout the trial, but would recuse himself from any further post-trial matters.[26]

On 15 April 2021, another post-trial 39(a) session was held at Camp Pendleton to litigate the Defense post-trial motion. Another military judge, Colonel [Col] Woodard, presided over the session. Col Woodard was the Circuit Military Judge normally assigned to the Eastern Judicial Circuit in Camp Lejeune, North Carolina.[27] Three new trial counsel were also detailed to the case. Two new defense counsel, LtCol Acosta and LtCol Dempsey, were detailed by the Chief Defense Counsel of the Marine Corps to represent Appellant. Oddly, their representation was purportedly limited to the post-trial hearing on the post-trial motion.[28]

LtCol Acosta conducted extensive voir dire of Col Woodard and then challenged him based on an "implied bias" theory.[29] Col Woodard denied that motion. He then heard the testimony of several witnesses on the merits of the Defense post-trial motion, and after the hearing, issued a written ruling denying the Defense post-trial motion to set aside the findings and sentence.[30]

Further facts necessary to resolve the issues are included in the opinion.

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[24] App. Ex. CXI.

[25] The actual complaint is not in the record, but Col Woodard who presided over the post-trial motion noted that "the gravamen of the complaint surrounds the circumstances of this case." (App. Ex. CLXIII at 8.)

[26] R. at 1999-2004.

[27] Col Woodard was detailed by the Chief Judge of the Navy-Marine Corps Trial Judiciary, not by the Circuit Military Judge in Camp Pendleton. *See* App. Ex. CXL.

[28] Col Woodard was properly dubious about the propriety of detailing an attorney with a limited scope of representation. R. at 2009-2015.

[29] R. at 2079.

[30] App. Ex. CXLIII.

II. DISCUSSION

A. The finding of guilty of sexual assault is legally and factually sufficient.

Appellant asserts the evidence is both legally and factually insufficient to support his conviction for sexual assault. We review such questions de novo.[31]

1. Legal and Factual Sufficiency Standards of Review

To determine legal sufficiency, we ask whether, "considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt."[32] In conducting this analysis, we must "draw every reasonable inference from the evidence of record in favor of the prosecution."[33]

In evaluating factual sufficiency, we determine "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are . . . convinced of [Appellant's] guilt beyond a reasonable doubt."[34] In conducting this unique appellate function, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt."[35] Proof beyond a "[r]easonable doubt, however, does not mean the evidence must be free from conflict."[36]

2. The conviction for sexual assault is legally and factually sufficient.

The court-martial members found Appellant guilty of sexually assaulting Ms. November by penetrating her vulva with his penis without her consent. To prove sexual assault, as charged, the Government had to prove that: (1) Appellant committed a sexual act on Ms. November by causing penetration, however

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[31] Article 66(d)(1), UCMJ; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

[32] *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *see United States v. Gutierrez*, 73 M.J. 172 (C.A.A.F. 2014).

[33] *Gutierrez*, 74 M.J. at 65 (citation and internal quotation marks omitted).

[34] *Turner*, 25 M.J. at 325.

[35] *Washington*, 57 M.J. at 399.

[36] *United States v. Rankin*, 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006).

slight, of her vulva by his penis; and (2) he did so without Ms. November's consent.[37] The Government further had to prove that Appellant did not honestly and reasonably believe that Ms. November consented.[38]

Both Ms. November and PFC Hotel testified that Ms. November drank a considerable amount of alcohol in a short period of time. PFC Hotel testified that Appellant had sexual intercourse with Ms. November while she was lying on the floor with her arms and legs flat on the floor, not moving. Although Appellant argues in his reply brief that "there is *no* evidence that [Appellant] caused the bleeding,"[39] this mischaracterizes the record. When PFC Hotel switched places with Appellant, PFC Hotel observed that Appellant had a "red area in his crotch" and that Ms. November was bleeding and had become unconscious.[40] Medical and law enforcement personnel also observed that Ms. November was bleeding and unconscious. Her blood alcohol level taken at the hospital several hours later was still .24. After weighing the evidence in the record of trial, and making every reasonable inference in favor of the prosecution, we are satisfied a reasonable fact-finder could have found all the essential elements, and the lack of an affirmative defense, beyond a reasonable doubt. Appellant's conviction is therefore legally sufficient. Further, after weighing the evidence in the record of trial, and making allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt and find that the evidence is factually sufficient to support Appellant's convictions.[41]

B. The military judge did not abuse his discretion by excluding evidence that Ms. November had chlamydia.

Appellant asserts the military judge abused his discretion in denying the Defense's motion to admit evidence that Ms. November had chlamydia, and that the bleeding sometimes associated with chlamydia could have contributed to her coital and post-coital bleeding. Appellant argues that this evidence falls

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[37] Article 120, UCMJ.

[38] *See* Rule for Courts-Martial 916(j)(1), Manual for Courts-Martial, United States (2019 ed.).

[39] Appellant's Reply Brief at 5 (emphasis added).

[40] R. at 1296-1299.

[41] Trial defense counsel conceded in his closing statement that Appellant was guilty of underage drinking. (R. at 1875.) We find the conviction for underage drinking legally and factually sufficient as well. *See* Article 66, UCMJ.

under two enumerated exceptions to the general rule that evidence of a victim's other sexual behavior is inadmissible under Mil. R. Evid. 412. We review rulings to admit or exclude evidence for an abuse of discretion.[42]

1. Standard of Review.

Evidence offered to prove an alleged victim engaged in other sexual behavior is, with limited exceptions, generally not admissible at a trial involving a sexual offense.[43] Two of the rule's three exceptions are relevant here. The first is for evidence of "specific instances of a victim's sexual behavior, if offered to prove that someone other than the accused was the source of semen, injury, or other physical evidence."[44] The other is for "evidence the exclusion of which would violate the accused's constitutional rights."[45] "The constitutionally required exception encompasses an accused's Sixth Amendment right to confront and cross-examine the witnesses against him, which includes the right "to impeach, i.e., discredit the witness."[46] Evidence is admissible under this exception if it is relevant, material, and favorable (i.e., "vital") to the defense, no matter how embarrassing it may be to the alleged victim.[47] Any evidence introduced under the exceptions to Mil. R. Evid. 412 must also pass the Mil. R. Evid. 403 balancing test. Evidence is relevant if it has any tendency to make a fact of consequence in determining the action more or less probable than it would be without the evidence.[48] Materiality "is a multi-factored test looking at the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to th[at] issue."[49] To pass the Mil. R. Evid. 403 balancing test, the evidence's probative value must not be substantially outweighed by such dangers as "harassment, prejudice, confusion of

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[42] *United States v. Ellerbrock*, 70 M.J. 314, 317 (C.A.A.F 2011).

[43] Mil. R. Evid. 412(a)(1). "Sexual behavior" includes "any sexual behavior not encompassed by the alleged offense." Mil. R. Evid. 412(d).

[44] Mil. R. Evid. 412(b)(1).

[45] Mil. R. Evid. 412(b)(3).

[46] *Ellerbrock*, 70 M.J. at 318 (quoting *Olden v. Kentucky*, 488 U.S. 227, 231 (1988)).

[47] *United States v. Banker*, 60 M.J. 216, 222-23 (2004), *abrogated by United States v. Gaddis*, 70 M.J. 248, 256 (C.A.A.F. 2011).

[48] Mil. R. Evid. 401.

[49] *Ellerbrock*, 70 M.J. at 318 (citations and internal quotation marks omitted).

the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."[50]

2. The ruling(s) in this case.

The military judge ruled that the fact that Ms. November tested positive for chlamydia was inadmissible under Mil. R. Evid. 412 and 403.[51] The Defense moved, *in limine* pursuant to Mil. R. Evid. 412, to introduce three areas of testimony. The military judge ruled that evidence of Ms. November's interactions with PFC Hotel in the Uber from the beach to Camp Pendleton and in the barracks room were admissible, but denied the Defense motion to introduce evidence of chlamydia. The Defense's position was "We're not saying that the chlamydia is the absolute cause of all the bleeding . . . [t]he chlamydia would go to further explain why there was so much blood."[52]

The military judge found that evidence of chlamydia, a common sexually transmitted infection, is encompassed within Mil. R. Evid. 412's general rule of exclusion.[53] The military judge then reasoned that "the evidence presented by the defense does not come close to showing that (1) [Ms. November] contracted chlamydia from some prior sexual encounter, or even if she did, that (2) any case of chlamydia would lead to the type of vaginal bleeding and pain suffered by [Ms. November] on 18-19 July 2020."[54] The military judge also conducted the proper balancing test under Mil. R. Evid. 403 and concluded, "it is clear that the dangers of unfair prejudice to the process, confusing the issues, and misleading the members all substantially outweigh any minimal probative value here."[55]

The military judge's findings of fact with respect to the presentation and symptoms of chlamydia were largely based on Ms. Oscar's testimony during the closed session of the hearing.[56] Ms. Oscar testified that, in those cases

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[50] *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *see United States v. St. Jean,* __ M.J. __ No. 22-0129, 2023 CAAF LEXIS 57, at *6-7 (C.A.A.F. Jan 30, 2023).

[51] App. Ex. LIX.

[52] R. at 271.

[53] App. Ex. LIX at 12.

[54] App. Ex. LIX at 13.

[55] *Id*. at 16.

[56] App. Ex. LIX, at 7, para. bb.

where there is discharge present resulting from chlamydia, there can be small amounts of blood in the discharge, which she termed "tinged."[57]

However, the military judge also declined to find that Ms. November contracted chlamydia prior to the incident in the barracks. He stated his belief that it was possible that she tested positive for chlamydia later that same evening as a result of sex with Appellant or PFC Hotel. As this factual finding is unsupported by the record, we find that it is clearly erroneous. But we do not disturb his ultimate ruling. The military judge did not abuse his discretion in ruling that the evidence of chlamydia was inadmissible under Mil. R. Evid. 412 and 403.

During trial, the Defense brought a motion to reconsider this ruling, attaching an affidavit from the Defense expert, LT Helm.[58] In her affidavit, LT Helm stated that the "possible" symptoms of chlamydia include "post coital bleeding . . . consistent with the evidence [from the barracks]."[59] The military judge denied the motion for reconsideration finding the evidence barred by Mil. R. Evid. 412, and again making a thorough Mil. R. Evid. 403 analysis.[60]

In her trial testimony before the members, LT Helm testified that the lacerations observed by Ms. Oscar could not have caused "that much bleeding" as was observed at the scene.[61] She believed it could have been menstrual blood.[62] She also testified that lacerations could result from consensual sex but in her experience conducting well-woman exams or even SAFE exams, she had never seen vaginal injuries of the type Ms. November had experienced, although she has seen such injury as a result of childbirth.[63]

We agree with the military judge that the evidence of chlamydia was properly excluded under Mil. R. Evid. 403. This is because whatever portion of the bleeding, if any, was caused by an infection was relatively minor in that the greater portion of the bleeding was undoubtedly caused by the lacerations the Ms. Oscar observed, possibly with menstrual blood added. The Defense theory was that chlamydia may have contributed to the bleeding, but there was no evidence presented that chlamydia could have caused lacerations of

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[57] App. Ex. LIX at 7, para. bb, sub. paras. c-d; App. Ex. LIX at 14.

[58] R. at 1438.

[59] App. Ex. LXXXVI at 1.

[60] R. 1486, 1501-02.

[61] R at 1756.

[62] R. at 1756-57.

[63] R. at 1759-60.

this magnitude which, according to the Defense expert, LT Helm, were more akin to the type of injuries sustained in childbirth. Moreover, the Defense was able to argue its theory that the blood found was menstrual blood. So any evidence of additional incidental chlamydia bleeding would have been substantially more prejudicial than probative; and because chlamydia is a sexually transmitted infection, this would have served no purpose other than to embarrass or discredit Ms. November.

Appellant relies on *United States v. Cuevasibarra* to argue that the military judge abused his discretion in disallowing evidence of Ms. November's chlamydia. In *Cuevasibarra,* the Army Court of Criminal Appeals reversed a conviction for sexual assault where the military judge had made a finding of fact that the complainant's pain during sex could not have been caused by chlamydia, and disallowed that evidence. That case hinged on the complainant's testimony that she experienced pain *during sex* with Sergeant Cuevasibarra as evidence that the intercourse was non-consensual. The Army Court of Criminal Appeals held that excluding the evidence of chlamydia was constitutional error because it was an alternate explanation for her pain.[64]

The present case is different in several important respects. First, the Defense in this case wanted to introduce evidence of chlamydia not as an alternate source of bleeding, but as a possible *additional* source of some of the bleeding and pain observed by nurses, including Ms. Oscar.[65] In other words, not to state that the chlamydia *caused* the injuries which were documented at the hospital, but to posit that *some* of the blood on the carpet may have been a symptom of this sexually transmitted infection. Second, the testimony about the pain experienced by the complainant in *Cuevasibarra* during the sex tied directly to her credibility as to the nonconsensual nature of the incident. Here though, Ms. November had no recollection of the event, and no evidence was presented to suggest that chlamydia could have caused the lacerations which Ms. Oscar observed and documented. Thus the military judge properly balanced the probative value of testimony related to possible symptoms of chlamydia, against the danger of unfair prejudice and confusion of the issues and properly excluded it under Mil. R. Evid. 403. Military judges receive wide discretion in conducting balancing under Mil. R. Evid. 403 where they reasonably

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[64] *United States v. Cuevasibarra,* No. ARMY 20200146, 2021 CCA LEXIS 254 (A. Ct. Crim. App. May 21, 2021). Notably, the Army Court declined to reach the issue of whether evidence of chlamydia constituted "other sexual behavior" within the meaning for Mil. R. Evid. 412(a)(1) because it resolved that case on constitutional grounds.

[65] R. at 271.

describe the nature of the evidence and properly state the legal standard for making an admissibility determination.[66]

Although we find that there was no error, let alone constitutional error, in excluding evidence of chlamydia, we are satisfied that even if there was an error, it was harmless beyond a reasonable doubt. We find that even if some portion of the vaginal bleeding resulted from chlamydia, while some of the blood resulted from the injuries including the 2 centimeter laceration which was still bleeding when she was examined at the hospital, that evidence was not material to the issue of whether or not Ms. November consented to sex with Appellant. Moreover, the fact that Appellant was able to present evidence that menstrual blood, rather than the injuries, caused the bleeding (or some of it) diminished the probative value that a third source of blood would have had, and risked confusing the issues altogether. We also reject Appellant's argument that the chlamydia evidence would have altered Ms. November's credibility, as we see no nexus between a diagnosis of a venereal disease and a victim's credibility in her testimony that she did not want to have sex.[67] This is exactly the type of embarrassing evidence that Mil. R. Evid. 412 was designed to exclude.[68]

C. The military judge did not abuse his discretion in denying the Defense motion to compel assistance of the requested expert in forensic pathology, gynecology, and wound interpretation.

Appellant asserts that the military judge abused his discretion in denying Appellant's pretrial motion for expert assistance from Dr. Meet in the fields of forensic pathology, gynecology, and wound interpretation.

1. Standard of Review.

We review a military judge's ruling on a request for expert assistance for abuse of discretion.[69] The abuse of discretion standard is a strict one, calling

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[66] *See St. Jean,* __ M.J. __, No. 22-0129, 2023 CAAF LEXIS 57, at *8-9 (C.A.A.F Jan 30, 2023).

[67] Appellant's Reply Brief at 13. In fact, excluding this type of evidence is exactly why rape shield laws have been enacted. *See United States v. Guzman,* 79 M.J. 856, 861 (C.G. Ct. Crim. App. 2020).

[68] Mil. R. Evid 412(a); *see also Ellerbrock*, 70 M.J. at 317-18.

[69] *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010).

for more than a mere difference of opinion—the challenged action must be "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous."[70]

A request for expert assistance must show a reasonable probability that the expert would be of assistance to the Defense (i.e., that the expert is necessary), and that denial of the expert assistance would result in a fundamentally unfair trial.[71] To demonstrate necessity, the request must show (1) why the expert is needed; (2) what the expert assistance will accomplish; and (3) why the defense would be unable to gather and present the evidence that the expert assistance would be able to develop.[72]

2. The military judge did not abuse his discretion in denying the Defense request for Dr. Meet.

The Defense filed a pretrial motion for Dr. Meet, who is a medical doctor with a specialty in forensic pathology and some experience in gynecology.[73] Dr. Meet briefly testified as to his qualifications during the Article 39(a) session held to litigate pretrial motions but did not testify as to anything specific about this case.[74] The Defense fell well short of presenting any evidence as to why Dr. Meet's expertise was needed, and what he would accomplish. The Defense proffered in its motion that because of his expertise, Dr. Meet would be able to testify "as to whether [Ms. November's] injuries are the likely result of force, lack of consent, or whether they are consistent with the allegations."[75] The military judge was properly dubious that any expert medical witness could opine as to whether injuries resulted from a consensual encounter or not.[76] (Notably, at the post-trial 39(a) session to litigate the motion to set aside the findings, Col Woodard likewise rejected this argument.)[77]

The military judge did not abuse his discretion in denying the motion compel the assistance of Dr. Meet as an expert consultant, as he properly found

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[70] *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)).

[71] *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008).

[72] *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994).

[73] App. Ex. XV at 19-24; R. at 49.

[74] R. at 48-52.

[75] App. Ex. XV at 3.

[76] R. at 61.

[77] R. at 2377.

that the Defense had not presented any evidence as to why Dr. Meet, or any forensic pathologist with his qualifications, was necessary to review and explain to the Defense the results of the sexual assault forensic examination conducted on Ms. November at the hospital.[78]

D. Allowing the Government to assign LT Helm to provide the Defense with expert assistance was not an abuse of discretion.

The military judge ordered that the Government provide an expert consultant to the Defense who was a SAFME or SANE nurse, with similar qualifications to the Government's expert, Ms. Oscar.[79] Ultimately, the Government provided LT Helm. During trial, the Defense moved for reconsideration.

1. There was a disparity of clinical experience in conducting sexual assault forensic examinations between Ms. Oscar and LT Helm, but in light of their overall qualifications and their expert testimony presented at trial, any potential error in appointing LT Helm was harmless.

LT Helm holds bachelor's and master's degrees in nursing and is a certified nurse-midwife.[80] She has extensive clinical experience and training in womens' health issues and gynecological examinations. She was relatively recent to the duties of a SAFME nurse, having done only 10 SAFME exams (by the time of trial), none of which involved vaginal injuries. The Defense filed a motion for reconsideration of its motion for Dr. Meet, correctly stating that "The Government SAFME has far more experience and training in sexual assault cases than [LT. Helm]."[81] Ms. Oscar holds a bachelor's of science in nursing, and is certified by the State of California as a SANE nurse, and had done over 115 sexual assault exams.[82] Ultimately, the trial court recognized both nurses as experts in the field of sexual assault medical and forensic examinations.[83]

The military judge did not abuse his discretion in denying the motion for reconsideration of the motion to compel the Government to provide Dr. Meet, because the Defense had not produced any new evidence (or any meaningful evidence) as to why a forensic pathologist was necessary. The military judge

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[78] R. at 67-69.

[79] R. at 70. The Government had already agreed to do this.

[80] App. Ex. XXV at 15; R. at 1751.

[81] App. Ex. XXV at 8.

[82] R. at 1515.

[83] R. at 1516, 1752.

also did not abuse his discretion in finding that LT Helm was "reasonably comparable" to Ms. Oscar.[84] The military judge stated that "although [LT Helm] has not personally conducted SAFE exams where there are injury findings, there is no doubt that she can assist the defense in understanding the injuries present in this case . . . ."[85] We agree that although the Government's expert (who was also the nurse who conducted the forensic sexual assault examination on Ms. November) had done approximately 10 times as many sexual assault forensic examinations as LT Helm, there is no doubt that LT Helm was qualified to assist the Defense in understanding the SANE report of examination of Ms. November that Ms. Oscar conducted, and competently evaluating her testimony.

Additionally, we find that if there was any error in allowing the Government to provide LT Helm rather than someone else, it would be harmless beyond a reasonable doubt. As a nurse midwife, LT Helm has extensive experience in women's health generally and vaginal injuries specifically. Second, LT Helm testified that she *agreed* with Ms. Oscar's observation and findings as reported, rendering any disparity of experience or "battle of the experts" largely irrelevant.[86] The only point of contention at trial (related to the bleeding) was that LT Helm testified that she did not believe that the lacerations in Ms. November's vagina that Ms. Oscar observed, *by themselves*, could have caused the amount of blood found on the carpet in the barracks.[87] LT Helm testified that she believed that some of it could have been menstrual blood.[88] (She also would have testified, if allowed to, that chlamydia can cause some bleeding in some people). The members asked questions regarding menstruation, and Ms. Oscar was recalled in the Government's rebuttal case. She testified that Ms. November, who stated initially that she was on her period when she was asked at the hospital, reported to Ms. Oscar at her follow up exam that her period started later. Thus Ms. Oscar did not believe, at the time of trial, that the blood she observed at the hospital was menstrual blood, despite noting it in her initial report.[89]

Regardless, this testimony only relates to the issue concerning what quantum or percentage of the blood on the carpet came from the vaginal injuries

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[84] R. at 304.

[85] R. at 306.

[86] R. at 1753.

[87] R. at 1756.

[88] *Id*.

[89] R. at 1793.

and whether there was any blood from any other cause mixed in. The injuries were well documented and it was undisputed that they caused bleeding, which was observed and documented at the hospital. No evidence was proffered to the military judge or presented at the motions sessions that chlamydia can cause lacerations.

Thus, after reviewing all of the testimony we are satisfied that the military judge did not abuse his discretion in finding that LT Helm was adequate to be an expert for the Defense; and if there was any error resulting from the disparity between Ms. Oscar and LT Helm as to how many forensic sexual assault exams each had conducted, it was harmless beyond a reasonable doubt.

E. The military judge did not abuse his discretion in denying either of the challenges for cause of Master Sergeant Papa and Captain Strike.

In his "Issues Presented," Appellant asks us to consider "Did the military judge err by denying defense challenges for cause of Master Sergeant Papa and Captain Strike for their actual and implied bias?"[90] However, the argument section of the brief slightly recasts the issue to focus primarily on implied bias. The heading of the section reads, "the military judge erroneously denied the defense's challenges for cause against Master Sergeant Papa and Captain Strike for implied bias." At oral argument appellate defense counsel clarified that implied bias was the stronger of the two arguments, but did not explicitly withdraw the actual bias argument as to Master Sergeant Papa.

1. Standards of review:

Rule for Courts-Martial [R.C.M.] 912(f)(1)(N) provides: "A member shall be excused for cause whenever it appears that the member ... [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N) encompasses "both actual bias and implied bias."[91] R.C.M. 912(f)(3) provides: "The burden of establishing that grounds for a challenge exist is upon the party making the challenge." Military judges should be "liberal in granting challenges for cause."[92]

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[90] Appellant's Brief at 1.

[91] *United States v. Rome,* 47 M.J. 467, 469 (C.A.A.F. 1998).

[92] *Id.*

R.C.M. 912(f)(4) provides:

> When a challenge for cause has been denied the successful use of a peremptory challenge by either party, excusing the challenged member from further participation in the court-martial, shall preclude further consideration of the challenge of that excused member upon later review.[93]

a. Actual Bias

The test for actual bias is whether any bias "is such that it will not yield to the evidence presented and the judge's instructions."[94] Further, actual bias is reviewed subjectively, "through the eyes of the military judge or the court members."[95] Actual bias is a question of fact. Accordingly, the military judge is given great deference on issues of actual bias, recognizing that he or she has observed the demeanor of the challenged party. We will not overturn the military judge's denial of a challenge unless there is a clear abuse of discretion in applying the liberal-grant mandate.[96]

b. Implied Bias

In *United States v. Pyron* this Court exhaustively restated the standards for review of a military judge's denial of a challenge for cause for implied bias.[97] We generally give a military judge's ruling on a challenge for cause great deference, but we review rulings on challenges for implied bias "under a standard less deferential than abuse of discretion but more deferential than de novo."[98] This is because implied bias views the issue from the vantage point of the public's objective perception of the fairness of the military justice system, and not simply the military judge's assessment of whether a challenged member can

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[93] R.C.M. 912(f)(4) was amended to this current version in 2005 via Executive Order 13387 (2005 Amendments to the Manual for Courts-Martial, United States (October 14, 2005)); *see United States v. Walker*, No. 201100463, 2012 CCA LEXIS 396 at *8-9 (N-M. Ct. Crim. App. Sep 26, 2012) (unpublished).

[94] *United States v. Napoleon,* 46 MJ 279, 283 (C.A.A.F. 1997) (quoting *United States v. Reynolds,* 23 MJ 292, 294 (C.M.A. 1987)).

[95] *Id*. (citing *United States v. Daulton,* 45 M.J. 212, 217 (C.A.A.F. 1996)).

[96] *See, e.g., United States v. Warden*, 51 M.J. 78 (C.A.A.F. 1999).

[97] *United States v. Pyron*, 81 M.J. 637, 641-42 (N-M. Ct. Crim. App. 2021).

[98] *See United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002).

serve in a fair and impartial manner.[99] The test for implied bias takes into account, among other distinct military factors, the confidence appellate courts have that military members will be able to follow the instructions of military judges and thus, while it will often be possible to rehabilitate a member on a possible question of actual bias, questions regarding the appearance of fairness may nonetheless remain.[100] Thus, errors in denying the Defense's meritorious challenges for cause based on implied bias are akin to structural errors in the trial, and not tested for prejudice.[101]

2. Master Sergeant Papa

The Defense challenged Master Sergeant Papa for cause.[102] He had disclosed during individual voir dire that a few years before, his sister had informed him that she had been raped some years prior to that disclosure when she was in her early twenties.[103] In response to defense counsel's question "when you hear about the facts in this case, will that make you think about your sister's experience?" he responded in the affirmative.[104] He stated, quite reasonably, that when he heard that news from his sister it upset him, but that he did not feel similar emotions when hearing the charges in this case.[105] He stated that he would be a fair and impartial member, and would follow the military judge's instructions.[106]

The military judge denied the challenge for cause.[107] He based his denial upon Master Sergeant Papa's forthright demeanor and obvious candor in answering counsel's questions.[108] He applied the correct standards for both actual

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[99] *See Pyron*, 81 M.J. at 641 (*citing United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008)); *see also United States v. Townsend*, 65 M.J. 460, 463 (C.A.A.F. 2008).

[100] *See Pyron*, 81 M.J. at 642 (*citing United States v. Woods*, 74 M.J. 238, 243 (C.A.A.F. 2015)).

[101] *See, e.g., Pyron*, 81 M.J. at 642-43; *Woods*, 74 M.J. at 244; *United States v. Rogers*, 75 M.J. 270 (C.A.A.F. 2016).

[102] R. at 781, 793.

[103] R. at 742-43.

[104] R. at 744.

[105] R. at 744.

[106] R. at 742-43.

[107] R. at 808.

[108] R. at 810-811.

and implied bias, and his denial of the challenge for cause for (alleged) actual bias was not an abuse of discretion. There is no doubt that the military judge properly applied the liberal grant mandate, as he granted numerous other defense challenges for cause. Nor do we find, under the less deferential standard applicable to implied bias challenges, that a reasonable member of the public would have any concerns about the fairness of the military justice system generally or Master Sergeant Papa's ability to sit impartially on this panel.

3. Captain Strike.

The Defense also challenged Captain Strike for cause.[109] The military judge denied the challenge for cause.[110] However, Captain Strike was excused from the panel based on a Defense peremptory challenge.[111] Appellant formally withdrew this sub-assignment of error at oral argument. Regardless, this issue is waived under R.C.M. 912(f)(4).[112]

F. The military judge was impartial during the trial, and properly recused himself at the post-trial session on 8 March 2021. Col Woodard did not err when he (1) did not recuse himself based on a challenge for apparent bias because he had served with the military judge at a prior duty station; and (2) when he did not set aside the findings and sentence in this case.

Appellant contends that both the military judge at trial and Col Woodard (detailed post-trial) were biased and he did not receive a fair trial or a fair post-trial hearing.

1. Standards of review

Rule for Courts-Martial 902(a) states that a military judge shall disqualify himself or herself in any proceeding in which the military judge's impartiality might reasonably be questioned. There are two types of bias: actual bias and

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[109] R. at 781.

[110] R. at 803.

[111] R. at 814-15, 817. Trial defense counsel stated that but for the judge denying this challenge for cause, the Defense would have exercised its peremptory challenge on First Lieutenant Echo, who the Defense did not challenge for cause. This has not been an adequate way of preserving this issue for appeal since 2005.

[112] *See United States v. Walker*, No. 201100463, 2012 CCA LEXIS 396, at *8-9 (N-M. Ct. Crim. App. Sep 26, 2012); *United States v. Nickens*, No. 201500142, 2016 CCA LEXIS 204, at *12 (N-M. Ct. Crim. App. Mar. 31, 2016) (unpublished).

apparent bias. For a bias to be disqualifying, the bias must be "personal, not judicial, in nature."[113] The test for identifying an appearance of bias is "whether a reasonable person knowing all the circumstances" would conclude that the military judge's impartiality might reasonably be questioned.[114]

R.C.M. 902(b) then states several specific grounds for which a military judge shall recuse himself or herself. They include (but are not limited to) where a military judge has a personal bias concerning a party. However, "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge."[115]

This Court reviews a military judge's disqualification decision for an abuse of discretion.[116] A military judge's ruling constitutes an abuse of discretion if it is "arbitrary, fanciful, clearly unreasonable or clearly erroneous," not if a reviewing court merely would reach a different conclusion.[117]

2. The military judge did not display any actual or implied bias during trial.

During the litigation of this case from arraignment through trial, the military judge expressed displeasure with the procedural missteps of counsel. The defense counsel did not pre-mark their motions and exhibits as required by the local court rules.[118] The military judge observed that "this continues to happen in this Circuit" and stated "the Court has little patience for counsel who are too lazy to read the Circuit rules that apply to them, and then follow them, especially counsel who have been practicing in this Circuit for a while and know exactly how we do things here."[119]

Outside the presence of members, the military judge was rather stern with counsel for these oversights. He "counseled" the victim's legal counsel for "his

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[113] *United Sates v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000).

[114] *United States v. Uribe*, 80 M.J. 442, 446 (C.A.A.F. 2021) (citations omitted).

[115] *Liteky v. United States*, 510 U.S. 540, 555 (1994).

[116] *Uribe*, 80 M.J. at 446; *United States v. Sullivan*, 74 M.J. 448, 453 (C.A.A.F. 2015).

[117] *Id.* (quoting *United States v. Brown*, 72 M.J. 359, 362 (C.A.A.F. 2013)).

[118] R. at 29.

[119] R. at 29-30.

unprofessionalism" for failing to follow the Circuit rules regarding timely filings.[120] He was also irritated by the Defense's repeated filing of untimely motions.[121] (However, in order to ensure that Appellant received a fair trial he considered and ruled on the merits of the untimely filed motions).[122] He perceived defense counsel was being "glib" at one point in response to a question.[123] He did not allow "discussion over the bar from the gallery" and despite repeated instructions, it continued to happen.[124] When those discussions from the gallery continued via text message in violation of the Circuit rule against electronic devices in the courtroom, the military judge "counseled both sides."[125] Without question, these kinds of things irritate trial judges in courtrooms across the country. In this case, the military judge addressed them with counsel outside of the presence of the members.

Importantly, after the parties had rested, the military judge properly instructed the members that,

> You must disregard any comment or statement or expression made by me during the course of the trial that might seem to indicate any opinion on my part as to whether the accused is guilty or not guilty, since you alone have the responsibility to make that determination. Each of you must impartially decide whether the accused is guilty or not guilty according to the law I have given you, the evidence admitted in court, and your own conscience.[126]

And before this Court, Appellant does not raise any assignments of error with respect to members instructions on findings, the sentencing instructions, or the manner in which the military judge delivered them.

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[120] R. at 135.

[121] R. at 155-56 (Motion to Suppress); R. at 1826 (Motion for Reconsideration).

[122] R. at 159, 405, 1826.

[123] R. at 226.

[124] R. at 795, 1725-30.

[125] R. at 1726.

[126] R. at 1853.

The members found Appellant guilty of both charges, and the Government put on a case in aggravation. Appellant elected to be sentenced by the members.[127] However, the Defense elected not to call any witnesses or present any documents during the sentencing portion, and the Defense case was limited to Appellant's unsworn statement. The military judge was obviously surprised by this, and engaged in a second colloquy with Appellant and discussed with him this right to present evidence in extenuation and mitigation.[128] Appellant was facing 32 years in confinement, total forfeitures, reduction to E-1, and a dishonorable discharge.[129] Trial counsel argued for a sentence that included 11 years of confinement and a dishonorable discharge. Defense counsel asked the members for 19 months' confinement.[130] Members awarded a sentence that included a dishonorable discharge and three years' confinement.[131]

Having carefully examined the record, we find that the military judge did not display any actual or implied bias during trial, and that he adjudicated the case appropriately. His frustration with counsel, expressed outside the presence of the members, was apparent at times, but not unwarranted.

3. The military judge recused himself after making post-trial ex parte comments to trial counsel.

The crux of Appellant's argument is that the military judge's ex parte "direct stern feedback" to trial counsel after adjournment is evidence of a bias against Appellant that must have pervaded the trial.[132]

The Defense filed a post-trial motion to disqualify the military judge, and objected during the session on 8 March to the military judge's participation.[133] However, the sole purpose of that post-trial Article 39(a),UCMJ, session was for the military judge to recuse himself, and state his reasons, which he did.[134]

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[127] R. at 1931.

[128] R. at 1922-25.

[129] R. at 1962.

[130] R. at 1973.

[131] R. at 1991.

[132] *See generally* Appellant's Reply Brief at 26-30.

[133] R. at 1999.

[134] R. at 2000-2004.

We do not find that the military judge abused his discretion in recusing himself on 8 March 2021 rather than ruling on the post-trial motion filed by the Defense. We observe that his doing so while the Defense post-trial motion was pending effectively eliminated any possibility (however remote) that this Court would remand this case for a *Dubay* hearing. The decision to detail Col Woodard to preside over the subsequent session and to rule on the Defense motion results in a complete record for this Court to review.[135]

4. The Defense voir dire of Col Woodard became inane at times and the Defense challenge to Col Woodard for implied bias was without merit.

The Court of Appeals for the Armed Forces [CAAF] has explicitly recognized that "the world of career JAG Corps officers is relatively small and cohesive, with professional relationships the norm and friendships common."[136] And of course, typically, these relationships do not rise to the point where a military judge must recuse himself or herself.[137] Indeed, as CAAF has noted, the interplay of social and professional relationships in the armed forces poses particular challenges for the military judiciary."[138] Therefore, the proper focus for this kind of inquiry is whether the relationship between a military judge and a party raises special concerns, whether the relationship was so close or unusual as to be problematic, or whether the association exceeds what might reasonably be expected in light of the normal associational activities of an ordinary military judge.[139]

In this case, Col Woodard's relationship with the prior military judge[140] raised no special concerns, was not so close or unusual as to be problematic, and did not exceed reasonable associational activities. During the hearing, Col Woodard explained the procedures he had put in place to avoid any concerns: he informed counsel that electronic filings would go to a server in Camp

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[135] App. Ex. CXLIII.

[136] *Uribe*, 80 M.J. at 447 (citing *United States v. Butcher*, 56 M.J. 87, 91 (C.A.A.F. 2001).

[137] *Id*. (citing *United States v. Norfleet*, 53 M.J. 262, 270 (C.A.A.F. 2000)).

[138] *See id.* (citing *Butcher*, 56 M.J. at 91).

[139] *Id*. (citations omitted).

[140] As the military judge recused himself from further participation on 8 March 2021, thus we will refer to him after that date as the "prior military judge" for clarity, as Col Woodard was detailed to the case as the military judge for the post-trial 39(a) session.

Lejeune rather than the Western Judicial Circuit's server in Camp Pendleton;[141] and that he had not talked about this case or about the post-trial 39(a) session with any of the Circuit Judges in Camp Pendleton. During voir dire of Col Woodard, one of the defense counsel that was detailed post-trial, LtCol Acosta, asked extensive voir dire questions, probing about his prior service at Camp Lejeune, North Carolina, with the prior military judge. Specifically, he asked extensive voir dire questions about how he knew the prior military judge and about their service together years before at Camp Lejeune when the prior military judge was a trial counsel and Col Woodard was a staff judge advocate.[142]

Several of the voir dire questions were inappropriate. For example, LtCol Acosta wanted Col Woodard to opine on the credibility he would attach to possible testimony from the prior military judge, when contrasted with another probable witness. The following exchange occurred:

> DC (LtCol Acosta): Sir [if] Major Michel told you one thing and LtCol Norman said another, how would you reconcile the differences, and how would your past experiences impact how you would judge their credibility?
>
> MJ: I don't think I can give – I don't believe that's an appropriate question for you to be asking me.[143]

LtCol Acosta nonetheless pressed this line of voir dire questioning, and subsequently wandered into irrelevant matters, to include where the visiting judge's chambers were on Camp Pendleton. Col Woodard's temporary office was within the judiciary spaces, which is in the same building as the main Camp Pendleton courtroom. After this voir dire, LtCol Acosta asked Col Woodard to recuse himself on that basis, as (in the Defense's view) it raised "an appearance of bias" because the military judge also had an office in those chambers.[144] Col Woodard asked, "Do you prefer me to go to the trial counsel's office? Do you prefer me to go to the defense counsel's office? Do you prefer me to go to the [Officer in Charge's] office?"[145] Displaying considerable patience

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[141] R. at 2023.

[142] R. at 2029-2088.

[143] R. at 2074.

[144] R. at 2086.

[145] R. at 2086.

with the scope of the Defense's voir dire and with the Defense's eventual "implied bias" challenge, Col Woodard properly denied the motion to recuse himself on that basis.[146]

After reviewing the record we determine that there was nothing atypical or unusual about this professional relationship between the prior military judge and Col Woodard. The interactions he described were routine, and he described his impressions of the prior military judge as a "competent professional counsel."[147] Col Woodard applied the proper standards, put his commonsense ruling on the record, and did not abuse his discretion in denying the challenge to his presiding at the hearing.[148] Col Woodard also properly denied the Defense motion to call the prior military judge as part of the evidence on the motion for Col Woodard to recuse himself, as he properly noted that this would serve no purpose.[149]

Col Woodard did not abuse his discretion when he denied the Defense motion for him to recuse himself, as the Defense had failed to establish any actual or implied bias, and upon a thorough review of the entire record we see none. Nor are we convinced that the Defense voir dire of Col Woodard had much to do with representing Appellant's interests. Regardless, we reject Appellant's suggestion that Col Woodard had a bias against Appellant or displayed any desire "to protect [the prior military judge] and the judiciary. . ." because there is no evidence in the record to suggest that.[150]

5. Col Woodard did not err in declining to set aside the findings and sentence in this case.

On appeal, Appellant argues that in denying the Defense motion to set aside the findings, Col Woodard made clearly erroneous findings of fact and

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[146] R. at 2087-2088. Col Woodard could reasonably have limited the scope of voir dire questioning in order to prevent the proceedings from "becoming a forum for unfounded opinion, speculation, or innuendo." Discussion following R.C.M. 902(d)(2).

[147] R. at 2100.

[148] R. at 2091-2101. This Court uses the terms "motion to recuse himself" and "challenge to his presiding" interchangeably.

[149] *See* Discussion following R.C.M. 902(d)(2).

[150] Appellant's Reply Brief at 32.

made unreasonable conclusions of law.[151] We review a military judge's findings of fact under a clearly erroneous standard, and conclusions of law de novo.[152]

The Defense's argument, essentially, is that because during trial, the military judge chastised trial counsel for a weak sentencing argument in a post-trial discussion in the courtroom, and further made policy arguments to trial counsel about incentivizing defense counsel to avoid contested trials, he must have been biased against Appellant himself.[153] Concerningly, LtCol Dempsey, one of the defense counsel who was detailed to represent Appellant at the post-trial 39(a), *signed* a Reply Brief filed with the court which contained the statement,

> The Military Judge's post-trial comments in the context of the entirety of this trial show such a deep seated favoritism towards the Government and against the Defense, PFC Tapp, and the constitutional rights of all accused that he should have been and continue to be disqualified from serving as a military judge.[154]

Moreover, during the post-trial 30(a) session on 15 April 2021, LtCol Dempsey also stated,

> And so, in this case we believe that those statements, looking at the entire record, show that there was actual bias in favor of getting a conviction in this case, that there was bias in favor of the prosecution, bias against [Appellant], against his defense counsel and against all defense counsel.[155]

When directly questioned by Col Woodard about this rather unusual statement, LtCol Dempsey clarified that "all defense counsel" was not limited to all

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[151] Appellant's Brief at 98.

[152] *United States v. Argo*, 46 M.J. 454, 457 (C.A.A.F. 1997) (citations omitted).

[153] Appellant's Brief at 77-100; Appellant's Reply Brief at 26-32.

[154] AE CXV at p. 58 of 73.

[155] R. at 2365. Given the statements of both LtCol Acosta and LtCol Dempsey as well as their apparent focus on collateral issues and inflammatory rhetoric this Court cannot rule out the possibility that the discovery they sought, and the testimony they presented, at the post-trial motion may have been calculated in part to provide some evidentiary support for the already-pending professional responsibility complaint against the prior military judge apparently filed by their supervisory attorney.

of the defense counsel in this case, but to *all* defense counsel.[156] Even considering the context of this statement, this was a baseless allegation.

Further, we note that LtCol Acosta's request for production of the prior military judge's Lexis-Nexis search history was merely an attempted fishing expedition. Regardless, it was unquestionably protected from disclosure because it was part of the military judge's deliberative process.[157]

LtCol Dempsey's repeated contentions that the prior military judge harbored a bias against all defense counsel and should be disqualified from serving as a military judge, and LtCol Acosta's contention that the prior military judge's Lexis-Nexis search history would reveal the military judge's "consciousness of guilt" and that "he tried to cover it up"[158] were speculative, unprofessional and inflammatory. Whether these statements violated Rule 3.5 of the Judge Advocate General Instruction 5803.1E, which requires that a covered attorney be respectful of the military judge, in the context of this case is a matter for Rules Counsel, not this Court, to decide.[159] Additionally, both LtCol Acosta and LtCol Dempsey were necessarily detailed to the case only to represent Appellant. They were therefore bereft of authority to represent collateral interests of the Camp Pendleton defense bar generally, or to litigate issues untethered from Appellant's interests, such as whether or not the prior military judge should be disqualified from serving as a military judge in other cases.

Before this Court, Appellant argues that he was deprived of his constitutional right to an impartial judge. His argument for this contention is fourfold: (1) erroneous evidentiary rulings; (2) admonishment of trial counsel for undervaluing the case; (3) dismissive attitude toward medical evidence;[160] and (4)

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[156] R. at 2365.

[157] *See generally United States v. Matthews*, 68 M.J. 29 (C.A.A.F. 2009).

[158] R. at 2117.

[159] *See generally United States v. Lewis,* 61 M.J. 512, 517 (N-M. Ct. Crim. App. 2005) (holding that an unprofessional manner in which a voir dire of a military judge is conducted can violate Rule 3.5 of the Judge Advocate General Instruction 5803.1B (a precursor to the present operative instruction). Rule 3.5 unquestionably applies uniformly to trial counsel, defense counsel and other attorneys appearing before a court-martial in any capacity.

[160] *See supra* Sections B and C.

"deep seated antagonism toward the defense throughout trial."[161] None of these contentions have merit.

Col Woodard conducted a thorough review of the case and took considerable testimony. His extensive findings of fact are supported by the record and are not clearly erroneous.[162] However, Appellant contends that two discrete findings of fact are clearly erroneous: (1) that "[the military judge] never stated that trial counsel should have asked for more than the 11 years of confinement"[163] and; (2) "Major Michel [one of the trial counsel] described [the prior military judge's] comments during the ex parte session as objective feedback."[164]

Assuming, *arguendo*, that these two discrete findings of fact, out of the dozens of individual findings contained in the 8 pages of findings of fact, are somehow clearly erroneous, they are both (individually and collectively) minor, immaterial to the outcome even if they are set aside, and insufficient to call into question Col Woodard's conclusions of law. Col Woodard found, as do we, that "the record reveals that [the military judge] expressed his impatience, dissatisfaction, annoyance, and even potentially anger toward counsel on both sides of the aisle"[165] However, Col Woodard concluded, as do we, that the military judge's comments after trial coupled with his comments during trial and his rulings do not display any bias against Appellant, deep seated or otherwise, or call into question his fairness. The military judge in this case ensured a fair trial, even if he was personally or professionally displeased with defense counsel, the Government's presentation of its sentencing case, or the sentence ultimately adjudged by the members.

Having read the entire record, we agree with Col Woodard's findings of fact and conclusions of law. As Col Woodard aptly stated, "Although the Court does

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[161] Appellant's Brief at 77.

[162] App. Ex. CXLIII.

[163] Appellant's Brief at 98-99, referencing finding of fact 17 at App. Ex. CXLIII at page 5.

[164] Appellant's Brief at 100, referencing finding of fact 8 at App. Ex. CXLIII at page 4.

[165] App. Ex. CXLIII at 14. Of note, even during the post-trial 39(a) session, LtCol Acosta was communicating over the bar with someone in the courtroom, which was noted on the record with some understandable disapproval by Col Woodard. R. at 2200-2201.

not condone or approve of [the military judge's] post-trial *ex parte* communication with the trial counsel, taken as a whole the Court finds that neither his post-trial *ex parte* comments nor his actions and rulings during trial, when taken as a whole in the context of this trial, placed in doubt this court-martial's legality, fairness and impartiality."[166] We agree, and we find that the military judge, despite expressing some displeasure with defense counsel's missteps, had no actual bias against Appellant. Further, a reasonable observer knowing all the facts and circumstances would not question the military judge's impartiality.[167]

As a further note, although Col Woodard ordered the prior military judge to testify on the merits of the post-trial motion, we observe that it was not necessary to do so. We reiterate the CAAF's admonition that calling a military judge to testify about a case that he or she had presided over is generally "ill advised" because (with limited exceptions) the deliberative processes and reasoning of courts-martial military judges are protected from post-trial inquiry.[168]

Finally, we do not find any merit at all in Appellant's unfounded contentions that Col Woodard himself "displayed bias against [Appellant]" and that "Col Woodard displayed a desire to protect [the prior military judge] and the judiciary by making exceptions for him."[169]

This being the case, it is unnecessary for us to undertake the test for an appropriate remedy applying the *Liljeberg* factors for either the military judge or for Col Woodard.[170]

Accordingly, we decline to set aside the findings and sentence in this case.

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[166] App. Ex. CXLII at 12.

[167] *Uribe*, 80 M.J. at 446 (citations omitted).

[168] *See Matthews*, 68 M.J. at 40.

[169] Appellant's Reply Brief at 32. The "exceptions" Appellant references are rooted in the fact that by the time of the Article 39(a) on 15 April 2021, the prior military judge was represented by defense counsel for the purpose of defending himself against the professional responsibility complaint that the Chief Defense Counsel of the Marine Corps had filed *prior to* the 15 April hearing. Thus, Col Woodard's coordinating with counsel assigned to represent the prior military judge regarding the contours of his testimony was reasonable. *See* Mil. R. Evid. 611, 605.

[170] *Liljeberg v. Health Services Acquisition Group*, 486 U.S. 847 (1988).

G. Relief based on cumulative error is not warranted in this case.

Appellant asserts that "[e]rror was pervasive throughout [Appellant]'s court-martial. Appellant's argument is that even if no particular error warrants relief, the cumulative effect of all the errors deprived him of a fair trial."[171] Without question, the doctrine of cumulative error allows this Court to reverse a conviction even if errors do not merit reversal individually.[172] But we do not find that any errors that actually occurred in this case are prejudicial, either alone or in the aggregate. Further, there was no structural error. Appellant received a fair trial. This assignment of error is therefore without merit.

H. Military members panels are not required to reach a unanimous verdict.

Appellant challenges his conviction because the military judge did not instruct the members that their verdict must be unanimous.[173] At oral argument, Appellant conceded that he did not object at trial to the military judge's instructions to the members on this point to preserve this issue.

Appellant cites to the United States Supreme Court's opinion in *Ramos v. Louisiana* for the proposition that a jury trial must reach a unanimous verdict in order to convict.[174] The statute governing members' verdicts in courts-martial provides that the concurrence of three-fourths of the members is required for a finding of guilt in a noncapital case.[175] In a recently published opinion, *United States v. Causey,* this Court has already held that the Sixth Amendment's requirement for a unanimous verdict for serious offenses tried in state or civilian federal criminal courts does not apply in courts-martial. Thus, *Causey* rejected an argument that a court-martial likewise requires a unanimous

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[171] Appellant's Brief at 105.

[172] *United States v. Dominguez*, 81 M.J. 800, 822-23 (N-M. Ct. Crim. App. 2021) (*citing United States v. Banks* 36 M.J. 150 (C.A.A.F. 1992)).

[173] R. at 1906. (noting military judge's instructions that three-fourths of the members must concur in a guilty finding). Of course, we do not know whether the verdict in this case was unanimous or not.

[174] *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

[175] Art. 52, UCMJ; 10 U.S.C. § 852.

verdict for a conviction.[176] Accordingly, we decline to set aside the findings and sentence in this case on that basis, even if this issue is not waived.[177]

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, as well as the excellent oral arguments from both counsel on 2 February 2023, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.[178]

The findings and sentence are **AFFIRMED**.

FOR THE COURT:

Mark K. Jamison

MARK K. JAMISON
Clerk of Court

[176] *United States v. Causey*, 82 M.J. 574 (N-M. Ct. Crim. App. 2022).

[177] The Court of Appeals for the Armed Forces granted review of this Court's decision in *United States v. Causey* on 3 August 2022*, then* rescinded the grant of review on 26 August 2022, and denied the petition. However, the unanimous verdict issue remains pending at the CAAF in several other cases.

[178] Articles 59 & 66, UCMJ.